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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

AUGUST 22, 2017 and JUNE 4, 2018

IN THE

# Nebraska Court of Appeals

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# NEBRASKA APPELLATE REPORTS

VOLUME XXV

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PEGGY POLACEK
OFFICIAL REPORTER

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## DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
Everett O. Inbody, Associate Judge[1]
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge
David K. Arterburn, Associate Judge
Lawrence E. Welch, Jr., Associate Judge[2]

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Peggy Polacek . . . . . Reporter
Teresa A. Brown . . . . . Clerk[3]
Erica Schafer . . . . . Acting Clerk[4]
Wendy Wussow . . . . . Clerk[5]
Corey Steel . . . . . State Court Administrator

[1]Until December 31, 2017
[2]As of March 28, 2018
[3]Until March 3, 2018
[4]As of March 1, 2018 until April 2, 2018
[5]As of April 2, 2018

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## LIST OF CASES DISPOSED OF BY MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Author judge listed first.)

(† Indicates opinion selected for posting to court Web site.)

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†No. A-15-648: **In re Estate of Howard**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-15-798: **State v. Fair**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-15-987: **State v. Buttercase**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-15-1014: **In re Henry B. Wilson, Jr., Revocable Trust**. Affirmed as modified. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge. Riedmann, Judge, concurring in part, and in part dissenting.

†No. A-15-1015: **In re Estate of Wilson**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge. Riedmann, Judge, concurring in part, and in part dissenting.

†No. A-16-059: **State v. McCray**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

†No. A-16-292: **Spethman v. Spethman**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-16-467: **Hopkins v. Macias**. Reversed and remanded with directions. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-493: **State v. Glazebrook**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-16-606: **State v. Martinez**. Affirmed in part, and in part sentence vacated. Inbody, Riedmann, and Arterburn, Judges.

†No. A-16-622: **Humm v. Perault-Humm**. Affirmed in part, and in part reversed and remanded with directions. Inbody and Riedmann, Judges. Bishop, Judge, participating on briefs.

†No. A-16-630: **Alicia K. v. Garrett S**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-635: **State on behalf of Bryce S. v. Garrett S**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-16-690: **State v. Camp**. Affirmed. Pirtle, Inbody, and Arterburn, Judges.

†No. A-16-727: **N.P. Dodge Mgmt. Co. v. Eltouny**. Appeal dismissed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

†No. A-16-747: **Davlin v. Cruickshank**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-16-750: **Panowicz v. Panowicz**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

†No. A-16-752: **Mallory Fire Protection Servs. v. McShane Constr. Co**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-760: **Hillsborough Pointe v. Skutchan**. Appeal dismissed. Arterburn, Pirtle, and Riedmann, Judges.

†No. A-16-777: **State v. Aron**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-16-806: **Baker v. Gatson**. Affirmed. Riedmann, Pirtle, and Arterburn, Judges.

No. A-16-840: **Widick v. Price**. Remanded with directions. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-846: **James-Estensen v. Estensen**. Affirmed. Arterburn, Pirtle, and Riedmann, Judges.

No. A-16-864: **State v. Determan**. Affirmed. Inbody, Riedmann, and Arterburn, Judges.

†No. A-16-867: **Tyler v. City of Omaha**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

†No. A-16-869: **Crow v. Chelli**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-16-888: **State v. Long**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-895: **In re Guardianship of Jaime G**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-16-907: **Gagne v. Gagne**. Affirmed. Pirtle, Riedmann, and Arterburn, Judges.

No. A-16-915: **Ritts v. TEO, Inc**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

†No. A-16-923: **State v. Cook**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-929: **Beutler v. Steiner**. Affirmed in part, and in part reversed and remanded for further proceedings. Riedmann, Pirtle, and Arterburn, Judges.

†No. A-16-930: **State v. Payne**. Affirmed. Inbody, Pirtle, and Arterburn, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-16-934: **State v. Vance**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

No. A-16-954: **State v. Miranda**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

†No. A-16-967: **McLeod v. Frakes**. Reversed and remanded for further proceedings. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-16-978: **Gless v. Dritley Properties**. Affirmed. Pirtle, Riedmann, and Arterburn, Judges.

†No. A-16-997: **Mischo v. Chief School Bus Serv**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-16-998: **In re Interest of Soliana V**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-16-1008: **Koch v. City of Sargent**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

†No. A-16-1029: **Nasalik v. Nasalik**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

†No. A-16-1042: **State v. Fletcher**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-16-1044: **In re Guardianship & Conservatorship of Hunt**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

†No. A-16-1047: **Grinnell Mutual Reinsurance Co. v. Fisher**. Affirmed in part, and in part reversed and vacated, and cause remanded for further proceedings. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge

†No. A-16-1050: **State v. Rowe**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

†No. A-16-1057: **State v. Hawley**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-16-1059: **Nienaber v. Nienaber**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

No. A-16-1064: **Jones v. Jones**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

†No. A-16-1065: **Adams Bank & Trust v. Brown**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

No. A-16-1082: **In re Interest of Neveah H**. Reversed and remanded for further proceedings. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-16-1087: **Banghart v. Banghart**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-16-1088: **State v. Niewohner**. Affirmed. Pirtle, Riedmann, and Arterburn, Judges.

†No. A-16-1089: **Hernandez v. Barthold**. Affirmed. Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

No. A-16-1091: **Antons v. Antons**. Vacated and remanded with directions. Inbody, Pirtle, and Arterburn, Judges.

No. A-16-1095: **In re Interest of N.L**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-16-1129: **In re Interest of Dante S**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

†No. A-16-1137: **In re Guardianship & Conservatorship of Haubold**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-16-1148: **Markey v. Markey**. Affirmed. Pirtle, Riedmann, and Arterburn, Judges.

†No. A-16-1162: **Urban v. Urban**. Affirmed in part, and in part vacated. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-16-1163: **Dupell v. Ford Storage & Moving**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†Nos. A-16-1165, A-16-1166: **Dole v. Dole**. Affirmed in part, and in part reversed and remanded with directions. Riedmann, Pirtle, and Arterburn, Judges.

†No. A-16-1168: **State v. Ware**. Affirmed in part, and in part vacated and remanded for resentencing. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-16-1171: **State on behalf of Jacobson v. Jacobs**. Affirmed as modified. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-16-1172: **Zapata v. Kelly's Carpet**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-16-1198: **State v. VanAckeren.** Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-16-1201: **Holen v. Holen**. Affirmed in part, affirmed in part as modified, reversed and remanded in part with directions, and in part reversed and vacated. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-16-1205: **In re Interest of Kalen M**. Reversed and remanded with directions to dismiss. Inbody, Pirtle, and Riedmann, Judges.

†No. A-16-1215: **Dahlgren v. Brooks**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-16-1218: **Gray v. Nebraska Dept. of Corr. Servs**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

†Nos. A-16-1226 through A-16-1228: **State v. Heiser**. Judgments in Nos. A-16-1226 and A-16-1228 affirmed. Judgment in No. A-16-1227 affirmed in part and in part vacated, and cause remanded with directions. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-16-1229: **State on behalf of Kyce K. v. Le'Sean T**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-16-1230: **Suthar v. Bryan**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge, Retired.

†No. A-16-1231: **State v. Saldivar**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

Nos. A-17-003 through A-17-007: **In re Interest of Breanna F. et al**. Affirmed. Inbody, Judge, Retired, and Moore, Chief Judge, and Bishop, Judge.

†No. A-17-009: **Horn v. Shell-Horn**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-17-011: **Lineweber v. Kruse**. Affirmed. Inbody, Judge, Retired, and Riedmann and Bishop, Judges.

†No. A-17-018: **Schurman v. Wilkins**. Affirmed in part, and in part reversed and remanded with directions. Arterburn, Pirtle, and Riedmann, Judges.

No. A-17-019: **State v. Fessler**. Affirmed. Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

Nos. A-17-020 through A-17-022: **In re Interest of Elijah I**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

†No. A-17-030: **In re Interest of D.R**. Affirmed. Inbody, Judge, Retired, and Pirtle and Riedmann, Judges.

No. A-17-035: **State v. Heath**. Affirmed in part; reversed in part. Inbody, Pirtle, and Riedmann, Judges.

†No. A-17-036: **Schmaderer v. Schmaderer**. Affirmed as modified. Moore, Chief Judge, and Riedmann and Bishop, Judges.

†No. A-17-044: **State v. St. Louis**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

†No. A-17-046: **State v. Ostasuc**. Affirmed in part, and in part reversed and remanded with directions. Arterburn, Pirtle, and Riedmann, Judges.

†No. A-17-050: **In re Interest of Carter P. & Isabel P**. Affirmed. Riedmann, Pirtle, and Arterburn, Judges.

†No. A-17-058: **In re Interest of Breanna E. et al**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-17-060: **State v. Williams**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-17-067: **State v. Cope**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-17-074: **Shawn E. on behalf of Grace E. v. Diane S**. Appeal dismissed. Inbody, Judge, Retired, and Moore, Chief Judge, and Riedmann, Judge.

†No. A-17-077: **State v. Keita**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-17-079: **State v. Sysel**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-17-084: **State v. Bosse**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-17-089: **In re Interest of Ozmohsiz M**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-17-092: **State v. Dittrich**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

†No. A-17-101: **State v. Detwiler**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-17-102: **Hamilton v. United Parcel Serv**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-17-105: **State v. Bates**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

No. A-17-108: **State v. Finnell**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-17-110: **State v. Groves**. Affirmed. Arterburn and Pirtle, Judges, and Inbody, Judge, Retired.

†No. A-17-135: **Meisinger v. Meisinger**. Affirmed. Pirtle, Inbody, and Bishop, Judges.

†Nos. A-17-144, A-17-145: **State v. Walker**. Judgment in No. A-17-144 affirmed. Judgment in No. A-17-145 affirmed as modified. Pirtle, Inbody, and Riedmann, Judges.

No. A-17-153: **Leonor v. Frakes**. Affirmed. Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

†No. A-17-170: **Arnold v. Arnold**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

No. A-17-171: **Scheidies v. Scheidies**. Affirmed in part, and in part reversed and remanded with directions. Pirtle, Inbody, and Arterburn, Judges.

No. A-17-184: **Gardner v. International Paper Destr. & Recycl**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge, Retired.

†No. A-17-185: **In re Interest of Gypsey N**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

†No. A-17-187: **State v. Ratumaimuri**. Affirmed. Riedmann, Pirtle, and Arterburn, Judges.

No. A-17-192: **In re Interest of Anthony P**. Affirmed. Pirtle, Riedmann, and Arterburn, Judges.

†No. A-17-193: **In re Interest of Tre'von A**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-17-199: **State v. Sterkel**. Affirmed. Arterburn, Pirtle, and Riedmann, Judges.

†No. A-17-200: **State v. Agok**. Affirmed in part, and in part vacated and remanded for resentencing. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-17-203: **Covil v. Covil**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

†No. A-17-207: **Vlasak v. Vlasak**. Affirmed as modified. Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

No. A-17-210: **State v. Turner**. Affirmed. Arterburn, Pirtle, and Riedmann, Judges.

†No. A-17-211: **State v. Valeriano**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-17-225: **Village Green Townhouse v. Douglas Cty. Bd. of Equal**. Affirmed. Inbody, Judge, Retired, and Moore, Chief Judge, and Riedmann, Judge.

No. A-17-229: **State v. Nichelson**. Affirmed. Riedmann, Pirtle, and Arterburn, Judges.

†No. A-17-239: **State v. Welty-Hackett**. Sentence vacated, and cause remanded with directions. Moore, Chief Judge, and Bishop and Arterburn, Judges.

No. A-17-243: **State v. Smith**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-17-246: **In re Interest of Nohua D**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

No. A-17-252: **State v. Capone**. Affirmed. Inbody, Judge, Retired, and Pirtle and Bishop, Judges.

†No. A-17-260: **In re Interest of Kelsey B**. Reversed and remanded for further proceedings. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-17-264: **Bramble v. Bramble**. Affirmed in part, and in part dismissed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-17-266: **Turner v. Turner**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

†No. A-17-272: **State v. Colligan**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

†No. A-17-273: **Shepard v. Bauers**. Affirmed. Inbody, Judge, Retired, and Riedmann and Bishop, Judges.

†Nos. A-17-283, A-17-284: **State v. Wellon**. Judgment in No. A-17-283 affirmed. Judgment in No. A-17-284 affirmed as modified. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-17-293: **In re Interest of Caprice M. et al**. Affirmed. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-17-295: **Mitchell v. Mitchell**. Affirmed as modified. Moore, Chief Judge, and Pirtle and Riedmann, Judges.

†No. A-17-296: **State v. Trujillo**. Affirmed in part, and in part vacated and remanded for resentencing. Moore, Chief Judge, and Bishop and Arterburn, Judges.

†No. A-17-304: **Wiedel v. Lucile Duerr Hair Styling**. Affirmed. Riedmann, Pirtle, and Arterburn, Judges.

Nos. A-17-308, A-17-309: **State v. Mohamed**. Affirmed. Welch, Riedmann, and Bishop, Judges.

†No. A-17-311: **Jaide v. Jaide**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-17-317: **In re Interest of Antonio J. et al**. Affirmed. Pirtle, Riedmann, and Arterburn, Judges.

No. A-17-320: **State v. Gray**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-17-331: **Sutton v. Hochreiter**. Affirmed as modified. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-17-342: **Gray v. Hansen**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-17-344: **Lytle v. Lytle**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-17-346: **State v. Arellano**. Affirmed as modified. Pirtle, Riedmann, and Arterburn, Judges.

†No. A-17-347: **State v. Weston**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-17-351: **Tunga-Lergo v. Rebarcak**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-17-353: **State v. Bedolla**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-17-357: **State v. Williams**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

†No. A-17-365: **State v. Brown**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-17-373: **State v. Lopez-Bracamontes**. Affirmed as modified, and cause remanded with directions. Arterburn, Pirtle, and Bishop, Judges.

†No. A-17-386: **State v. Caldwell**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-17-391: **Woita v. Shanahan**. Reversed and remanded with directions. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-17-395: **In re Interest of Daniel C. & James C**. Affirmed. Riedmann, Pirtle, and Arterburn, Judges.

No. A-17-407: **State v. Smith**. Affirmed as modified. Inbody, Pirtle, and Riedmann, Judges.

†No. A-17-420: **State v. Miguel**. Affirmed. Inbody, Judge, Retired, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-17-421: **In re Interest of H.R**. Affirmed. Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

†No. A-17-423: **Brady v. Ruelas**. Affirmed as modified. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-17-435: **State v. Broberg**. Affirmed. Inbody, Judge, Retired, and Moore, Chief Judge, and Riedmann, Judge.

Nos. A-17-439, A-17-440: **State v. Ricard**. Affirmed. Arterburn, Inbody, and Bishop, Judges.

†No. A-17-447: **State v. Mohammed**. Affirmed. Bishop, Riedmann, and Welch, Judges.

No. A-17-450: **State v. Aragon**. Affirmed. Riedmann, Pirtle, and Arterburn, Judges.

†No. A-17-452: **Yaeger v. Fenster**. Affirmed in part, and in part reversed and remanded with directions. Pirtle, Bishop, and Arterburn, Judges.

†Nos. A-17-453, A-17-454: **In re Interest of Elias V. & Aliah M**. Affirmed. Arterburn, Pirtle, and Riedmann, Judges.

No. A-17-455: **In re Interest of King W. & Ja Sani J**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-17-460: **In re Interest of Jo Shua K. et al**. Affirmed as modified. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-17-462: **State v. James**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

No. A-17-469: **State v. Recca**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-17-472: **Castonguay v. Jorgenson**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-17-481: **State v. Rief**. Affirmed. Inbody, Judge, Retired, and Riedmann and Bishop, Judges.

Nos. A-17-482, A-17-626: **Gray v. Hansen**. Judgment in No. A-17-482 affirmed. Judgment in No. A-17-626 reversed and vacated. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-17-496: **Rice v. Sykes Enterprises**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-17-499: **Keruzis-Thorson v. Thorson**. Reversed and remanded with directions. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-17-500: **State v. Kelley**. Affirmed in part, and in part reversed and remanded for further proceedings. Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

†No. A-17-503: **State v. Walker**. Affirmed in part, and in part vacated and remanded with directions. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-17-507: **Shaw v. Nebraska Med. Ctr**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-17-516: **State v. Aragon**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

†No. A-17-526: **State v. Martinez-Estrada**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-17-527: **In re Interest of Doriahn P**. Affirmed. Arterburn, Pirtle, and Riedmann, Judges.

†Nos. A-17-545, A-17-546: **State v. Goeken**. Sentence in No. A-17-545 affirmed. Sentence in No. A-17-546 vacated, and cause remanded for resentencing. Riedmann, Inbody, and Pirtle, Judges.

No. A-17-551: **State v. White**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

No. A-17-552: **In re Interest of Zandom M. et al**. Affirmed. Pirtle, Riedmann, and Arterburn Judges.

†No. A-17-554: **State v. Clarke**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

†No. A-17-565: **State v. Price**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

†No. A-17-568: **In re Guardianship & Conservatorship of Klein**. Affirmed. Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

No. A-17-573: **In re Interest of Jose P. & Alberto S**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-17-574: **Cohrs v. Bruns**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

†No. A-17-582: **Whitaker v. Whitaker**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

†Nos. A-17-583, A-17-584: **State v. Lewis**. Affirmed. Bishop and Riedmann, Judges, and Inbody, Judge, Retired.

†No. A-17-595: **Gardner v. Burkley Envelope Co**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

No. A-17-603: **In re Interest of Jose H. et al**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

No. A-17-621: **State v. Carr**. Affirmed in part, and in part vacated and remanded with directions. Arterburn, Pirtle, and Bishop, Judges.

†No. A-17-625: **State v. Smith**. Affirmed. Riedmann, Bishop, and Welch, Judges.

†No. A-17-631: **State v. Johnson**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

†No. A-17-634: **In re Interest of Alexis S. & Caiden S**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

†No. A-17-636: **Bolita v. West Omaha Winsupply Co**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

No. A-17-642: **State v. Minor**. Affirmed in part, and in part vacated and remanded for resentencing. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-17-650: **Goodwin v. Goodwin**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

†No. A-17-651: **Sanford v. Lincoln Poultry & Egg Co**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

†Nos. A-17-652, A-17-653: **In re Interest of Hunter L. & Opie L**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-17-664: **McClure v. McClure**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

†No. A-17-669: **In re Interest of Angelo A. & Eli A**. Appeal dismissed. Bishop, Riedmann, and Welch, Judges.

Nos. A-17-670; A-17-671: **In re Interest of Syerra P. & Tyler P**. Affirmed. Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

Nos. A-17-672, A-17-673: **In re Interest of Rianna B. & Riley B**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

No. A-17-676: **State v. Ruaikot**. Affirmed. Inbody, Judge, Retired, and Moore, Chief Judge, and Riedmann, Judge.

No. A-17-691: **State v. Mason**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

No. A-17-692: **State v. Hallauer**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

No. A-17-693: **Moyer v. Moyer**. Affirmed in part, and in part reversed and remanded. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-17-697: **Smith v. Pounds**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-17-710: **Gerber v. P & L Finance Co**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-17-718: **State v. Meister**. Affirmed in part, and in part vacated and remanded with directions. Arterburn, Pirtle, and Bishop, Judges.

No. A-17-752: **State v. Guerrero**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-17-762: **State v. Huffman**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

†No. A-17-763: **Stevens v. Terrazas**. Reversed and remanded with directions. Bishop and Riedmann, Judges, and Inbody, Judge, Retired.

Nos. A-17-764 through A-17-768: **State v. Harris**. Affirmed in part, and in part vacated and remanded for resentencing. Welch, Judge, and Moore, Chief Judge, and Riedmann, Judge.

Nos. A-17-770, A-17-879: **State v. Zephier**. Affirmed. Riedmann, Bishop, and Arterburn, Judges.

†No. A-17-776: **Rusinko v. Rusinko**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

†No. A-17-779: **State v. Pester**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

†No. A-17-787: **In re Interest of Arabella G. & Phoenix H**. Reversed and remanded with directions to dismiss. Pirtle, Bishop, and Arterburn, Judges.

No. A-17-788: **Fischer v. Fischer**. Affirmed. Moore, Chief Judge, and Arterburn and Welch, Judges.

†No. A-17-790: **Sanwick v. Dean**. Reversed and remanded with directions. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

Nos. A-17-795, A-17-796: **In re Interest of Amari B. & Alyssa B**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-17-798: **In re Interest of Armani W. et al**. Affirmed. Bishop, Pirtle, and Arterburn, Judges.

No. A-17-804: **In re Interest of Dae Lyn W**. Affirmed. Inbody, Judge, Retired, and Moore, Chief Judge, and Riedmann, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

Nos. A-17-823, A-17-824: **State v. Hauser**. Affirmed. Pirtle, Bishop, and Arterburn, Judges.

†No. A-17-839: **State v. Young**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Pirtle, Judge.

Nos. A-17-861, A-17-862: **In re Interest of Haileigh M. & Kendricks G**. Affirmed. Arterburn, Judge, and Moore, Chief Judge, and Welch, Judge.

†No. A-17-868: **Calleja v. Calleja**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-17-883: **In re Interest of Michael M**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

†No. A-17-898: **St. John v. Gering Public Schools**. Affirmed. Moore, Chief Judge, and Pirtle and Arterburn, Judges.

No. A-17-910: **In re Interest of Ian C**. Affirmed. Arterburn, Pirtle, and Bishop, Judges.

No. A-17-919: **In re Interest of Gerald B. & Leia C**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

No. A-17-949: **State v. Norris**. Affirmed. Riedmann, Bishop, and Welch, Judges.

†No. A-17-962: **State v. Nemeiksis**. Affirmed. Moore, Chief Judge, and Riedmann and Arterburn, Judges.

†No. A-17-1013: **State v. Howard**. Affirmed. Moore, Chief Judge, and Riedmann and Bishop, Judges.

No. A-17-1025: **In re Interest of Timario M**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Arterburn, Judge.

No. A-17-1046: **State v. House**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge, Retired.

No. A-17-1049: **In re Interest of Nevaeh S**. Affirmed. Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

No. A-17-1054: **Tarman v. Tarman**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

†No. A-17-1070: **In re Interest of Jaydi L**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

No. A-17-1081: **State v. Butcher**. Affirmed. Welch, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-17-1091: **In re Interest of Brelaan G. & Makhi B**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

No. A-17-1135: **State v. Sturm**. Affirmed. Pirtle, Judge (1-judge).

No. A-17-1136: **State v. Welter**. Affirmed. Pirtle, Judge (1-judge).

†No. A-17-1138: **Klein v. Dixon**. Affirmed in part, and in part remanded with directions. Riedmann, Pirtle, and Bishop, Judges.

No. A-17-1149: **State v. Marol**. Affirmed. Riedmann, Bishop, and Welch, Judges.

†No. A-17-1162: **State v. Vidales**. Affirmed. Inbody, Judge, Retired, and Moore, Chief Judge, and Bishop, Judge.

†No. A-17-1268: **State v. Hill**. Affirmed. Moore, Chief Judge, and Riedmann and Arterburn, Judges.

# LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-16-898: **Alvarez v. Choi**. Summarily remanded. See, § 4-203; *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

No. A-16-1021: **State v. Wilson**. Motion of appellee for summary affirmance sustained; October 5, 2016, order affirmed. See § 2-107(B)(2).

No. A-16-1061: **In re Estate of Brown-Elliott**. Appeal dismissed. See, § 2-107(A)(2); *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 902 N.W.2d 115 (2017); *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

No. A-16-1208: **Sobolik v. Fletcher**. Affirmed. See, § 2-107(A)(1); *Federal Nat. Mortgage Assn. v. Marcuzzo*, 289 Neb. 301, 854 N.W.2d 774 (2014); *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983).

No. A-17-055: **State v. Fletcher**. Affirmed.

No. A-17-080: **State v. Guel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Saylor*, 294 Neb. 492, 883 N.W.2d 334 (2016); *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

No. A-17-182: **Mumin v. Downing**. Affirmed. See § 2-107(A)(1).

No. A-17-190: **In re Interest of Angel R**. Affirmed.

No. A-17-191: **In re Interest of Tyerca R**. Affirmed.

Nos. A-17-204, A-17-205: **State v. Malone**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-208: **Barfield v. Silverleaf Investments**. Affirmed. See § 2-107(A)(1).

Nos. A-17-212, A-17-213: **State v. Rocha**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-262: **In re Estate of Kelly**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-17-275: **State v. Hiles**. Appellee's suggestion of remand granted; matter remanded with instructions. See Neb. Rev. Stat. § 60-6,165(1) (Reissue 2010). See, also, *Morfeld v. Bernstrauch*, 216 Neb. 234, 343 N.W.2d 880 (1984).

No. A-17-280: **State v. English**. Affirmed. See, § 2-107(A)(1); *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018).

Nos. A-17-282, A-17-288: **State v. Loftis**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dehning*, 296 Neb. 537, 894 N.W.2d 331 (2017).

No. A-17-289: **State v. Harris**. Appellee's suggestion of remand sustained. Sentence vacated and cause remanded for resentencing. See Neb. Rev. Stat. § 29-2204.02(4) (Reissue 2016). See, also, *State v. Artis*, 296 Neb. 606, 894 N.W.2d 349 (2017); *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

No. A-17-307: **Patmon v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2016); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *Gonzalez v. Gage*, 290 Neb. 671, 861 N.W.2d 457 (2015).

Nos. A-17-313 through A-17-315: **State v. Johnson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-17-328: **State v. Welch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-329: **State v. Wallace**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-336: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Jackson*, 297 Neb. 22, 899 N.W.2d 215 (2017).

No. A-17-337: **State v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Jones*, 296 Neb. 494, 894 N.W.2d 303 (2017).

No. A-17-376: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-378: **Dixon v. Dixon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-379: **Ivey v. Department of Health & Human Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-17-380: **Hudiburgh v. Galvan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-385: **Krafka v. Krafka**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010). See, also, *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016).

No. A-17-388: **Redding v. Duckwall Alco Stores**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-394: **State v. Alvarez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-396: **State v. Travieso**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-399: **Campbell v. Hansen**. Affirmed. See § 2-107(A)(1).

Nos. A-17-403 through A-17-406: **State v. McCroy**. By order of the court, appeals dismissed for failure to file briefs.

No. A-17-410: **In re Interest of Benjamin S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-411: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-412: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-414: **Rosberg v. Vaughan**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2016).

No. A-17-415: **Rosberg v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-417: **Christner v. Brott**. Appeal dismissed for lack of jurisdiction, district court's order vacated, and cause remanded with directions. See *State v. Coble*, 299 Neb. 434, 908 N.W.2d 646 (2018).

No. A-17-426: **Johnson v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-17-427 through A-17-429: **State v. Saenz**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-434: **State v. Straughn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

Nos. A-17-446, A-17-448: **State v. Wilson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-451: **Estate of Ashby v. Hubbard**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-456: **Strom v. Strom**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-457: **Fieldgrove v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-17-464: **State v. Frazier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-467: **In re Estate of Manion**. Stipulation allowed; appeal dismissed.

Nos. A-17-477 through A-17-479: **State v. Taylor**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017); *State v. Cerritos-Valdez*, 295 Neb. 563, 889 N.W.2d 605 (2017).

No. A-17-493: **In re Interest of Joseph W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-501: **County of Dodge v. Schindler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-504: **Tyler v. Kim**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, §§ 2-107(B)(2) and 2-109(A); *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013); *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011); *Logan v. Logan*, 22 Neb. App. 667, 859 N.W.2d 886 (2015).

No. A-17-505: **State v. Finley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

CASES DISPOSED OF WITHOUT OPINION

No. A-17-506: **Black v. Swanson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-510: **State v. Hernandez-Gallardo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-511: **Lundahl v. Rock Springs Housing Authority**. Motion of appellants to dismiss and response of appellees considered; appeal dismissed; each party to pay own costs.

No. A-17-514: **Herrera v. Gearhart**. Stipulation considered; appeal dismissed; each party to pay own costs.

No. A-17-517: **In re Interest of Marla M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-522: **State v. Schaneman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017); *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

No. A-17-533: **State v. Mumin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-534: **Klasi v. Klasi**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-17-536: **In re Estate of Acher**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-17-558: **State v. Feldhacker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

No. A-17-563: **State v. Vang**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-566: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-571: **State v. Christensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-17-578: **State v. Corado Diaz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-579: **State v. McBeth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-581: **State v. Miksch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, *State v. Harrison*, 293 Neb. 1000, 881 N.W.2d 860 (2016).

No. A-17-585: **State v. Norris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-586: **State v. Gatwech**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-587: **State v. Billups**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912 and 25-1329 (Reissue 2016).

No. A-17-590: **E.D. v. Bellevue Pub. Sch. Dist**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-17-596: **State v. Alatorre**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015). See, also, Neb. Rev. Stat. § 28-1205(3) (Reissue 2016).

No. A-17-604: **State v. Verhagen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015); *State v. Svoboda*, 13 Neb. App. 266, 690 N.W.2d 821 (2005).

No. A-17-606: **State v. Reed**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-607: **Schroder v. Best**. Appeal dismissed. See, § 2-107(A)(2); *Floerchinger v. Floerchinger*, 24 Neb. App. 120, 883 N.W.2d 419 (2016).

No. A-17-609: **State v. Worrell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-617: **Nocita v. Rees**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 25-217 (Reissue 2016); *Dillion v. Mabbutt*, 265 Neb. 814, 660 N.W.2d 477 (2003); *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999).

Nos. A-17-618, A-17-620: **State v. Craig**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017).

No. A-17-619: **State v. Kraljev**. Appellee's suggestion of remand granted. Sentence vacated, and matter remanded with directions. See Neb. Rev. Stat. § 29-2204(1) (Reissue 2016).

No. A-17-623: **State v. Eason**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-624: **State v. Two Two**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-628: **Vindicia, Inc. v. Infofree.com, LLC**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-17-629: **AMCO Ins. Co. v. Shrago**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-638: **McEwen v. Nebraska State College System**. Appeal dismissed. See, § 2-107(A)(2); *Jackson v. Board of Equal. of City of Omaha*, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

No. A-17-640: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017).

No. A-17-643: **State v. Alhussaini**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-647: **Johnson v. Meister**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-655: **State v. Yanga**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016); *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-17-660: **State v. Mays**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-661: **State v. Hood**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-662: **Fittje v. Potter**. Appeal dismissed. See, § 2-107(A)(2); *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

No. A-17-663: **Geoffrey V. on behalf of Jaxon F. v. Sara P.** Appeal dismissed. See, § 2-107(A)(2); *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

No. A-17-666: **Wesner v. Cruickshank**. Motion of appellee for summary affirmance sustained; order denying habeas relief affirmed. See, § 2-107(B)(2); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016); *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

No. A-17-667: **Phillips v. Memorial Health Care Systems**. Motions of appellees for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-679: **Castonguay v. Castonguay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2016).

No. A-17-683: **Martinez v. Amerigreen, LLC**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-684: **State v. Butler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-694: **State v. Alarcon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017).

No. A-17-695: **State v. Standley**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-696: **Thompson v. Alston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-698: **State v. Norton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-701: **Alston v. Alston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-704: **State v. Ellington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-706: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-708: **In re Interest of Diego G**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-17-715: **Lewis v. Rolling Stone Feedyard**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-717: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-725: **In re Interest of Isaiah G**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-727: **State v. Torres**. Stipulation allowed; appeal dismissed.

No. A-17-728: **State v. Yanga**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016); *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-17-729: **State v. Curtis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-731: **State v. Potmesil**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-17-734: **In re Interest of Diego G**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-17-735: **In re Interest of Diego G**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-17-736: **In re Interest of Diego G**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-17-738: **Davis v. Applied Underwriters**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-746: **Harrell v. Bloos**. Affirmed. See § 2-107(A)(1).

No. A-17-772: **Kennicutt v. Vandelay Investments**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Hauxwell v. Henning*, 291 Neb. 1, 863 N.W.2d 798 (2015).

No. A-17-774: **State v. Furlow**. Stipulation allowed; appeal dismissed.

No. A-17-777: **Hunter v. Gronenthal**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-780: **State v. Traylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-784: **State v. McKay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016).

Nos. A-17-785, A-17-786: **State v. Janousek**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016).

No. A-17-789: **Hayes v. Hayes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-789: **Hayes v. Hayes**. Motion of appellant to vacate dismissal granted; appeal reinstated.

No. A-17-789: **Hayes v. Hayes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-791: **State v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-17-792: **Redus v. Redus**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-793: **State v. Abejide**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2912(1) (Reissue 2016).

No. A-17-794: **State on behalf of JayShawn V. v. Jamar A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-17-797: **Hernandez v. Frakes**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-802: **State v. Littledog**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-805: **Smith v. Mental Health Assn. of Nebraska**. Appeal dismissed. See, § 2-107(A)(2); *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

No. A-17-806: **State v. Gray**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4)(e) (Reissue 2016); *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012).

No. A-17-811: **State v. Harris**. Stipulation allowed; appeal dismissed.

No. A-17-819: **In re Interest of Lydia R. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-820: **State v. Contreras**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-822: **State v. Sampson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-825: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dehning*, 296 Neb. 537, 894 N.W.2d 331 (2017).

No. A-17-826: **In re Interest of Ra'Khyia T. et al**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-827: **Cuenca v. Physicians Clinic**. Appeal dismissed.

No. A-17-828: **Mengedoht v. Andersen**. Motion of appellees for summary affirmance sustained; July 25, 2017, order affirmed. See § 2-107(B)(2).

No. A-17-829: **Mengedoht v. Looby**. Motion of appellee for summary affirmance sustained; July 25, 2017, order affirmed. See § 2-107(B)(2).

No. A-17-830: **Smith v. Smith**. Stipulation to dismiss appeal allowed; appeal dismissed.

No. A-17-832: **Edwards v. Madsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-1603 (Cum. Supp. 2014 & Reissue 2016); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-17-833: **State v. Ayubzai**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-837: **State v. Lemburg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-838: **State v. Vigil**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017).

No. A-17-840: **Valentine v. Gerber**. Appeal dismissed. See, § 2-107(A)(2); *State v. Riensche*, 283 Neb. 820, 812 N.W.2d 293 (2012).

No. A-17-841: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016).

No. A-17-844: **Hall v. Creighton Legal Clinic**. Motion of appellee for summary dismissal granted; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017); *Landrum v. City of Omaha Planning Bd.*, 297 Neb. 165, 899 N.W.2d 598 (2017).

Nos. A-17-845, A-17-848, A-17-849: **State v. Hiatt**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017); *State v. Dehning*, 296 Neb. 537, 894 N.W.2d 331 (2017).

No. A-17-847: **Martinez v. Hormel Foods Corp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-850: **State v. Robinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-851: **State v. Peithman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-854: **State v. Wallace**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-858: **Alford v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

No. A-17-859: **Sorensen v. Thomas**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-863: **Jensen v. Griffin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-869: **Kingston v. San Angelo**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-871: **State v. Crites**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-17-882: **State v. Osby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-886: **State v. Powell**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-887: **State v. Sapp**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-890: **State v. Cassell**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2912(1) (Reissue 2016).

No. A-17-892: **Mumin v. Frakes**. Affirmed. See § 2-107(A)(1). See, also, *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

No. A-17-893: **State v. Gray**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2103(4) (Reissue 2016).

No. A-17-895: **State v. Keown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999).

No. A-17-896: **State v. Brewer**. Stipulation allowed; appeal dismissed.

No. A-17-901: **State v. Heston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-902: **State v. Rogers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-17-904: **Mumin v. Kelly**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-907: **State v. Lugo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-911: **State v. Casey**. Stipulation allowed; appeal dismissed.

No. A-17-913: **In re Interest of Imelda H. et al**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. §§ 43-2,106.01(1) and 25-1912(1) (Reissue 2016).

No. A-17-917: **Tucker v. Porter**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-17-922: **Valentine v. Randall**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-923: **Williams v. Longs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-928: **State on behalf of JayShawn V. v. James A**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-929: **State v. Jenkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dehning*, 296 Neb. 537, 894 N.W.2d 331 (2017).

No. A-17-930: **Lecher v. Zapata**. Stipulation to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-17-932: **State ex rel. Kathryn G. v. Nicholas L**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-933: **Applied Underwriters v. All American School Bus Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016); *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

No. A-17-936: **Owens v. Owens**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-17-937: **Harms v. Harms**. Appeal dismissed. See, § 2-107(A)(2); *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

No. A-17-938: **State v. Bart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-940: **State v. Kues**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-941: **State v. Spencer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-945: **State v. Iglesias**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-946: **State v. Martinez**. Stipulation allowed; appeal dismissed.

No. A-17-947: **State v. Owens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-17-953: **State v. Wilson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-954: **State v. Murph**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-956: **Clark v. Sarpy County**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-959: **State v. Three Thousand Six Hundred Ninety-One Dollars**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017); *Carrel v. Serco Inc.*, 291 Neb. 61, 864 N.W.2d 236 (2015).

No. A-17-963: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015); *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990).

No. A-17-964: **State v. Kues**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-965: **State v. Kalina**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-965: **State v. Kalina**. Motion of appellant to set aside dismissal sustained; appeal reinstated.

No. A-17-966: **In re Interest of Kyle G**. Appeal dismissed. See, § 2-107(A)(2); 2017 Neb. Laws, L.B. 11; *In re Interest of Sandrino T.*, 295 Neb. 270, 888 N.W.2d 371 (2016).

No. A-17-973: **State v. Chaloupka**. Appeal dismissed. See, § 2-107(A)(2); *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999).

No. A-17-974: **State v. Fauth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-975: **Hall v. Wojtalewicz**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2729(1) (Reissue 2016); *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

No. A-17-977: **State v. Fox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2204.02(2)(c) (Reissue 2016); *State v. Dyer*, 298 Neb. 82, 902 N.W.2d 687 (2017).

No. A-17-979: **Shannon v. Jurgens**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-984: **Dieter v. Dieter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2016).

No. A-17-986: **In re Trust of Shonka**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-987: **State v. Tran**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-988: **Cinatl v. Prososki**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-990: **State v. Schindler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-992: **Phillips v. Silver Memories**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016).

Nos. A-17-998, A-17-999: **State v. Riek**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1000: **State v. Osman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1001: **Theisen v. Theisen**. Stipulation to dismiss appeal sustained; appeal dismissed.

No. A-17-1003: **State v. Chapman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2016); *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

No. A-17-1004: **State v. Ater**. Stipulation allowed; appeal dismissed.

No. A-17-1005: **In re Interest of Noah H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1006: **In re Interest of Elijah H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1007: **In re Interest of Americ H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1008: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-1009: **State v. Monasmith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1012: **State v. Mayhew**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-1014: **Wilson v. Hall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1015: **Wise v. Hall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1020: **Martinez v. CMR Constr. & Roofing of Texas**. Appeal dismissed. See, § 2-107(A)(2); *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

No. A-17-1021: **State v. Owens**. Stipulation allowed; appeal dismissed.

No. A-17-1022: **Tyler v. Belik**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-1023: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-1027: **State v. Chesson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-1029: **State on behalf of Richard W. v. Richard W**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1030: **State v. Lara-Lozano**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-1031: **McSwine v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1032: **State v. Winters**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1035: **State v. Hatch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015); *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990).

No. A-17-1038: **Tyler v. City of Omaha**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-1040: **McElroy v. Davita Dialysis Clinics Corp**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-17-1041: **White v. State**. Motion of appellee for summary affirmance granted; judgment affirmed.

No. A-17-1043: **State v. Castonguay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-1045: **Varenhorst v. Otoe Cty. Bd. of Equal**. Stipulation to dismiss considered; appeal dismissed; each party to pay own costs.

No. A-17-1052: **State on behalf of JayShawn V. v. Jamar A**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-1057: **State v. Blazek**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1058: **State v. Blazek**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1060: **State v. Cassell**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1061: **State v. Schwisow**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1065: **Hooper v. Hooper**. Appeal dismissed. See, § 2-107(A)(2); *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

No. A-17-1069: **State v. Scott**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1073: **State v. O'Donahue**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1078: **State v. Palmer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-1080: **In re Estate of Mosher**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1082: **Grabast v. Grabast**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1084: **Dawson v. Tilted Kilt**. Appeal dismissed.

No. A-17-1085: **Hildebrandt v. Tilted Kilt**. Appeal dismissed.

No. A-17-1087: **Hillyard v. Tilted Kilt**. Appeal dismissed.

No. A-17-1088: **Becker v. Tilted Kilt**. Appeal dismissed.

No. A-17-1089: **In re Interest of Joseph P**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1090: **State v. Chuol**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-17-1094: **State v. Sepulveda**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1095: **In re Adoption of Aubree K**. Appeal dismissed. See, § 2-107(A)(2); *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

No. A-17-1097: **State v. Divis**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-17-1100: **State v. Martinez**. Motion of appellee for summary affirmance granted; judgment affirmed. See, Neb. Rev. Stat. § 29-3001(4) (Reissue 2016); *State v. Amaya*, 298 Neb. 70, 902 N.W.2d 675 (2017); *State v. Mamer*, 289 Neb. 92, 853 N.W.2d 517 (2014).

No. A-17-1102: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1104: **Gray v. Flood**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1105: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dehning*, 296 Neb. 537, 894 N.W.2d 331 (2017).

No. A-17-1108: **Bruce v. Department of Motor Vehicles**. Appeal dismissed. See, § 2-107(A)(2); *Woodward v. Lahm*, 295 Neb. 698, 890 N.W.2d 493 (2017); *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987).

No. A-17-1109: **Schlax v. Schlax**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1112: **Jensen v. Jensen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1329 (Reissue 2016); *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013).

No. A-17-1117: **State on behalf of JayShawn V. v. Jamar A**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-1119: **Above Average Painting & Drywall v. Ross**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1120: **SNJ Inc. v. Nebraska Liquor Control Comm**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 84-917 (Reissue 2014); *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996).

No. A-17-1122: **Schmidt v. Schmidt**. Appeal dismissed. See, § 2-107(A)(2); *Schlake v. Schlake*, 294 Neb. 755, 855 N.W.2d 15 (2016); *Sewall v. Whiton*, 85 Neb. 478, 123 N.W. 1042 (1909).

No. A-17-1125: **Bleicher v. Bleicher**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1128: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1137: **State v. Estill**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1145: **State v. Harden**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-17-1146: **State v. Harpster**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1150: **State v. Person**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016).

No. A-17-1153: **Fritz v. Wente**. Appeal dismissed. See, § 2-107(A)(2); *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

No. A-17-1157: **State v. Matias-Gonzalez**. Motion of appellee for summary affirmance granted; judgment affirmed. See *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016).

No. A-17-1161: **State v. Diego-Francisco**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-1163: **Mumin v. Hansen**. Motion of appellee for summary affirmance pursuant to § 2-107(B)(2) sustained in part, and in part reversed and vacated.

No. A-17-1168: **Cogdill v. Reynolds**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1169: **Standley v. Sprague**. Appeal dismissed. See, § 2-107(A)(2); *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

No. A-17-1172: **Morris v. CT Corp. Systems**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-17-1174: **State v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1175: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-1180: **State v. Yang**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

No. A-17-1185: **Solorio-Gallardo v. Dieguez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1187: **Zuhlke v. W.M. Krotter Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1192: **Lundahl v. Walmart**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-1194: **State v. Copeland**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-17-1196: **In re Interest of Joshua S**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999); *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013).

No. A-17-1200: **Yah v. Fontenelle Realty**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1203: **Colburn v. CHS, Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-17-1205: **State v. Briggs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-1207: **State v. Curtis**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1212: **State v. Bennett**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1213: **Montalvo v. Koch Equity Corp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1220: **In re Adoption of Faith H**. Appeal dismissed. See, § 2-107(A)(2); *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

No. A-17-1222: **State v. Ebert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-1224: **Utecht v. Western Sugar Co-op**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1226: **Merrill v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); *Purdie v. Nebraska Dept. of Corr. Servs.*, 292 Neb. 524, 872 N.W.2d 895 (2016).

No. A-17-1227: **State v. Kaar**. Stipulation allowed; appeal dismissed.

No. A-17-1228: **Gray v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017).

No. A-17-1230: **State v. Harris**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1233: **State v. Leonard**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1235: **State v. Charbonneau**. Stipulation allowed; appeal dismissed.

No. A-17-1236: **State v. Knight**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1238: **State v. Campos**. Appeal dismissed. See §§ 2-107(A)(2) and 2-101(B)(4). See, also, Neb. Rev. Stat. § 25-1912(1) (Reissue 2016); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-17-1241: **State v. Thoan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1242: **Gray v. Department of Corr. Servs**. Appeal dismissed for lack of jurisdiction.

No. A-17-1245: **Heckard v. Hansen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1249: **In re Guardianship of Kyoko R**. Appeal dismissed. See § 2-107(A)(2).

No. A-17-1251: **Patterson v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1252: **State v. Hatch**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-17-1256: **Molina v. Maxson**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-17-1259: **State v. Espinosa**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-17-1263: **Guerry v. Frakes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1264: **Fletcher v. Joseph**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016); *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

No. A-17-1266: **State v. Lopez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1266: **State v. Lopez**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-17-1266: **State v. Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1267: **Mansuetta v. Mansuetta**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Tyrone K.*, 295 Neb. 193, 887 N.W.2d 489 (2016). See, also, *Devney v. Devney*, 295 Neb. 15, 886 N.W.2d 61 (2016).

No. A-17-1270: **State v. Alford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1241 (Reissue 2016); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-17-1271: **Kelvin v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1273: **State v. Garibo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 298 Neb. 279, 903 N.W.2d 911 (2017); *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017); *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017); *State v. Goynes*, 293 Neb. 288, 876 N.W.2d 912 (2016).

No. A-17-1274: **Marcia S. on behalf of Kyoko R. v. Martin S**. By order of the court, appeal dismissed for failure to file briefs.

No. A-17-1290: **State v. Gray**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1295: **Hernandez v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, Neb. Rev. Stat. §§ 28-416(2) and 28-401(28)(h) (Cum. Supp. 2006).

No. A-17-1298: **State v. Curry**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-17-1299: **State v. Curry**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-17-1300: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-17-1304: **State v. Hughes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

No. A-17-1305: **State v. Valentino**. Appeal dismissed. See, § 2-107(A)(2); *State v. Yuma*, 286 Neb. 244, 835 N.W.2d 679 (2013); *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

No. A-17-1306: **State v. Davis**. Stipulation allowed; appeal dismissed.

No. A-17-1310: **In re Estate of Taylor**. Motion of appellee to dismiss granted; appeal dismissed. See, Neb. Rev. Stat. § 30-1601(3) (Reissue 2016); *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2017).

No. A-17-1315: **Dannatt v. Dannatt**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-17-1320: **Goodwin v. Goodwin**. Appeal dismissed. See, § 2-107(A)(2); *Furstenfeld v. Pepin*, 23 Neb. App. 673, 875 N.W.2d 468 (2016).

No. A-17-1322: **State v. Hood**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1323: **State v. Hood**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

No. A-17-1330: **City of Atkinson v. Widtfeldt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016). See, also, *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

No. A-17-1333: **State v. Hizar**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-010: **State v. Chhetri**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

No. A-18-015: **Parker v. Parker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-017: **Tierney v. Tierney**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Supp. 2017); *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

No. A-18-026: **Thomas v. Moyer**. Appeal dismissed. See, § 2-107(A)(2); *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

No. A-18-027: **Thomas v. Jackson**. Appeal dismissed. See, § 2-107(A)(2); *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

No. A-18-028: **Jacob v. Ricketts**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-031: **In re Interest of Nina J**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-036: **State v. Mai**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

No. A-18-042: **In re Estate of Trawicke**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Supp. 2017).

No. A-18-046: **State v. Matson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-047: **State v. Matson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-048: **State v. Hagemeier**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-051: **State v. Stark**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-064: **In re Interest of Revontre J. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-065: **State v. Trifu**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-067: **State v. Alford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-068: **Kays v. Madsen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-069: **Gray v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 84-917(2)(a)(i) (Reissue 2014).

No. A-18-070: **Goodwin v. Goodwin**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-071: **Gray v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 84-917(2)(a)(i) (Reissue 2014).

No. A-18-074: **State v. Coffman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-079: **State on behalf of JayShawn V. v. Jamar A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-18-084: **Fontenelle Realty v. Yah**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2016); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-18-088: **Eskridge v. Department of Corr. Servs. Appeals Bd**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-089: **In re Interest of Tiana B**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017). See, also, *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013).

No. A-18-092: **State v. Mumin**. Stipulation allowed; appeal dismissed.

No. A-18-100: **Johnson v. Johnson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-102: **State v. McNeal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-18-109: **State v. Freemont**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-115: **English v. Time Warner Cable**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-118: **State v. Barnes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-119: **State v. Barnes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-120: **Robinson v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-18-124: **In re Interest of Tiana B**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017). See, also, *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013).

No. A-18-137: **Molina v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-144: **Owens v. Owens**. Appeal dismissed. See, § 2-107(A)(2); *Furstenfeld v. Pepin*, 287 Neb. 12, 840 N.W.2d 862 (2013).

No. A-18-149: **Jackson v. Pfeifer**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-152: **Friedrichsen v. Gosda**. Summarily remanded.

No. A-18-153: **Newman v. Liebig**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-161: **Chapman v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-162: **State v. Lampman**. By order of the court, appeal dismissed for failure to file briefs.

CASES DISPOSED OF WITHOUT OPINION

No. A-18-167: **State v. Hladik**. Stipulation allowed; appeal dismissed.

No. A-18-183: **Pilcher v. Pilcher**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016). See, also, *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016); *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988).

No. A-18-185: **Mumin v. Nebraska Legislature**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

No. A-18-201: **State v. Kadavy**. Stipulation allowed; appeal dismissed.

No. A-18-202: **State v. Kadavy**. Stipulation allowed; appeal dismissed.

No. A-18-210: **State v. Masters**. Stipulation allowed; appeal dismissed.

No. A-18-215: **Krafka v. Krafka**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-222: **Graham v. First Nat. Bank of Omaha**. Appeal dismissed. See, § 2-107(A)(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-18-226: **State v. Dughman**. Appeal dismissed. See, § 2-107(A)(2); *State v. Gill*, 297 Neb. 852, 901 N.W.2d 679 (2017).

No. A-18-254: **In re Interest of Kennah S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-18-259: **State v. Guilliatt**. Stipulation allowed; appeal dismissed.

No. A-18-261: **Kramer v. Gold Ring Enters**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016).

No. A-18-275: **State v. Scott**. Stipulation allowed; appeal dismissed.

No. A-18-340: **Lay v. Board of Supervisors of Adams Cty**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-346: **Alameri v. US Foods**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 48-180 and 48-182 (Cum. Supp. 2016).

No. A-18-367: **Harper v. Kaczor**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2016); *State v. Bluett*, 295 Neb. 369, 889 N.W.2d 83 (2016).

No. A-18-374: **State v. Podkovich**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 2017).

CASES DISPOSED OF WITHOUT OPINION

No. A-18-381: **Bhatt v. Pragya, Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

No. A-18-395: **State v. El**. Appeal dismissed. See § 2-107(A)(2).

No. A-18-400: **In re Interest of Cayden R. et al**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 43-1613 (Reissue 2016).

No. A-18-425: **Armada Media Corp. v. Legacy Communications**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2016); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-15-798: **State v. Fair**. Petition of appellant for further review denied on November 13, 2017.

No. A-15-923: **State v. Purdy**. Petition of appellant for further review denied on September 8, 2017.

No. A-15-987: **State v. Buttercase**. Petition of appellant for further review denied on March 2, 2018. See § 2-102(F)(1).

No. S-15-1014: **In re Henry B. Wilson, Jr., Revocable Trust**. Petition of appellee for further review sustained on February 23, 2018.

Nos. A-15-1211, A-15-1214: **State v. Robey**. Petitions of appellant for further review denied on November 8, 2017.

No. S-16-054: **Becher v. Becher**, 24 Neb. App. 726 (2017). Petition of appellant for further review sustained on September 27, 2017.

No. S-16-054: **Becher v. Becher**, 24 Neb. App. 726 (2017). Petition of appellee for further review sustained on September 27, 2017.

No. A-16-059: **State v. McCray**. Petition of appellant for further review denied on January 17, 2018.

No. A-16-103: **Chevalier v. Metropolitan Util. Dist.**, 24 Neb. App. 874 (2017). Petition of appellant for further review denied on December 11, 2017.

No. S-16-113: **Nadeem v. State**, 24 Neb. App. 825 (2017). Petition of appellee for further review sustained on August 17, 2017.

No. A-16-202: **Crozier v. Brownell-Talbot School**, 25 Neb. App. 1 (2017). Petition of appellee for further review denied on November 22, 2017.

No. A-16-208: **Andrew v. Village of Nemaha**. Petition of appellant for further review denied on September 14, 2017.

No. A-16-309: **Northeast Neb. Pub. Power Dist. v. Nebraska Pub. Power Dist.**, 24 Neb. App. 837 (2017). Petition of appellant for further review denied on September 13, 2017.

No. S-16-451: **Wisner v. Vandelay Investments**. Petition of appellee for further review sustained on November 16, 2017.

No. A-16-460: **Computer Support Servs. v. Vaccination Servs**. Petition of appellant for further review denied on August 30, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-16-493: **State v. Glazebrook**. Petition of appellant for further review denied on March 22, 2018.

No. A-16-507: **In re Interest of Gabriella N. et al**. Petition of appellant for further review denied on October 2, 2017.

No. A-16-527: **State v. Derreza**. Petition of appellant for further review denied on October 17, 2017.

No. A-16-620: **Ganzel v. Ganzel**. Petition of appellant for further review denied on August 30, 2017.

No. A-16-638: **Summer Haven Lake Assn. v. Vlach**, 25 Neb. App. 384 (2017). Petition of appellant for further review denied on April 18, 2018.

No. A-16-682: **Essink v. City of Gretna**, 25 Neb. App. 53 (2017). Petition of appellee for further review denied on November 21, 2017.

No. A-16-690: **State v. Camp**. Petition of appellant for further review denied on March 21, 2018.

No. A-16-727: **N.P. Dodge Mgmt. Co. v. Eltouny**. Petition of appellant for further review denied on March 1, 2018, as untimely.

No. A-16-747: **Davlin v. Cruickshank**. Petition of appellant for further review denied on October 4, 2017.

No. A-16-824: **State v. Harris**. Petition of appellant for further review denied on November 13, 2017.

No. A-16-844: **Walker v. Probandt**, 25 Neb. App. 30 (2017). Petition of appellee for further review denied on May 8, 2018.

No. A-16-846: **James-Estenson v. Estenson**. Petition of appellant for further review denied on April 24, 2018.

No. A-16-850: **Miller v. Miller**. Petition of appellant for further review denied on August 14, 2017.

No. A-16-888: **State v. Long**. Petition of appellant for further review denied on December 11, 2017.

No. A-16-890: **Schriner v. Schriner**, 25 Neb. App. 165 (2017). Petition of appellant for further review denied on November 3, 2017, as premature. See § 2-102(F)(1).

No. A-16-890: **Schriner v. Schriner**, 25 Neb. App. 165 (2017). Petition of appellant for further review denied on December 29, 2017.

No. A-16-905: **Carey v. Hand**. Petition of appellee for further review denied on August 30, 2017.

No. A-16-910: **State v. Williams**, 24 Neb. App. 920 (2017). Petition of appellant for further review denied on December 22, 2017.

No. A-16-915: **Ritts v. TEO, Inc**. Petition of appellant for further review denied on December 28, 2017.

No. A-16-923: **State v. Cook**. Petition of appellant for further review denied on October 18, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-16-930: **State v. Payne**. Petition of appellant for further review denied on November 3, 2017.

No. A-16-934: **State v. Vance**. Petition of appellant for further review denied on March 1, 2018, as untimely. See § 2-102(F)(1).

No. A-16-954: **State v. Miranda**. Petition of appellant for further review denied on December 11, 2017, for failure to file brief in support. See § 2-107(F)(1).

No. A-16-964: **State v. Heng**, 25 Neb. App. 317 (2017). Petition of appellant for further review denied on February 27, 2018.

No. A-16-972: **Kirkelie v. Henry**. Petition of appellant for further review denied on October 4, 2017.

No. A-16-983: **State v. Huff**, 25 Neb. App. 219 (2017). Petition of appellant for further review denied on January 17, 2018.

No. S-16-985: **State v. Botts**, 25 Neb. App. 372 (2017). Petition of appellee for further review sustained on January 31, 2018.

No. A-16-997: **Mischo v. Chief School Bus Serv**. Petition of appellant for further review denied on November 20, 2017.

No. A-16-1008: **Koch v. City of Sargent**. Petition of appellant for further review denied on November 9, 2017.

No. A-16-1018: **Leslie v. City of Sidney**. Petition of appellant for further review denied on September 5, 2017.

No. A-16-1021: **State v. Wilson**. Petition of appellant for further review denied on November 6, 2017.

No. A-16-1044: **In re Guardianship & Conservatorship of Hunt**. Petition of appellant for further review denied on February 22, 2018.

No. A-16-1050: **State v. Rowe**. Petition of appellant for further review denied on December 11, 2017.

No. A-16-1059: **Nienaber v. Nienaber**. Petition of appellant for further review denied on November 13, 2017, as premature. See § 2-102(F)(1).

No. A-16-1059: **Nienaber v. Nienaber**. Petition of appellant for further review denied on February 28, 2018.

No. A-16-1065: **Adams Bank & Trust v. Brown**. Petition of appellant for further review denied on December 6, 2017.

Nos. A-16-1077, A-16-1078: **In re Interest of Annika H. & Praxton H**. Petitions of appellant for further review denied on November 8, 2017.

No. A-16-1088: **State v. Niewohner**. Petition of appellant for further review denied on January 17, 2018.

No. A-16-1095: **In re Interest of N.L**. Petition of appellant for further review denied on October 17, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-16-1109: **Berndt v. Berndt**, 25 Neb. App. 272 (2017). Petition of appellee for further review denied on January 3, 2018.

No. A-16-1129: **In re Interest of Dante S**. Petition of appellant for further review denied on December 29, 2017.

No. A-16-1163: **Dupell v. Ford Storage & Moving**. Petition of appellant for further review denied on November 13, 2017, as premature. See § 2-102(F)(1).

No. A-16-1163: **Dupell v. Ford Storage & Moving**. Petition of appellant for further review denied on December 5, 2017.

No. A-16-1168: **State v. Ware**. Petition of appellant for further review denied on January 4, 2018.

No. A-16-1198: **State v. VanAckeren**. Petition of appellant for further review denied on February 15, 2018.

No. A-16-1201: **Holen v. Holen**. Petition of appellee for further review denied on March 14, 2018.

No. S-16-1205: **In re Interest of Kalen M**. Petition of appellee for further review sustained on January 17, 2018.

No. A-16-1220: **In re Interest of Johnathan D**. Petition of appellant for further review denied on October 10, 2017.

No. A-16-1230: **Suthar v. Bryan**. Petition of appellant for further review denied on May 8, 2018.

No. A-16-1231: **State v. Saldivar**. Petition of appellant for further review denied on March 14, 2018.

Nos. A-17-003 through A-17-007: **In re Interest of Breanna F. et al**. Petitions of appellant for further review denied on March 27, 2018.

Nos. A-17-003 through A-17-007: **In re Interest of Breanna F. et al**. Petitions of appellee Jerry F. for further review denied on March 27, 2018.

No. A-17-008: **Moyers v. International Paper Co.**, 25 Neb. App. 282 (2017). Petition of appellant for further review denied on December 29, 2017, as premature. See § 2-102(F)(1).

No. A-17-008: **Moyers v. International Paper Co.**, 25 Neb. App. 282 (2017). Petition of appellant for further review denied on March 2, 2018.

No. A-17-018: **Schurman v. Wilkins**. Petition of appellant for further review denied on April 25, 2018.

No. A-17-024: **State v. Jennings**. Petition of appellee for further review denied on September 6, 2017.

No. A-17-029: **Davlin v. Cruickshank**. Petition of appellant for further review denied on September 13, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-17-055: **State v. Fletcher**. Petition of appellant for further review denied on April 19, 2018.

No. A-17-059: **State v. Jones**. Petition of appellant for further review denied on September 14, 2017.

No. S-17-061: **State v. McCurdy**, 25 Neb. App. 486 (2018). Petition of appellant for further review sustained on April 25, 2018.

No. A-17-068: **State v. Sands**. Petition of appellant for further review denied on August 31, 2017.

No. S-17-074: **Shawn E. on behalf of Grace E. v. Diane S**. Petition of appellant for further review sustained on March 16, 2018.

No. A-17-077: **State v. Keita**. Petition of appellant for further review denied on January 31, 2018.

No. A-17-079: **State v. Sysel**. Petition of appellant for further review denied on March 1, 2018.

No. A-17-089: **In re Interest of Ozmohsiz M**. Petition of appellant for further review denied on January 24, 2018.

No. A-17-090: **State v. Peery**. Petition of appellant for further review denied on September 14, 2017.

No. A-17-092: **State v. Dittrich**. Petition of appellant for further review denied on January 29, 2018.

No. A-17-099: **Telford v. Smith County, Texas**. Petition of appellants for further review denied on February 9, 2018.

No. A-17-102: **Hamilton v. United Parcel Serv**. Petition of appellant for further review denied on December 19, 2017.

Nos. A-17-144, A-17-145: **State v. Walker**. Petitions of appellant for further review denied on March 1, 2018.

No. A-17-154: **State v. Lindberg**, 25 Neb. App. 515 (2018). Petition of appellant for further review denied on March 27, 2018.

No. A-17-184: **Gardner v. International Paper Destr. & Recycl**. Petition of appellant for further review denied on May 15, 2018.

No. A-17-185: **In re Interest of Gypsey N**. Petition of appellant for further review denied on January 24, 2018.

No. S-17-187: **State v. Ratumaimuri**. Petition of appellant for further review denied on February 14, 2018.

No. S-17-187: **State v. Ratumaimuri**. Petition of appellee for further review sustained on February 14, 2018.

No. A-17-210: **State v. Turner**. Petition of appellant for further review denied on February 1, 2018.

No. A-17-211: **State v. Valeriano**. Petition of appellant for further review denied on December 29, 2017.

No. A-17-234: **Mehner Family Trust v. U.S. Bank**. Petition of appellant for further review denied on October 2, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-17-243: **State v. Smith**. Petition of appellant for further review denied on February 1, 2018.

No. A-17-252: **State v. Capone**. Petition of appellant for further review denied on April 12, 2018.

Nos. A-17-283, A-17-284: **State v. Wellon**. Petitions of appellant for further review denied on January 8, 2018.

No. A-17-285: **State v. Hollingsworth**. Petition of appellant for further review denied on September 14, 2017.

No. A-17-295: **Mitchell v. Mitchell**. Petition of appellant for further review denied on May 21, 2018.

No. A-17-300: **State v. Gaines**. Petition of appellant for further review denied on September 27, 2017.

No. A-17-305: **State v. Charles**. Petition of appellant for further review denied on December 22, 2017.

No. A-17-307: **Patmon v. State**. Petition of appellant for further review denied on October 4, 2017.

No. A-17-310: **State v. Pryce**, 25 Neb. App. 792 (2018). Petition of appellant for further review denied on May 18, 2018.

No. A-17-317: **In re Interest of Antonio J. et al**. Petition of appellant for further review denied on February 23, 2018.

No. A-17-317: **In re Interest of Antonio J. et al**. Petition of appellee Cordell S. for further review denied on February 23, 2018.

No. A-17-329: **State v. Wallace**. Petition of appellant for further review denied on November 8, 2017.

No. A-17-342: **Gray v. Hansen**. Petition of appellant for further review denied on March 14, 2018.

No. A-17-346: **State v. Arellano**. Petition of appellant pro se for further review denied on January 31, 2018.

No. A-17-365: **State v. Brown**. Petition of appellant for further review denied on April 3, 2018.

No. A-17-385: **Krafka v. Krafka**. Petition of appellant for further review denied on November 8, 2017.

No. S-17-399: **Campbell v. Hansen**. Petition of appellant for further review sustained on August 30, 2017.

No. A-17-399: **Campbell v. Hansen**. Petition of appellant for further review denied on May 8, 2018.

No. A-17-401: **In re Interest of Lizabella R.**, 25 Neb. App. 421 (2018). Petition of appellee for further review denied on March 13, 2018.

No. A-17-420: **State v. Miguel**. Petition of appellant for further review denied on April 18, 2018.

PETITIONS FOR FURTHER REVIEW

No. A-17-426: **Johnson v. Hansen**. Petition of appellant for further review denied on January 25, 2018.

Nos. A-17-427 through A-17-429: **State v. Saenz**. Petitions of appellant for further review denied on November 13, 2017.

No. A-17-462: **State v. James**. Petition of appellant for further review denied on April 30, 2018.

No. A-17-472: **Castonguay v. Jorgenson**. Petition of appellant for further review denied on March 28, 2018.

No. A-17-482: **Gray v. Hansen**. Petition of appellant for further review denied on February 27, 2018.

No. A-17-501: **County of Dodge v. Schindler**. Petition of appellant for further review denied on January 4, 2018.

No. A-17-513: **In re Interest of Jade H. et al.**, 25 Neb. App. 678 (2018). Petition of appellant for further review denied on May 16, 2018.

No. A-17-523: **Jackson v. Henry**. Petition of appellant for further review denied on August 23, 2017.

No. A-17-533: **State v. Mumin**. Petition of appellant for further review denied on December 1, 2017.

No. A-17-558: **State v. Feldhacker**. Petition of appellant for further review denied on November 27, 2017, as untimely filed. See § 2-102(F)(1).

No. A-17-565: **State v. Price**. Petition of appellant for further review denied on March 22, 2018.

No. A-17-578: **State v. Corado Diaz**. Petition of appellant for further review denied on March 5, 2018.

No. A-17-579: **State v. McBeth**. Petition of appellant for further review denied on November 13, 2017.

No. A-17-581: **State v. Miksch**. Petition of appellant for further review denied on December 19, 2017.

No. A-17-604: **State v. Verhagen**. Petition of appellant for further review denied on January 3, 2018.

No. S-17-638: **McEwen v. Nebraska State College Sys**. Petition of appellant for further review sustained on May 9, 2018.

No. A-17-641: **Olson v. Koch**. Petition of appellant for further review denied on October 10, 2017.

No. A-17-651: **Sanford v. Lincoln Poultry & Egg Co**. Petition of appellant for further review denied on February 23, 2018.

Nos. A-17-652, A-17-653: **In re Interest of Hunter L. & Opie L**. Petitions of appellant for further review denied on March 16, 2018.

No. A-17-655: **State v. Yanga**. Petition of appellant for further review denied on January 9, 2018.

PETITIONS FOR FURTHER REVIEW

No. A-17-666: **Wesner v. Cruickshank**. Petition of appellant for further review denied on January 10, 2018.

No. A-17-679: **Castonguay v. Castonguay**. Petition of appellant for further review denied on October 2, 2017.

No. A-17-706: **State v. Jackson**. Petition of appellant for further review denied on January 4, 2018.

No. A-17-717: **State v. Jones**. Petition of appellant for further review denied on February 9, 2018.

No. A-17-728: **State v. Yanga**. Petition of appellant for further review denied on December 19, 2017.

No. A-17-798: **In re Interest of Armani W. et al**. Petition of appellant for further review denied on May 8, 2018.

No. A-17-806: **State v. Gray**. Petition of appellant for further review denied on December 1, 2017.

No. A-17-828: **Mengedoht v. Andersen**. Petition of appellants for further review denied on May 16, 2018.

No. A-17-829: **Mengedoht v. Looby**: Petition of appellants for further review denied on May 16, 2018.

No. A-17-832: **Edwards v. Madsen**. Petition of appellant for further review denied on March 1, 2018. See § 2-102(F)(1).

No. A-17-858: **Alford v. Hansen**. Petition of appellant for further review denied on February 9, 2018.

No. A-17-883: **In re Interest of Michael M**. Petition of appellant for further review denied on April 30, 2018.

No. A-17-892: **Mumin v. Frakes**. Petition of appellant for further review denied on May 10, 2018.

No. A-17-902: **State v. Rogers**. Petition of appellant for further review denied on April 18, 2018.

No. A-17-933: **Applied Underwriters v. All American School Bus Corp**. Petition of appellant for further review denied on March 22, 2018.

No. A-17-973: **State v. Chaloupka**. Petition of appellant for further review denied on November 21, 2017.

No. A-17-977: **State v. Fox**. Petition of appellant for further review denied on April 17, 2018.

No. A-17-1003: **State v. Chapman**. Petition of appellant for further review denied on December 19, 2017.

No. A-17-1035: **State v. Hatch**. Petition of appellant for further review denied on April 12, 2018.

No. A-17-1043: **State v. Castonguay**. Petition of appellant for further review denied on February 15, 2018.

PETITIONS FOR FURTHER REVIEW

No. A-17-1079: **State v. Blimling**, 25 Neb. App. 693 (2018). Petition of appellant for further review denied on May 8, 2018, as untimely. See § 2-102(F)(1).

No. A-17-1122: **Schmidt v. Schmidt**. Petition of appellant for further review denied on May 16, 2018.

No. A-17-1145: **State v. Harden**. Petition of appellant for further review denied on March 1, 2018, as untimely. See § 2-102(F)(1).

No. A-17-1169: **Standley v. Sprague**. Petition of appellant for further review denied on March 8, 2018.

No. A-17-1228: **Gray v. Hansen**. Petition of appellant for further review denied on April 12, 2018.

No. A-17-1242: **Gray v. Department of Corr. Servs**. Petition of appellant for further review denied on April 18, 2018.

No. A-17-1263: **Guerry v. Frakes**. Petition of appellant for further review denied on April 25, 2018.

No. A-17-1295: **Hernandez v. Frakes**. Petition of appellant for further review denied on May 4, 2018.

No. A-17-1305: **State v. Valentino**. Petition of appellant for further review denied on March 27, 2018.

25 Nebraska Appellate Reports
CROZIER v. BROWNELL-TALBOT SCHOOL
Cite as 25 Neb. App. 1

**Nebraska Court of Appeals**
I attest to the accuracy and integrity of this certified document.
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# Paula M. Crozier, appellant, v. Brownell-Talbot School, a Nebraska nonprofit corporation, appellee.

901 N.W.2d 341

Filed August 22, 2017. No. A-16-202.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts.** Whether a contract is ambiguous is a question of law.
4. **Appeal and Error.** An appellate court resolves questions of law independently of the conclusions reached by the trial court.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** 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.
7. **Contracts: Parol Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.
8. **Contracts: Juries: Courts.** When the terms of a contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.

9. **Contracts: Summary Judgment.** When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
10. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
11. **Employment Contracts: Termination of Employment: Good Cause.** A contract for employment for a defined term cannot lawfully be terminated prior to the expiration of that term without good cause.
12. **Termination of Employment: Good Cause: Words and Phrases.** "Good cause" for an employee's dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the employee's services, as distinguished from arbitrary whim or caprice.
13. **Termination of Employment: Good Cause.** Whether good cause existed for discharging an employee is a question of fact.
14. **Trial: Evidence.** Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, a question can be determined as a matter of law.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Reversed and remanded for further proceedings.

Justin D. Eichmann, of Houghton, Bradford & Whitted, P.C., L.L.O., for appellant.

Kathryn A. Dittrick, Sarah L. McGill, and Rhianna A. Kittrell, of Fraser Stryker, P.C., L.L.O., for appellee.

Inbody, Riedmann, and Arterburn, Judges.

Riedmann, Judge.

## INTRODUCTION

Paula M. Crozier appeals the order of the district court for Douglas County which granted summary judgment in favor of Brownell-Talbot School (Brownell). We conclude that genuine issues of material fact preclude the entry of summary judgment and therefore reverse the district court's order and remand the cause for further proceedings.

## BACKGROUND

Crozier resigned from her position as executive director of a nonprofit organization in March 2014, and shortly thereafter applied for the position of director of communications and marketing at Brownell. She participated in two rounds of interviews, including one telephone interview and one inperson interview. During the inperson interview, she was asked why she left her last employment. Crozier responded that she left "due to differences in business practices and ethical standards." Brownell subsequently offered the position to Crozier and sent her an offer letter, which she was to sign and return prior to starting work.

The offer letter stated, "It is with great pleasure that I offer you the position of Director of Communications and Marketing." The letter further stated, "This position is considered a twelve-month position beginning May 5, 2014 to June 30, 2015 with an annual salary of $55,000.00." The letter referenced various benefits, such as sick days, insurance, and retirement, some of which were to take effect after 2 years of employment.

Brownell sent the offer letter to Crozier on April 28, 2014. She signed it the following day and returned it. On May 1, Brownell announced to its community, including parents and board members, that it had hired Crozier. In the announcement, Brownell mentioned Crozier's prior executive director position.

On May 2, 2014, a newspaper article was published concerning problems facing Crozier's former employer. Among the issues mentioned were billing and management problems, as well as the failure to adequately respond to an allegation of sexual abuse by an employee. The newspaper article did not include specific dates of the incidents involved nor did it mention Crozier's name.

Crozier brought the article to the attention of her direct supervisor who then delivered it to Brownell's head of school. The head of school called a meeting with Crozier the same

day. In the meeting, Crozier explained that she was not responsible for any of the issues mentioned in the article and that she had resigned prior to the incident involving alleged sexual abuse by an employee. She further informed the head of school that she had resigned from her former employment after discovering the improprieties mentioned in the news article and reporting them to the attorney general and the Department of Health and Human Services. Later that day, Brownell made the decision to "retract" the offer to Crozier, citing public relations concerns and damage to its reputation as a result of hiring Crozier.

Crozier filed a complaint against Brownell for breach of contract. She subsequently filed a motion for partial summary judgment, and Brownell filed a cross-motion for summary judgment. After a hearing, the district court granted Brownell's motion for summary judgment and dismissed the complaint, finding that the durational terms in the letter were ambiguous and that there was no clear intent sufficient to overcome the presumption of at-will employment. The district court further found that Brownell had good cause to revoke the offer. Crozier now appeals.

## ASSIGNMENTS OF ERROR

Crozier assigns that the district court erred in (1) failing to determine she had established a contract of employment with Brownell, (2) determining that the parties' contract failed to overcome any presumption of at-will employment, (3) determining that the terms of the parties' contract were ambiguous, (4) determining that good cause existed for terminating the contract, and (5) failing to determine that Brownell breached its contract of employment with her.

## STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as

to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

## ANALYSIS

*Contract of Employment.*

Crozier's first three assignments of error focus on the effect of the offer letter. The district court concluded that the letter was insufficient to establish a clear intent to enter into an employment contract for a defined term; therefore, Crozier was hired as an at-will employee. Specifically, the court stated:

> The language of the offer letter states it is a "twelve-month position beginning May 5, 2014 to June 30, 2015 with an annual salary of $55,000.00" and also references certain benefits that will apply after two years of employment. The Court finds these terms are ambiguous, as they can be interpreted in more than one way. Thus, there was no meeting of the minds nor clear intent sufficient to overcome the presumption of at-will employment.

While we agree that the terms of the offer letter are ambiguous as to the duration of Crozier's employment, we disagree with the district court's conclusion that the ambiguity in duration provided a basis upon which to grant Brownell's motion for summary judgment.

[3-5] 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). An appellate court resolves questions of law independently of the conclusions reached by the trial court. See *id*. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of,

at least two reasonable but conflicting interpretations or meanings. *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015). Here, we find that the terms of the contract are facially ambiguous. Specifically, we note the offer letter references a "twelve-month position" and an "annual salary" but also gives a term of employment from May 5, 2014, to June 30, 2015. No reading of this letter on its face can reconcile these conflicting durations, which stand in direct contradiction of one another. Such conflict renders it uncertain whether the parties intended the duration of the position to be 12 months or 14 months.

[6,7] 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.* A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. *Id*.

Brownell's director of business and finance testified via deposition that the reference to a 12-month position was to differentiate the position "from other staff that during a school year are only 10-month employees or 9-month employees." He further testified that the reference to the annual salary was for purposes of determining her monthly rate of pay; in other words, "the [$]55,000 would be divided into twelfths and would be paid every month based on that, but for a term from May of 2014 through June of 2015, that would actually be 14 months."

[8,9] If the fact finder were to accept these explanations, it presumably could determine that the letter extended an offer of employment for a definite term of May 5, 2014, to June 30, 2015, at a specific rate of pay, thereby finding that Crozier was hired for a definite term. But determining how ambiguous terms are to be interpreted is beyond the province of a court on a summary judgment motion. When the terms of a

contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances. *Schwindt v. Dynamic Air, Inc.*, 243 Neb. 600, 501 N.W.2d 297 (1993). When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. *Id*.

Because a fact question exists as to the terms of the offer letter, we reverse the trial court's order granting summary judgment on this issue.

*Good Cause for Revoking Offer.*

Crozier claims that the district court erred in finding that, even if the offer letter did constitute a contract for a definite term, Brownell had good cause to revoke such offer. She argues that Brownell's only justification for the revocation was public relations concerns due to the news article that was published about her former employer. However, the article did not identify Crozier, and the dates referenced in the article were after she had resigned. She claims that there is no allegation that she personally had engaged in any misconduct that could reflect poorly upon Brownell. Additionally, she claims that the district court's ruling held her accountable for the bad acts of others which were unrelated to her and not within her control.

We have already determined that a genuine issue of material fact exists as to whether Crozier was hired for a definite term. This court could only affirm and find summary judgment appropriate for Brownell if we could say, as a matter of law, that the offer was revoked for good cause, thereby nullifying the issue of whether the contract was for at-will employment or for a defined term. Based upon the record before us, we are unable to do so.

[10-13] Under Nebraska law, there is a distinction between at-will employment and employment for a defined term. Unless

constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007). A contract for employment for a defined term cannot lawfully be terminated prior to the expiration of that term without good cause. See *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993). "Good cause" for an employee's dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the employee's services, as distinguished from arbitrary whim or caprice. See *id*. Whether good cause existed for discharging an employee is a question of fact. *Id*.

[14] As discussed above, summary judgment is proper only when 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. *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014). Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, a question can be determined as a matter of law. See *Pierce v. Landmark Mgmt. Group*, 293 Neb. 890, 880 N.W.2d 885 (2016).

Here, reasonable minds could draw conflicting conclusions as to whether Brownell revoked its offer of employment for good cause. Brownell stated its reason for revoking its offer was because it was concerned that "the issues with her prior employer would cause public relations concerns and harm to the reputation" of Brownell. But Crozier presented evidence that the news article did not implicate or involve her. According to Crozier, she explained to Brownell that the article identified the very issues that caused her to resign from her prior employment and that she had, in fact, filed "whistle-blowing" complaints against the organization. She also explained that the alleged abuse occurred after she had resigned.

Viewing the evidence in the light most favorable to Crozier, we find that reasonable minds could differ as to whether Brownell revoked its offer for good cause. Therefore, we determine that summary judgment on this issue was inappropriate.

Because there are genuine issues of material fact regarding Crozier's employment status and whether good cause existed for the offer revocation, summary judgment is improper for either party. Due to these factual questions, we disagree with Crozier that the court erred in failing to grant partial summary judgment in her favor.

## CONCLUSION

We conclude that the district court erred in granting summary judgment in favor of Brownell. We therefore reverse the order of the district court and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

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

# State of Nebraska, appellee, v. Ramon M. Kirby, appellant.

901 N.W.2d 704

Filed August 29, 2017. No. A-16-741.

1. **Pleas: Courts.** A trial court has discretion to allow defendants to withdraw their guilty or no contest pleas before sentencing.
2. **Pleas: Appeal and Error.** An appellate court will not disturb the trial court's ruling on a presentencing motion to withdraw a guilty or no contest plea absent an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Pleas.** To support a finding that a defendant freely, intelligently, voluntarily, and understandingly entered a guilty plea, a court must inform a defendant about (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 show a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
6. **Pleas: Proof: Appeal and Error.** The right to withdraw a plea previously entered is not absolute. When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may sustain the motion for any fair and just reason, provided that such withdrawal would not substantially prejudice the prosecution. The defendant has the burden to show the grounds for withdrawal by clear and convincing evidence.
7. **Sentences.** Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or

law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

8. **Bonds: Appeal and Error.** A pretrial bond and an appeal bond after conviction are treated differently.
9. **Bonds.** Neb. Rev. Stat. § 29-2302 (Reissue 2016) requires that a reasonable bond be set following a misdemeanor conviction in district court.
10. **Bonds: Appeal and Error.** Reasonableness of the appeal bond amount is determined under the general discretion of the district court.
11. ____: ____. Factors to be considered in determining the reasonableness of a defendant's appeal bond under Neb. Rev. Stat. § 29-2302 (Reissue 2016) following a misdemeanor conviction include the atrocity of the defendant's offenses, the probability of the defendant appearing to serve his or her sentence following the conclusion of his or her appeal, the defendant's prior criminal history, and the nature of other circumstances surrounding the case.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, George R. Love for appellee.

Moore, Chief Judge, and Riedmann and Bishop, Judges.

Bishop, Judge.

Ramon M. Kirby pled no contest to two counts: (1) criminal mischief causing a pecuniary loss between $500 and $1,500, a Class I misdemeanor, and (2) third degree domestic assault, a Class I misdemeanor. The district court sentenced him to concurrent sentences of 270 days' imprisonment on each count. Kirby argues that the district court would not allow him to withdraw his pleas, imposed excessive sentences, and set an unreasonable appeal bond. For the following reasons, we affirm.

## BACKGROUND

On July 17, 2014, the State filed an information charging Kirby with three counts: (1) criminal mischief causing

a pecuniary loss over $1,500, a Class IV felony, pursuant to Neb. Rev. Stat. § 28-519(1) and (2) (Reissue 2008); (2) terroristic threats, a Class IV felony, pursuant to Neb. Rev. Stat. § 28-311.01 (Reissue 2008); and (3) domestic assault, third degree, a Class I misdemeanor, pursuant to Neb. Rev. Stat. § 28-323(1) and (4) (Cum. Supp. 2014). We note that Kirby's offenses occurred prior to August 30, 2015, the effective date of 2015 Neb. Laws, L.B. 605, which changed the classification of certain crimes and made certain amendments to Nebraska's sentencing laws.

In December 2014, the State filed an amended information charging Kirby with two counts: (1) criminal mischief causing a pecuniary loss between $500 and $1,500, a Class I misdemeanor, pursuant to § 28-519(1) and (3); and (2) third degree domestic assault, a Class I misdemeanor, pursuant to § 28-323(1) and (4). Pursuant to a plea agreement, Kirby pled "no contest" to counts 1 and 2 of the amended information. According to the factual basis provided by the State:

> [O]n September 6th, 2013, approximately 6:04 a.m., the Lincoln Police Department received a report of a domestic assault. They received that report from [T.G.] Officers were dispatched to her residence . . . here in Lincoln, Lancaster County, Nebraska.
>
> She indicated that between the hours of three o'clock a.m. and five o'clock a.m. on September 6th, 2013, she was assaulted by her then boyfriend, [Kirby]. She said that she had been with [Kirby] for approximately 15 years. She returned home and [Kirby] was already there. She indicated at some point, while they were in the home together, he became belligerent, so she asked him to leave. She said that [Kirby] refused to leave the house, became physical with her.
>
> She said that as she was walking towards the bedroom, [Kirby] punched her in the face, forced her into the bedroom, forced her onto the bed, and then once she was on the bed, he got on top of her, put his knees on her chest

> and put one hand around her neck and the other on her head. She said she was unsure if her airway was ever obstructed, but she did have significant red marks on her neck and her face from the assault, and those were visible to the officer. She also indicated that while he was on top of her, on the bed, he said that he was going to kill her.
>
> [T.G.] indicated that eventually she was able to get away from him and she left the house, went to her daughter's house . . . . She stayed there for some time before returning to the home. . . .
>
> Once [T.G. and her daughter] went into the home, they found that [Kirby] had caused significant damage to some items, there was a broken computer. Also in the bathroom, they noticed that [Kirby] had caused some damage as well, evidently he had plugged up the toilet or something of that nature; turned on the water, and water had been overflowing into the bathroom, and then that flowed down into the basement, and they noticed that there was standing water in the basement as a result of the running water.
>
> There was [sic] damage estimates in excess of $3,000. The total restitution of damage in this case was $3,453.60.

The State also noted that as part of the plea agreement, Kirby was to plead to the two Class I misdemeanors in the amended petition and to pay restitution in the amount of $3,453.60, which he had paid. When Kirby was asked if that was his understanding of the plea deal, Kirby responded, "Not quite. They were supposed to reduce the charges considerably, according to how fast I paid off the restitution, and I paid it off rather quick . . . [a]nd, no, they did not keep their word." Defense counsel informed the court that Kirby may be referring to an original agreement to deal with his case in county court, when Kirby was represented by different counsel; current counsel's understanding was the offer had been

withdrawn and the case bound over to district court. Kirby said he hired his current counsel because his previous counsel "did not make the prosecutor keep their word." After defense counsel was allowed to confer with Kirby, Kirby confirmed to the court that the plea agreement outlined at the hearing was the agreement as he understood it that day and that he wanted the court to accept that plea agreement and his no contest plea to each charge. The district court accepted Kirby's no contest pleas to counts 1 and 2.

Kirby failed to appear for sentencing in February 2015, and a warrant was issued for his arrest. He was not arrested on the warrant until April 2016.

In June 2016, Kirby appeared before the district court for a hearing on his motion to withdraw plea. (The motion does not appear in our record, but the judge's notes indicate that it was filed in April.) The district court denied the motion, reasoning that Kirby understood the nature and terms of the agreement at the time of his plea.

On August 2, 2016, the district court sentenced Kirby to concurrent sentences of 270 days' imprisonment on each count, with 11 days' credit for time served. According to the "Judges Notes" appearing in our transcript, on August 3, the district court set an appeal bond "in the amount of $250,000 Reg. 10% bond with community corrections conditions" and Kirby was "remanded to custody pending posting of appeal bond."

Kirby now appeals.

## ASSIGNMENTS OF ERROR

Kirby assigns, reordered, that the district court erred when it (1) denied Kirby's motion to withdraw his pleas, (2) imposed excessive sentences, and (3) set an unreasonable appeal bond.

## STANDARD OF REVIEW

[1-3] A trial court has discretion to allow defendants to withdraw their guilty or no contest pleas before sentencing. *State v. Carr*, 294 Neb. 185, 881 N.W.2d 192 (2016). An appellate court will not disturb the trial court's ruling on a presentencing

motion to withdraw a guilty or no contest plea absent an abuse of discretion. *Id*. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016).

## ANALYSIS

*Motion to Withdraw Plea.*

Kirby asserts that the district court's denial of his motion to withdraw plea was an abuse of discretion because "[i]t is clear from the record that [Kirby] did not fully understand the nature and terms of the plea agreement," in that he believed the agreement "included a [further] substantial reduction in the charges in congruence with him paying restitution." Brief for appellant at 17.

[5] To support a finding that a defendant freely, intelligently, voluntarily, and understandingly entered a guilty plea, a court must inform a defendant about (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. *State v. Carr, supra.* The record must also show a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *Id*. Kirby was advised as to all of the above, and a factual basis for the pleas was given at the December 2014 plea hearing.

[6] The right to withdraw a plea previously entered is not absolute. *State v. Carr, supra*. When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may sustain the motion for any fair and just reason, provided that such withdrawal would not substantially

prejudice the prosecution. *Id*. See, also, *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000) (reaffirming standard is that court *may* allow defendant to withdraw plea, not that court *should* allow defendant to withdraw plea). The defendant has the burden to show the grounds for withdrawal by clear and convincing evidence. *State v. Carr, supra*. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012).

According to Kirby, Nebraska case law "affords little guidance in articulating a coherent meaning for the 'fair and just' standard." Brief for appellant at 15-16. However, while the cases may not "articulate" a definition for "fair and just," they nevertheless provide guidance. See, *State v. Carr*, 294 Neb. 185, 881 N.W.2d 192 (2016) (holding that newly discovered evidence can be fair and just reason to withdraw plea before sentencing, but defendant failed to meet his burden by clear and convincing evidence); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002) (trial court did not abuse its discretion when it did not allow defendant to withdraw plea after he learned he would be required to register as sex offender); *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001) (defendant's assertion that she felt coercion and duress to make plea was not fair and just reason to withdraw plea; only evidence of duress and coercion was fact that defendant missed trial date prior to entering pleas and was told by counsel that if she did not accept plea she would spend time in jail due to her failure to appear); *State v. Carlson, supra* (defendant's assertion his attorney promised he could withdraw plea upon possible discovery of additional evidence failed to establish fair and just reason to withdraw plea); *State v. Schurman*, 17 Neb. App. 431, 762 N.W.2d 337 (2009) (defendant was not represented at plea hearing, exhibited confusion, and suffered from bipolar disorder and hearing loss; counsel subsequently appointed for sentencing phase motioned to withdraw plea

but motion was denied; reversed on appeal because defendant should have been permitted to withdraw pleas based on record presented).

At the hearing on Kirby's motion to withdraw plea, the court received into evidence the bill of exceptions from the December 2014 plea hearing described previously. Kirby acknowledged that after the plea agreement was "put on the record," he conferred with counsel off the record. Defense counsel then inquired about Kirby's recollection of that conversation during the following colloquy:

> Q[:] . . . Kirby, what is your recollection of our conversation between yourself and myself, as your attorney, off the record, on the plea proceeding that was held on December 2nd, 2014?
>
> A[:] I explained to you how I had a deal made with the prosecution, and they did not hold up their end of the deal.
>
> Q[:] And the plea agreement that you believe you were entitled to was different than the one that was stated on the record on December 2nd, 2014, correct?
>
> A[:] Correct.
>
> Q[:] What was the difference between the plea agreement put on the record and the one you believed you were entitled to?
>
> A[:] Well, I already made - they had already reduced the charges to those, and I was told that the sooner I pay the restitution off, they would drop the charges further down. And so I paid them off as quickly as possible.
>
> Q[:] And who provided you with that information . . . ?
>
> A[:] That would have been [my public defender].
>
> . . . .
>
> Q[:] At the time of entry of your plea on December 2nd, 2014, did you feel like you were coerced with regard to entering that plea?
>
> A[:] Yes.
>
> Q[:] Why is that?

A[:] I was just encouraged, I guess, maybe not coerced.

Q[:] And was that, in part, due to the issues that you previously noted with regard to the plea agreement?

A[:] Yes.

On cross-examination, Kirby stated that within a month of his September 2013 arrest, his public defender told him about the plea offer wherein the charges would be further reduced if restitution were paid quickly. When asked by the State what "further reduced" meant, Kirby responded, "That's just all [my public defender] would tell me."

There was also some discussion during cross-examination as to whether the plea offer Kirby was referring to was made in county court, but Kirby did not know where the offer was made. The State asked the district court "to take judicial notice of the court filing, including the transcript from county court that would have been bound over at the time," and the district court said it would do so. However, we note that the court file was not offered or received into evidence, nor does it otherwise appear in the record before us. But, at the December 2014 plea hearing (received into evidence at the motion to withdraw plea hearing), when discussing Kirby's understanding that under the plea agreement charges would be reduced considerably based on how quickly restitution was paid, defense counsel informed the court that Kirby may be referring to an original agreement to deal with his case in county court, when Kirby was represented by different counsel; current counsel's understanding was that the offer had been withdrawn and the case bound over to district court.

In overruling Kirby's motion to withdraw plea, the district court found the record clearly reflected that Kirby understood the nature and terms of the plea agreement. "At the time of the plea . . . the Court asked him if that was his understanding of the plea agreement, he indicated that it was not. . . . His exact words were, 'Not quite. They were supposed to reduce the charges considerably,' and then he goes on." The district court noted that Kirby was then given an opportunity to talk to his

counsel off the record, and when they were back on the record the following discussion was had (quoting directly from the plea hearing):

> [Defense counsel]: Your Honor, I think we've cleared it up in speaking with . . . Kirby.
>
> THE COURT: All right. . . . Kirby, have you had an opportunity to talk to your attorney?
>
> [Kirby]: Yes, sir.
>
> THE COURT: The plea agreement, as outlined by [the State], is that the plea agreement as you understand it today?
>
> [Kirby]: Yes, sir.
>
> THE COURT: And do you want the Court to accept that plea agreement?
>
> [Kirby]: Yes, sir.
>
> THE COURT: Other than this plea agreement, has anyone connected with law enforcement or the County Attorney's Office, or anyone else, made any promises, threats, or used any force or inducements to get you to plead no contest to these charges?
>
> [Kirby]: No, sir.
>
> . . . .
>
> THE COURT: Do you still wish to plead no contest to each charge?
>
> [Kirby]: Yes, sir.
>
> THE COURT: Are you freely, voluntarily, knowingly and intelligently entering each plea of no contest and waiving your rights in this matter?
>
> [Kirby]: Yes.
>
> THE COURT: [Defense counsel], do you believe the pleas of no contest are consistent with the law and the facts?
>
> [Defense counsel]: I do, Your Honor.
>
> THE COURT: Do you believe your client is making each of these pleas freely, voluntarily, knowingly and intelligently?
>
> [Defense counsel]: Yes, I do, Your Honor.

The district court, in continuing its oral pronouncement on Kirby's motion to withdraw plea, found the record clearly reflected that Kirby's pleas were freely, voluntarily, knowingly, and intelligently entered, and that the plea agreement was outlined clearly in court at the time of the plea hearing. Kirby indicated that he understood that was the agreement at the time of the pleas and wanted the court to accept that plea agreement. The court held that Kirby's motion to withdraw plea was "overruled and denied."

Kirby argues that given his confusion as to the plea agreement, he did not give voluntary and knowing pleas of no contest, and that the district court erroneously applied a heightened "manifest injustice" standard rather than a "fair and just" standard when it denied his motion to withdraw plea. Brief for appellant at 18. However, his argument that the district court applied an erroneous standard is not supported by the record. The district court noted that Kirby initially indicated some confusion as to the plea agreement, but after conferring with his counsel stated he understood the agreement and wanted the court to accept the agreement. The court also considered that the pleas were entered on December 2, 2014, and that the motion to withdraw plea was not filed until nearly 17 months later, on April 25, 2016 (and during the interim Kirby failed to appear and a warrant was issued for his arrest). Given the circumstances of this case, and in light of the case law cited above, Kirby failed to prove by clear and convincing evidence that he had a "fair and just" reason to withdraw his pleas. Accordingly, the district court's denial of Kirby's motion to withdraw plea was not an abuse of discretion.

*Excessive Sentences.*

[7] Kirby asserts that the district court imposed excessive sentences and did not give proper weight to the relevant sentencing factors. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation

for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. See *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

Kirby was 51 years old at the time of the crimes and 54 years old at the time of sentencing. He obtained his GED in 1979 and had been unemployed since 1989. When asked by the probation officer why he does not work, Kirby said "'it's just not for me'" and stated his family provides for all of his financial needs. He lives with his father, and his brother pays for all of his food. According to a letter from the Lancaster County Department of Community Corrections to the district court, Kirby helps care for his 84-year-old father, who has Alzheimer's disease, and he helps his brother with the family farm.

Kirby has been divorced since 1995 and has three grown children, one of whom is disabled and lives with Kirby's ex-wife. Kirby had been in a relationship with the victim in this case on-and-off since 1997. He reported using marijuana daily from the age of 15 up until 4 months prior to his presentence investigation (PSI), which took place in July 2016. When asked how he was able to purchase marijuana since he does not work, Kirby said, "'I get money from my brother.'"

Kirby's criminal history includes convictions for manufacturing a controlled substance, possession of a controlled substance with intent to deliver, possession of drug paraphernalia, "Attempt of Class 3A or Class 4 Felony," disturbing the peace, numerous traffic violations, and numerous failures to appear on citations. He has previously been on probation, had his probation revoked, and was subsequently incarcerated for 1 year.

Regarding his current convictions, Kirby physically assaulted his then girlfriend, T.G.; threatened to kill her; and damaged her home. According to her victim impact statement, T.G. was "traumatized by the incident" wherein she was punched, choked, and threatened. For several days after the incident, she was afraid to stay at her house alone. T.G. "felt violated,

humiliated and didn't feel safe for quite some time afterward." At the time of her victim impact statement, nearly 3 years had passed since the incident and T.G. had "moved on with [her] life."

As part of the PSI for his current conviction, the probation officer conducted a level of service/case management index. Kirby scored in the "high risk range" to reoffend. Due to the nature of the offense, he was also given a specific assessment for domestic violence (the "Domestic Violence Offender Matrix") and scored in the "high risk range."

According to the PSI, Kirby did not want to be considered for probation and said:

> "I would just rather do my time and be done. That is why I didn't show up for my first appointment. I thought this was optional. I didn't know me not showing up was going to piss the judge off. I thought if I didn't want probation there was no need to come."

He also did not take responsibility for the present offenses and told the probation officer that the victim was the one who assaulted him; when asked about the injuries to the victim he stated, "'She was quite capable of doing that to herself.'" He also denied damaging the home, saying the damage was already there. Kirby also stated that his brother paid the restitution, in full.

At the sentencing hearing, defense counsel stated that Kirby was not requesting probation, but was asking for the imposition of either a minimal jail sentence or a fine only. Counsel noted that Kirby was needed to help care for his father and his daughter, as well as to help his brother with the family farm. Counsel further noted that restitution for the criminal mischief charge had been paid in full.

The district court said it considered the PSI, additional letters from various persons (including the victim in the case), and the comments of defense counsel. The court said, "I can't ignore the serious nature of these offenses and the surrounding facts and circumstances. When this matter was originally

set for sentencing, you failed to appear and you were gone for approximately a year, or a little longer I believe." The court found that imprisonment was "necessary for the protection of the public, because the risk is substantial that during any period of probation, [Kirby] would engage in additional criminal conduct, and because a lesser sentence would depreciate the seriousness of [Kirby's] crimes and promote disrespect for the law." The district court sentenced Kirby to concurrent sentences of 270 days' imprisonment on each count, with 11 days' credit for time served.

At the time of Kirby's offenses (which occurred before L.B. 605), Class I misdemeanors were punishable by up to 1 year's imprisonment, a $1,000 fine, or both. See Neb. Rev. Stat. § 28-106 (Cum. Supp. 2014). Kirby's sentences were within the permissible sentencing range. Additionally, in exchange for his pleas, Kirby had one of his counts reduced from a felony to a misdemeanor, and another felony count was dropped. Having considered the relevant factors in this case, we find that Kirby's sentences are not excessive or an abuse of discretion and his sentences are therefore affirmed. See *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013) (sentence imposed within statutory limits will not be disturbed on appeal absent abuse of discretion by trial court); *State v. Meehan*, 7 Neb. App. 639, 585 N.W.2d 459 (1998) (sentencing court in noncapital cases may consider defendant's nonadjudicated misconduct in determining appropriate sentence).

*Appeal Bond.*

Initially, we note that we have found nothing in the record to suggest that Kirby motioned the district court to reduce his appeal bond. The State asserts that Kirby's failure to first seek reduction of his bond in the district court precludes him from challenging the bond amount on appeal; however, the State provides us no authority to support its assertion. Accordingly, we will address the merits of Kirby's assigned error regarding the appeal bond. Kirby contends that the district court set

an unreasonable appeal bond and "[t]his effectively failed to suspend the sentence pending the outcome of this appeal," and that this "was a clear abuse of discretion." Brief for appellant at 18. He argues that "[t]he establishment of a quarter million dollar bond on an appeal of two misdemeanor convictions is an excessive bond" in violation of Neb. Rev. Stat. § 29-2302 (Reissue 2016), as well as constitutional provisions protecting individuals from excessive bail. Brief for appellant at 18.

Section 29-2302 states:

> The execution of sentence and judgment against any person or persons convicted and sentenced in the district court for a misdemeanor shall be suspended during an appeal to the Court of Appeals or Supreme Court. The district court shall fix the amount of a recognizance, which in all cases shall be reasonable, conditioned that the appeal shall be prosecuted without delay and that in case the judgment is affirmed he, she, or they will abide, do, and perform the judgment and sentence of the district court.

See, also, U.S. Const. amend. VIII ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); Neb. Const. art. I, § 9 ("[a]ll persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted").

Since no Nebraska case law specifically addresses factors to consider for appeal bonds set by the district court in misdemeanor cases under § 29-2302, our review is guided by the plain language of the statute, along with other statutes and case law pertinent to appeal bonds in criminal cases.

[8] We preliminarily observe that Neb. Rev. Stat. § 29-901 (Reissue 2016), which requires release on personal recognizance

or bond for "[a]ny bailable defendant," unless otherwise exempted, only applies to cases *before* judgment. "A bond to guarantee the appearance of a defendant at pretrial proceedings and at trial is distinct from an appeal bond after conviction." *State v. Hernandez*, 1 Neb. App. 830, 834, 511 N.W.2d 535, 538 (1993). A convicted person is treated differently than "one who is awaiting trial and still presumed innocent." *Id*. We note that the Nebraska Legislature recently amended § 29-901 to require a court to consider all methods of bond and conditions of release to avoid pretrial incarceration, including consideration of the defendant's financial ability to pay a bond and consideration of "the least onerous" of conditions to "reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or the public at large." 2017 Neb. Laws, L.B. 259 § 2 (effective August 24, 2017). While these amendments may impact consideration of bonds pertinent to pretrial proceedings, the present matter involves the propriety of a bond ordered after a conviction. And as this court stated in *State v. Hernandez, supra*, a pretrial bond and an appeal bond after conviction are treated differently. We turn our attention to statutes and cases dealing with bonds after conviction.

With regard to an appeal bond after a felony conviction, our Supreme Court has stated that the

> right to bail, after conviction, is discretionary and not absolute. Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail. Such determination is left to the discretion of the trial court who may prescribe the amount of the bond and the conditions thereof, including a requirement that the full amount of the bond be posted.

*State v. Woodward*, 210 Neb. 740, 747, 316 N.W.2d 759, 763 (1982). See, also, *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994) (no abuse of discretion in setting appeal bond at $50,000 when defendant had failed to appear after being released on bail in two prior cases).

[9] The above-cited cases make it clear that the setting of an appeal bond after a felony conviction is discretionary to the district court. We do note, however, that there is some difference in the statutory language regarding postjudgment bonds in felony cases and misdemeanor cases. Regarding a felony conviction, Neb. Rev. Stat. § 29-2303 (Reissue 2016) states in part:

> Whenever a person shall be convicted of a felony, and the judgment shall be suspended as a result of the notice of appeal, it shall be the duty of the court to order the person so convicted into the custody of the sheriff, to be imprisoned until the appeal is disposed of, or such person is admitted to bail.

Whereas, following a misdemeanor conviction, § 29-2302 states in part, "The execution of sentence and judgment against any person or persons convicted and sentenced in the district court for a misdemeanor shall be suspended during an appeal to the Court of Appeals or Supreme Court." Therefore, while the "judgment shall be suspended" on appeal in felony cases, the "execution of sentence and judgment . . . shall be suspended" on appeal in misdemeanor cases. In misdemeanor cases, the district court "shall fix the amount of a recognizance, which in all cases shall be reasonable." § 29-2302. Accordingly, § 29-2302 requires that a reasonable bond be set following a misdemeanor conviction in district court, whereas, § 29-2303 does not contain that same requirement following a felony conviction.

Interestingly, in appeals in criminal cases from county court to district court, the county court may exercise its discretion with regard to bail. Specifically, the execution of a sentence to a period of confinement shall be suspended only if "the county court, in its discretion, allows the defendant to continue at liberty under the prior recognizance or bail," or if "the defendant enters into a written recognizance to the State of Nebraska, with surety or sureties approved by the county court or with a cash bond, filed with the clerk of the county

court." Neb. Rev. Stat. § 25-2730(3) (Reissue 2016). Further, when a notice of appeal is filed, "the county court shall fix the amount of the recognizance or cash bond, which shall be a reasonable amount." *Id*. Additionally, § 25-2730(6) allows the district court to modify an appeal bond "on motion after notice and hearing and upon such terms as justice shall require," and our Supreme Court has indicated that such modifications are "consistent with the general discretion of the district court to prescribe the amount and conditions of an appeal bond in a criminal case." *State v. Griffin*, 270 Neb. 578, 583, 705 N.W.2d 51, 56 (2005).

[10] We conclude that the plain language of § 29-2302 requires that a bond be set in the present matter, because the execution of sentence and judgment against any person convicted and sentenced in the district court for a misdemeanor "shall be suspended" during an appeal to this court or the Supreme Court and because the district court "shall fix the amount of a recognizance." Further, the amount of the appeal bond should be reasonable. Our review of other related statutes and case law leads to the conclusion that reasonableness of the appeal bond amount is determined under the general discretion of the district court. Accordingly, we review the district court's decision regarding the amount of the appeal bond in this case for an abuse of discretion.

[11] In considering the reasonableness of the bond amount, we note that it has previously been argued that an indigent defendant could not post a $500 appearance bond and that this was excessive and violative of the federal and state Constitutions. In *State v. Howard*, 185 Neb. 583, 584-85, 177 N.W.2d 566, 567-68 (1970), our Supreme Court stated:

> Apparently it is appellant's contention that for most indigents any bail would be excessive. When an offense charged is a bailable one, discretion rests with the judge in fixing the amount of the recognizance, but this discretion is a judicial one. The question to be determined in every case that is bailable is not whether the

> defendant may make bail, but whether or not the bail demanded is unreasonable and disproportionate to the crime charged. . . .
>
> While the pecuniary circumstances of a prisoner should be considered in determining the amount of the bail, that in itself is not controlling. If that were determinative of the question, a defendant without means or friends would be entitled to be discharged on his recognizance regardless of the risk involved. As we said in In re Scott, [38 Neb. 502, 508-09, 56 N.W. 1009, 1010 (1893)]: "Many things should be taken into consideration in fixing the amount of bail, such as the atrocity of the offense; the penalty which the law authorizes to be inflicted in case of a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pecuniary condition and the nature of the circumstances surrounding the case."
>
> Definitely, a prior criminal record is an important factor to be considered. There is no merit to appellant's claim of the requirement of an excessive bond.

Notably, the factors discussed in the above-quoted cases were considered in a prejudgment context, and we offer no opinion as to any impact the amendments contained in L.B. 259 may have on bail considerations in the prejudgment context. That said, we see no reason why the foregoing considerations for fixing the amount of bail in a prejudgment context cannot similarly be considered in our review of the reasonableness of Kirby's appeal bond under § 29-2302 following his misdemeanor convictions. In particular, we consider the atrocity of Kirby's offenses, the probability of Kirby appearing to serve his sentences following the conclusion of his appeal, Kirby's prior criminal history, and the nature of other circumstances surrounding the case.

Kirby pled no contest to two Class I misdemeanors, one of which was a crime of violence against his then girlfriend. Kirby physically assaulted his girlfriend; he punched her in

the face, and forced her onto a bed, where he got on top of her, put his knees on her chest, and put one hand around her neck and the other on her head, causing significant red marks on her neck and her face. While assaulting his girlfriend of 15 years in this manner, he also threatened to kill her. Additionally, Kirby failed to appear for sentencing in February 2015 and a warrant was issued for his arrest. He remained at large for more than a year and was not arrested on the warrant until April 2016. He was ultimately sentenced in August 2016. As noted by the State, the district court did not make it impossible for Kirby to post bail, but given Kirby's avoidance of sentencing for over a year after conviction, the "court ensured that Kirby would lose a significant sum if he once again failed to appear and went on the run." Brief for appellee at 8. We also take into account Kirby's prior criminal history, which includes numerous failures to appear on citations and the revocation of probation. Additionally, Kirby has been unemployed since 1989, he gets money to support his marijuana use from his brother, his family provides for all his financial needs, his brother paid the restitution in this case, and Kirby failed to take responsibility for the present offenses. In other words, Kirby's unwillingness to be accountable, combined with the other factors noted, make the appeal bond in this case reasonable under these circumstances. We cannot say that the district court abused its discretion when it set the appeal bond "in the amount of $250,000 Reg. 10% bond." Accordingly, we affirm the appeal bond.

## CONCLUSION

For the reasons set forth above, we affirm the decision of the district court.

Affirmed.

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

# Dennis Walker et al., appellants and cross-appellees, v. John Probandt, appellee, and John Raynor, appellee and cross-appellant.

902 N.W.2d 468

Filed September 12, 2017. No. A-16-844.

1. **Default Judgments: Pleadings: Appeal and Error.** Whether default judgment should be entered because of a party's failure to timely respond to a petition rests within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify reversal on such a ground.
2. **Default Judgments.** A trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default.
3. **Default Judgments: Pleadings: Damages.** In the case of an original action filed in the district court, the failure of a defendant to file a responsive pleading entitles the plaintiff to a default judgment, without evidence in support of the allegations of the petition, except as to allegations of value or damages.
4. **Negotiable Instruments: Principal and Surety.** If an instrument is issued for value given for the benefit of a party to the instrument (accommodated party) and another party to the instrument (accommodation party) signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party for accommodation.
5. **Negotiable Instruments: Principal and Surety: Words and Phrases.** An accommodation party is one who signs the instrument for the purpose of lending his credit to some other person or party.
6. **Promissory Notes: Guaranty.** The assignment of a promissory note and its guaranties to a guarantor does not enhance the guarantor's right of

recovery against a coguarantor; rather, recovery against a coguarantor remains limited to the coguarantor's proportionate share.

7. **Negotiable Instruments: Intent.** In determining the identity of the party accommodated, the intention of the parties is determinative.
8. **Actions: Contribution: Time: Liability.** Co-obligors to a debt are each liable for a proportionate share of the debt as a whole, and an action for contribution does not accrue until a co-obligor has paid more than his or her proportionate share of the debt as a whole.
9. **Negotiable Instruments: Security Interests: Contribution: Liability.** If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred.
10. **Security Interests.** Impairing value of an interest in collateral includes failure to obtain or maintain perfection or recordation of the interest in collateral.
11. **Principal and Surety: Words and Phrases.** Rights of the surety to discharge are commonly referred to as "suretyship defenses."
12. **Contracts: Guaranty: Waiver.** The defense that a guarantor is discharged by a creditor's impairment of collateral can be waived by an express provision in the guaranty agreement.
13. **Reformation: Words and Phrases.** A mutual mistake is a belief shared by the parties, which is not in accord with the facts.
14. ____: ____. A mutual mistake is a mistake common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about its instrument.
15. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.
16. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that an agreement correctly expresses the parties' intent and therefore should not be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence.
17. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
18. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** A holder in due course means the holder takes an instrument

(1) for value, (2) in good faith, (3) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (4) without notice that the instrument contains an unauthorized signature or has been altered, (5) without notice of any claim to the instrument described in Neb. U.C.C. § 3-306 (Reissue 2001), and (6) without notice that any party has a defense or claim in recoupment described in Neb. U.C.C. § 3-305(a) (Reissue 2001).

19. **Contracts: Negotiable Instruments.** Unless one has the rights of a holder in due course, he is subject to all the defenses of any party which would be available in an action on a simple contract.
20. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position he would have occupied if the contract had been performed, that is, to make the injured party whole.
21. **Damages.** As a general rule, a party may not have double recovery for a single injury, or be made "more than whole" by compensation which exceeds the actual damages sustained.
22. **Actions: Accord and Satisfaction.** Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had.
23. **Accord and Satisfaction: Damages.** Where the plaintiff has received satisfaction from a settlement with one defendant for injury and damages alleged in the action, any damages for which a remaining defendant would be potentially liable must be reduced pro tanto.
24. **Actions: Parties.** Every action must be prosecuted in the name of the real party in interest.
25. **Actions: Parties: Standing.** To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
26. **Assignments: Words and Phrases.** As a general rule, an assignment is a transfer vesting in the assignee all of the assignor's rights in property which is the subject of the assignment.
27. **Assignments.** The assignee of a thing in action may maintain an action thereon in the assignee's own name and behalf, without the name of the assignor.
28. **Assignments: Consideration.** An assignee may recover the full value of an assigned claim regardless of the consideration paid for the assignment.
29. **Pleadings: Evidence.** Admissions made in superseded pleadings are no longer judicial admissions, but, rather, simple admissions.

30. **Contracts: Consideration.** Generally, there is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. What that benefit and detriment must be or how valuable it must be varies from case to case. It is clear, however, that even "a peppercorn" may be sufficient.
31. ____: ____. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor.
32. ____: ____. For the purpose of determining consideration for a promise, the benefit need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request.

Appeal from the District Court for Dawson County: James E. Doyle IV, Judge. Affirmed in part, and in part reversed and remanded with directions.

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

Patrick M. Heng, of Waite, McWha & Heng, for appellee John Raynor.

Moore, Chief Judge, and Inbody and Riedmann, Judges.

Riedmann, Judge.

## I. INTRODUCTION

This case calls into question the ability of a co-obligor to settle a claim on a promissory note for less than the amount due, and in return obtain the authority to direct assignment of the note to a third party of his choosing for full enforcement against another co-obligor. Under the facts of this case, we find recovery must be limited to the amount outstanding on the note.

## II. BACKGROUND

A & G Precision Parts, LLC (Parts LLC), was a limited liability company whose members at the time of organization were Dennis Walker, John Raynor, John Probandt, John

Brazier, and Walter Glass. The five members of Parts LLC formed a second limited liability company, A&G Precision Parts Finance, LLC (Finance LLC).

In 2002, Finance LLC, Walker, Raynor, and Brazier obtained a loan from Five Points Bank of Grand Island, Nebraska, for approximately $2.1 million and delivered the proceeds of the loan to Parts LLC. Parts LLC and Finance LLC (collectively the LLCs) did not make the loan payments as required, and the bank made demand for full payment. In September 2004, Raynor filed personal bankruptcy, and his personal liability on the Five Points Bank loan was discharged in bankruptcy in 2005.

In March 2008, the parties negotiated with First State Bank (FSB) to refinance the Five Points Bank loan. In conjunction with the loan, Parts LLC, Finance LLC, Walker, Raynor, Brazier, and Mark Herz signed a promissory note for $1.5 million. Under the promissory note, Walker, Raynor, Brazier, and Herz were cosigners on the loan and assumed joint and several liability for the repayment of the loan. The LLCs defaulted on the loan, and FSB commenced this action to recover on the note in February 2009.

In June 2011, Parts LLC, Finance LLC, Walker, Walker's wife, FSB, and Five Points Bank entered into a settlement agreement and mutual release under which Walker agreed to pay FSB $1.05 million to settle the claims FSB asserted against him and the LLCs. In exchange, FSB assigned the FSB note and related agreements to an entity of Walker's choosing; he selected Skyline Acquisition, LLC (Skyline). As a result of the settlement and assignment, Walker and the LLCs became plaintiffs in this action. On the first day of trial, the plaintiffs orally moved to amend the pleadings to name Skyline as a plaintiff, and the district court granted the motion.

Walker and the LLCs filed a motion for default judgment against Probandt on December 15, 2011. They asserted that Probandt never filed an answer and asked that judgment be entered against him in the amount of $2,134,832.99. The

district court denied the motion, finding that entering a default judgment as to one defendant prior to trial could result in inconsistent and illogical judgments following determination on the merits as to the remaining defendants.

Due to various settlement agreements and dismissals, the parties remaining at trial were Walker, the LLCs, and Skyline as plaintiffs, and Raynor and Probandt as defendants. Probandt did not appear at trial. Trial was held on the fourth amended complaint, which included four operative causes of action—two against Raynor and two against Probandt. Raynor's operative answer asserted several affirmative defenses and two counterclaims.

After the conclusion of trial, the district court entered an order which found in favor of Skyline as to one claim against Raynor but denied the remaining causes of action and Raynor's counterclaims. Specifically, the court found that the evidence established Raynor's liability to Skyline for repayment of the FSB note, because the full amount of principal and interest is due and Raynor has made no payments on the note and is in default. The court noted that the president of FSB testified that the principal amount due on the note as of the first day of trial was $1,430,260. Adding in the accrued interest up to the time of the court's order, judgment was entered in favor of Skyline and against Raynor for $2,306,244.76. In its order, the court stated that default judgment had previously been entered against Probandt on the FSB note. Walker, the LLCs, and Skyline (hereinafter collectively the appellants) appeal, and Raynor cross-appeals.

## III. ASSIGNMENTS OF ERROR

On appeal, the appellants assign that the district court erred in failing to enter an award of damages against Probandt for the full amount of the note and for the amount of money Probandt misappropriated from Parts LLC. On cross-appeal, Raynor assigns, restated and renumbered, that the district court erred in (1) failing to apply Nebraska's Uniform Commercial

Code (U.C.C.); (2) failing to give effect to the order of the bankruptcy court; (3) failing to find that he was an accommodation party and Walker was an accommodated party; (4) failing to apply the rule based on *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998) (Mandolfo Rule); (5) denying judgment on his counterclaim for contribution; (6) failing to find that his obligation on the debt was discharged; (7) failing to find mutual mistakes of fact; (8) allowing judgment in favor of Skyline because of lack of consideration; (9) entering judgment in favor of Skyline because Skyline sustained no injury and received a windfall; (10) failing to treat Walker as the real party in interest; (11) allowing foreign corporations to prosecute the action without certificates of authority; (12) allowing Walker and the LLCs to take inconsistent positions with respect to the enforceability of the FSB note; and (13) ignoring the "sole basis" stipulation.

## IV. STANDARD OF REVIEW

A suit for damages arising from breach of a contract, including breach of the terms of a promissory note, presents an action at law. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998). In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id.*

## V. ANALYSIS

### 1. Default Judgment Against Probandt

On appeal, the appellants assign that the district court erred in failing to enter an award of damages against Probandt. The appellants argue that because Probandt failed to appear and enter a responsive pleading, and the evidence was sufficient to establish his liability and damages, the court should have entered a default judgment. We find that the district court did not abuse its discretion in failing to grant a default judgment on the unjust enrichment claim, but that it should have granted a default judgment against Probandt on the

fraud/misappropriation claim. We therefore reverse the court's order denying the appellants' cause of action for fraud/misappropriation against Probandt.

[1,2] Whether default judgment should be entered because of a party's failure to timely respond to a petition rests within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify reversal on such a ground. *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). In denying the motion for default judgment before trial in the present case, the district court concluded that entry of a default judgment prior to trial could result in inconsistent and illogical judgments following determination on the merits as to the remaining defendants. In reaching its decision, the district court relied upon *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999), in which the Nebraska Supreme Court held that under *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872), a trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default.

Here, the operative complaint at the time the motion for default judgment was filed was the second amended complaint; however, between the date the motion was argued and the date on which the court entered its order, the appellants filed a revised third amended complaint. It is upon this complaint that the court denied the motion. In the revised third amended complaint, the appellants included two causes of action against Probandt. The first was a claim for unjust enrichment against Brazier, Herz, and Probandt. Therein, the complaint alleged that Brazier, Herz, and Probandt used a portion of the funds from the FSB loan to satisfy the loan which was owed to Five Points Bank by the LLCs and guaranteed by Probandt and Glass. The complaint alleged that because Probandt was a guarantor of the Five Points Bank loan, he benefited from the use of the FSB loan to pay off the Five Points Bank loan,

relieving him of his obligation to Five Points Bank. It further alleged that despite demands to pay, Brazier, Herz, and Probandt failed to pay the amount due.

The second cause of action involving Probandt was for fraud. This claim alleged that Probandt misappropriated funds from the original financing of Parts LLC to finance other business ventures; Probandt took unauthorized payments from Parts LLC; Probandt took money from Parts LLC and signed a promissory note in the amount of $64,859 but never repaid the note; and Probandt used funds of Parts LLC to pay rent on an apartment and pay personal living expenses.

Although the appellants' motion for default judgment was broad, at the hearing on the motion, the appellants' counsel limited the scope of her motion. Responding to an objection to an offered exhibit, she stated, "[T]hese number[s] go to just amounts that . . . Probandt took for his personal uses. There's a separate cause of action against . . . Probandt for misappropriation of funds; and this default judgment only goes to that cause of action."

Our review of the revised third amended complaint reveals that the cause of action to which counsel referred was the fraud/misappropriation claim. Under this cause of action, appellants sought recovery from only Probandt for actions he performed individually. It does not involve the other defendants and therefore a judgment against Probandt on this cause of action could not produce conflicting results. We determine that the court's analysis under *State of Florida v. Countrywide Truck Ins. Agency, supra*, is therefore inapplicable.

[3] In the case of an original action filed in the district court, the failure of a defendant to file a responsive pleading entitles the plaintiff to a default judgment, without evidence in support of the allegations of the petition, except as to allegations of value or damages. *Chapman v. Department of Motor Vehicles*, 8 Neb. App. 386, 594 N.W.2d 655 (1999). Because Probandt failed to file a responsive pleading, the appellants were entitled to a default judgment on their fraud/misappropriation

cause of action. It was then incumbent upon the appellants to prove damages.

The appellants argue on appeal that they sufficiently proved damages at trial via deposition testimony of Rex Hansen, a certified public accountant, and Herz. We agree that Hansen's testimony and the corresponding ledger offered at the close of appellant's case in chief establishes damages in the amount of $2,184,530.

Hansen testified that he classified expenditures by Probandt into two categories: "Bad" and "Sketch." According to Hansen, the "Bad" were expenditures "clearly used for something other than the daily operations of A&G" and the "Sketch" expenditures were composed of items that he "didn't understand what they were. There were some loan guarantees, financing costs, et cetera." The "Bad" totaled $2,184,530, and the "Sketch" totaled $477,661. We determine that the evidence sufficiently proved that Probandt misappropriated $2,184,530 from the LLCs; however, the evidence that the "Sketch" items represented additional misappropriations was insufficient due to Hansen's own admission that he did not understand what they were. Accordingly, the court should have entered a default judgment against Probandt in the amount of $2,184,530.

Because counsel limited the scope of her pretrial motion for default judgment to the claim for misappropriation of funds, the court did not err in failing to grant a default judgment against Probandt on the unjust enrichment claim. We further observe that the appellants did not move for default either at trial or after trial. See, e.g., *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986) (referencing plaintiff's motion for default judgment made after trial).

We note that in its memorandum order entered after trial, the court stated, "During the early stages of the case, the court entered a default judgment against . . . Probandt on the plaintiffs' claims under the First State Bank note." The appellants argue that the court's statement was in error, and Raynor takes no position on the assigned error. We agree that

no order is contained in our record granting default judgment against Probandt. However, we interpret the court's misstatement to relate to a claim other than the two claims contained in the operative complaint because the district court's order specifically rejected these two claims, citing a lack of proof. Therefore, this misstatement does not constitute reversible error.

2. U.C.C.

On cross-appeal, Raynor posits several arguments with respect to the U.C.C. He argues that the district court failed to apply the U.C.C., failed to give effect to the order of the bankruptcy court, failed to find that he was an accommodation party and Walker was an accommodated party as defined by the U.C.C., failed to apply the Mandolfo Rule, erred in denying judgment on his contribution counterclaim against Walker, and failed to find that his obligation on the debt was discharged under the U.C.C.

(a) Failure to Apply U.C.C.

Raynor first claims that the district court erred in failing to apply the U.C.C. in entering judgment against him on the FSB note. He does not specify, however, in what way the court "ignor[ed]" the U.C.C. Brief for appellee on cross-appeal at 30. The parties stipulated that the FSB note is a negotiable instrument within the meaning of the U.C.C. When the district court addressed Raynor's arguments regarding accommodation and accommodated parties in its order, the court cited to the U.C.C. Although it disagreed with Raynor's position, the court considered certain sections of the U.C.C. in reaching its decision. We therefore disagree with Raynor's assertion that the district court did not address the U.C.C.

(b) Accommodation Party and Accommodated Party

Raynor next argues that the district court failed to give effect to the bankruptcy court order to find that he was an

accommodation party and failed to find that Walker was an accommodated party. He asserts that because, at the time he signed the FSB note, he had no ownership in the LLCs and was not personally liable for the Five Points Bank loan, he qualifies as an accommodation party under the U.C.C. He further claims that Walker is an accommodated party and that under the U.C.C., an accommodated party is prohibited from seeking contribution from an accommodation party. Therefore, he argues that the judgment entered against him is erroneous.

[4] If an instrument is issued for value given for the benefit of a party to the instrument (accommodated party) and another party to the instrument (accommodation party) signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "'for accommodation.'" Neb. U.C.C. § 3-419(a) (Reissue 2001).

[5] An accommodation party is one who signs the instrument for the purpose of lending his credit to some other person or party. See *Bachman v. Junkin*, 129 Neb. 165, 260 N.W. 813 (1935). See, also, 10 C.J.S. *Bills and Notes* § 26 (2008) (party accommodated is one to whom name of accommodation party is loaned).

The claim upon which judgment was entered against Raynor was based on his liability to FSB for nonpayment of the loan. Specifically, the operative complaint alleges that Raynor was a maker and guarantor of the promissory note to FSB in the amount of $1.5 million and that Raynor failed to pay amounts due on the loan; therefore, FSB, later amended to Skyline as assignee, is entitled to judgment against Raynor for the outstanding balance plus interest. The district court agreed, finding that Raynor signed the note but failed to repay the loan and was therefore liable. In its order, the district court stated that for "the sake of resolving the claims, the court assumed Raynor was an accommodation maker." The court observed

that as an accommodation party, Raynor remained liable to FSB, and subsequently to Skyline. His status of an accommodation party would only be relevant in an action for contribution by the accommodated party. However, because this was not a cause of action for contribution raised by Walker individually, the issue of contribution between an accommodated party and an accommodation party was immaterial.

We find no error in the district court's analysis. As stated above, the claim on the FSB note was prosecuted in the name of Skyline, the assignee of the note. The court's judgment was in favor of Skyline, not Walker. As such, the status of Raynor and Walker under the U.C.C., and whether Walker is barred from seeking contribution from Raynor, have no effect on whether Skyline can recover on the note from Raynor. This argument therefore lacks merit.

(c) Mandolfo Rule

[6] Raynor next argues that the district court erred in failing to apply the Mandolfo Rule, which he claims prohibits enhancing recovery by reason of the assignment of a promissory note after default. See *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998). See, also, *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). In the cases Raynor cites, the Supreme Court held that the assignment of a promissory note and its guaranties to a guarantor does not enhance the guarantor's right of recovery against a coguarantor; rather, recovery against a coguarantor remains limited to the coguarantor's proportionate share. See, *Mandolfo v. Chudy, supra*; *Rodehorst v. Gartner, supra*.

In the present case, however, the assignment of the note was not made to a coguarantor of the note, but, instead, to Skyline. Raynor argues that Skyline is a mere alter ego of Walker and that the assignment of the note to Skyline was a "[s]ham [t]ransaction" because it was done for the sole purpose of enhancing Walker's recovery. Brief for appellee on cross-appeal at 34. We find no evidence in the record to support

this argument, however, and Raynor cites to none in his brief. To the contrary, the only evidence regarding Skyline is that it is owned by Walker and his wife. None of the factors necessary to evaluate the existence of an alter ego were presented. As such, we find the holdings of *Mandolfo* and *Rodehorst* are inapplicable to the present case and do not prohibit Skyline's recovery on the FSB note from Raynor.

(d) Counterclaim for Contribution

Raynor argues that the district court erred in denying his counterclaim for contribution from Walker, asserting that under § 3-419, Walker is the party primarily responsible for the debt because of his status as an accommodated party. As such, Raynor argues that his contribution claim should have been granted. We disagree.

The district court denied Raynor's contribution claim because there was no evidence that Raynor had paid any portion of the FSB debt. Raynor claims this "result ignores the duty of the Trial Court to fully dispose of all contribution issues of parties to the controversy regarding the personal liability for unpaid negotiable instruments according to each party's pecuniary obligation pursuant to Nebr. U.C.C., Article 3, Part 4." Brief for appellee on cross-appeal at 39.

Assuming without deciding that Raynor was an accommodation party, the evidence does not establish that Raynor signed the note in order to accommodate or benefit Walker; he stipulated that he signed it to assist Herz who was managing the business of the LLCs. In essence, Raynor signed it to assist the LLCs in obtaining the loan. With respect to the instrument, Walker held the same position Raynor did—that of cosigner who lent his credit in order to benefit the LLCs.

[7] The fact that Walker was an owner of the LLCs and received some benefit from the FSB note does not conclusively establish his status as an accommodated party. See *Empson v. Richter*, 113 Neb. 706, 204 N.W. 518 (1925) (mere fact that party may have received some benefit out of transaction

does not necessarily determine that he was an accommodated party). Rather, in determining the identity of the party accommodated, the intention of the parties is determinative. See 10 C.J.S. *Bills and Notes* § 26 (2008). There is no evidence that Raynor intended to assist Walker in obtaining a loan. Walker needed no accommodation to secure financing, because the undisputed evidence establishes that FSB offered financing to the LLCs based exclusively on Walker's financial strength and willingness to cosign. Thus, Raynor and Walker each cosigned the note in order to assist the LLCs, and therefore, Walker had no greater liability on the note than did Raynor.

[8] Co-obligors to a debt are each liable for a proportionate share of the debt as a whole, and an action for contribution does not accrue until a co-obligor has paid more than his or her proportionate share of the debt as a whole. See *Cepel v. Smallcomb*, 261 Neb. 934, 628 N.W.2d 654 (2001). Accordingly, until Raynor has paid more than his proportionate share of the debt as a whole, he has no basis for contribution from Walker or any other co-obligors. As a result, the district court did not err in denying Raynor's counterclaim for contribution from Walker.

### (e) Discharge of Raynor's Obligation

Raynor asserts that because FSB failed to properly secure Walker's collateral, his liability on the note is discharged under Neb. U.C.C. § 3-605 (Reissue 2001). We conclude that this defense has been waived.

[9-11] If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution,

if impairment had not occurred. § 3-605(f). Impairing value of an interest in collateral includes failure to obtain or maintain perfection or recordation of the interest in collateral. See § 3-605(g). Rights of the surety to discharge are commonly referred to as "suretyship defenses." § 3-605, comment 1.

[12] Here, however, Raynor waived his right to assert this defense. According to the promissory note Raynor signed in conjunction with the FSB loan, Raynor agreed to "waive any defenses . . . based on suretyship or impairment of collateral." The defense that a guarantor is discharged by a creditor's impairment of collateral can be waived by an express provision in the guaranty agreement. See *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008). Accordingly, we find that Raynor has waived his right to assert this defense.

### 3. Mutual Mistakes of Fact

Raynor argues that he is not liable for the debt to FSB because of mutual mistakes of fact among the parties. He argues that the evidence was clear that, at the time the FSB note was executed, all of the parties to the note mistakenly believed he retained an ownership interest in the LLCs and remained personally liable for the Five Points Bank note. He claims that but for the mistakes of fact, he would not have executed the FSB note. We find that Raynor failed to meet his burden of proving that mutual mistakes of fact exist.

[13-15] A mutual mistake is a belief shared by the parties, which is not in accord with the facts. *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011). It is a mistake common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about its instrument. *Id*. A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties. *Id*.

[16,17] To overcome the presumption that an agreement correctly expresses the parties' intent and therefore should not be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence. See *id*. Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Id*.

Raynor cites to no evidence in the record to support a conclusion that the promissory note does not express what was really intended by the parties. To the contrary, the parties intended that FSB would extend the loan in exchange for the cosigners' signatures. The promissory note reflects that intent. The fact that Raynor was no longer liable on the Five Points Bank debt nor a member of the LLCs is of no effect. As in *R & B Farms v. Cedar Valley Acres, supra*, there is no clear and convincing evidence that the parties mistakenly believed the contract to mean one thing when in reality it did not.

The burden was on Raynor to present clear and convincing evidence to overcome the presumption that the agreement correctly expresses the parties' intent. Because he failed to do so, the district court correctly rejected his argument.

### 4. Skyline's Status and Real Party in Interest

Raynor asserts several arguments with respect to the ability of Skyline and the LLCs to prosecute a case against him. Specifically, he argues that the district court erred in allowing a judgment in favor of Skyline, entering a judgment in contravention of the Nebraska Constitution, failing to treat Walker as a substantive owner of the FSB note and instead treating Skyline as the real party in interest, allowing foreign limited liability companies to prosecute the action without certificates of authority, and allowing Walker and the LLCs to take inconsistent positions on the enforceability of the FSB note.

(a) Lack of Consideration From Skyline

Raynor argues that Skyline does not qualify as a holder in due course of the FSB note and that therefore, Skyline's enforcement of the note against him is subject to the personal defenses that existed between the original parties to the instrument.

[18] Neb. U.C.C. § 3-302 (Reissue 2001) provides that a holder in due course means the holder takes an instrument (1) for value, (2) in good faith, (3) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (4) without notice that the instrument contains an unauthorized signature or has been altered, (5) without notice of any claim to the instrument described in Neb. U.C.C. § 3-306 (Reissue 2001), and (6) without notice that any party has a defense or claim in recoupment described in Neb. U.C.C. § 3-305(a) (Reissue 2001).

Here, Skyline does not meet all of the requirements to qualify as a holder in due course. Despite the language of the assignment, it does not appear that Skyline paid value for the note; rather, as evidenced by the language of the settlement agreement, the consideration was paid by Walker, and upon such payment, FSB agreed to assign the note to Skyline. In addition, in taking the note, Skyline had notice that the instrument was overdue, because Walker and his wife are the only members of Skyline and they both signed the release which recognized the default of the note. Therefore, although Skyline is the present holder of the note, it is not a holder in due course.

[19] Raynor argues that because Skyline does not qualify as a holder in due course, it is subject to any defenses he could have asserted against FSB, and we agree. Unless one has the rights of a holder in due course, he is subject to all the defenses of any party which would be available in an action

on a simple contract. See *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983). See, also, § 3-305. This would include the defense of set-off. See *Davis v. Neligh*, 7 Neb. 78 (1878) (stating that holder not in due course takes note subject to any right of set-off which maker had against any prior holder). See, also, Neb. U.C.C. § 3-601 (Reissue 2001) (limiting effectiveness of discharge of obligation of party to holder in due course of instrument without notice of discharge); § 3-605, comment 3 (using hypothetical stating partial payment by one borrower reduces obligation of coborrower).

[20-23] Furthermore, in a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position he would have occupied if the contract had been performed, that is, to make the injured party whole. *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998). As a general rule, a party may not have double recovery for a single injury, or be made "'more than whole'" by compensation which exceeds the actual damages sustained. *Id*. at 516, 576 N.W.2d at 825. Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had. *Id*. Thus, where the plaintiff has received satisfaction from a settlement with one defendant for injury and damages alleged in the action, any damages for which a remaining defendant would be potentially liable must be reduced pro tanto. See *id*.

Accordingly, in the present case, because Skyline is not a holder in due course, it is subject to any defense Raynor could assert against FSB in a simple contract case. In such a case, Raynor would have a defense against FSB that any amount for which he is liable on the note must be reduced pro tanto by the amounts FSB already received in settling the claims for nonpayment of the note from Walker, Brazier, Herz, and/or Hansen. FSB is not allowed double recovery from multiple defendants for the same claim as to the note, and therefore, Raynor is liable only for the amount remaining on the note

after subtraction of the amounts FSB received from the settling defendants. Therefore, we reverse the award of damages entered in favor of Skyline against Raynor and remand the cause for recalculation of the remaining balance due on the note.

(b) Skyline Sustained No Injury

Raynor contends that the judgment entered against him was unconstitutional, because Skyline sustained no legally cognizable injury. In other words, he claims that Skyline was not the real party in interest. We do not agree.

[24,25] Subject to an exception not relevant here, every action must be prosecuted in the name of the real party in interest. Neb. Rev. Stat. § 25-301 (Reissue 2016). To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

[26-28] As a general rule, an assignment is a transfer vesting in the assignee all of the assignor's rights in property which is the subject of the assignment. *Id*. The assignee of a thing in action may maintain an action thereon in the assignee's own name and behalf, without the name of the assignor. Neb. Rev. Stat. § 25-302 (Reissue 2016). An assignee may recover the full value of an assigned claim regardless of the consideration paid for the assignment. *Eli's, Inc. v. Lemen, supra*.

In the instant case, FSB assigned to Skyline all of its rights conferred by the terms of the promissory note and term loan agreement which are the subject of this action. The cause of action upon which judgment was entered against Raynor, FSB, or Skyline alleged that Raynor signed the FSB note, the note was in default, and Raynor failed to satisfy the debt. As the assignee of FSB's right to collect on the loan, Skyline was permitted to maintain an action against Raynor and pursue

any rights that FSB had to recover on the note. Although lack of consideration is a factor in Skyline's becoming a holder in due course, it does not void the assignment. As a result, we find no merit to this argument.

(c) Unconstitutional Windfall in Favor of Skyline

Raynor also argues that the award in favor of Skyline was an unconstitutional windfall for Skyline because the district court refused to consider the settlements of Walker, Brazier, Hansen, and Herz. We agree. As set forth above, Skyline was not a holder in due course. It was therefore allowed to collect only the remaining balance on the note. The district court should have taken into consideration the settlement amounts paid by Walker, Brazier, Hansen, and Herz. As stated above, we remand the cause for recalculation of the unpaid balance.

(d) Certificates of Authority

Raynor argues that the LLCs were dissolved before this action was commenced and never had certificates of authority to do business in Nebraska. Thus, he claims, they have no standing as plaintiffs in Nebraska courts under Neb. Rev. Stat. § 21-162(a) (Reissue 2012).

The cause of action upon which judgment was entered against Raynor was the claim of FSB, later assigned to Skyline. The LLCs are not the plaintiffs with respect to the claim at issue in Raynor's argument. In ruling on this claim, the district court found that judgment should be entered on the FSB note in favor of Skyline. Therefore, whether the LLCs having standing as plaintiffs in a Nebraska court has no bearing on Raynor's liability to Skyline.

(e) Inconsistent Positions on Enforceability of FSB Note

Raynor claims that initially Walker and the LLCs argued that the FSB note was unenforceable for various reasons, but once they settled and became plaintiffs, they took an opposite

position. He argues that the assertions Walker and the LLCs made in their early pleadings constitute judicial admissions and that they should be estopped from asserting an inconsistent position now.

[29] As discussed above, neither Walker nor the LLCs are the plaintiffs in the relevant cause of action against Raynor. It is FSB by way of Skyline that is asserting the enforceability of the note. Thus, Walker's and the LLCs' positions with respect to the note are irrelevant to our analysis as to whether judgment was erroneously entered against Raynor. Furthermore, admissions made in superseded pleadings are no longer judicial admissions, but, rather, simple admissions. *Cook v. Beermann*, 202 Neb. 447, 276 N.W.2d 84 (1979). We therefore reject this argument.

### 5. Sole Basis Stipulation

Raynor argues that the district court's judgment was contrary to the parties' stipulation that the sole basis for seeking recovery against him was his expressed intent to assist Herz. We understand this stipulation to be the parties' recognition that Raynor was not an owner or member of the LLCs at the time the FSB note was signed nor was he personally liable on the Five Points Bank note. The dispute appears to arise out of whether Raynor's intended assistance to Herz is sufficient consideration to support the FSB note.

[30-32] Generally, there is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000). What that benefit and detriment must be or how valuable it must be varies from case to case. It is clear, however, that even "'a peppercorn'" may be sufficient. *Id*. at 439, 618 N.W.2d at 436. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is

any actual loss or detriment to him or actual benefit to the promisor. *Id*. For the purpose of determining consideration for a promise, the benefit need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request. *Id*.

In the present case, a detriment to the promisee is present: FSB issued a loan to the LLCs, a legal act which it was not bound to do. Raynor argues that he, as the promisor, did not receive a benefit from the loan because he was not an owner of the LLCs at the time of the loan and was not personally liable on the Five Points Bank loan. There is no requirement, for purposes of consideration, that Raynor personally received a benefit; his stated intention to assist Herz is sufficient consideration, because Herz received a personal benefit via the loan proceeds. Accordingly, this argument lacks merit.

## VI. CONCLUSION

We conclude that the district court abused its discretion in declining to enter default judgment against Probandt on the fraud/misappropriation cause of action, and we remand the cause to the district court with directions to enter a default judgment against Probandt in the amount of $2,184,530.

We find no error in the decision to enter judgment in favor of Skyline against Raynor. However, the district court erred in failing to award a credit against the judgment for the amounts received in settlement, and we remand the cause for recalculation of this amount.

Affirmed in part, and in part reversed and remanded with directions.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# Rene Essink et al., appellees, v. City of Gretna, a municipal corporation, appellant.

901 N.W.2d 466

Filed September 19, 2017. No. A-16-682.

1. **Constitutional Law: Appeal and Error.** Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
3. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
4. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
5. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
6. **Eminent Domain: Words and Phrases.** Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.

7. **Eminent Domain: Property: Intent.** Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the public entity and has been deemed to be available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings.
8. **Constitutional Law: Eminent Domain: Damages.** Because the governmental entity has the power of eminent domain, the property owner cannot compel the return of property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken.
9. **Constitutional Law: Eminent Domain: Words and Phrases.** Under the Nebraska Constitution, the requirement that property was taken or damaged "for public use" means that the taking or damage must be the result of the governmental entity's exercise of the right of eminent domain.
10. **Eminent Domain: Damages.** Not all damage to property by a governmental entity in the performance of its duties occurs as a result of the exercise of eminent domain.
11. **Eminent Domain: Damages: Proximate Cause: Proof.** The initial question in an inverse condemnation case is not whether the actions of the governmental entity were the proximate cause of the plaintiff's damages. Instead, the initial question is whether the governmental entity's actions constituted the taking or damaging of property for public use. That is, it must first be determined whether the taking or damaging was occasioned by the governmental entity's exercise of its power of eminent domain. Only after it has been established that a compensable taking or damage has occurred should consideration be given to what damages were proximately caused by the taking or damaging for public use.
12. **Eminent Domain: Property: Proof.** In order to meet the initial threshold that the property has been taken or damaged for public use, it must be shown that there was an invasion of property rights that was intended or was the foreseeable result of authorized governmental action.
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.
14. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
15. **Political Subdivisions Tort Claims Act: Notice.** With regard to a claim's content, substantial compliance with the statutory provisions

supplies the requisite and sufficient notice to a political subdivision under the Political Subdivisions Tort Claims Act.

16. ____: ____. The written claim required by the Political Subdivisions Tort Claims Act notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made.

Appeal from the District Court for Sarpy County: Max Kelch, Judge, and Paul D. Merritt, Jr., Judge, Retired. Vacated in part, and in part reversed and remanded with directions.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellant.

Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Pirtle, Judge.

## INTRODUCTION

Rene Essink, Brandon Henry and Amanda Henry, and Michael Foged and Catherine Howard, now known as Catherine Foged (collectively appellees), brought an inverse condemnation action and a negligence action under the Political Subdivisions Tort Claims Act (the Tort Claims Act) against the City of Gretna (City) as a result of two sanitary sewer backups into their homes. A jury found in favor of appellees on the inverse condemnation claims and awarded damages. The trial court dismissed the negligence action under the Tort Claims Act as to Essink and the Henrys. Following a bench trial, the court found that the Fogeds had complied with the filing requirements of the Tort Claims Act and that the City negligently caused the backups and awarded damages. The City appeals from the judgment on the jury

verdict and the trial court's order from the bench trial. On the inverse condemnation action, we conclude that the trial court should have granted a directed verdict in favor of the City, and therefore, we vacate the jury's verdict, and reverse the judgment of the trial court and remand the matter with directions to enter judgment in favor of the City. On the Fogeds' negligence action under the Tort Claims Act, we determine that the Fogeds did not comply with the filing requirements of the Tort Claims Act, and therefore, we reverse the trial court's order and remand the matter to the trial court with directions to dismiss.

## BACKGROUND

The City has a wastewater collection system that collects sewage from residences and businesses and uses gravity to direct the collected sewage to a pumping station or treatment facility. Residents connect to the City's collection system through private service connections that run from their properties to the City's line.

In July and August 2010, appellees all lived on Meadow Lane in Gretna, Nebraska. Their homes were located near the top of the gravitational line of the City's sewage collection system.

On July 23, 2010, sewage from the City's collection system backed up into Essink's and the Fogeds' residences. Richard Andrews, the City's utility superintendent, responded and investigated by lifting the covers to the two manholes closest to the residences and checking the flow of water. He discovered that there was a blockage between the two manholes. Andrews used the City's sewer "jet" to clear the blockage. He then checked manholes down the gravitational line and observed that the collection system was clear and flowing. Andrews was unable to determine what caused the blockage. Andrews checked the manholes on Meadow Lane for several days after the July 23 backup to make sure the system was flowing, and he did not observe any further blockages or issues with the flow.

On August 16, 2010, sewage from the City's collection system backed up into appellees' residences. Andrews responded again and investigated to determine where the blockage was located. He started by checking the manholes closest to the residences, which was where he had discovered the blockage on July 23. Andrews did not find a blockage between those manholes or any manholes on Meadow Lane. Andrews continued checking manholes down the gravitational line until he found the blockage several blocks away on Cherokee Drive. The City hired Utility Services Group (USG) to jet the line and clear the blockage. When the blockage was cleared, Andrews checked manholes down the gravitational line and observed that the collection system was clear and flowing. After the August 16 backup, the City also had USG conduct a "televised" video inspection on an area of the City's sewerlines, which included Meadow Lane.

Sometime after the July 23 and August 16, 2010, backups, Michael Foged's father hand delivered two envelopes to an employee of the City clerk's office on his son's behalf. The envelopes contained bills the Fogeds received from the business they hired to clean up their home after the backups.

In June 2011, appellees filed a written tort claim addressed and delivered to the City's clerk, pursuant to the Tort Claims Act. In October 2011, before the 6-month claim period expired, appellees filed a complaint in the district court for Sarpy County containing an inverse condemnation claim. In December 2014, appellees filed an amended complaint adding a negligence claim under the Tort Claims Act.

The City moved for summary judgment with respect to appellees' tort claim. The district court determined that the amended complaint related back to the original complaint and that the tort claim was therefore not time barred by the 2-year statute of limitations. The district court then concluded that because the original complaint was filed before the 6-month claim period under the Tort Claims Act expired, appellees failed to comply with all conditions of the Tort

Claims Act before filing their complaint. However, the district court found that questions of fact existed as to whether the cleaning bills Michael Foged's father delivered to the City clerk's office constituted a "claim" properly filed under the Tort Claims Act. Accordingly, the district court granted the City's summary judgment motion with respect to Essink's and the Henrys' tort claims, but overruled the motion as to the Fogeds' tort claim.

A jury trial was held on appellees' inverse condemnation claim. Andrews, the City's utility superintendent, testified that prior to July 2010, there were no reported sewer backups into any homes on Meadow Lane or reports of any other issues with the City's collection system on Meadow Lane. Stephen Sherry, a City employee with over 35 years of experience working with the City's sewer system, testified that the July 23 and August 16 backups were the only sewer backups on Meadow Lane that he was aware of.

Andrews and Sherry also testified to the City's regular inspection, maintenance, and repair procedures for the sewage collection system. The City maintains a list of manholes that are checked daily to make sure water is flowing in the system. The manholes on the list are where there are large collection points, low spots, or problem areas where blockages have occurred. The manholes on Meadow Lane and Cherokee Drive were not on this list prior to the July and August 2010 backups. Andrews testified that the manholes on Meadow Lane were added to the list after the August 16 backup and that they are checked daily.

In addition to checking the manholes on the list on a daily basis, the City also conducts random inspections of manholes throughout the City. The City also tries to jet out all the sewerlines throughout the City on an annual basis, depending on budget constraints.

Greg MacLean, a civil engineer who testified for appellees, stated that in his opinion, the City's practice of checking certain manholes on a daily basis indicated that it knew it had

a problem with the sewer system. He testified that knowing there was a problem and not doing anything to address the problem makes it certain that there will eventually be a backup of some kind.

MacLean testified that in the video taken by USG of the sewerlines, he observed broken and disjointed or offset pipes, as well as tree roots in the line. He testified that in his opinion, the blockages at issue were caused by the condition of the lines. He testified that broken and disjointed pipes reduce the flow and reduce the carrying capacity of the pipes. MacLean further explained that during times when the flow increases from increased usage or during wet weather, the capacity of the pipes can be exceeded, resulting in a sewer backup upstream.

MacLean also testified that backups can also be caused by foreign objects users put into the collection system and that the City has no control over nor can it predict what will be put into the system. He also admitted that blockages in a sewage collection system can occur despite the best practices. He acknowledged that when he was the Lincoln, Nebraska, sewer system supervisor, Lincoln experienced an average of 20 backups per year despite his best maintenance efforts.

Steven Perry, the City's civil engineering consultant for over 30 years, testified that he did not see anything in the USG video that would have caused the sewer backups on Meadow Lane. He testified that offset pipes and broken or cracked pipes would not cause a blockage in the line. He acknowledged that a leaky joint or an infiltration into the system, such as roots, allows water into the system which reduces the carrying capacity of the pipes. Perry testified, however, that there was nothing in the system itself that would have caused a backup.

Perry testified that there is no way to predict when or where a blockage is going to occur. He further testified that in over 30 years as an engineer dealing with sewer systems in various communities, he was not aware of any sewer system that never has any blockages.

The City made a motion for directed verdict at the close of appellees' evidence, which the court denied. Following the presentation of evidence by both parties, the City renewed its motion for directed verdict, which was again denied. The jury returned a verdict in favor of appellees on the inverse condemnation claim, and the district court entered judgment on the verdict. The City made a motion for judgment notwithstanding the verdict, which the district court denied.

Following the jury trial on the inverse condemnation claim, a bench trial was held on the Fogeds' tort claim. The district court determined that the cleaning bills that were presented to the City clerk's office constituted a "claim" under the Tort Claims Act, that the Fogeds substantially complied with the Tort Claims Act, and that the City negligently caused the sewer backups. The court awarded damages.

## ASSIGNMENTS OF ERROR

The City assigns that the trial court erred in (1) failing to direct a verdict in the City's favor on appellees' inverse condemnation claims; (2) failing to grant the City judgment notwithstanding the verdict on appellees' inverse condemnation claims; (3) submitting the takings question to the jury; (4) improperly instructing the jury on appellees' inverse condemnation claims; (5) accepting the jury's verdict, which included a finding that the July 23 and August 10, 2010, backups constituted a taking; (6) finding that the Fogeds filed a "claim" with the proper city official; (7) finding that the Fogeds complied with the Tort Claims Act's filing requirements by delivering cleaning bills to an employee of the City clerk's office but who was not the person whose duty it was to maintain the City's records; (8) finding that the cleaning bills the Fogeds delivered to the City constituted a "claim" under the Tort Claims Act; (9) finding that the City was negligent in causing the backups that occurred at the Fogeds' residence on July 23 and August 16; and (10) finding that the backups were proximately caused by the City's negligence.

## STANDARD OF REVIEW

[1] Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013).

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Winder v. Union Pacific RR. Co.*, 296 Neb. 557, 894 N.W.2d 343 (2017).

[3] While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003).

## ANALYSIS

*Inverse Condemnation Claim.*

The City's first five assignments of error relate to the jury trial on appellees' inverse condemnation action. Included in these assignments of error is the City's allegation that the trial court erred in failing to direct a verdict in its favor. We address this assignment of error first.

[4,5] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Winder v. Union Pacific RR. Co., supra*. A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Id.*

[6] The City argues that based on the evidence presented at trial, there was only one conclusion that could be drawn and a directed verdict should have been granted in its favor on the inverse condemnation claim. The right to bring an inverse condemnation action derives from Neb. Const. art. I, § 21, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The 5th Amendment to the U.S. Constitution, made applicable to the states through the 14th Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings. *6224 Fontenelle Blvd. v. Metropolitan Util. Dist.*, 22 Neb. App. 872, 863 N.W.2d 823 (2015).

[7,8] Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the public entity and has been deemed to be available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. *Id.* Because the governmental entity has the power of eminent domain, the property owner cannot compel the return of property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken. *Id*.

[9,10] Under the Nebraska Constitution, the requirement that property was taken or damaged "for public use" means that the taking or damage must be the result of the governmental entity's exercise of the right of eminent domain. *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013). Not all damage to property by a governmental entity in the performance of its duties occurs as a result of the exercise of eminent domain. *Id.*

In *Henderson v. City of Columbus, supra*, the plaintiffs sued the defendant after raw sewage flooded into their home after a heavy rainstorm. The plaintiffs claimed that the flooding damaged their home and was the result of a malfunction of the city-run sanitary sewage system. The complaint alleged several theories of recovery, including inverse condemnation. After a bench trial, the court found in favor of the defendant and dismissed the plaintiffs' complaint, determining that the plaintiffs failed to prove that the defendant's actions or inactions were the proximate cause of their damages. On appeal, this court concluded that the defendant's actions proximately caused the backups and reversed the portion of the trial court's order which dismissed the inverse condemnation claim and remanded the cause for a determination of damages. Although for reasons different from those of the trial court, the Nebraska Supreme Court on further review held that the plaintiffs failed to establish an inverse condemnation claim and affirmed the trial court's judgment in favor of the defendant. *Id*.

[11,12] In its opinion, the Nebraska Supreme Court stated that the focus on proximate cause was premature and set forth that

> [t]he initial question in an inverse condemnation case is not whether the actions of the governmental entity were the proximate cause of the plaintiff's damages. Instead, the initial question is whether the governmental entity's actions constituted the taking or damaging of property for public use. That is, it must first be determined whether the taking or damaging was occasioned by the governmental entity's exercise of its power of eminent domain. Only after it has been established that a compensable taking or damage has occurred should consideration be given to what damages were proximately caused by the taking or damaging for public use.

*Id.* at 489, 827 N.W.2d at 492. In order to meet the initial threshold that the property has been taken or damaged for

public use, it must be shown that there was an invasion of property rights that was intended or was the foreseeable result of authorized governmental action. See *id.*

In analyzing whether the flooding in *Henderson v. City of Columbus, supra*, was an invasion of property rights that was intended or foreseeable, the court considered the U.S. Supreme Court case of *Arkansas Game and Fish Com'n v. United States*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). Specifically, it noted:

> At issue in *Arkansas Game and Fish Com'n* was "whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking of property." 133 S. Ct. at 518. The Court concluded that government-induced "recurrent floodings, even if of a finite duration, are not categorically exempt from Takings Clause liability." 133 S. Ct. at 515. The temporary nature of the flooding at issue in *Arkansas Game and Fish Com'n* did not automatically exclude it from being a compensable event under the Takings Clause and the order of dismissal therein was reversed and the cause remanded. While time or duration was the relevant factor in determining the existence of a compensable taking at issue in *Arkansas Game and Fish Com'n,* the Court further stated that "[*a*]*lso relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action.*" 133 S. Ct. at 522. This additional factor of intention or foreseeability is of particular importance in the case before us.

*Henderson v. City of Columbus*, 285 Neb. 482, 492, 827 N.W.2d 486, 494 (2013) (emphasis supplied).

The *Henderson* court also recognized that the *Arkansas Game and Fish Com'n* Court stated, in regard to the intentional or foreseeable results of the acts of the governmental entity, that "'a property loss compensable as a taking only results when the government intends to invade a protected property

interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action."'" 285 Neb. at 493, 827 N.W.2d at 495.

The *Henderson* court further noted that Nebraska case law and that of other states indicate flooding may be a compensable taking when it is frequent or recurring. The *Henderson* court stated that this is consistent with the statement in *Arkansas Game and Fish Com'n v. United States, supra*, that intention or foreseeability is a factor in determining whether there has been a taking, because the frequency of flooding could indicate that the taking or damaging of property is a known or foreseeable result of government action for public use.

The *Henderson* court concluded that the plaintiffs failed to establish the threshold element that their property was taken or damaged for public use by the defendant in the exercise of its power of eminent domain. The court relied on the district court's finding that no evidence existed to show that the plaintiffs had suffered property damage as a result of recurring, permanent, or chronic sewer backups, or that the damage was intentionally caused by the defendant. The court concluded that the district court's findings supported a conclusion that this was not a case where the defendant exercised its right of eminent domain, because when the defendant took action, there had not been recurring sewer backup, nor was it known or foreseeable that the defendant's action would take or damage private property. *Id*. It further stated that the plaintiffs did not present evidence that the defendant knew damage would occur or could have foreseen that its actions could cause damage to private property.

We conclude that *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013), is instructive in the present case and that therefore, the dispositive issue is whether the backups constituted a taking or damaging of property for public use. As stated in *Henderson*, in order to meet this initial threshold, appellees had to show that the invasion of property rights was

intended or was the foreseeable result of authorized governmental action. *Henderson* also indicated that a flooding case may be a compensable taking when it is frequent or recurring, because the frequency is indicative that the taking or damaging of property was known or foreseeable.

In the present case, the sewer backups were not frequent or recurring. The evidence showed that there were two backups which occurred several weeks apart as a result of two blockages at different areas of the sewer system. The first backup for which appellees claim damages occurred on July 23, 2010. After the backup was reported to the City, Andrews located a blockage in between the two manholes closest to appellees' homes. He jetted the sewerline and cleared the blockage. Andrews then checked manholes down the gravitational line and observed that the collection system was clear and flowing. He checked the manholes on Meadow Lane for several days after the July 23 backup to make sure the system was flowing, and he did not observe any further blockages or issues with the flow.

The evidence was undisputed that no backups occurred on Meadow Lane before July 2010. Sherry, who had over 35 years of experience working with the City's sewer system, testified that besides the two backups at issue in this case, he was aware of only one other sewer backup that occurred in 2007 on a different street. Andrews, the City's utility superintendent, testified that prior to July 2010, there were no reported sewer backups into any homes on Meadow Lane or reports of any other issues with the City's collection system on Meadow Lane. Andrews also testified that there had been only one other backup into a basement other than the ones at issue.

Michael Foged testified that he moved into his house in July 2009 and that he had no backups prior to July 2010. Brandon Henry testified that he had been in his house since 2006 and had no backup problems before July 2010. Similarly, Essink moved into her house in 2001 and had no backups prior to July 2010.

There was evidence that a minor backup occurred at appellees' homes a few days before July 23, 2010, but there was no evidence that this backup was caused by a blockage on Meadow Lane or anywhere in the City's sewer system. Michael Foged and Brandon Henry testified that water came out of their basement drains on July 19 and then receded. Essink testified that her toilet overflowed on the same day. Michael Foged called a plumber who indicated the Fogeds' personal line was clear. Michael Foged also called the City, and Andrews came out and checked the closest manhole and told him there was no blockage. Essink called a plumber who saw no problem with her personal line.

On August 16, 2010, the second backup for which appellees claim damages occurred. Andrews responded after the backup was reported and investigated to determine where the blockage was located. He started by checking the manholes closest to the residences, which was where he had discovered the blockage on July 23. Andrews did not find a blockage between those manholes or any manholes on Meadow Lane. Andrews continued checking manholes down the gravitational line until he found the blockage several blocks away on Cherokee Drive. The City hired USG to jet the line and clear the blockage. When the blockage was cleared, Andrews checked manholes down the gravitational line and observed that the collection system was clear and flowing.

The backup on August 16, 2010, was the second backup on Meadow Lane that was caused by a blockage in the City's sewer system. It was the first backup on Meadow Lane caused by a blockage that was several blocks away.

There was no evidence presented of other backups into appellees' homes besides those in July and August 2010. There was limited evidence of one other backup that occurred into someone else's home in 2007, but it did not take place on Meadow Lane. Accordingly, appellees failed to present evidence of frequent or recurring backups, and failed to prove that

the City knew or could have foreseen that damage would occur to appellees' property.

Appellees argue the City had sufficient knowledge to make it foreseeable that sewer backups would occur based upon its allegedly inadequate method of maintenance and operation of the system and its list of manholes that were checked daily. First, the manhole list does not prove foreseeability: those manholes were checked daily because they were large collection points, low spots in the sewerline, or areas where some sort of blockage had occurred in the past. The manholes where the blockages occurred in the instant case were not on the list. Second, the possibility of backups occurring somewhere in Gretna due to inadequate maintenance and operation is not sufficient to prove that the City knew or could foresee that a backup was going to occur at appellees' properties. In *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013), the court quoted with approval *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004), which held that before a governmental entity may be held liable for an intentional taking, the claimant must show that the government "'knows that a *specific act* is causing identifiable harm'" or "'knows that the *specific property damage* is substantially certain to result from an authorized government action.'" 285 Neb. at 494, 827 N.W.2d at 495 (emphasis supplied). Appellees had to prove that the City knew or could have foreseen that damage would occur to appellees' property, and it failed to do so. Further, as previously discussed, there was no evidence of frequent or recurring backups at appellees' homes, on Meadow Lane, or anywhere in Gretna.

Absent evidence of frequent or recurring sewer backups in the past, appellees failed to prove the threshold issue of whether the backups were intended or were the foreseeable result of authorized governmental action. Accordingly, we conclude appellees failed to prove that the backups constituted a taking or damaging of property for public use. We conclude

that the district court erred in failing to grant the City's motion for directed verdict.

[13] The City also assigns that the trial court erred in submitting the question of whether a taking occurred to the jury. It relies on *6224 Fontenelle Blvd. v. Metropolitan Util. Dist.*, 22 Neb. App. 872, 863 N.W.2d 823 (2015), wherein the court held that the ultimate determination of whether government conduct constitutes a taking or damaging of property is a question of law for the court. We note that *6224 Fontenelle Blvd. v. Metropolitan Util. Dist., supra*, was released after the jury trial in this matter. It was also the first time Nebraska courts had addressed an inverse condemnation action where there had been no physical intrusion or taking of property, but only a damaging of property by virtue of a loss of value to the property. Regardless, because we have concluded that the trial court should have directed a verdict in favor of the City and the case should not have gone to the jury, we need not address whether the trial court erred in submitting the takings question to the jury. Further, we need not address the City's remaining assignments of error that relate to the jury trial on appellees' inverse condemnation claim. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *In re Conservatorship of Abbott*, 295 Neb. 510, 890 N.W.2d 469 (2017).

*The Fogeds' Claim Pursuant to Tort Claims Act.*

We next address the City's assignments of error that relate to the Tort Claims Act, specifically that the Fogeds failed to file a proper claim. The City argues that the Fogeds did not comply with the filing requirements of the Tort Claims Act in two respects: (1) the cleaning bills presented to the City clerk's office did not demand the satisfaction of an obligation and (2) the Fogeds did not deliver the cleaning bills to the proper city official.

[14] The Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003). While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. *Jessen v. Malhotra, supra*. Neb. Rev. Stat. § 13-920(1) (Reissue 2012) provides, in relevant part:

> No suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property . . . caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment . . . . unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued . . . .

[15] The requisite content of a written claim is addressed in Neb. Rev. Stat. § 13-905 (Reissue 2012), which requires that all claims "shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant." With regard to a claim's content, substantial compliance with the statutory provisions supplies the requisite and sufficient notice to a political subdivision. *Jessen v. Malhotra, supra.*

[16] The written claim required by the Tort Claims Act notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made. *Jessen v. Malhotra, supra.*

We first address the City's argument that the cleaning bills that were delivered to the City clerk's office did not demand

the satisfaction of an obligation. The City relies on *Jessen v. Malhotra, supra*, in support of its argument. In *Jessen,* a physician employed by a county medical clinic allegedly misdiagnosed a patient's heart disease. Two days after seeing the physician, the patient died from a myocardial infarction. The patient's widow sent a letter to the physician stating that her husband had been examined by the physician and implying that the physician negligently failed to diagnose her husband's condition, a condition which led to his death. The letter further stated that the physician's misdiagnosis was "'malpractice'" and that the patient's family was "'very angry.'" *Jessen v. Malhotra*, 266 Neb. at 395, 665 N.W.2d at 589. The Nebraska Supreme Court concluded that the content of the widow's letter was insufficient to satisfy the requirements of a written claim under § 13-905 because it did not make a demand for the satisfaction of any obligation, nor did it convey what relief was sought by the plaintiff. The court found that without a proper demand of the relief sought to be recovered, a written claim fails to accomplish one of its recognized objectives: to allow the political subdivision to decide whether to settle the claimant's demand or defend itself in the course of litigation.

The court in *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003), referred to two cases where the Nebraska Supreme Court had construed the predecessor to § 13-905 to require that a written claim make a demand upon a political subdivision for the satisfaction of an obligation rather than merely alerting the political subdivision to the possibility of a claim. The cases were *Peterson v. Gering Irr. Dist.*, 219 Neb. 281, 363 N.W.2d 145 (1985), and *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988). *Peterson* was a case in which the claim failed to meet the "demand" requirement. The purported claim gave notice to the political subdivision that it "'failed to deliver water by reason of negligence or omission of duties and responsibilities of the

[political subdivision]'" and that the plaintiffs would hold it liable for "'whatever damages *may result* as a result of failure to deliver water.'" *Peterson v. Gering Irr. Dist.*, 219 Neb. at 283, 284, 363 N.W.2d at 147. The court held that the claim did not make a demand against the political subdivision and therefore did not satisfy the requirements of the Tort Claims Act.

The other case referred to by the *Jessen* court, *West Omaha Inv. v. S.I.D. No. 48, supra*, is a case where the written claim passed statutory muster. The claimant filed a claim pursuant to the Tort Claims Act "'*for the property loss*'" caused in part by the political subdivision's negligence, and thus made a proper demand to the political subdivision. *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. at 788, 420 N.W.2d at 294 (emphasis supplied). In considering whether the letter sent to the political subdivision met the Tort Claims Act's requirements, the court determined that the court in *Peterson v. Gering Irr. Dist., supra*, was mostly concerned that the plaintiffs made an actual demand upon the defendant. The Supreme Court found that the letter in *West Omaha Inv.* satisfied the Tort Claims Act's requirements, because the letter stated that property loss had occurred and that the defendant was responsible. The *West Omaha Inv.* court stated, "The letter did not merely alert the defendant to the future 'possibility of a claim' for 'whatever damages may result' as in *Peterson*. Rather, the plaintiff stated that 'claim is made' against the defendant for actual property loss caused in part by the defendant's negligence." 227 Neb. at 790, 420 N.W.2d at 295.

In the present case, the Fogeds submitted two envelopes to the City clerk's office after the sewer backups into their home. The first envelope had a bill addressed to Michael Foged from a cleaning and restoration company for work done at the Fogeds' residence. The amount of the bill was $20,257.37. There was also a bill from a plumbing company for $105.93. The second envelope, delivered after the second

backup, included a bill addressed to Michael Foged from the cleaning and restoration company for water damage cleanup at the Fogeds' residence in the amount of $6,944.30.

We conclude that like in *Jessen v. Malhotra, supra*, the cleaning bills here do not meet the statutory requirements of a claim, because the bills do not make a demand on the City for the satisfaction of an obligation or relief sought to be recovered. There were no other documents submitted with the cleaning bills. There was no written document of any sort by the Fogeds. Although the bills show the dates the work was performed, the location of the work, the reason (water damage) for the work, and the specific amount owed for such work, there is no demand made that the City satisfy an obligation. The bills are addressed to the Fogeds, indicating they are responsible for payment of the bills. The bills indicate that they are a result of water damage in the home, but there is no allegation that the City caused the water damage, no reference to the sewer backups, and no indication as to why the City would be responsible for the bills. The only reference to the City is a statement in the bills where it indicates that the Fogeds would be submitting them to the City for payment.

The content of the bills does not satisfy the requirements of § 13-905, and therefore, we reverse the trial court's finding that the cleaning bills delivered to the City clerk's office constituted a "claim" under the Tort Claims Act. Accordingly, the Fogeds failed to comply with a condition precedent to the commencement of a suit under the Tort Claims Act and their claim must be dismissed.

Having concluded that the cleaning bills did not demand the satisfaction of an obligation, we need not discuss whether the cleaning bills were delivered to the proper city official. We also do not need to discuss whether the trial court erred in finding that the City was negligent in causing the backups. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

*In re Conservatorship of Abbott*, 295 Neb. 510, 890 N.W.2d 469 (2017).

## CONCLUSION

We conclude that the trial court erred in failing to grant a directed verdict in favor of the City on appellees' inverse condemnation action. Therefore, we vacate the jury's verdict, and reverse the judgment of the trial court and remand the matter to the trial court with directions to enter judgment in favor of the City. We further conclude that the trial court erred in finding that the Fogeds complied with the filing requirements of the Tort Claims Act, and therefore, we reverse the trial court's order in regard to the Fogeds' tort claim and remand the matter to the trial court with directions to dismiss.

Vacated in part, and in part reversed and remanded with directions.

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

# Alexandra Courtney, appellant, v. Rene Jimenez, appellee.

903 N.W.2d 41

Filed September 26, 2017. No. A-16-868.

1. **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.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court resolves independently of the trial court.
3. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
4. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
5. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
6. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
7. **Moot Question: Appeal and Error.** Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.
8. ____: ____. 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.

9. **Motions to Vacate: Time.** A court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute.
10. **Judgments: Statutes: Time.** The 5-day period set forth in Neb. Rev. Stat. § 42-925(1) (Reissue 2016) is not central to the purpose of the domestic abuse protection order statutes; once the ex parte protection order has been granted, the fundamental purpose of the statute has been satisfied.
11. **Pleadings: Time.** The 5-day period to file a show cause hearing request as set forth in Neb. Rev. Stat. § 42-925(1) (Reissue 2016) is directory and not mandatory. Accordingly, failing to file a request for a show cause hearing within that 5-day period does not preclude the later filing of a motion to bring the matter back before the court, including the filing of a motion to vacate an ex parte order.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

Jeff T. Courtney, P.C., L.L.O., for appellant.

Hugh I. Abrahamson, of Abrahamson Law Office, for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

## INTRODUCTION

An ex parte domestic abuse protection order was entered by the Douglas County District Court in favor of Alexandra Courtney and against Rene Jimenez. Jimenez did not request a hearing to challenge the ex parte order within 5 days as set forth in Neb. Rev. Stat. § 42-925(1) (Reissue 2016); however, Jimenez subsequently filed a motion to vacate the order. Courtney appeals from the district court's order vacating the ex parte order. We affirm.

## BACKGROUND

Courtney filed a petition and affidavit for an ex parte domestic abuse protection order on May 6, 2016. The petition

indicates that Courtney and Jimenez have a 3-year-old child together, that a "Paternity/Custody" case was pending between them, and that another protection order against Jimenez (in favor of Courtney) was set to expire on May 8. Where the form requested the facts of the most recent incidents of domestic abuse, Courtney described the following incidents: First, she alleged that on April 29, 2016, Jimenez sent her a text message "about our daughter and death," which she took as a death threat to her (Courtney). In a second incident, on October 16, 2015, Jimenez told a mediator that "the protection order would be over soon [and] 'he'll be able to handle this himself.'" Courtney said that "[t]his made me very afraid because of the way I know that he handles things." Courtney next listed as an incident of domestic abuse, "See previous affidavit submitted on 5/7/2015." Finally, Courtney alleged that on May 6, 2016, after she spoke to the county attorney about Jimenez' April 29 text message, she was informed that the text message had become part of a "'warrant case'"; she thought this would "further provoke" Jimenez.

The district court entered an ex parte domestic abuse protection order against Jimenez on May 6, 2016. The order stated:

> If the respondent wishes to appear and show cause why this 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 on the **Request for Hearing** form provided and return it to the clerk of the district court within five (5) days after service upon him or her.

(Emphasis in original.)

Jimenez was served on May 17, 2016, but did not return the "Request for Hearing" form within 5 days thereafter. Instead, Jimenez filed a "Motion to Dismiss Protection Order" on August 1. He requested that the district court vacate the protection order because "reading [Courtney's] Petition and Affidavit to Obtain Domestic Abuse Protection Order in the most favorable light to [her], it is readily apparent that [she]

has failed to allege the facts necessary" for the court to issue a protection order. While the document was titled "Motion to Dismiss Protection Order," we will refer to it as a motion to vacate because it asked the court to vacate the protection order and because the district court's later order referred to it as a motion to vacate.

The district court held a hearing on Jimenez' motion to vacate on August 9, 2016. At the hearing, Jimenez' counsel argued that the allegations in Courtney's petition and affidavit did not meet the statutory criteria for a domestic abuse protection order because the text message was not threatening and Jimenez was only seeking suggestions on how to explain a family death to their daughter. Jimenez' counsel stated:

> The only reason I can think that there would be a protection order here is to try and provoke my client, and that's not the use of a protection order. My client has done nothing that would warrant the issuance of a protection order, and I'd ask that you set it aside.

Courtney's counsel responded:

> The problem, Judge, is that there is probably more of a record that would have been created in support of the protection order, at least through the testimony of my client and any of her witnesses, but there was no hearing and nothing was placed on the record because . . . Jimenez did not ask for a hearing.

Courtney's counsel further argued that Courtney's fears were justified because of her past experiences with Jimenez, and her counsel asked that a hearing be held on the merits of the petition and affidavit, wherein Courtney could "fill in the gaps" with her testimony.

The district court said that it understood both parties' positions, but determined that Courtney's petition and affidavit failed to allege enough facts to support the protection order. The court acknowledged the possibility of other evidence but told the parties that "in a hearing on a protection order, the Court is confined to what's alleged in the Petition."

Although the court decided the protection order should be vacated, it informed Courtney she could refile for an order, and the court further directed that an order would be entered in the pending paternity case that Jimenez was to have "absolutely no contact" with Courtney whatsoever. Courtney filed a timely appeal.

## ASSIGNMENTS OF ERROR

Courtney assigns, restated, that the district court erred when it vacated the domestic abuse protection order against Jimenez because (1) Jimenez' motion to vacate was untimely and was not a proper pleading under the domestic abuse protection order statutes and (2) Courtney alleged facts sufficient to support the issuance of the protection order.

## STANDARD OF REVIEW

[1] 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.*

[2] Statutory interpretation presents a question of law, which an appellate court resolves independently of the trial court. *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013).

[3,4] Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions. *Id*. When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Id*.

## ANALYSIS

*Mootness.*

Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.

*In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011). While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000). In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Glantz v. Daniel, supra*. Therefore, we first consider whether this appeal is moot, since the protection order in this case would have already expired had it not been vacated.

[5,6] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. See *id.* As a general rule, a moot case is subject to summary dismissal. *Id*.

The district court entered a temporary ex parte protection order on May 6, 2016. Jimenez was served with the order on May 17. Jimenez did not request a show cause hearing within 5 days of service, so the temporary order became a final ex parte protection order, valid until May 6, 2017. See § 42-925(1). The district court vacated the protection order on August 9, 2016, after a hearing on Jimenez' motion to vacate. Courtney filed a notice of appeal on September 8; however, she did not send a copy of the praecipe for bill of exceptions to the court reporter as required by appellate court rules. This resulted in a delay in the preparation of the appellate record, which was followed by multiple extensions of brief dates filed by Courtney. These delays have contributed to this appeal coming before this court after what would have been the expiration date of the protection order, had it not been vacated. Since this court cannot reinstate an expired protection order, this appeal is moot.

[7,8] However, under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination. *Glantz v. Daniel, supra*. When determining

whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem. *Id.*

This case is similar to *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013), where we applied the public interest exception to a moot case concerning an ex parte harassment protection order. Individuals subject to an ex parte harassment protection order have 5 days from the date of service to request a hearing to show cause why the order should not remain in effect for 1 year. See Neb. Rev. Stat. § 28-311.09(7) (Reissue 2016). In *Glantz*, a hearing was requested more than 5 days after service of the ex parte order, but the district court nevertheless allowed the hearing and dismissed the ex parte harassment protection order. On appeal, it was argued that the district court erred by allowing the show cause hearing when it had not been requested within the 5 days specified by statute. Courtney makes a similar argument in the present appeal, but in the context of the domestic abuse protection order statutes rather than the harassment protection order statutes at issue in *Glantz*.

However, as in this case, the harassment protection order in *Glantz* had expired when the case came before this court on appeal, rendering the appeal moot. In *Glantz*, we noted that the case involved the interpretation of a statute and that there was no previous interpretation of the time limitation contained in § 28-311.09(7); thus, the case raised a public question and our decision on the issue would provide valuable guidance to lower courts. Further, because of the multitude of harassment protection order cases filed in Nebraska, this court concluded that the same question would likely arise in the future. *Id.* Therefore, we found that the public interest exception to the mootness doctrine applied and we addressed the merits of the case.

While we are mindful that the public interest exception should not be used so often that it circumvents the mootness doctrine, this case presents a sufficiently important issue to merit consideration. See *Yancer v. Kaufman*, 22 Neb. App. 320, 854 N.W.2d 640 (2014). Like *Glantz v. Daniel, supra*, this case raises a statutory question more public in nature than private, an authoritative adjudication for future guidance is desirable, and there is a likelihood of future recurrence of the same or a similar problem. Similar to *Glantz*, there is no previous interpretation of how the 5-day time requirement specified in § 42-925(1) for requesting a show cause hearing to challenge an ex parte domestic abuse protection order may impact a later request for hearing. Additionally, in this case, we are asked to consider whether a party's failure to request a hearing in accordance with § 42-925(1) should prevent a district court from exercising its inherent power to vacate a prior order. Accordingly, we conclude the public interest exception to the mootness doctrine applies, at least in part, to the present appeal.

*District Court's Inherent Power to Vacate.*

Courtney argues that the district court should not have considered Jimenez' motion to vacate because he did not timely file his request to contest the protection order. She argues that the 5-day deadline in § 42-925(1) is "a 'hard and fast' deadline" and that "[t]he five day period is similar to a statute of limitations, or the 30 day period in which a notice of appeal must be filed following entry of a final order of a trial court." Brief for appellant at 7. Courtney categorizes the motion to vacate as "a time barred, inappropriate collateral attack on a valid order issued by the court. Not only was the five day period not adhered to, the 30 days in which Jimenez could have appealed the entry of the order expired 38 days before the motion to dismiss was filed." *Id.*

[9] We initially draw a distinction between Jimenez missing the statutory 5-day period for requesting a show cause hearing as described in § 42-925(1) and his filing a motion to vacate the protection order. With regard to a motion to vacate, a court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute. *Kibler v. Kibler*, 287 Neb. 1027, 845 N.W.2d 585 (2014). The local rules of the district court for the Fourth Judicial District, applicable here, provide that the term of the court runs from January 1 to December 31 of the calendar year. See Rules of Dist. Ct. of Fourth Jud. Dist. 4-1 (rev. 1995). The ex parte order was filed on May 6, 2016, and Jimenez filed his motion to vacate on August 1. Accordingly, Jimenez filed his motion to vacate within the court's term, and the court had the inherent power to vacate or modify its prior order.

In considering the motion to vacate, the district court determined that Courtney's petition and affidavit failed to allege enough facts to support the protection order, stating, "The problem that this court has is I don't believe there's enough — when I read the Petition and the affidavit, I don't think there's enough in the Petition itself for a protection order." The court acknowledged the possibility of other evidence but told the parties that "in a hearing on a protection order, the Court is confined to what's alleged in the Petition." The court said the protection order should be vacated, but "[s]hould you [Courtney] want an order . . . and you feel the need for an order, you would have to put those things in the Petition itself so that we could have a hearing and address them." The discussion between the court and counsel indicates that the paternity matter was scheduled for trial "this coming Monday," "[t]he 15th." The court noted that a different district court judge entered the protection order and that it "is always problematic when more than one judge is involved in the proceedings." The court vacated "this protection order at

this point in time," but stated that an order was to be entered in the paternity case that Jimenez was "to have absolutely no contact" with Courtney whatsoever.

Courtney argues, however, that "[a]ny argument from Jimenez that the trial court's equity powers allow it to vacate the *ex-parte* order and dismiss the petition and affidavit" is without merit. Brief for appellant at 8 (emphasis in original). The totality of Courtney's argument in support of this assertion is limited to her reference to Neb. Rev. Stat. § 42-924(5) (Reissue 2016), which states, "If there is any conflict between sections 42-924 to 42-926 and any other provision of law, sections 42-924 to 42-926 shall govern." Courtney does not explain how the district court's inherent power to vacate orders within its court term conflicts with these statutory sections. Our review of the listed statutes reveals no apparent conflicts, and in light of Courtney's failure to provide any discussion of the same, we decline to consider this assertion further. See *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015) (court declined to address appellant's conclusory arguments which had no supporting explanation).

Finding no conflict between § 42-924(5) and the district court's inherent power to vacate a prior order entered within its court term, we find no error in the district court's order dismissing Courtney's petition and vacating the ex parte protection order.

*Failure to Follow Deadline in § 42-925(1).*

Courtney argues that § 42-925(1) sets forth "a 'hard and fast' deadline" for "action on the part of Jimenez." Brief for appellant at 7. Courtney claims the 5-day period is similar to a statute of limitations, and she suggests that failing to request a hearing within those 5 days should preclude any subsequent action on a final protection order, including the filing of the motion to vacate. We do not read the statute to create such limitations.

As noted previously, this court has addressed a similar 5-day statutory requirement with regard to harassment protection orders. In *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013), a request for hearing on an ex parte harassment protection order was challenged as being untimely, since it was filed outside the 5-day deadline in § 28-311.09(7). This court concluded that the 5-day period to request a hearing was directory rather than mandatory. We determined that the deadline for requesting a hearing regarding a harassment protection order did not affect the underlying goal of the harassment statutes, e.g., protecting victims of stalking or harassment. The immediate protections afforded to stalking or harassment victims was accomplished by allowing the courts to enter an ex parte order upon the filing of a petition. We found no error in the district court's decision to proceed to hearing, nor in its decision to then dismiss the protection order petition and ex parte order.

In considering principles of statutory construction, our Supreme Court has stated:

> The general rule is that the word "shall" in a statute is mandatory and inconsistent with the idea of discretion. But we construe the word "shall" as permissive if the spirit and purpose of the legislation requires such a construction. No universal test distinguishes mandatory from directory provisions. Broadly, provisions that relate to the essence of the thing to be done are mandatory while provisions for which compliance is a matter of convenience rather than substance are directory. Put another way, we have been reluctant to deem provisions mandatory if something less than strict compliance would not interfere with the statute's fundamental purpose.
>
> *We have frequently applied these principles to statutory time limits. In most cases, we have decided that provisions specifying the time by which something "shall" be done are merely directory.* But we have given "shall" a

> mandatory construction if completion of the action within the specified period was essential to accomplishing a principal purpose of the law.

*D.I. v. Gibson*, 291 Neb. 554, 557-58, 867 N.W.2d 284, 287 (2015) (emphasis supplied). The footnote to the italicized language above identifies a number of supporting cases where statutory time limits were determined to be directory rather than mandatory, including *Glantz v. Daniel, supra*.

In the present matter, the Protection from Domestic Abuse Act, Neb. Rev. Stat. § 42-901 et seq. (Reissue 2016), provides that a victim of domestic abuse may file a petition and affidavit for a protection order with the clerk of the district court. § 42-924. Section 42-925 provides that domestic abuse protection orders, as defined under § 42-924, may be issued ex parte. If a court issues a domestic abuse protection order ex parte:

> [S]uch order is a temporary order and the court shall forthwith cause notice of the petition and order to be given to the respondent. The court shall also cause a form to request a show-cause hearing to be served upon the respondent. *If the respondent wishes to appear and show cause why the order should not remain in effect, 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 request of the petitioner, or upon the court's own motion, the court shall immediately schedule a show-cause hearing . . . . If the respondent does not so appear [at the hearing] and show cause, the temporary order *shall* be affirmed and shall be deemed the final protection order. If the respondent has been properly served with the ex parte order and fails to appear at the hearing, the temporary order *shall* be affirmed and the service of the ex parte order shall be notice of the final protection

> order for purposes of prosecution under subsection (4) of section 42-924.

§ 42-925(1) (emphasis supplied).

The fundamental purpose of the Protection from Domestic Abuse Act is "to provide abused family and household members necessary services including shelter, counseling, social services, and limited medical care and legal assistance." See § 42-902. As with harassment protection orders, immediate protection is afforded under the domestic abuse protection order statutes by allowing courts to enter an ex parte order upon the filing of a petition and affidavit. Upon entry of such an ex parte order, the respondent is immediately enjoined from engaging in any of the actions set forth in § 42-924, as may be ordered by the court.

[10,11] We see no reason why the 5-day period for domestic abuse protection orders set forth in § 42-925(1) should be treated any differently than the 5-day rule for harassment protection orders set forth in § 28-311.09(7), see *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013), or the 7-day rule for emergency protective custody hearings as addressed in *D.I. v. Gibson*, 291 Neb. 554, 867 N.W.2d 284 (2015). As stated by our Supreme Court, "We have noted our reluctance to find statutory time limits mandatory if they are not central to the purpose of the statute." *Id.* at 561, 867 N.W.2d at 289. The 5-day period set forth in § 42-925(1) is not central to the purpose of the domestic abuse protection order statutes. Although prompt responses to ex parte domestic abuse protection orders no doubt encourage orderly and rapid resolution of challenges to such orders, once the ex parte protection order has been granted, the fundamental purpose of the statute has been satisfied. We conclude the 5-day period to file a show cause hearing request as set forth in § 42-925(1) is directory and not mandatory. Accordingly, failing to file a request for a show cause hearing within that 5-day period does not preclude the later filing of a motion to bring the matter back before the

court, including the filing of a motion to vacate an ex parte order as was filed in this case.

*Sufficiency of Evidence.*

Courtney argues that she alleged facts sufficient to support the issuance of the protection order and that therefore, it should not have been vacated. We need not address this argument because even if we were to determine that Courtney alleged sufficient facts to support the issuance of an ex parte protection order, we cannot provide her with a remedy because the underlying protection order would have expired on May 6, 2017. Unlike interpreting § 42-925(1), whether Courtney alleged sufficient facts for an ex parte protection order is of a private nature, it does not demand an authoritative adjudication for future guidance of public officials, and because of the unique facts of her case, the same or a similar problem is not likely to recur. See *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000). We find no exception to the mootness doctrine under which we can address sufficiency of the evidence. See *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

## CONCLUSION

The district court's order dismissing Courtney's petition and vacating the ex parte domestic abuse protection order is affirmed.

Affirmed.

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

# Dukhan Mumin, appellant, v. Nebraska Department of Correctional Services, appellee.

# Dukhan Mumin, appellant, v. State of Nebraska, appellee.

903 N.W.2d 483

Filed October 3, 2017. Nos. A-16-618, A-16-619.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis under Neb. Rev. Stat. §§ 25-2301.02 and 25-3401 (Reissue 2016) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.
2. **Affidavits.** The procedure for in forma pauperis is generally governed by Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 2016).
3. **Affidavits: Prisoners.** In forma pauperis applications filed in prisoner litigation cases are subject to a more restrictive statute, Neb. Rev. Stat. § 25-3401 (Reissue 2016), which must be read in conjunction with Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 2016).
4. ____: ____. Pursuant to Neb. Rev. Stat. § 25-3401(2)(a) (Reissue 2016), a prisoner who has filed three or more civil actions, commenced after July 19, 2012, that have been found to be frivolous by a court of this state or a federal court for a case originating in this state shall not be permitted to proceed in forma pauperis for any further civil actions without leave of court. A court shall permit the prisoner to proceed in forma pauperis if the court determines that the person is in danger of serious bodily injury.
5. **Affidavits: Prisoners: Appeal and Error: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 25-3401(1)(a) (Reissue 2016), civil action means a legal action seeking monetary damages, injunctive relief, declaratory relief, or any appeal filed in any court in this state that relates to or involves a prisoner's conditions of confinement. Civil action does not include a motion for postconviction relief or petition for habeas corpus relief.

6. **Prisoners: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 25-3401(1)(b) (Reissue 2016), conditions of confinement means any circumstance, situation, or event that involves a prisoner's custody, transportation, incarceration, or supervision.
7. **Trial: Attorneys at Law: Evidence.** Statements by an attorney are not treated as evidence.
8. **Judicial Notice: Records.** The law requires that papers requested to be judicially noticed be marked, identified, and made a part of the record; testimony must be transcribed, properly certified, marked, and made a part of the record.
9. **Rules of Evidence: Judicial Notice.** Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 2016), grants a judge or court the authority to take judicial notice of adjudicative facts, whether requested or not.
10. **Judicial Notice.** Care should be taken by the court to identify the fact it is noticing, and its justification for doing so.

Appeals from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed and remanded for further proceedings.

Dukhan Mumin, pro se.

No appearance for appellees.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

In case No. A-16-618 and case No. A-16-619, Dukhan Mumin, pro se, appeals the orders of the district court for Lancaster County denying his requests to proceed in forma pauperis (IFP) in the underlying civil actions. The court has consolidated these cases for disposition. For the reasons that follow, we reverse, and remand for further proceedings.

## BACKGROUND

On March 16, 2016, Mumin, pro se, filed an affidavit and application to proceed IFP in Lancaster County District Court case No. CI 16-911 (now case No. A-16-618). The underlying action in that case is a civil complaint filed by Mumin against

the Nebraska Department of Correctional Services pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2014), for allegedly adding 5 years to Mumin's discharge date in a criminal sentence.

On March 21, 2016, Mumin, pro se, filed an affidavit and application to proceed IFP in Lancaster County District Court case No. CI 16-977 (now case No. A-16-619). The underlying action in that case is a civil complaint filed by Mumin against the State of Nebraska pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2016), challenging the alleged denial of good time credit and Mumin's habitual criminal mandatory minimum sentence.

On March 25, 2016, the State, as "an interested party to this suit, and appearing by way of special appearance only," filed identical objections to IFP status in both cases. The State, represented by the Attorney General's office, alleged that Mumin was a prisoner who had three or more civil actions deemed frivolous by the courts of this state and was no longer allowed to proceed IFP pursuant to Neb. Rev. Stat. § 25-3401(2)(a) (Reissue 2016). Section 25-3401(2)(a) states:

> A prisoner who has filed three or more civil actions, commenced after July 19, 2012, that have been found to be frivolous by a court of this state or a federal court for a case originating in this state shall not be permitted to proceed in forma pauperis for any further civil actions without leave of court. A court shall permit the prisoner to proceed in forma pauperis if the court determines that the person is in danger of serious bodily injury.

The State referred the court to

> three or more civil actions, commenced after July 19, 2012, that have been found frivolous by a court of this state. They are:
>
> **a.** *Mumin v. Flowers, et al.*, in the Lancaster County District Court, case number CI 14-4333;
>
> **b.** *Mumin v. Gage*, in the Johnson County District Court, case number CI 13-121;

**c.** *Mumin v. Gage*, in the Johnson County District Court, case number CI 14-59.

The State alleged that because Mumin had received "three 'strikes,'" the district court should deny Mumin's applications to proceed IFP and allow the cases to proceed only after Mumin has paid the necessary filing fees.

A hearing on the State's objections to IFP was held on April 21, 2016. Mumin, pro se, appeared telephonically. The State, represented by the Attorney General's office, argued that under § 25-3401, if an inmate has filed three or more civil actions that have been deemed frivolous, that inmate is subjected to "heightened scrutiny" by courts. According to the State, Mumin had five frivolous findings of courts by this state:

> Into the record I will just say that is Mumin v. Gage, from Johnson County District Court, at CI13-121; Mumin v. Gage, Johnson County again, at CI14-59; Mumin v. Flowers, at Lancaster County District Court, at CI14-4333; Mumin v. Frakes, in Johnson County, that's CI16-34; and Mumin v. Taylor, that's at Lancaster County District Court, CI16-76.

Mumin argued that "none of those cases that he just mentioned would even qualify under the statute" because "[t]here has been no summons issued on any of those cases. Those cases have not even . . . commenced under statute or even under the case law." He further argued, "the other habeas corpus actions, they don't qualify under the statutes or case law as well."

On June 6, 2016, the district court filed identical orders in both cases sustaining the State's objections to IFP. The court said that "[a]ll totaled, the State points to five cases filed by [Mumin] that have been found to be frivolous by a court of this state." After setting forth the five cases noted by the State at the April 21 hearing, the court found that "since July 2012, [Mumin] has brought three or more cases, while incarcerated, which were dismissed for being frivolous." The court sustained the State's objections and said that Mumin "shall

have thirty days from the date of this order to pay the filing fees in this matter, or the matter shall be dismissed without further notice."

Mumin now appeals. The State did not file briefs in response to Mumin's appeals.

## ASSIGNMENTS OF ERROR

Mumin assigns that the district court erred by (1) receiving statements by the State without a proper offer pursuant to the Nebraska Evidence Rules, (2) ruling that habeas petitions qualified as "strikes," and (3) ruling that the cases filed by Mumin in the lower court were "commenced."

## STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis under Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) and § 25-3401 is reviewed de novo on the record based on the transcript of the hearing or written statement of the court. See *Gray v. Nebraska Dept. of Corr. Servs.*, 24 Neb. App. 713, 898 N.W.2d 380 (2017).

## ANALYSIS

*IFP Statutes.*

[2] The procedure for IFP is generally governed by Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 2016). Pursuant to those statutes, any county or state court, except the Nebraska Workers' Compensation Court, may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case IFP. § 25-2301.01. An application to proceed IFP shall include an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case; the nature of the action, defense, or appeal; and the affiant's belief that he or she is entitled to redress. *Id*. Section 25-2301.02 states that an application to proceed IFP "shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees,

or security or (b) is asserting legal positions which are frivolous or malicious." The objection may be made by the court on its own motion or on the motion of any interested person. *Id*. The motion objecting to the application shall specifically set forth the grounds of the objection, and an evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion or on the grounds that the applicant is asserting legal positions which are frivolous or malicious. *Id*. If an objection is sustained, the party filing the application shall have 30 days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security. *Id*.

[3-6] While the above statutes govern IFP proceedings generally, IFP applications filed in prisoner litigation cases are subject to a more restrictive statute, § 25-3401, which must be read in conjunction with §§ 25-2301 to 25-2310. Section 25-3401(2)(a) states:

> A prisoner who has filed three or more civil actions, commenced after July 19, 2012, that have been found to be frivolous by a court of this state or a federal court for a case originating in this state shall not be permitted to proceed in forma pauperis for any further civil actions without leave of court. A court shall permit the prisoner to proceed in forma pauperis if the court determines that the person is in danger of serious bodily injury.

Section 25-3401(1)(a) states that, for purposes of this section, "[c]ivil action means a legal action seeking monetary damages, injunctive relief, declaratory relief, or any appeal filed in any court in this state that *relates to or involves a prisoner's conditions of confinement*. *Civil action does not include a* motion for postconviction relief or *petition for habeas corpus relief*." (Emphasis supplied.) And "[c]onditions of confinement means any circumstance, situation, or event that involves a prisoner's custody, transportation, incarceration, or supervision." § 25-3401(1)(b).

*Legal Application to Mumin.*

In its March 2016 objection to IFP status, the State, citing to § 25-3401(2)(a), alleged that Mumin has had three or more civil cases deemed frivolous by the courts of this state, and because he had received "three 'strikes,'" the court should deny IFP. Referenced in the State's objection were three previous district court cases initiated by Mumin, the orders of which were attached to the objection. Those cases were: Johnson County District Court case No. CI 13-121 (does not specify nature of underlying case, but states Mumin's motion to proceed IFP was denied because legal positions advanced by him were frivolous); Johnson County District Court case No. CI 14-59 (states that Mumin's petition for issuance of protection order was denied as frivolous and meritless); and Lancaster County District Court case No. CI 14-4333 (denied Mumin's application to proceed IFP because Mumin's "Amended Complaint on Official Bonds" was malicious and frivolous).

[7,8] At the hearing in April 2016, without presenting evidence or requesting that the district court take judicial notice, the State cited the above cases referenced in its March objection, as well as Johnson County District Court case No. CI 16-34 and Lancaster County District Court case No. CI 16-76, and argued that all five had "frivolous findings of courts by this state." But, statements by an attorney are not treated as evidence. See *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007) (attorney's assertions at trial are not to be treated as evidence). Additionally, even if the State had asked the court to take judicial notice of those cases, the law requires that papers requested to be judicially noticed be marked, identified, and made a part of the record; testimony must be transcribed, properly certified, marked, and made a part of the record. See *Everson v. O'Kane*, 11 Neb. App. 74, 643 N.W.2d 396 (2002).

[9,10] Even though the State did not ask the district court to take judicial notice of the five previous cases, Neb. Evid.

R. 201, Neb. Rev. Stat. § 27-201 (Reissue 2016), grants a judge or court the authority to take judicial notice of adjudicative facts, whether requested or not. Section 27-201 provides in part:

> (1) This rule governs only judicial notice of adjudicative facts.
>
> (2) A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (3) A judge or court may take judicial notice, whether requested or not.
>
> . . . .
>
> (6) Judicial notice may be taken at any stage of the proceeding.

"[A]s a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 835, 458 N.W.2d 443, 455 (1990). "Thus, a court may judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata." *Id*. at 836, 458 N.W.2d at 456. See, also, *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998); *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363 (1991). Furthermore, care should be taken by the court to identify the fact it is noticing, and its justification for doing so. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

In its order, after setting forth the five cases noted by the State at the April 2016 hearing, the court found that "since

July 2012, [Mumin] has brought three or more cases, while incarcerated, which were dismissed for being frivolous." The district court did not specifically state that it was taking judicial notice of the cases cited by the State. Even if it did take judicial notice of those cases, the district court's order does not address other factors necessary to determine whether § 25-3401(2)(a) should bar Mumin from IFP status. First, the district court simply stated that Mumin brought "three or more" cases which were dismissed for being frivolous; it did not specifically state which cases were dismissed for being frivolous, or whether all of them were dismissed as frivolous. Second, the district court addressed only the "frivolousness" of previous actions, but § 25-3401 requires additional considerations to determine whether those actions were "civil actions" as defined by that statute. Section 25-3401(1)(a) states that, for purposes of this section, a civil action means "a legal action seeking monetary damages, injunctive relief, declaratory relief, or any appeal filed in any court in this state that relates to or involves a prisoner's conditions of confinement. Civil action does not include a motion for postconviction relief or petition for habeas corpus relief." The district court did not make determinations as to whether any or all of Mumin's previous actions were "relate[d] to or involve[d] a prisoner's conditions of confinement" as further defined in § 25-3401(1)(b), were motions for postconviction relief, or were petitions for habeas corpus relief. Although Mumin does not raise the issue of "conditions of confinement" in his current appeals, this court may, at its option, notice plain error. See *Gray v. Nebraska Dept. of Corr. Servs.*, 24 Neb. App. 713, 898 N.W.2d 380 (2017).

We note that four of the five cases relied on by the State and the district court were appealed, and we can certainly take judicial notice of our own records. See *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016). Having taken such judicial notice, we have determined that two of the previous cases

involved petitions for habeas corpus relief and are therefore excluded from being civil actions for purposes of § 25-3401; those two cases are Johnson County District Court case No. CI 13-121, see *Mumin v. Gage*, 21 Neb. App. xlvi (No. A-13-1084, Mar. 17, 2014) (disposed of without opinion), and Johnson County District Court case No. CI 16-34, see *Mumin v. Frakes*, No. A-16-327, 2017 WL 672286 (Neb. App. Feb. 21, 2017) (selected for posting to court website). A civil action does not include a petition for habeas corpus relief. See § 25-3401(1)(a). See, also, *Gray, supra*.

The other two cases appealed were Lancaster County District Court case No. CI 14-4333 (appellate case No. A-15-248, unpublished memorandum opinion filed on January 5, 2016) and Lancaster County District Court case No. CI 16-76 (appellate case No. A-16-478, disposed of without opinion on August 9, 2016). In case No. A-16-478, Mumin and other inmates filed a complaint alleging violations of their civil rights while incarcerated. As to Mumin specifically, he alleged discriminatory, targeted, and retaliatory searches of his prison cell. The complaint, which appears to relate to or involve his conditions of confinement, was dismissed by the Lancaster County District Court as frivolous; the appeal was dismissed for failure to file a brief. In case No. A-15-248, Mumin filed an "Amended Complaint on Official Bonds" against multiple "public officer[s]," the county, and an insurer of the official bonds, alleging improprieties at his criminal trial. The Lancaster County District Court dismissed Mumin's application to proceed IFP in that case after finding the amended complaint was "malicious and frivolous," a decision that was affirmed by this court on appeal. From what we can glean from our appellate record, while there was a finding of frivolousness in case No. A-15-248, that action does not appear to relate to Mumin's "conditions of confinement" as required by the definition of civil actions for purposes of § 25-3401. See § 25-3401(1)(a) and (b). If it does not relate to

"conditions of confinement," then it cannot be a civil action for purposes of § 25-3401.

Finally, we note that Johnson County District Court case No. CI 14-59 was not appealed. Although the Johnson County District Court's order was attached to the State's March 2016 objection, that order merely shows that Mumin's petition for issuance of a protection order was denied as "frivolous and meritless." There is nothing in our record to show whether Mumin's petition for a protection order was related to or involved Mumin's conditions of confinement. Having previously found that two cases cited by the State and the district court involved petitions for habeas corpus relief and are excluded from being civil actions for purposes of § 25-3401, this protection order case could be critical to determining whether Mumin has filed "three or more civil actions." However, we are unable to fully review it.

This case highlights the importance of creating a complete record at the trial court level to enable appellate review. At the objection hearing in April 2016, the State simply referenced five previous actions filed by Mumin and argued that all five had "frivolous findings of courts by this state." But, the State did not present evidence or ask the court to take judicial notice of those cases, which would have required papers to be marked, identified, and made a part of the record. See *Everson v. O'Kane*, 11 Neb. App. 74, 643 N.W.2d 396 (2002). And in its order, the district court, assuming it did take judicial notice of the previous cases, did not specify exactly what was being judicially noticed. Neither the State nor the district court in this case focused on anything other than the frivolous nature of Mumin's previous actions, even though § 25-3401 requires additional considerations as we have noted in this opinion.

After our review of the case, we cannot determine whether Mumin has filed the requisite three or more civil actions for purposes of § 25-3401 which would prohibit him from

proceeding IFP in further actions. We therefore reverse, and remand for further proceedings. As noted above, Johnson County District Court case No. CI 13-121 (appellate case No. A-13-1084) and Johnson County District Court case No. CI 16-34 (appellate case No. S-16-327) both involved petitions for habeas corpus relief and do not count as civil actions for purposes of § 25-3401. That leaves only three previous actions for consideration under § 25-3401. Accordingly, on remand, the district court will need to further address Johnson County District Court case No. CI 14-59; Lancaster County District Court case No. CI 14-4333 (appellate case No. A-15-248) (although it appears this case does not relate to Mumin's "conditions of confinement," we leave that determination for the district court to further explore on remand); and Lancaster County District Court case No. CI 16-76 (appellate case No. A-16-478). If, after reviewing these three cases the district court determines that they satisfy the requirements of § 25-3401, then the court should once again deny Mumin's applications to proceed IFP under this statute.

However, if the district court determines that one or more of those three cases does not qualify as a civil action for purposes of § 25-3401, or was not found to be frivolous, then IFP cannot be denied on the basis of § 25-3401(2)(a). That would not preclude the district court from denying Mumin's applications to proceed IFP should it be determined that the legal positions asserted by Mumin in the current actions are frivolous or malicious, or there are other reasons the applications should be denied pursuant to § 25-2301.02. See *Gray v. Nebraska Dept. of Corr. Servs.*, 24 Neb. App. 713, 898 N.W.2d 380 (2017).

For the sake of completeness, we note that in case No. A-16-618 and case No. A-16-619, Mumin also asserts that the district court erred in finding that the previous cases were "commenced." See § 25-3401(2)(a). Having already found the need to reverse, and remand for further proceedings, we elect

to not consider Mumin's assigned error regarding when an action is deemed to have been "commenced" for purposes of § 25-3401. See *Gray, supra* (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it). The issue of commencement may be addressed by the district court on remand if necessary.

## CONCLUSION

For the reasons stated above, we reverse, and remand for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

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

# Michelle R. Drabbels, appellee and cross-appellant, v. Darren W. Drabbels, appellant and cross-appellee.

902 N.W.2d 705

Filed October 3, 2017. No. A-16-1046.

1. **Divorce: Child Support: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding child support.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Child Support: Insurance: Proof.** In calculating a party's child support obligation, a deduction shall be allowed for the monthly out-of-pocket cost to the parent for that particular parent's health insurance so long as the parent requesting the deduction submits proof of the actual cost incurred for health insurance.
5. ____: ____: ____. In calculating a party's child support obligation, the increased cost to a parent for health insurance for the child shall be prorated between the parents; the parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the child.
6. **Child Support.** In calculating child support, the total monthly income of a parent should include earnings derived from all sources.
7. ____. While a court is allowed to add in-kind benefits, derived from an employer or other third party, to a party's income, a court's findings

regarding an individual's level of income should not be based on the inclusion of income that is entirely speculative.

8. **Child Support: Pensions.** In calculating child support, a parent may receive a deduction for contributions to a retirement plan.

Appeal from the District Court for Sheridan County: Travis P. O'Gorman, Judge. Affirmed as modified, and cause remanded with direction.

Jerrod P. Jaeger, of Jaeger Law Office, P.C., L.L.O., for appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Arterburn, Judge.

## INTRODUCTION

Darren W. Drabbels appeals, and Michelle R. Drabbels cross-appeals, from the decree of dissolution entered by the district court for Sheridan County, which decree dissolved their marriage, awarded them joint legal custody of their daughter, awarded Michelle physical custody of their daughter, and ordered Darren to pay child support. At issue in this appeal is the district court's calculation of Darren's child support obligation. Upon our review, we conclude that the district court erred in calculating Darren's monthly income and in failing to allocate childcare expenses between the parties. As a result, we must modify that portion of the decree which concerns child support. In addition, we must remand the cause to the district court to enter an order allocating childcare expenses between the parties.

## BACKGROUND

Darren and Michelle were married on September 26, 2009. There was one child born during the marriage; a daughter, born in January 2013. The parties separated in October 2014.

Michelle filed a complaint for dissolution of the marriage on April 27, 2015. In the complaint, she specifically asked that the parties' marriage be dissolved, that their marital assets and debts be equitably divided, and that she be awarded custody of their daughter and child support.

On December 28, 2015, the district court entered a temporary order which awarded Michelle physical and legal custody of the parties' daughter pending the dissolution trial. The temporary order also awarded Michelle $500 per month in child support.

Trial was held on June 28 and August 17, 2016. During the trial, the evidence presented by both parties focused primarily on custody of the parties' daughter, the division of marital property, and the proper amount of child support to be paid by Darren. In this appeal, neither party challenges the district court's decisions concerning custody or the division of property. As such, our recitation of the evidence presented at the trial focuses on only that evidence relating to child support and childcare expenses.

Michelle testified that she is currently employed as a dental office manager. She has been employed there since 2011 and earns $20 per hour. Michelle testified that she receives certain benefits as a result of her employment, including free dental care, the option to obtain health insurance, and a "401K where [the company] matches 3 percent of what I put in there." Michelle indicated that Darren currently provides their daughter with health insurance through his employer. Michelle testified that while she could provide health insurance for their daughter, she believes that it would be best for their daughter to remain on Darren's insurance plan. Michelle also indicated that their daughter attends daycare and that she and Darren have been splitting the cost of this daycare since at least January 2016. Michelle testified that she wanted this arrangement to continue.

Darren testified that he is currently employed by a public power district as a journeyman lineman. As a part of

his employment, he is a member of a union. In 2016, he earned $33.35 per hour. In addition to his hourly wages, he receives certain "fringe benefits" as a result of his employment. These benefits include health insurance and retirement benefits. Darren offered evidence which showed that in 2016, his employer paid $1,935.52 per month for Darren's and his daughter's health insurance. Darren testified that this insurance was paid for entirely by his employer. He does not pay anything toward the insurance plan, and nothing is deducted from his paycheck to pay for this benefit. However, Darren also testified that if the cost of his insurance increases, his hourly rate of pay may be affected. Similarly, Darren offered evidence which showed that in 2016, his employer paid $12,555.61 in retirement benefits for him. Darren testified that these retirement benefits were paid for entirely by his employer and that nothing is deducted from his paycheck to pay for this benefit. Other "fringe benefits" received by Darren in 2016 include the opportunity to earn overtime, a "Safety Award" of $107.63, and paid holiday, vacation, and sick leave. However, Darren testified that the overtime and the safety award are not "guaranteed."

Darren testified that his monthly income should be calculated by using his hourly wage of $33.35 and adding in the amount that his employer pays for health insurance. He also indicated that when the court calculates his child support obligation, he should receive a deduction for his health insurance premiums and a credit for his daughter's health insurance premiums.

After trial, the district court entered a decree of dissolution. In the decree, the court ordered Darren to pay child support in the amount of $880 per month. In calculating Darren's child support obligation, the court indicated its finding that Darren's monthly income totals $7,716. The court did not give Darren a deduction or a credit for the health insurance premiums, but did give him a deduction of $375 for his contributions to a retirement account. The court indicated its finding that Michelle's

monthly income totals $3,466 per month. The court did not give Michelle a deduction for any contribution to a retirement account. The court also did not discuss the allocation of childcare expenses in the decree.

After the court entered the decree of dissolution, Darren filed a timely motion to alter or amend, requesting that the court reconsider the calculation of his monthly income for child support purposes. A hearing was held on this motion. At this hearing, Michelle specifically indicated that she had not filed any motions after the decree was entered. However, she offered into evidence copies of recent paystubs and copies of recent daycare bills. Ultimately, the district court denied Darren's motion to alter or amend and did not make any changes to its child support calculation.

Darren appeals, and Michelle cross-appeals.

## ASSIGNMENTS OF ERROR

On appeal, Darren argues that the district court erred in calculating his monthly income for child support purposes. Specifically, he asserts that the district court failed to include in its calculations a deduction and a credit for the health insurance premiums he pays for himself and his daughter.

On cross-appeal, Michelle also argues that the district court erred in calculating Darren's monthly income. Specifically, she asserts that the district court erred in failing to include all of Darren's "fringe benefits" in the calculation of his monthly income; in determining the portions of Darren's income which are taxable and nontaxable; and in including a deduction for Darren's retirement contributions. In addition, Michelle argues that the district court erred in calculating her monthly income because the court failed to include a deduction for her retirement contributions. Finally, she argues that the court erred in failing to allocate childcare expenses between the parties.

## STANDARD OF REVIEW

[1,2] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether

there has been an abuse of discretion by the trial judge. *Patton v. Patton*, 20 Neb. App. 51, 818 N.W.2d 624 (2012). This standard of review applies to the trial court's determinations regarding child support. See *id*. A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id*.

[3] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

## ANALYSIS

### Calculation of Darren's Monthly Income

In calculating Darren's child support obligation, the district court determined Darren's gross monthly income to be $7,716. While the court did not specifically explain how it determined that amount, it appears that the court utilized Darren's hourly wages along with the amount his employer pays for health insurance in its calculation. Darren earns $33.35 per hour and works 40 hours per week. Accordingly, prior to taxes, Darren earns $5,780.67 per month. The evidence revealed that Darren's employer pays for health insurance premiums for Darren and his daughter. The monthly total of those premiums is $1,935.52. When we add Darren's gross monthly earnings to the amount spent on his health insurance premiums, we get $7,716.19, which is, essentially, the amount the district court calculated for Darren's gross monthly income.

In their respective appeals, both Darren and Michelle challenge the district court's calculation of Darren's income. In his appeal, Darren asserts that the district court erred in including the amount his employer pays for health insurance premiums in its calculation of his monthly income, but failing to then provide him with a deduction or a credit for those

health insurance premiums. Upon our review, we conclude that Darren's assertion on appeal has merit.

[4,5] In calculating a party's child support obligation, a deduction shall be allowed for the monthly out-of-pocket cost to the parent for that particular parent's health insurance so long as the parent requesting the deduction submits proof of the actual cost incurred for health insurance. Neb. Ct. R. § 4-205(F) (rev. 2016). The increased cost to a parent for health insurance for the child shall be prorated between the parents; the parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the child. See Neb. Ct. R. § 4-215(A) (rev. 2011).

At trial, Darren offered into evidence proof of the cost of health insurance for himself and his daughter. This evidence indicated that if Darren were only to insure himself, the monthly premium would total $764.87. Darren also insures his daughter, and as a result, his monthly premium totals $1,935.52. Such evidence demonstrates that the increased cost to Darren for his daughter's health insurance is $1,170.65. Normally, pursuant to the Nebraska Child Support Guidelines, Darren should receive a deduction for the amount he pays to insure himself and a credit for the increased amount he pays to insure his daughter. However, the evidence at trial established that Darren does not actually pay anything out of pocket for the health insurance premiums. Instead, his employer pays all of the monthly premiums as a part of his employee benefits. Accordingly, if we consider only Darren's hourly wages in calculating his income, he would receive neither a deduction nor a credit for the payment of health insurance premiums.

As we discussed above, however, the district court did not consider only Darren's hourly wages in calculating his income. Instead, the court calculated Darren's gross monthly income by adding Darren's hourly earnings to the amount

his employer spends on the health insurance premiums. In doing so, the court imputed the cost of the health insurance premiums as income to Darren. When the court imputed the health insurance premiums as income to Darren, it was required to follow the guidelines to provide Darren a deduction and a credit for the payment of the premiums. If the court had included such a deduction and a credit, however, Darren would actually pay less child support than he would if the employer-paid premiums were not imputed to him as income, even if the imputed income was listed as tax exempt. This is clearly an inequitable result, especially when we consider that the purpose of the guidelines is to determine a proper portion of a person's expendable income to be allocated to child support. No part of the health insurance premium is available to Darren to utilize for other purposes. Upon our review, we conclude that the district court abused its discretion in including in its calculation of Darren's income the health insurance premiums paid by Darren's employer.

Darren's monthly income must be calculated by utilizing only his hourly wages and not the amount his employer spends on the health insurance premiums. This calculation eliminates any need to provide Darren with a deduction or a credit for the health insurance premiums and, as a result, leads to a fair and equitable child support calculation. Based on our calculation, Darren's gross monthly income should total $5,781.

In her cross-appeal, Michelle also challenges the district court's calculation of Darren's monthly income. As a part of her argument, she asserts that the district court erred in including the cost of the health insurance premiums in Darren's taxable income, rather than in his nontaxable income. Given our conclusion that the health insurance premiums should not be included at all in the calculation of Darren's monthly income, we need not address this assertion further.

Michelle also asserts that the district court erred in failing to include all of Darren's "fringe benefits" in the calculation of his monthly income. Upon our review of the record,

we cannot say that the district court abused its discretion in failing to include Darren's benefits in the calculation of his monthly income.

At trial, Darren indicated that in 2016, he received certain benefits, beyond his hourly salary, as compensation for his employment. These benefits included payment of health insurance premiums, monthly payments to a retirement plan, the opportunity to earn overtime, a safety award of $107.63, and paid holiday, vacation, personal, and sick leave. We have already determined that the district court should not include the payment of the health insurance premiums in its calculation of his total monthly income. Additionally, we address Darren's retirement benefits separately in our analysis below. Accordingly, in examining the merits of Michelle's assertion about whether all of Darren's benefits should be included in the calculation of his monthly income, we focus on only Darren's opportunity to earn overtime, his safety award of $107.63, and his paid holiday, vacation, personal, and sick leave.

[6] In calculating child support, the total monthly income of a parent should include earnings "derived from all sources." Neb. Ct. R. § 4-204 (rev. 2016). The guidelines also indicate that in calculating a parent's total monthly income:

> The court may consider overtime wages in determining child support if the overtime is a regular part of the employment and the employee can actually expect to regularly earn a certain amount of income from working overtime. In determining whether working overtime is a regular part of employment, the court may consider such factors as the work history of the employee for the employer, the degree of control the employee has over work conditions, and the nature of the employer's business or industry.

*Id.*

[7] The Nebraska Supreme Court provided further guidance on how to calculate a person's income for child support purposes when it held that a flexible approach should be taken in

determining a person's income for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). For example, while a court is allowed to add in-kind benefits, derived from an employer or other third party, to a party's income, a court's findings regarding an individual's level of income should not be based on the inclusion of income that is entirely speculative. See, *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006); *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001).

At trial, Darren testified that the overtime and the safety award are not guaranteed to be a part of his salary, but, rather, these benefits are opportunities to earn additional income. There was no evidence to indicate whether Darren regularly earns overtime pay or exactly how much overtime pay he had earned in the months and years preceding the dissolution proceeding. Similarly, there was no evidence about the requirements for earning the safety award or whether this award had previously been earned by Darren and could be considered a regular part of his annual salary.

Based on the limited evidence presented at trial, we cannot say that the district court erred in excluding from its calculation of Darren's income any overtime pay or the amount of the safety award. There is nothing in the record to demonstrate that these benefits are a regular part of Darren's income. The district court did not abuse its discretion in failing to include such speculative income.

We also conclude that the district court did not err in excluding from its calculation of Darren's monthly income his paid holiday, vacation, personal, and sick leave. Again, there is nothing in the record to indicate that these benefits represent anything more than a substitute for Darren's normal hourly earnings when he is unable to work or chooses to take time off from work. There was nothing to suggest that if Darren does not use these benefits, he will receive an additional monetary payout based on the value of the benefit.

Michelle also challenges the district court's calculation of Darren's monthly income based on the court's inclusion of a deduction for Darren's retirement contributions. Upon our review of the record, we conclude that Michelle's assertion in this regard has merit.

[8] In calculating child support, a parent may receive a deduction for contributions to a retirement plan. Section 4-205(C) of the child support guidelines provides that a parent should be given a deduction for

> [i]ndividual contributions, in a minimum amount required by a mandatory retirement plan. Where no mandatory retirement plan exists, a deduction shall be allowed for a continuation of actual voluntary retirement contributions not to exceed 4 percent of the gross income from employment or 4 percent from the net income from self-employment.

In its calculation of Darren's income, the district court included a deduction of $375 for Darren's contribution to a retirement plan. However, the evidence offered at trial revealed that Darren's employer makes monthly payments to a retirement plan for Darren. There is nothing to indicate that Darren makes any out-of-pocket contributions in excess of his employer's contributions. Because there is nothing to support the district court's inclusion of a $375 deduction for Darren's payment to a retirement plan, we conclude that the court erred in including this deduction.

As we mentioned above, Michelle also asserts that the district court erred in not including in its calculation of Darren's income the amount Darren's employer pays toward his retirement plan. We conclude that the district court did not err in this regard. As a part of the division of marital property, the court awarded Michelle a portion of Darren's retirement account. Given this award, we cannot say that the district court abused its discretion in failing to include any future payments to the retirement account as a part of Darren's income. Moreover, moneys paid into a retirement plan do not constitute

income that is readily available for support. Depending on the retirement plan, said employer deposits may be completely unavailable to access by the employee until retired or may be accessible only as a loan which must be repaid. In any event, no evidence was adduced indicating that Darren could gain access to the contributions made by his employer to his retirement plan. Therefore, we find that the employer's contributions cannot be considered as income to Darren for purposes of a child support calculation.

Upon our review, we find that Darren's gross monthly income should be calculated utilizing only his hourly wages. He should not receive a deduction for the payment of his health insurance premiums, nor should he receive a credit for the payment of his daughter's health insurance premiums. He also should not receive any retirement deduction, since he does not make any out-of-pocket contributions to a retirement account.

### Calculation of Michelle's Monthly Income

In her cross-appeal, Michelle also argues that the district court erred in calculating her monthly income for child support purposes. She asserts that the court should have included in its calculation a deduction for the payments she makes to a retirement plan. We find no merit to Michelle's assertions.

As we discussed above, the guidelines provide that a parent may receive a deduction for actual contributions to a retirement plan. See § 4-205(C). However, at trial, Michelle failed to present any evidence to prove that she currently makes contributions to a retirement plan or to prove the amount of any contributions she makes. Michelle testified that one of the benefits provided to her by her employer is a "401K where [the company] matches 3 percent of what I put in there." She also adduced evidence regarding a retirement account she accrued while working for a former employer. Michelle did not provide any further information at trial about whether

she contributed to the retirement account with her present employer or how much she contributes on a monthly basis.

We do note that at the hearing on Darren's motion to alter or amend, Michelle did offer into evidence copies of her paystubs from June to September 2016. Presumably, these paystubs would indicate whether Michelle contributes to a retirement plan and how much she contributes on a monthly basis. However, we decline to consider these paystubs as evidence because Michelle did not make any postjudgment motion to reopen the evidence or for reconsideration of the decree. In fact, after Michelle submitted the paystubs into evidence, she did not even mention the district court's failure to include in its calculation of her income a deduction for her contributions to a retirement plan. Moreover, it appears that Darren's assertions in his motion to alter or amend were based solely on evidence presented at trial. As such, the information Michelle presented at the hearing was not relevant to Darren's motion.

Given the lack of evidence adduced at trial to support Michelle's claim that she is entitled to a deduction for her contributions to a retirement plan, we cannot say that the district court abused its discretion in failing to allow such deduction in its calculation of Michelle's income for child support purposes.

## Child Support Conclusion

Upon our review, we find that Darren's gross monthly income should be calculated utilizing only his hourly wages. He should not receive a deduction for the payment of his health insurance premiums, nor should he receive a credit for the payment of his daughter's health insurance premiums. He also should not receive any retirement deduction, since he does not make any out-of-pocket contributions to a retirement account. Based on our findings, we have recalculated Darren's child support obligation in the child support worksheet attached to this opinion as appendix A. Ultimately, we modify Darren's child support obligation to be $782 per month.

### Allocation of Childcare Expenses

Finally, Michelle asserts that the district court erred in failing to allocate childcare expenses between the parties. Upon our de novo review of the record, we find Michelle's assertion has merit.

The guidelines provide the following instructions about how childcare expenses should be treated:

> Childcare expenses are not specifically computed into the guidelines amount and are to be considered independently of any amount computed by use of these guidelines. Care expenses for the child for whom the support is being set, which are due to employment of either parent or to allow the parent to obtain training or education necessary to obtain a job or enhance earning potential, shall be allocated to the obligor parent as determined by the court, but shall not exceed the proportion of the obligor's parental contribution . . . and shall be added to the basic support obligation computed under these guidelines.

Neb. Ct. R. § 4-214 (rev. 2016). At trial, Michelle testified that the parties' daughter attends daycare because both Michelle and Darren work. Michelle did not indicate the cost of this daycare, but she did testify that since at least January 2016, she and Darren have been splitting the daycare costs. Michelle testified that she wanted that arrangement to continue. The district court did not address the parties' childcare expenses in the decree.

Based upon the language in § 4-214, we find that the district court erred in failing to address the parties' childcare expenses in the decree. We remand the cause to the district court for a determination of the allocation of the costs of childcare between the parties.

## CONCLUSION

Upon our de novo review, we conclude that the district court erred in its calculation of Darren's child support obligation.

Specifically, we find that the court erred in calculating Darren's monthly income by adding the amount his employer spends on his health insurance premiums to his hourly earnings and by providing Darren with a $375 deduction for his contribution to a retirement plan. We have recalculated Darren's child support obligation, consistent with our findings, in the child support worksheet attached to this opinion as appendix A. We modify Darren's monthly child support obligation to be $782 per month. We also find that the district court erred by failing to allocate the costs of childcare. We remand the cause to the district court to allocate the costs of childcare between the parties.

Affirmed as modified, and cause remanded with direction.

(*See page 117 for appendix A.*)

## APPENDIX A

Case Name: Drabbels v. Drabbels

Worksheet 1 - Basic Income and Support Calculation

Mother: Single / 1.5 Exemptions / Not Self Employed
Father: Single / 1.5 Exemptions / Not Self Employed

| Line | Description | Mother | Father |
|---|---|---|---|
| 1 | Total Monthly Income | $3,466.00 | $5,780.00 |
| 1 | Tax-Exempt Income | $0.00 | $0.00 |
| 2.a | Taxes - Federal | $325.73 | $831.04 |
| 2.a | Taxes - Nebraska | $113.05 | $271.32 |
| 2.b | FICA - Social Security | $214.89 | $358.36 |
| 2.b | FICA - Medicare | $50.26 | $83.81 |
| 2.c | Retirement | $0.00 | $0.00 |
| 2.d | Previously Ordered Support | $0.00 | $0.00 |
| 2.e | Regular Support for Other Children | $0.00 | $0.00 |
| 2.f | Health Insurance Premium for Parent | $0.00 | $0.00 |
| | Other Deductions | $0.00 | $0.00 |
| | Child Tax Credit | ($41.67) | ($41.67) |
| 2.g | Total Deductions | $662.26 | $1,502.87 |
| 3 | Net Monthly Income | $2,803.74 | $4,277.13 |
| 4 | Combined Net Monthly Income | $7,080.87 | |
| 5 | Combined Net Annual Income | $84,970.41 | |
| 6 | Each Parent's Percent | 39.6% | 60.4% |
| 7 | Monthly Support from Table (1 Child) | $1,294.00 | |
| 8 | Health Insurance Premium for Children | $0.00 | $0.00 |
| 9 | Total Obligation | $1,294.00 | |
| 10 | Each Parent's Monthly Share | $512.42 | $781.58 |
| 11 | Credit For Health Insurance Premium Paid | ($0.00) | ($0.00) |
| 12 | Each Parent's Final Share (1 Child, rounded) | $512.00 | $782.00 |

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# In re Interest of Hla H., a child under 18 years of age. State of Nebraska, appellee, v. Hla H., appellant.

903 N.W.2d 664

Filed October 10, 2017. No. A-16-739.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.
3. **Juvenile Courts: Rules of Evidence.** The Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
5. **Rules of Evidence: Hearsay: Words and Phrases.** Neb. Evid. R. 801, Neb. Rev. Stat. § 27-801(3) (Reissue 2016), defines hearsay as 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. One definition of "statement," for the purposes of the Nebraska Evidence Rules, is an oral or written assertion.
6. **Hearsay.** If an out-of-court statement is not offered for proving the truth of the facts asserted, it is not hearsay.
7. **Rules of Evidence: Hearsay.** Apart from statements falling under the definitional exclusions and statutory exceptions, the admissibility of an out-of-court statement depends upon whether the statement is offered

for one or more recognized nonhearsay purposes relevant to an issue in the case.

8. **Hearsay: Words and Phrases.** A verbal act is a statement that has legal significance, i.e., it brings about a legal consequence simply because it was spoken. Words that constitute a verbal act are not hearsay even if they appear to be.
9. **Hearsay.** Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it.
10. ____. A nonhearsay purpose for offering a statement does exist when a statement has legal significance because it was spoken, independent of the truth of the matter asserted.
11. **Rules of Evidence.** Neb. Evid. R. 902, Neb. Rev. Stat. § 27-902 (Reissue 2016), states that certain documents are self-authenticating and extrinsic evidence of authenticity as a condition precedent to admissibility is not required.
12. **Rules of Evidence: Proof.** Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901(1) (Reissue 2016), does not impose a high hurdle for authentication or identification. A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1).
13. **Evidence: Testimony: Proof.** Authentication of letters may be provided by testimony.
14. **Juvenile Courts: Public Officers and Employees: Minors.** Neb. Rev. Stat. § 43-276(2) (Reissue 2016) requires that prior to filing a petition alleging that a juvenile is a juvenile as described in Neb. Rev. Stat. § 43-247(3)(b) (Supp. 2015), the county attorney shall make reasonable efforts to refer the juvenile and his or her family to community-based resources available to address the juvenile's behaviors, provide crisis intervention, and maintain the juvenile safely in the home.
15. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

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

Joe Nigro, Lancaster County Public Defender, and James G. Sieben for appellant.

Joe Kelly, Lancaster County Attorney, and Maureen E. Lamski for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Bishop, Judge.

## I. INTRODUCTION

Hla H. appeals the order of the separate juvenile court of Lancaster County adjudicating him as a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(b) (Supp. 2015) for being habitually truant from school between August 12 and December 18, 2015. At issue in this case is whether the office of the Lancaster County Attorney (County Attorney) fulfilled the statutory duty to make reasonable efforts to refer Hla and his family to community-based resources prior to filing the juvenile petition. We conclude that the County Attorney did, and we therefore affirm the decision of the juvenile court.

## II. BACKGROUND

On January 19, 2016, the State filed a petition alleging that Hla, born in July 2000, was a juvenile within the meaning of § 43-247(3)(b), because he was habitually truant from school between August 12 and December 18, 2015. The State alleged:

> Further, a description of the efforts made by the County Attorney to refer the juvenile and family to community-based resources available to address the juvenile's behavior, provide crisis intervention, and maintain the juvenile safely in the home is as follows:
>
> 1. On or about October 26, 2015, a letter from the Lancaster County Attorney's office was provided to Eh [P.] [Hla's mother] which a) referred the family to a guide of available resources in Lancaster County; b) encouraged the family to work closely with the school to access those or other resources; and c) provided information about how to contact the county's Truancy Resource Specialist if the student/family needed assistance in

> accessing appropriate services to overcome any barriers to regular school attendance that the student/family [was] encountering.

An adjudication hearing was held on June 20 and 23, 2016. Hla and his mother, Eh P., were present at the hearing. Because Eh's native language is Karen, an interpreter was also present.

The State's only witness was Matthew Gerber, an instructional coordinator at Hla's school. Gerber works with students regarding behavioral concerns, attendance, scheduling, and "all the general responsibilities of the student's education." He worked with Hla during the 2015-16 school year.

Exhibit 1, a "Conference Absence Report," was received into evidence without objection. The report contained a number of codes such as "TR" and "TD." Gerber testified that "TR" means "truant" and indicates that the student was absent during that period of the day. "TD" means "tardy" and indicates that the student arrived late to that class period. The report showed that in the fall of 2015, Hla had numerous truancies and tardies in August, September, and October (and by December 18, he had anywhere from 22 to 38 unexcused absences for each class period).

According to Gerber, the school worked with Hla to help him improve his attendance. One of the "primary interventions" the school used was a "collab[o]rative plan meeting" held on October 26, 2015. The meeting was attended by the school's attendance team leader, Hla, Eh, an interpreter, and Gerber. The purpose of the collaborative plan meeting was to determine if there was anything preventing Hla from attending school and to determine any "supports" that could be provided to help improve attendance.

At the collaborative plan meeting, it was noted that Hla had already missed a significant amount of school and that if he continued to miss school, his grades would suffer and he would be referred to the County Attorney once he accumulated 20 days of absences. Hla's attendance record was provided

and explained to Eh, outlining the number of absences Hla had by October 26, 2015. Exhibit 2, the "Collaborative Plan" for the meeting, was received into evidence over Hla's hearsay objection (not challenged on appeal). Gerber testified that exhibit 2 was the agenda for the meeting, and he outlined a series of questions that were asked of Hla and Eh to determine if there were any barriers to school attendance. Neither Hla nor Eh provided any explanation as to why Hla was missing school. The collaborative plan shows that the attendees considered the following to reduce barriers to improve attendance: illness, educational counseling, educational evaluation, referral to community agencies for economic services, family or individual counseling, and assisting the family in working with community services. The form indicates that illness was not a barrier to attendance, and it was determined that none of the listed actions were needed "to reduce barriers to improve regular attendance." All attendees signed the collaborative plan.

At the October 2015 meeting, Hla and his family were given a letter from the County Attorney outlining "[attendance] expectations and possible consequences, as well as resources and places to go for further information." As previously noted, Hla and Eh both signed the collaborative plan (exhibit 2), and Eh initialed the line indicating that she had been provided a copy of the County Attorney's letter. The County Attorney's letter, exhibit 3, was received into evidence over Hla's hearsay and foundation objections. The letter refers families to a school district website for a guide of available resources and encourages families to work with the school to access those or other resources. The letter also provides the contact information for the "Truancy Resource Specialist," who was available to assist the family in accessing resources. Gerber said this letter is given to all families during collaborative plan meetings at the school.

Gerber testified that the attendance team leader explained the purpose of the County Attorney's letter, and this was

interpreted for Eh, but that the interpreter did not translate any specific part of the letter for Eh during the meeting. Gerber believed the interpreter could explain the contents of the letter at the request of the family, but the "word-for-word" translation "couldn't be done during the meeting." There was an opportunity for questions related to the letter, but neither Hla nor Eh indicated they had any questions and neither requested additional services or support from the school to help improve Hla's attendance. Had additional services or support been requested, Gerber said he would have assisted the family in making connections with the appropriate resources. Gerber was asked if Eh was referred to an interpreter service that could be utilized "to try to put these possible community agencies at their disposal." He responded, "No, they were not referred to an interpreter service." After the October 2015 meeting, Gerber continued monitoring Hla's attendance, but his "attendance continued in a negative trajectory" until December 18, when the matter was referred to the County Attorney.

After the State rested, Hla moved to dismiss, arguing that Nebraska truancy law requires the County Attorney to make reasonable efforts to refer Hla's family to community services and that because exhibit 3 (meant to be a referral to services) was not translated for Eh, she did not receive that letter and the State did not meet its burden to prove that she received the referrals. The juvenile court overruled Hla's motion to dismiss, and Hla proceeded with his evidence.

Eh testified via an interpreter. She understood that during the fall of 2015, Hla was missing a lot of school. She tried her best "to tell him and to teach him that he needs to go to school." Eh received telephone calls from the school regarding Hla's attendance. She attended a meeting at the school concerning her son's attendance, and an interpreter was present. When counsel showed her exhibit 3 (the County Attorney's letter), Eh stated that she could not read it and did not recognize it; she cannot read English. She acknowledged, however,

that at the meeting, an interpreter did tell her how to access the services mentioned in the letter. Eh also acknowledged that when asked at the meeting if she had any questions about the letter, Eh said she did not have any questions. Eh testified that the interpreter also gave Eh a telephone number to use "for help." Eh was aware that Hla continued to miss school from the time of the meeting up until December 18.

Eh testified that the interpreter from the October 2015 meeting gave Eh her (the interpreter's) personal telephone number. When asked if she used interpreters for anything outside of school, Eh said "yes." For example, if she received letters or bills in the mail, Eh said, "I have a teacher and I give it to her." At the time of the adjudication hearing, Eh had not had this teacher very long, and the teacher did not attend the October 2015 meeting at the school. Eh also testified that although Hla does not speak fluent English, he is able to function in a school setting speaking English without an interpreter.

Jared Gavin is a social worker with the Lancaster County public defender's office. He was previously employed with the probation department of the Nebraska Supreme Court, where he helped with juvenile reform efforts. Gavin has viewed documents identical or substantially similar to exhibit 3 (County Attorney's letter) in the past. His understanding is that the purpose of the letter is "for the County Attorney to notify a family that assistance is available and that they were being charged with a truancy case in Lancaster County." The letter is written in English, and he had never seen one written in a different language. Gavin is familiar with the website referenced in the letter and had reviewed the website approximately a week before the hearing. According to Gavin, the website is in English and "has the traditional header for Lincoln Public Schools and lists resources available in the community. It's got approximately 18 headers and 93 separate links"; the majority of the links were in English, and he never "[came] across a link in Karen." The website also contained a telephone number for an interpretive service line. Gavin has called the

number on numerous occasions, and each time the person who answered spoke English.

During closing arguments, the State argued that Hla had missed a significant amount of school during the first 4 months of the 2015-16 school year. A formalized intervention was held in October 2015, with an interpreter present to assist the family's understanding. Eh was aware of Hla's attendance problems, understood the purpose of the meeting, and had no additional questions at the meeting. The State contends that the statutory requirement regarding reasonable efforts was met and that the State met its burden of proving the allegations in the truancy petition.

Hla argued that the only issue in the case was whether reasonable efforts were made to refer the family to community-based resources and that the burden is on the State to show these referrals were made. He contends that because Eh did not understand the County Attorney's letter and because the letter was not translated for her, she did not receive the letter the same way a similarly situated English-speaking or English-reading parent would have. Additionally, the services referenced in the letter were not available in Eh's native language. Accordingly, it was Hla's position that the "school" did less than is required to be considered a reasonable effort.

The juvenile court entered an order on July 19, 2016, finding that Hla was a juvenile as defined by § 43-247(3)(b) for being habitually truant from school between August 12 and December 18, 2015. The court found:

> It is significant that [Eh], when she testified, expressed concern about [Hla's] failure to attend school and her own efforts to encourage school attendance and that she tried her best to "tell him and teach him" that he needed to attend school. [Eh] clearly wants [Hla] to attend school and appears to have difficulty helping him achieve that goal of regular attendance.

The court found that the "school's actions" met the statutory requirements to assist Hla in correcting his truancy and

that "[f]ailure to comply with statutory requirements by the school is not a defense in this case." (The juvenile court never specifically discussed whether the County Attorney complied with the statutory requirements pursuant to Neb. Rev. Stat. § 43-276(2) (Reissue 2016).) Finally, the court found that "[i]n this case[,] clearly excessive absenteeism has been shown, [and] no defense has been presented to that absenteeism that would cause a finding [that] the petition shouldn't be adjudicated." Hla timely appealed the juvenile court's order.

## III. ASSIGNMENTS OF ERROR

Hla assigns that the juvenile court erred in finding there was sufficient evidence to prove that he had been habitually truant as alleged in the petition, because of the following: (1) Exhibit 3, a necessary component to prove the State's case, was improperly received over his hearsay and foundation objections, and (2) even if exhibit 3 was validly received, there was insufficient evidence to find that the County Attorney made reasonable efforts to refer him and his family to community-based services prior to filing the petition.

## IV. STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014).

[2] The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court. *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

## V. ANALYSIS

At issue in this case is whether the County Attorney fulfilled the statutory duty to make reasonable efforts to refer Hla and his family to community-based resources prior to filing the petition. Section 43-276(2), which became effective on August 30, 2015, states:

> Prior to filing a petition alleging that a juvenile is a juvenile as described in subdivision (3)(b) of section 43-247, the county attorney shall make reasonable efforts to refer the juvenile and family to community-based resources available to address the juvenile's behaviors, provide crisis intervention, and maintain the juvenile safely in the home. Failure to describe the efforts required by this subsection shall be a defense to adjudication.

And § 43-247 states in relevant part:

> The juvenile court in each county shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile . . . (b) who, by reason of being wayward or habitually disobedient, is uncontrolled by his or her parent, guardian, or custodian; who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school . . . .

(Effective July 21, 2016, the relevant language applicable here is still found in § 43-247(3)(b), but commencing July 1, 2017, the statute requires that the child be 11 years of age or older.) No published case law in Nebraska has addressed the application of § 43-276(2), as set forth above, to any juvenile proceeding under § 43-247(3)(b). But, see, *In re Interest of Sandra I.*, No. A-16-371, 2016 WL 6596097 (Neb. App. Nov. 8, 2016) (selected for posting to court website).

The State argues the County Attorney's letter contained a referral to services in fulfillment of the obligation under § 43-276(2).

### 1. Exhibit 3

[3] Hla argues the juvenile court erred in receiving exhibit 3 (County Attorney's letter) over his hearsay and foundation objections. The Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code. *In re Interest of Ashley W.*, 284 Neb. 424, 821

N.W.2d 706 (2012). See, also, Neb. Rev. Stat. § 43-279(1) (Reissue 2008).

The undated typewritten letter was addressed to the "Parent(s) or Guardian(s)" of Hla, whose name was handwritten. The letterhead said "**Joe Kelly**[,] Lancaster County Attorney" and contained the seal of Lancaster County, Nebraska. The letter concluded with:

> Sincerely,
> Joe Kelly
> Lancaster County Attorney
> [Signature of Alicia B. Henderson]
> Alicia B. Henderson
> Chief Deputy/Juvenile Division
> Lancaster County Attorney's Office

For the reasons set forth below, we conclude the juvenile court did not err in admitting the letter into evidence.

(a) Hearsay

Hla asserts the County Attorney's letter is hearsay and is not admissible under any applicable hearsay exception. He claims the State offered the letter to show that the County Attorney referred Hla and his family to community-based resources prior to the filing of the petition, as required by § 43-276(2).

[4] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Here, the record shows only that the court overruled the objection without explanation.

[5] Neb. Evid. R. 801, Neb. Rev. Stat. § 27-801(3) (Reissue 2016), defines hearsay as "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[.]" One definition of "statement," for the purposes of

the Nebraska Evidence Rules, is "an oral or written assertion." Rule 801(1)(a).

[6,7] The Nebraska Supreme Court has stated, "If an out-of-court statement is not offered for proving the truth of the facts asserted, it is not hearsay." *State v. McCave*, 282 Neb. 500, 531, 805 N.W.2d 290, 316-17 (2011). But it does not necessarily follow that such a statement is admissible in a particular case. *Id*. Apart from statements falling under the definitional exclusions and statutory exceptions, the admissibility of an out-of-court statement depends upon whether the statement is offered for one or more recognized nonhearsay purposes relevant to an issue in the case. *Id*.

[8] The State contends that the letter was offered for a permissible, nonhearsay purpose. Specifically, that the letter had legal significance, independent of the truth of the matter asserted, because it qualified as a "verbal act." Brief for appellee at 7. "A verbal act is a statement that has legal significance, i.e., it brings about a legal consequence simply because it was spoken." *McCave*, 282 Neb. at 531, 805 N.W.2d at 317. "[W]ords that constitute a verbal act are not hearsay even if they appear to be." *Id*. Common examples of verbal acts are words that constitute contractual agreements or terms, or words that establish an agency relationship; they are words that have legal significance independent of their truth. See *McCave, supra*.

[9,10] Legal commentators have stated:

> A verbal act is an utterance of an operative fact that gives rise to legal consequences. Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it.

5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 801.11[3] (Joseph M. McLaughlin ed., 2d ed. 2017). See, also, *McCave, supra* (where testimony is offered to establish existence of statement rather than to prove truth of

that statement, hearsay rule does not apply; this does not mean that any out-of-court statement is admissible to show that it was made; but nonhearsay purpose for offering statement does exist when statement has legal significance because it was spoken, independent of truth of matter asserted).

As another commentator has explained:

> If the mere fact that the words were spoken creates, alters, or completes a legal relationship then the assertion is not hearsay. If the words spoken out-of-court have a legal effect of their own, not hearsay. If the utterance is the issue, not hearsay. Sometimes the words themselves are the issue (or, often more precisely, *an* issue). Sometimes the words themselves are the principal fact in controversy. Examples include:
>
> • In a breach of contract action, the terms of a contract.
>
> • In a defamation action, the allegedly libelous words.
>
> • In an employment discrimination case, the racially derogatory words that created the hostile work environment.
>
> • In a tort action for intentional infliction of emotional distress, words used to inflict the distress.
>
> • In a criminal action, words that are an element of a crime . . . ; or words that are at issue in an affirmative defense to a criminal action . . . .
>
> These cases involve words that have a legal effect that is not concerned with the out-of-court declarant's memory, perceptions, or honesty. In these cases, the link between the words spoken out of court and the issues in the case is direct, without having to travel through the sincerity of the person who spoke the words or the accuracy of that person's perceptions or memory. This is one way of looking at the question of whether counsel is offering the out-of-court assertion to prove the truth of the matter asserted or just to show that it was made.

G. Michael Fenner, The Hearsay Rule 25-26 (3d ed. 2013). See, e.g., *U.S. v. Dupree*, 706 F.3d 131 (2d Cir. 2013) (statements

that in themselves affect parties' legal rights are not hearsay; temporary restraining order issued to restrain defendant from removing assets was not hearsay, as it was verbal act and was offered as well to show defendant was on notice); *State v. McCave*, 282 Neb. 500, 531, 805 N.W.2d 290, 317 (2011) (defendant's stepmother's out-of-court statements giving defendant permission to be on property were "verbal act[s]" relevant to central issue in trespass case of whether defendant intended to be on property knowing he was not licensed or privileged to do so, and thus statements were not inadmissible as hearsay).

In the instant case, the County Attorney's letter was offered to show that Hla and his family had been referred by the County Attorney to community-based resources to help address Hla's truancy problem before a petition was filed. Whether the letter had a legal effect does not depend upon the out-of-court declarant's credibility. See *McCave, supra.* And the letter had independent legal significance because it shows that referrals were made, but does not go to the truth of the matter asserted, i.e., that the efforts and referrals were reasonable. The County Attorney's letter (exhibit 3) constituted a verbal act and was not hearsay.

(b) Foundation

Exhibit 3 was admitted into evidence based on the testimony of Gerber, an instructional coordinator at Hla's school. Hla contends that exhibit 3 should not have been admitted because insufficient foundation was laid to authenticate the letter. Specifically, he argues that Gerber was not the author of the letter, and he "could not identify when the letter was drafted, who drafted the letter, or properly attest to the accuracy and validity of the signature." Brief for appellant at 11. In support of his argument, Hla cites to *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015). However, the *Richards* case, which involved an anonymous letter offered into evidence at

a harassment protection order hearing, is factually distinguishable from the instant case.

[11] Although Hla argues that insufficient foundation was laid via Gerber's testimony to authenticate the County Attorney's letter, Hla fails to consider that the letter might be self-authenticating under Neb. Evid. R. 902, Neb. Rev. Stat. § 27-902 (Reissue 2016). Rule 902 states in relevant part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone or the Trust Territory of the Pacific Islands, *or of a political subdivision, department, officer, or agency thereof*, and a signature purporting to be an attestation or execution.

(Emphasis supplied.) Here, the document's letterhead said "**Joe Kelly**[,] Lancaster County Attorney" and contained the seal of Lancaster County. It was signed by "Alicia B. Henderson[,] Chief Deputy/Juvenile Division[,] Lancaster County Attorney's Office." Thus, we conclude that the County Attorney's letter was self-authenticating under rule 902(1).

[12] Even if the letter was not self-authenticating under rule 902(1), we would still find that the letter was properly authenticated by Gerber's testimony. Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901(1) (Reissue 2016), states, "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." Rule 901 does not impose a high hurdle for authentication or identification. *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014). A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. *Id.* If the proponent's showing is sufficient to support a finding that

the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1). *Id*. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. *Id*.

[13] Authentication of letters may be provided by testimony. See rule 901(2)(a). See, also, *Richards, supra*. To properly authenticate a letter, the witness must provide personal knowledge regarding the important facts surrounding the letter. *Id.* See *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992).

Gerber testified that one of his job duties includes working with students who are excessively absent. One of the "primary interventions" used with Hla was the collaborative plan meeting held on October 26, 2015. The document identified as exhibit 3 is the County Attorney's letter that was provided to Hla and his mother on October 26. Gerber stated that the County Attorney provided the form letter, a copy of which is printed out and given to all families during collaborative plan meetings at the school; the letter outlines resources and places to go for further information. Gerber's testimony confirmed the source of the letter and satisfied the requirement to show the letter was what it claimed to be: a letter from the County Attorney that was provided to the family of a child struggling with attendance at school, referring them to available community resources. Thus, the juvenile court did not err by receiving the letter over Hla's foundation objection.

### 2. Reasonable Efforts

Hla argues that even if exhibit 3 was validly received, there was insufficient evidence to find the County Attorney made reasonable efforts to refer him and his family to community-based services prior to filing the petition as required by § 43-276(2). Hla asserts the letter was insufficient to fulfill the requirements of § 43-276(2), because it did "not give [him] any information about services that will address the specific

barriers that make attendance at school difficult." Brief for appellant at 14. He argues the letter "is a generic form letter, given to every family that has a juvenile struggling with school attendance," and "[i]n this case, the letter was not even in a language that the person it was given to could comprehend." *Id*. While it is true the letter is a form letter, that factor does not disqualify its contents from consideration of the County Attorney's efforts under § 43-276(2).

[14,15] Section 43-276(2) requires the County Attorney to "make reasonable efforts to refer the juvenile and family to community-based resources available to address the juvenile's behaviors, provide crisis intervention, and maintain the juvenile safely in the home." Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Interest of Danajah G. et al.*, 23 Neb. App. 244, 870 N.W.2d 432 (2015). There is no ambiguity in the statute's language; its meaning is straightforward. We therefore review the record to determine whether the County Attorney made reasonable efforts to refer Hla and his family to community-based resources to address matters related to Hla's habitual truancy.

At the collaborative plan meeting, the school provided Hla and Eh with the letter prepared by the County Attorney. The letter specifically requested that the family "review the 'Lancaster County Resource Guide' found under 'Community Resources' on LPS's Parent Page at http://www.lps.org/parents/." The letter advised the family to follow up with any programs described in the guide that "may help you address your student's behaviors, provide crisis intervention, and maintain your student safely in your home." The letter also stated, "If you need help accessing any of those resources or determine that some other kind of assistance would be most beneficial to your family, we ask that you work closely with your school as part of the collaborative planning process." The letter also advised that there is a person on staff at the "Lincoln/Lancaster County

Human Services Office" who can assist the family in accessing resources or determining whether other resources are available to address "any barriers" to the student's regular attendance at school. The telephone number and office hours of the "Truancy Resource Specialist" were provided.

Gerber testified this letter was provided to Hla and his mother at the collaborative plan meeting in an effort to improve attendance. He confirmed the letter was meant to serve as a way to assist the family in getting the necessary community services. Both Hla and Eh signed the collaborative plan. And Eh initialed Hla's collaborative plan confirming her receipt of the letter. Eh's initials appear in the blank line next to this statement in the plan: "7. Provided a copy of the County Attorney Community-Based Resources Referral Letter to the family, as indicated by their initials. Parent/Guardian initials ____." Eh testified that at the meeting, an interpreter told her how to access the services mentioned in the letter and gave her a telephone number to use "for help." When asked at the meeting if she had any questions about the letter, Eh said she did not have any questions. Hla was also present for this meeting and asked no questions about the information contained in the letter.

It is important to note that in this case, when Hla, Eh, and school officials went through the collaborative plan, no specific barriers to Hla's attendance were identified. The collaborative plan states that the attendees considered the following to reduce barriers to improve attendance: illness, educational counseling, educational evaluation, referral to community agencies for economic services, family or individual counseling, and assisting the family in working with community services. It was determined that illness was not a barrier to attendance, and it was further determined that none of the listed actions were needed "to reduce barriers to improve regular attendance." Therefore, it is unclear how the letter failed to "give [Hla] any information about services that will address the specific barriers that make attendance at school difficult," brief for appellant at 14,

when no barriers were identified or otherwise discussed by Hla or his mother at the meeting.

Furthermore, we do not find the language barrier to be an issue in this case. As noted previously, Hla does not raise this issue as to his own understanding of the letter's content; rather, he focuses on Eh's inability to understand the letter. Eh was given a copy of the letter at the October 2015 meeting. Although the letter was not written in Eh's native language, Eh testified that the interpreter told her how to access the services mentioned in the letter. And when asked at the meeting if she had any questions about the letter, Eh said she did not have any questions. Additionally, Gerber testified the contents of the letter could be translated at the request of the family. And Eh testified the interpreter gave Eh her (the interpreter's) personal telephone number. Finally, when Eh was asked if she used an interpreter "for anything outside of school," she said, "Yes." Hla and his family clearly had sufficient resources available to them to have the letter translated if necessary and to help them access any necessary community programs. However, Gerber testified neither Hla nor Eh requested additional services or "supports" from the school to help improve Hla's attendance. Had additional services or support been requested, Gerber said he would have assisted the family in making connections with the appropriate resources.

The record before us reveals that the County Attorney and the school engaged in a coordinated effort to refer community-based resources to Hla and his family to help correct attendance problems before a petition for habitual truancy was filed in the juvenile court. The County Attorney's letter referred the family to various available community-based resources, which included website resources, as well as specific contact information for a "Truancy Resource Specialist." Hla and his family were provided an opportunity to ask questions about the resources at the collaborative plan meeting, and they could have sought additional help with regard to accessing those resources. Also, the interpreter at the meeting provided

personal contact information for further assistance to the family. Upon our de novo review, we find there was sufficient evidence that the County Attorney complied with the "reasonable efforts" requirement of § 43-276(2) as applied to the habitual truancy provision of § 43-247(3)(b). To be clear, this court's conclusion with regard to the County Attorney's "reasonable efforts" in this case is limited solely to efforts pertaining to habitual truancy and not to other juvenile behaviors encompassed by § 43-247(3)(b).

## VI. CONCLUSION

For the reasons stated above, we find the County Attorney met the statutory obligation under § 43-276(2) as applied to the habitual truancy provision of § 43-247(3)(b). We further find the juvenile court properly adjudicated Hla as a juvenile within the meaning § 43-247(3)(b) for being habitually truant from school.

Affirmed.

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

# State of Nebraska, appellee, v. Brian P. Robeson, appellant.

903 N.W.2d 677

Filed October 17, 2017. No. A-16-1056.

1. **Constitutional Law: Waiver: Appeal and Error.** In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits unless the trial court abused its discretion.
3. **Sentences: Words and Phrases: Appeal and Error.** An appellate court reviews criminal sentences for an 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. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.
5. **Criminal Law: Presentence Reports.** The plain language of Neb. Rev. Stat. § 29-2261(1) (Reissue 2016) provides that a presentence investigation is generally required in felony cases; however, there are exceptions under which such an investigation is unnecessary.
6. **Presentence Reports.** A presentence investigation may be impractical where another investigation had just been completed.
7. **Presentence Reports: Waiver.** A presentence investigation may be waived.
8. **Attorney and Client: Waiver.** A defendant may waive a right by silently acquiescing to the waiver given by his counsel, and by failing to object and raise the issue to a trial court.

9. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
10. ____. Neb. Rev. Stat. § 29-2204 (Reissue 2016) requires a sentence for a Class II felony to have different minimum and maximum terms of imprisonment.
11. **Sentences: Time.** Neb. Rev. Stat. § 29-2204 (Reissue 2016) is not effective unless the offense was committed on or after August 30, 2015.
12. ____: ____. When an element of the charged offense occurred prior to August 30, 2015, Neb. Rev. Stat. § 29-2204 (Reissue 2016) does not apply to the defendant's sentence.
13. **Sentences.** A sentence with the same minimum term and maximum term is an indeterminate sentence.
14. **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.
15. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
16. **Effectiveness of Counsel: Proof: Appeal and Error.** General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Mikki C. Jerabek for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Arterburn, Judge.

## I. INTRODUCTION

Brian P. Robeson appeals from his plea-based conviction for first degree sexual assault. On appeal, Robeson asserts that the district court erred in imposing an excessive sentence and in sentencing him without first obtaining a presentence investigation report. Robeson also asserts that he received ineffective assistance of counsel. For the reasons set forth herein, we affirm.

## II. BACKGROUND

On January 4, 2016, the State filed an information charging Robeson with two counts of first degree sexual assault of a child, in violation of Neb. Rev. Stat. § 28-319.01(1)(b) (Reissue 2016), each a Class IB felony. On September 22, a hearing was held. At this hearing, defense counsel informed the district court that a plea agreement had been reached. Counsel indicated that as a part of the plea agreement, Robeson would plead guilty to one count of first degree sexual assault, as alleged in the amended information. The State was granted leave to file an amended information charging Robeson with two counts of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 2016), each a Class II felony. The State agreed to dismiss the second count of first degree sexual assault alleged in the amended information as a part of the plea agreement. Also as a part of the plea agreement, Robeson and the State would jointly recommend a sentence of 40 to 40 years' imprisonment.

The State provided a factual basis for Robeson's plea to first degree sexual assault. According to that factual basis, Robeson was a teacher who began a romantic relationship with one of his seventh grade students. Robeson was initially the victim's mentor, but the relationship escalated into their kissing and having sexual intercourse on multiple occasions. When the victim was interviewed, she said that she and Robeson were dating and that she planned on marrying him and having children with him. When Robeson was

interviewed by law enforcement, he admitted that he loved the victim and was not ashamed of his relationship with her. He described that he began talking to the victim when she was 12 years old but did not begin intimate contact with her until she was 13 years old. He admitted that he engaged in sexual intercourse with the victim at various locations, including her house and his car. Robeson was 34 to 35 years old during this time, and the victim was 13 to 14 years old. The sexual penetration occurred "[o]n or about" September 1, 2014, through December 27, 2015.

The district court found that Robeson understood the nature of the charge against him and the possible sentence; that his plea was made freely, knowingly, intelligently, and voluntarily; and that the factual basis supported his plea. The court then accepted Robeson's guilty plea to first degree sexual assault.

After the court accepted Robeson's guilty plea, defense counsel indicated to the court that "in light of the plea agreement we're asking for an expedited sentencing." The court then confirmed with counsel that Robeson was waiving his right to have a presentence investigation report completed.

A sentencing hearing was held on October 11, 2016. At the start of this hearing, defense counsel asked the court for "a short postponement" of sentencing. The court denied this request. Defense counsel and Robeson then provided statements to the court wherein each asked for leniency and "mercy" from the court. In fact, defense counsel specifically asked the court to consider a minimum sentence that is "slightly less" than the minimum of 40 years' imprisonment the parties had agreed to recommend as part of the plea agreement.

In response to the statements of defense counsel and Robeson, both the State and the district court questioned whether Robeson wished to withdraw his plea so that he did not have to agree to jointly recommend a sentence of 40 to 40 years' imprisonment. The court indicated to Robeson that it was "not going to consider less than the plea agreement as that

was the plea agreement." Robeson briefly spoke with counsel and then explicitly indicated that he did not want to withdraw his plea. He also stated as follows:

> Before the sentence I talked at length with my lawyer about the 40 to 40 and how I just wanted a chance to parole and how I didn't agree with it, but I felt stuck. I felt that that was the best I was going to get. All I did was come here today to try and plead with you to please understand the situation and to give me a chance at parole. I'm not trying to undermine anybody, the State or anything for [the] family [of the victim]. And I certainly don't want to put them through any more.

The court sentenced Robeson to 40 to 40 years' imprisonment. Robeson appeals.

## III. ASSIGNMENTS OF ERROR

On appeal, Robeson asserts that the district court erred in (1) sentencing Robeson without first obtaining a presentence investigation report, (2) imposing an excessive sentence which did not take into account the mitigating factors present in the case, and (3) imposing a minimum sentence that was the same as the maximum sentence. Robeson also asserts that he received ineffective assistance of counsel when counsel advised him to enter into the plea agreement with the State and failed to request the completion of a presentence investigation report.

## IV. STANDARD OF REVIEW

[1] In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review. *State v. Qualls*, 284 Neb. 929, 824 N.W.2d 362 (2012).

[2,3] An appellate court will not disturb a sentence imposed within the statutory limits unless the trial court abused its discretion. *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016). An appellate court reviews criminal sentences for an

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. *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

[4] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. See *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017). We determine as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance. *Id*.

## V. ANALYSIS

### 1. Imposing Sentence Without Presentence Investigation Report

After the district court accepted Robeson's guilty plea at the September 2016 hearing, the following discussion was had:

> [The court:] I'm going to continue sentencing, not order — I think by agreement of the parties, the Court is not going to order a presentence investigation report, is that correct?
>
> [The State:] Yes, Your Honor, we would — the State would just ask for a period of time before sentencing to allow for victim impact statements to be provided by the victim and her family.
>
> [Defense counsel:] And Judge, in light of the plea agreement we're asking for an expedited sentencing, that is true.
>
> THE COURT: And your client is waiving his right to have a presentence investigative report be done, is that correct?
>
> [Defense counsel:] Yes.

> THE COURT: Okay. I will continue this matter for an expedited sentencing to allow the State — in order to get victim impacts. And for . . . Robeson to get anything he wants the Court to consider for sentencing. And in light of the plea agreement I think an expedited sentencing is warranted.

On appeal, Robeson challenges the district court's decision to impose a sentence without first requiring Robeson to participate in a presentence investigation. Specifically, Robeson alleges that he did not validly waive his right to a presentence investigation report and that, as a result, the court was required to order that a presentence investigation report be completed. Upon our review, we do not find that the district court erred in concluding that Robeson validly waived his right to a presentence investigation report.

[5] Neb. Rev. Stat. § 29-2261(1) (Reissue 2016) provides that unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation. The plain language of § 29-2261(1) provides that a presentence investigation is generally required in felony cases; however, there are exceptions under which such an investigation is unnecessary.

[6,7] The first such exception is set out in § 29-2261(1) itself; an investigation is not necessary if it would be "impractical." The Nebraska Supreme Court has explained that a presentence investigation may be impractical where another investigation had just been completed. See *State v. Qualls*, 284 Neb. 929, 824 N.W.2d 362 (2012). In addition to the statutory exception, the Supreme Court has held that such a presentence investigation may be waived. See *id.* See, also, *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986). A waiver is defined as

> the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. . . . A voluntary

> waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.

*State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986) (citations omitted).

[8] At the September 2016 hearing, the district court specifically asked whether it was Robeson's intention to waive his right to a presentence investigation report. Robeson's counsel answered in the affirmative. We note that contrary to Robeson's assertions in his brief on appeal, the fact that Robeson, himself, did not affirmatively waive his right to the presentence investigation report is not determinative. The Nebraska Supreme Court has previously held that a defendant may waive a right by silently acquiescing to the waiver given by his counsel, and by failing to object and raise the issue to a trial court. See *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946). See, also, *State v. Sayers*, 211 Neb. 555, 319 N.W.2d 438 (1982) (noting that courts have found implied acquiescence of defendant's rights when counsel speaks on defendant's behalf and defendant is present, but remains silent).

In his brief on appeal, Robeson acknowledges that counsel did agree that Robeson was waiving his right to the presentence investigation report. However, he asserts that such a waiver was not knowingly and voluntarily given, because he was not properly informed of certain facts, including that a presentence investigation report is mandatory prior to a felony sentencing. In addition, Robeson asserts that the court failed to "make any inquiry into whether . . . Robeson understood this right but nonetheless wished to waive it." Brief for appellant at 11. To support his assertions, Robeson relies on this court's decision in *State v. Kellogg*, 10 Neb. App. 557, 633 N.W.2d 916 (2001).

In *State v. Kellogg, supra*, the defendant pled no contest to a burglary charge and pled guilty to two forgery charges. After the trial court accepted the pleas, both the State and defense counsel indicated their request that the defendant undergo a

"'90-day evaluation at the Department of Corrections.'" *Id*. at 558, 633 N.W.2d at 918. The plea hearing was concluded "with no one ever mentioning 'presentence report' or 'presentence investigation,'" and no presentence investigation was ever completed prior to sentencing. *Id.* at 559, 633 N.W.2d at 919. On appeal, the defendant argued that he received ineffective assistance of counsel because trial counsel did not request a presentence investigation.

In our analysis in *Kellogg*, we found that the defendant did not waive his right to a presentence investigation, because "the record lacks any showing that [he] was aware that a presentence investigation was mandatory before a felony sentencing . . . nor does the record show that [he] was aware that having such an investigation was his 'right' . . . ." *Id*. at 565, 633 N.W.2d at 923. We stated, "The fact that a presentence investigation was never even discussed in this entire plea-taking and sentencing process is of no small consequence and also precludes a finding that there was a waiver." *Id.* at 566, 633 N.W.2d at 923. Ultimately, we concluded that the court erred in sentencing the defendant without having a presentence investigation and without a valid waiver thereof on the record. *State v. Kellogg, supra*. We vacated the sentence imposed and remanded the cause to the district court with directions to have a presentence investigation completed and then to resentence the defendant. *Id*.

We find the facts of *State v. Kellogg, supra*, to be distinguishable from the facts presented by this case. In *Kellogg*, a presentence investigation was never even mentioned to the defendant. Accordingly, he was never informed that he had a right to such an investigation prior to sentencing. Here, during the September 2016 hearing, the court specifically inquired whether Robeson was waiving his "right" to a presentence investigation report. Defense counsel indicated that Robeson was waiving his right, and Robeson did not contest counsel's statement. As such, the record in this case clearly indicates that, at the least, Robeson knew he had a right to a presentence investigation report.

We find the facts of this case to be more akin to the facts in *State v. Qualls*, 284 Neb. 929, 824 N.W.2d 362 (2012). In that case, the defendant pled guilty to theft by deception. After the court accepted the defendant's plea, the court inquired about whether the defendant wished to have a presentence investigation report completed prior to sentencing:

> "I do need to advise you that since this is a felony offense, you do have a right to have a presentence investigation report prepared in this case.
>
> "Your attorney has indicated that you wish to waive that right and have me do sentencing based upon, I believe, the reports and your criminal history and then any other information you wish to present.
>
> "Do you wish to waive your right to a presentence report, sir?"

*Id.* at 930, 824 N.W.2d at 363. The defendant indicated that he did wish to waive his right to the presentence investigation report. He also indicated that no one had threatened him or promised him anything in order to induce his waiver and that his waiver was freely and voluntarily given.

On appeal, the defendant argued that the court's advisory was insufficient to inform him of his right to a presentence investigation report. *State v. Qualls, supra*. Specifically, he asserted that he was not informed that a presentence investigation report was mandatory, that the lack of a presentence investigation report would mean that an appellate court would not have the benefit of the contents of such a report, and that the sentencing court was unable to consider all of the relevant factors without such a report. The Supreme Court found his assertion to be without merit. The court stated that "'a formalistic litany is not required'" to establish the waiver of a statutory right and that a review of the totality of the circumstances established that the defendant had been adequately informed of his right to a presentence investigation report and had validly waived that right. *Id*. at 935, 824 N.W.2d at 366.

Clearly, in *State v. Qualls, supra*, the district court's discussion of the defendant's right to a presentence investigation report prior to sentencing was more thorough than the district court's discussion with Robeson at the September 2016 hearing. In fact, we believe that the discussion elicited by the district court in *Qualls* is the better practice, as the court more clearly explained the defendant's right to a presentence investigation report and established the defendant's valid waiver of that right by eliciting a response directly from the defendant. However, given the totality of the circumstances present in this case, we find the district court's discussion about Robeson's right to a presentence investigation report and defense counsel's representation that Robeson was waiving that right was sufficient to establish a valid waiver of that right. Robeson was clearly informed he had the right to a presentence investigation report, and his counsel indicated Robeson's desire to waive that right without any further discussion or objection by Robeson. Moreover, Robeson had previously indicated his desire to have an expedited sentencing hearing, and as part of his plea agreement, he had jointly recommended a sentence to the district court. At the sentencing hearing, Robeson's counsel asked for a postponement, but this request did not appear to be based on a desire to obtain a presentence investigation report. After the request for the postponement was denied, counsel indicated that he knew of "no other" legal reason why the court should not impose a sentence at that time. Robeson remained silent during this exchange and, as such, appeared to agree with his counsel's statement. Later, both Robeson and his counsel were permitted to provide the court with lengthy statements about the mitigating factors present in the case and about Robeson's present circumstances.

While the district court could have been more thorough in its discussion with Robeson about his right to a presentence investigation report, on these facts, we cannot say that the court clearly erred in finding that Robeson's waiver of his right to that report was valid.

### 2. Excessive Sentence

Robeson asserts that the district court imposed an excessive sentence because it failed to "seriously consider all of the mitigating factors" present in this case, brief for appellant at 17, including his young age and ability to be rehabilitated, his level of education and his career as a teacher, his difficult childhood, his struggle with alcoholism, his lack of intent to harm the victim, his strong relationship with his young children, his lack of a violent criminal history, and his cooperation with authorities. Upon our review, we conclude that Robeson's assertion has no merit.

Robeson pled guilty to first degree sexual assault, a Class II felony. A Class II felony is punishable by 1 to 50 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 2016). Robeson was sentenced to 40 to 40 years' imprisonment. As such, his sentence was clearly within the statutory limits.

Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, an appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016). An appellate court reviews criminal sentences for an 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. *Id*.

[9] In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id*.

At the outset of our analysis, we note that Robeson jointly recommended that he receive a sentence of 40 to 40 years' imprisonment as a part of his plea agreement. Given

Robeson's decision to recommend the sentence that he is now challenging as excessive, we do not disagree with the State's assertion that Robeson's argument on appeal is "disingenuous." Brief for appellee at 10.

Moreover, our review of the record reveals that both Robeson and his trial counsel were given the opportunity to make lengthy statements prior to Robeson's sentencing. During these statements, Robeson and his counsel directed the court's attention to all of the mitigating factors present in this case. Prior to imposing sentence, the district court stated, "In order to determine an appropriate sentence I've taken into consideration all of the information and argument presented here today . . . ." The court went on to state that based upon its consideration of Robeson's "age, mentality, education, experience, . . . background, past criminal record, nature of this offense, and motivation for this offense, the Court is going to go along with the agreement." The court's comments during the sentencing hearing refute Robeson's assertion on appeal that the court failed to consider all of the relevant mitigating factors present in this case.

Upon our review, we find that Robeson's sentence is not excessive or an abuse of discretion and is therefore affirmed.

### 3. Imposing Identical Minimum and Maximum Terms of Imprisonment

Robeson also asserts that the district court erred in imposing a sentence of 40 to 40 years' imprisonment because the imposition of "a sentence with identical minimum and maximum terms of imprisonment" violates Neb. Rev. Stat. § 29-2204(1) (Reissue 2016) and because such a sentence is "a de facto determinate sentence," which does not provide an opportunity for Robeson to be paroled within a reasonable time. Brief for appellant at 26.

#### (a) § 29-2204

[10] The most recent version of § 29-2204 provides, in part, that when a defendant is sentenced on a Class II felony, the

sentencing court "shall fix the minimum and the maximum terms of the sentence to be served within the limits provided by law" and the minimum sentence "shall be any term of years less than the maximum term imposed by the court." This language was included in § 29-2204 as part of the sentencing changes made by 2015 Neb. Laws, L.B. 605. Based upon our reading of the revised language of this section, we agree with Robeson's assertion that the most recent version of § 29-2204 requires a sentence for a Class II felony to have different minimum and maximum terms of imprisonment. However, we disagree with Robeson's assertion that the requirements of § 29-2204 apply to his sentence in this case.

[11] Neb. Rev. Stat. § 28-116 (Reissue 2016) states in part:

> The changes made to the sections listed in this section by Laws 2015, LB605, shall not apply to any offense committed prior to August 30, 2015. Any such offense shall be construed and punished according to the provisions of law existing at the time the offense was committed. For purposes of this section, an offense shall be deemed to have been committed prior to August 30, 2015, if any element of the offense occurred prior to such date.

The statute then lists sections subject to the provision. Section 29-2204 is one of the sections listed within § 28-116. As such, the recent revisions made to the language of § 29-2204 are not effective unless the offense was committed on or after August 30, 2015.

Here, the amended information alleged that "[o]n or about" September 1, 2014, through December 27, 2015, Robeson subjected the victim to sexual penetration. It is not clear from the language of the amended information or from any other facts provided in our record exactly what dates Robeson subjected the victim to sexual penetration; although, it is clear that Robeson engaged in sexual penetration with the victim on multiple occasions. A careful reading of the language of the amended information indicates that the multiple acts of sexual penetration occurred beginning on September 1, 2014, and

continued through December 27, 2015. As such, we can assume that an element of the offense Robeson was charged with occurred prior to August 30, 2015. We note that Robeson did not challenge the alleged time period of when the penetration occurred when he entered his plea to the amended charge.

[12] When an element of the charged offense occurred prior to August 30, 2015, the changes to § 29-2204 do not apply to the defendant's sentence. Robeson's sentence of 40 to 40 years' imprisonment is a valid sentence under the prior statutory scheme. See Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2014).

(b) De Facto Determinate Sentence

Robeson also argues that the court's decision to sentence him with identical minimum and maximum terms of imprisonment was an abuse of discretion, because such a sentence is a de facto determinate sentence which does not provide him with the opportunity for parole within a reasonable time.

[13] Robeson's sentence of 40 to 40 years' imprisonment is not a de facto determinate sentence. The Nebraska Supreme Court has previously found that a sentence with the same minimum term and maximum term is an indeterminate sentence. The court stated, "In Nebraska, the fact that the minimum term and maximum term of a sentence are the same does not affect the sentence's status as an indeterminate sentence." *State v. Artis*, 296 Neb. 606, 607, 894 N.W.2d 349, 350 (2017) (supplemental opinion). Moreover, as we discussed above, Robeson agreed to jointly recommend a sentence of 40 to 40 years' imprisonment as a part of his plea agreement. Because he recommended this sentence, it is disingenuous for him to now argue that the district court erred in accepting his recommendation. Had Robeson wished to have a meaningful opportunity to obtain parole in a reasonable period of time, he was free to reject the plea agreement and not recommend a sentence of 40 to 40 years' imprisonment.

Robeson's claims that the district court erred in imposing identical minimum and maximum terms of imprisonment are without merit.

4. Ineffective Assistance of Trial Counsel

[14] Robeson is represented in this direct appeal by different counsel than the counsel who represented him at the trial level. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

[15] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

[16] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Casares, supra*. The determining factor is whether the record is sufficient to adequately review the question. *Id*. When the claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel. *Id*. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review. *Id*.

Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial. *Id*. An ineffective assistance of counsel claim made on direct appeal can be

found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice. *Id*. See, also, *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

Robeson raises two allegations of ineffective assistance of trial counsel in this appeal. We address each allegation in turn.

(a) Advice to Accept Plea Agreement

Robeson asserts his trial counsel rendered deficient performance by advising him to accept "the terms of the plea agreement and agreeing to a lengthy and unwarranted recommended sentence." Brief for appellant at 14. Although our record does not contain Robeson's conversations with trial counsel prior to the entry of his guilty plea, the record does affirmatively refute his claim of ineffective assistance of counsel because it demonstrates that his plea was entered knowingly, understandingly, intelligently, and voluntarily, and it establishes the benefit Robeson received by entering this plea. Given our reading of the record, we conclude that Robeson cannot demonstrate that he was prejudiced by any advice counsel gave him regarding accepting the terms of the plea agreement.

At the plea hearing, Robeson indicated that his guilty plea was his "own free and voluntary act." He told the court that he had discussed the plea with defense counsel and that he was satisfied with defense counsel's representation. We also note that at the sentencing hearing, Robeson repeatedly reaffirmed his decision to plead guilty to first degree sexual assault and to accept the terms of the plea agreement, even when he was given a chance to change his mind.

In addition, in light of the available evidence against him, the plea agreement benefited Robeson. Initially, Robeson was charged with two counts of first degree sexual assault of a child, each a Class IB felony. As a result of the plea agreement, Robeson was allowed to plead guilty to one count of

first degree sexual assault, a Class II felony. Robeson had confessed to the acts which resulted in the charges against him, and the victim was capable of testifying against him. As such, if Robeson had gone to trial on the original charges, there was a strong possibility that he would have been convicted of two Class IB felonies. His agreement to jointly recommend a sentence of 40 to 40 years' imprisonment was arguably based on his recognition that he could have been sentenced to a much longer period of incarceration if he chose to go to trial on the original charges rather than pleading guilty to one, reduced charge pursuant to the terms of the plea agreement.

We conclude that Robeson cannot show that he was prejudiced by any advice his trial counsel provided regarding his acceptance of the plea agreement. As such, we conclude that this assertion of ineffective assistance of trial counsel is without merit.

(b) Failure to Request Presentence Investigation Report

Robeson asserts his trial counsel rendered deficient performance by failing to request that a presentence investigation report be completed prior to sentencing. Although our record does reflect that Robeson waived his right to a presentence investigation report, the record does not reflect the conversations Robeson had with trial counsel prior to entering this waiver. In addition, as we discussed above, the district court did not specifically ask Robeson on the record if he was waiving his right to the presentence investigation report knowingly, voluntarily, and intelligently. The court also did not ask him if he had a chance to discuss the waiver with his counsel. Accordingly, we are unable to discern whether or to what extent counsel's advice played a role in Robeson's decision to waive his right to the presentence investigation report. Essentially, the record is insufficient for this court to consider this allegation of ineffective assistance of counsel on direct appeal.

## VI. CONCLUSION

Upon our review, we conclude that the district court did not err in accepting the jointly recommended sentence of 40 to 40 years' imprisonment and sentencing Robeson accordingly. In addition, we find that Robeson did not receive ineffective assistance of counsel when counsel advised him to accept the plea agreement. We find that the record is insufficient to address Robeson's claim that his counsel was also ineffective in advising him to waive his right to a presentence investigation report.

Affirmed

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

Abbie Knopik, appellee, v.
Douglas D. Hahn, appellant.

Lance Greenwood, appellee, v.
Douglas D. Hahn, appellant.

902 N.W.2d 716

Filed October 17, 2017. Nos. A-16-1125, A-16-1127.

1. **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.
2. ____: ____: ____. In a de novo review of a protection order, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeals from the District Court for Merrick County: Rachel A. Daugherty, Judge. Reversed and remanded with directions.

Charles R. Maser for appellant.

Paul A. Clark, of Clark & Curry, P.C., for appellees.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Moore, Chief Judge.

## INTRODUCTION

Douglas D. Hahn appeals from harassment protection orders entered by the district court for Merrick County finding that the ex parte harassment orders entered against Hahn for the protection of Abbie Knopik and Lance Greenwood are to remain in effect until October 26 and November 3, 2017, respectively. Hahn argues insufficient evidence was provided to support issuance of the protection orders. Specifically, Hahn argues his actions did not amount to a course of harassing conduct, a statutory requirement for issuance of harassment protection orders. Finding no such course of conduct, we reverse, and remand with directions to vacate the harassment protection orders.

## BACKGROUND

On October 26, 2016, Knopik filed a "Petition and Affidavit to Obtain Harassment Protection Order" pursuant to Neb. Rev. Stat. § 28-311.09 (Reissue 2016) against Hahn. This petition was also made on behalf of Knopik's 4-year-old son. On November 3, Greenwood filed a "Petition and Affidavit to Obtain Harassment Protection Order" pursuant to § 28-311.09 against Hahn, arising from the same incident. Greenwood is the fiance of Knopik. Included in both affidavits were descriptions of the alleged harassment that inspired the protection order requests. The incident occurred on October 14, in front of a residence shared by Knopik and Greenwood.

On the same day as the petitions were filed, the court entered ex parte harassment protection orders. The order regarding Knopik also applied to her son. Hahn filed requests for a hearing on the respective protection orders.

A combined evidentiary hearing on both petitions was held on November 14, 2016. Knopik and Greenwood each testified during the hearing. Hahn did not provide testimony or any other evidence. No exhibits were admitted into evidence.

Knopik testified that on Friday, October 14, 2016, at approximately 9:30 p.m., Hahn was walking his dog, an "old black

lab," on the sidewalk in front of Knopik and Greenwood's residence. Hahn had his dog on a leash. Knopik knew Hahn as a neighbor and through church, and she recalled seeing Hahn walking his dog previously. At this time, Knopik was standing on her driveway speaking with another neighbor, an off-duty sheriff in civilian clothes. Knopik and Greenwood received a new dog earlier that day—a 1½-year-old German shepherd, weighing approximately 60 pounds. Knopik's dog was in her front yard, not on a leash. Knopik's son and her 12-year-old cousin were playing outside the residence.

As Hahn and his dog walked in front of the residence, Knopik's dog approached Hahn's dog. Knopik called her dog, but he did not respond. This was the first time Hahn encountered Knopik's dog. Knopik testified that the dogs were not aggressive and were simply "sniffing" each other. She grabbed her dog by the collar to coax and lead him away. Knopik testified that her dog "was never out of control." According to Knopik, Hahn leaned closely toward the shorter Knopik, began yelling aggressively, threatened to bring a lawsuit against her for not having the dog on a leash, and called her a "bitch." Knopik told Hahn "to get out of [her] face" and led her dog away. Knopik testified that when she turned around to walk away, Hahn followed her onto the property and called her names. Knopik confirmed Hahn's actions caused her to be fearful for her safety. She was also worried about getting her son inside, and she was fearful for his safety.

At this time, Greenwood spoke up and told Hahn "'you will not speak to my fiancee that way.'" Greenwood was standing next to the garage, at least 30 feet from Hahn. Greenwood described Hahn's demeanor as "hot-tempered" during the incident, explaining that Hahn was "[y]elling profanity at [Knopik], talking in a loud manner, [and] threatening with that lawsuit." Greenwood confirmed being fearful for Knopik's safety.

Hahn told Greenwood that their dog should be on a leash, to which Greenwood responded, "'[g]et your cats on a leash'

just in a joking ma[nn]er." Knopik said Hahn responded, "'I'm sick of your f-ing cocky attitude,'" charged across the driveway toward Greenwood, grabbed Greenwood by the sweatshirt, and punched him in the chest three times. Greenwood described the punches as aggressive, leaving marks or bruises. Greenwood testified that pictures were taken of the injury, but they were not offered or admitted into evidence at trial. Knopik testified that the other neighbor with whom they had been speaking yelled and "said to knock it off or to get out of here." Hahn then left with his dog, walking to his residence. There were no further interactions between the parties that evening. The incident lasted between 10 and 20 minutes. Greenwood testified that no prior, similar incidents occurred between the parties.

Following the testimony, the court found that Knopik and Greenwood established a prima facie case. The court then found by a preponderance of the evidence that "[Knopik and Greenwood] have shown a course of conduct intended to intimidate them which served no useful purpose." Specifically, the court found the following course of conduct: "The argument between . . . Knopik and . . . Hahn, the calling of . . . Knopik of names of profanity, the turning or following her after she had turned away, the continuing calling of names to her, the rushing of . . . Greenwood, and the punching of . . . Greenwood." The court continued the ex parte protection orders as previously entered for a period of 1 year.

On November 14, 2016, the district court entered harassment protection orders declaring that the ex parte harassment protection orders issued on October 26 and November 3 shall remain in effect for a period of 1 year from the date of the respective original orders.

Hahn subsequently perfected this appeal.

## ASSIGNMENTS OF ERROR

Hahn assigns, restated, that the district court erred in finding sufficient evidence to support ordering the ex parte harassment protection orders to remain in effect for 1 year.

## STANDARD OF REVIEW

[1,2] A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015). In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014); *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013).

## ANALYSIS

Harassment protection orders are issued pursuant to § 28-311.09, which 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.

The purpose and terms of § 28-311.09 are contained in Neb. Rev. Stat. § 28-311.02 (Reissue 2016), which 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 of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person.

Hahn's primary argument on appeal is that the conduct described by Knopik and Greenwood does not fit within the statutory definition of "[c]ourse of conduct." Hahn emphasizes that this was an isolated, one-time incident, occurring over a short period. He argues that the statutes envision a course of conduct akin to stalking and that they do not apply to situations such as occurred in the present case.

Knopik and Greenwood in turn argue that Hahn's actions qualified as a "series" of separate acts rather than one singular incident, which acts occurred "over a period of time," lasting 10 to 20 minutes. They further assert that Hahn displayed a "continuity of purpose" of using violence and aggression to express anger that the dog was not on a leash. Further, Knopik and Greenwood point to the statutory language that acts over a period of time, "however short," may amount to a course of conduct.

Upon our de novo review of the record, we conclude that the district court erred in finding sufficient evidence to support issuance of the harassment protection orders to remain in effect for 1 year. While Hahn's behavior was admittedly unsavory, it did not amount to a harassing "[c]ourse of conduct" as defined by § 28-311.02(2)(b) and applied through precedent.

[3] Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Schuyler Apt. Partners v. Colfax Cty. Bd. of Equal.*, 279 Neb. 989, 783 N.W.2d 587 (2010). Section 28-311.02(2)(b) expressly provides that harassment requires a course of conduct, which is defined in part as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." Further, the legislative intent articulated within § 28-311.02(1) is that the harassment protection statutes are meant to address "stalking offenses."

The testimony offered at trial reflected the incident with Hahn occurred within a span of 10 to 20 minutes on one particular day. No evidence of harassment prior to or after the confrontation was presented. In finding that Hahn's actions amounted to a course of conduct, the district court split this singular, short-term incident into separate acts. While we recognize that the definition of "[c]ourse of conduct" under § 28-311.02(2)(b) refers to a series of acts over a period of time, "however short," we ultimately conclude that Hahn's conduct did not amount to harassment as set forth in the statutes.

Nebraska courts have found harassment protection orders to be appropriate when the perpetrator stalks, follows, detains, restrains, or otherwise harasses the victim on several separate occasions. See, *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001) (harassment protection order granted after multiple occasions of harassment by attorney); *Yancer v. Kaufman*, 22 Neb. App. 320, 854 N.W.2d 640 (2014) (harassment protection order granted as result of continual harassing conduct by former boyfriend). See, also, *Linda N. v. William N.*, 289 Neb. 607, 615, 856 N.W.2d 436, 444 (2014) (stalking defined "to mean 'the extensive, ongoing, and escalating nature of . . . conduct' showing intent to intimidate the victim"); *In re Interest of Jeffrey K.*, 273 Neb. 239, 728

N.W.2d 606 (2007). On the other hand, this court has affirmed the dismissal of an ex parte harassment protection order by the district court due to insufficient evidence that the defendant engaged in an intimidating course of conduct. See *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013). In addition, appellate courts have reversed, and remanded the cause with directions to vacate harassment protection orders where there was insufficient evidence to satisfy the statutory definition. See, *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015); *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010); *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010).

In the present case, there was insufficient evidence to show that Hahn engaged in the type of stalking offense for which the statutes provide relief. The evidence did not show a knowing and willful course of conduct, evidencing a continuity of purpose; a series of acts of following, detaining, restraining the personal liberty of, or stalking Knopik or Greenwood; or telephoning, contacting, or otherwise communicating with them. Although Hahn's actions reflect a perhaps exaggerated response to an unrestrained dog, they do not constitute the type of stalking offense necessary to support issuance of a harassment protection order.

## CONCLUSION

Because there was insufficient evidence to support issuance of the protection orders, the district court erred in ordering that the ex parte harassment protection orders against Hahn remain in effect until October 26 and November 3, 2017. We reverse, and remand with directions to vacate the protection orders.

Reversed and remanded with directions.

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

# Cecil Scott Schriner, appellee, v. Sara Jane Schriner, appellant.

903 N.W.2d 691

Filed October 24, 2017. No. A-16-890.

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. **Visitation: Appeal and Error.** Parenting time determinations are also 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. **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. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
6. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
7. **Trial: Appeal and Error.** The conduct of final argument is within the discretion of the trial court, and a trial court's ruling regarding final argument will not be disturbed absent an abuse of discretion.
8. **Visitation.** The best interests of the children are the primary and paramount considerations in determining and modifying parenting time.

9. ____. The right of parenting time is subject to continuous review by the court, and a party may seek modification of a parenting time order on the grounds that there has been a material change in circumstances.
10. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, 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.
11. **Modification of Decree: Proof.** The burden is upon the party seeking the modification of decree to show that there has been a material change of circumstances.
12. **Child Custody.** Pursuant to Neb. Rev. Stat. § 43-2929(1)(b)(ix) (Reissue 2016), the parenting plan shall include provisions for safety when a preponderance of the evidence establishes child abuse or neglect, domestic intimate partner abuse, unresolved parental conflict, or criminal activity which is directly harmful to a child.
13. **Attorney Fees.** Customarily, attorney fees are awarded only to prevailing parties or assessed against those who file frivolous suits.
14. ____. In awarding attorney fees, 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 Franklin County: Stephen R. Illingworth, Judge. Affirmed.

Sara Jane Schriner, pro se.

Kristi L. Hilliard and Michael R. Snyder, of Snyder, Hilliard & Cochran, L.L.O., for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

Sara Jane Schriner appeals from the decision of the district court for Franklin County reducing her parenting time, restricting her participation in routine health-related appointments of the parties' children, ordering her to attend an anger management course and counseling, and ordering her to pay $7,500 of her ex-husband's attorney fees. We affirm.

## BACKGROUND

Cecil Scott Schriner and Sara were married in 2005. Two children were born during their marriage—one son in 2007 and another son in 2009. Sara also had two teenage children from a prior relationship.

In February 2014, the district court entered a decree dissolving the parties' marriage. The decree indicates that during the marriage, the parties had resided on a farm, and that Cecil was a grain farmer and Sara had worked in the U.S. postal system but resigned in November 2009 to be a "stay at home mother." The district court awarded Cecil legal and physical custody of the parties' two children, subject to Sara's parenting time every Tuesday and Thursday evening (after school until 7:30 p.m.) and on alternating weekends (Friday after school until 5:30 p.m. on Sunday). Sara was also to get 6 consecutive weeks of parenting time every summer, during which Cecil would get parenting time on alternating weekends. Sara was ordered to pay child support in the amount of $617 per month. Sara appealed, and in an unpublished memorandum opinion, this court affirmed the district court's decision regarding custody, but reversed and remanded the child support determination for further proceedings. See *Schriner v. Schriner*, 22 Neb. App. xxv (No. A-14-371, May 22, 2015). Our mandate issued on October 29, 2015. On November 23, the district court's order on mandate was filed and ordered that Sara pay child support in the amount of $321 per month, beginning on February 1, 2014. There were further pleadings, orders, and two more appeals regarding child support (both dismissed for lack of jurisdiction) that need not be discussed here as they are not relevant to the current appeal.

On December 3, 2014, prior to the custody portion of the decree being affirmed on appeal, Sara filed a complaint for modification of parenting time. She alleged that since the entry of the decree in February, there had been a material and substantial change in circumstances justifying a modification of parenting time, specifically: Cecil applied to and was accepted

by the "LEAD 34 program," a 2-year program "operated by a non-profit Nebraska Agricultural Leadership Council" in cooperation with other "institutions of higher learning throughout Nebraska"; the program began in September and included "extensive time away from home"; Cecil refused to allow Sara the right of first refusal for parenting time during his participation in the LEAD program; Cecil refused to notify Sara in advance of the children's medical and other appointments in such a manner that she could attend the appointments; Cecil continually refused to have any discussions regarding the health of the children; Cecil refused to notify Sara of the children's activities in such a manner that would allow her to attend the activities; Cecil refused to provide Sara with information regarding the preschool that the younger child attended; and Cecil refused to provide the names and contact information for the children's daycares, daycare providers, or nannies. Sara asked the court to enter an order modifying her parenting time, ordering Cecil to notify her of all of the children's appointments and activities, ordering Cecil to provide names and contact information for all childcare providers, and awarding attorney fees and costs to her.

On January 26, 2015, Cecil filed an answer and "Cross-Complaint." In his answer, he alleged that Sara's complaint was frivolous and that she is able to pay his attorney fees for a frivolous action and should be ordered to pay his fees and court costs. In his "Cross-Complaint," Cecil alleged that since the entry of the divorce decree, there had been a material change in circumstances that justified a modification of the parenting time. He alleged that Sara had (1) engaged in a pattern of taking out her anger at Cecil in front of their children; (2) engaged in a course of action where she willfully and intentionally "poison[ed] the mind[s]" of their children; (3) made false accusations about Cecil to and in front of their children in an attempt to make them angry or prejudice them against Cecil; (4) engaged in disruptive behavior in front of their children at parenting time exchanges, medical

appointments, public outings, and other events; (5) engaged in behaviors wherein she set Cecil up for failure, embarrassment, or frustration in front of their children or others; and (6) failed and refused to cooperate with parenting time adjustments and used the frequency of the exchanges to send "harassing and annoying" text messages to Cecil. Cecil asked the court to modify the parenting time schedule to "a standard every other weekend schedule or another similar schedule." He also asked the court to enter additional orders "regarding behavior parameters and guidelines that should be met by the parties when co-parenting [the] children including notification procedures, and contempt procedures for behaviors that tend to or attempt to poison the minds of the minor children." In his amended "Cross-Complaint" filed on June 22, Cecil also alleged that a material change in circumstances had occurred, because Sara was picking the children up from school without his knowledge or consent and because she refused to allow the children to participate in activities during her parenting time. He also requested that the district court restrict Sara's participation in the children's medical care and extracurricular activities.

Trial on both parties' complaints to modify parenting time was held on March 9 and May 4, 2016. Sara appeared pro se, and Cecil was represented by counsel.

Cecil testified that he has had temporary custody of the boys since May 2011 (when they were 2 and 4 years old) and that he was granted full custody in January 2014. At the time of the divorce, Cecil proposed a parenting plan allowing for Tuesday and Thursday midweek parenting time because a presenter at his required "divorce class" "suggested heavily that children under the age of kindergarten never go more than three days without seeing their other parent." By the time of the modification hearing, the boys were 7 and 8 years of age. Cecil and Sara have mediated twice since the decree, but the parties have had ongoing conflict. Both parties testified regarding their struggles.

Sara testified that in July 2014, Cecil was given the opportunity to go back to school when he was accepted to the LEAD program. From July to December, Sara requested the dates of the program and asked to have the boys on those days, but Cecil refused. Cecil also refused to tell Sara who was watching the boys during that time. Sara said that from September 2014 to March 2016, there were "over 45 nights" that Cecil was at LEAD program seminars, but Sara had the boys less than half of those nights. "So, the main reason for me filing for more time with the boys was because [Cecil] was not going to be in the state, country or around the area, and it would have been a great opportunity to allow me to have that time."

Cecil testified that the LEAD program began in August or September of 2014 and lasted until March 2016. It was basically seminars, most of them lasting 3 days from Sunday to Tuesday, and then there were two 2-week seminars. He had given Sara more than 20 extra overnight parenting times when he attended the LEAD seminars, but he said she still "demand[ed]" more time; she never wanted to "trade weekends," and she only wanted extra weekends. Over the past 2 years, Cecil had attempted to make a "reasonable trade" with Sara more than 20 times, for the LEAD program or at Christmastime, but she refused (even if he was trading 5 days for 1). Cecil did not tell Sara specifically where the boys would be each time he left town for the LEAD program, but "[t]hey're either with me or they're with my parents," and testified that Sara knows that. He also said he does not specifically tell her where the boys will be because she is "so harassing and burdensome." When Sara asked him to give examples of dates and times when she was "harassing and burdensome," Cecil responded, "I don't catalog and mark down on a calendar every time you followed me home or bothered my friends or family, stopped in unexpectedly or unannounced like you do."

Cecil testified that he does not want to allow Sara to have the "first right of daycare" and that he believes she wants the children anytime they are not under his direct supervision. He said Sara sends text messages "hammering me that it's wrong for me to send them to my parents or to my sister's for some play time when she wasn't notified first and that she should have them first and not somebody else." Cecil said that the boys need to be involved with their extended family and should be able to spend the night with their grandparents or cousins, and even with friends.

Cecil testified that on Tuesday and Thursday nights, Sara's parenting time was supposed to end at 7:30 p.m., but that she would keep the boys until 8:30 or 9 p.m. without his permission. And many times Sara would ask for extended time to attend her older children's events. Cecil said he gives Sara some extra time, but sometimes it is not long enough for them to stay until the end of the event; then the boys are mad at Cecil because "it's been imposed on them that it's my fault they [had] to leave early." When Cecil granted extended time on Tuesdays and Thursdays, it disrupted the boys' sleep schedule and not all of their homework got done.

Sara testified that on Tuesday and Thursday nights, she feeds the boys, they do homework, they play, and she gives them baths. She said that sometimes they attended ball games or wrestling practice and that they also spend time with Sara's older children. The boys' bedtime is 8 p.m., "[a]nd so sending them to Cecil's at 7:30 is — disrupts their bedtime. If I could just give them a bath, send them to bed, then we would be done." Sara also said:

> I have four children. The Tuesdays and Thursday nights until 7:30 is disruptive to everybody's schedule. We don't know if we have award banquets those nights. We don't know if we have ball games those nights. I have missed a lot of ball games for [my two older children]. . . . I asked [Cecil] if I could take [the boys] to Minden[, Nebraska,] to [their half sister's] very last volleyball

> game [in November 2015]. They were playing subdistricts. [Cecil] refused to allow me to take the boys to the last game, which meant I didn't get to stay at the last game either.

Cecil testified that Sara did go to the subdistrict high school volleyball game in Minden. He said he tried trading nights with Sara, but she apparently did not agree to a trade. So she brought the boys home to her house, Cecil picked them up at 8 p.m. instead of 7:30 p.m., and then Sara went back to the game. He acknowledged that he denied Sara's request that he pick the boys up at the high school, even if she reimbursed him for mileage. On cross-examination, Sara testified she missed "over half" of her daughter's volleyball games. But she was confronted with several dates where either she sent Cecil a text message to say they would be late getting back to his house because they were at volleyball or Cecil picked the boys up from the volleyball game. If Cecil agreed to pick the boys up from a home game at the school, Sara said it was a benefit to him (rather than an accommodation made for her) because the school is closer than her house where he would have picked the boys up. Later, she said that just because she was at a game does not mean that she stayed for the entire game because she would have left early to get the boys home. Sara said she also "asked [Cecil] if we could stay and watch [my older son's] first varsity [basketball] appearance [in December 2015]. [Cecil] refused. And so I missed [my son's] first basketball game." "[M]y older kids never know if I'm going to be there or if I'm not going to be there." "I have failed my older two children over and over because of [Cecil's] actions."

According to Sara, during parenting time exchanges, the boys have cried, bitten, lashed out, run, and hid. Cecil "has done everything possible to alienate me from the boys." Sara does not "speak badly" about Cecil and his family to the boys. "When the boys are with me, we spend our time . . . hanging out. We don't spend our time trying to get them to hate [Cecil]."

Cecil, however, testified that Sara is "pitting" the boys against him. Some of the problems stem from when Cecil tells Sara that the boys cannot stay late; she then tells the boys that they "can't go to a game because daddy won't let them." For the past 2 years, after having parenting time with Sara, the boys are sometimes upset with Cecil, and their behavior is "[v]ery disruptive and toxic." He said that when he picks the boys up from Sara's house, they will yell at him, tell him that they hate him, and slam the door in his face. Cecil testified that when the boys leave Sara's house on Tuesday and Thursday evenings, they are upset "[a]bout half the time."

Sara's various witnesses, including the principal and a "paraeducator" from the boys' school, testified that they have seen Sara and Cecil at various events and activities and witnessed no disruptive behavior by Sara. Sara called another witness who has children that go to school with Sara's older children. The witness observed parenting time exchanges between Cecil and Sara at various events and said that for the most part the exchanges were good, but there were a couple times when the boys did not want to go with Cecil when they were supposed to.

Cecil's brother-in-law testified that at a basketball game in December 2014, the boys were standing by Sara and one of the boys asked her for money to buy candy. Sara spoke loudly, "so everybody [could] hear," and said, "I don't have any money. Your daddy took it all."

Cecil wanted the court to remove Sara's midweek parenting time "to try and calm the chaos in the boys' lives." He said that they need structure. In response to Cecil's request to eliminate the Tuesday and Thursday exchanges, Sara said:

> I have no problems with getting rid of the exchanges. Allow them to spend the nights. There is no reason that the boys cannot spend Tuesday and Thursday night with me, and I can get them to school the next day. . . . This would allow me to not have to choose between going to my older kids' events or staying with my boys for the

> [parenting] time. These last two years I've had to be split, and it's been chaos for both my older children and my younger children.

According to Cecil, in addition to fighting about exchanges, it is a fight if he tries to give Sara time, if he tries to trade her time, and any time he sends her a message regarding the doctor or the dentist. The constant turmoil between Cecil and Sara is "wearing" on the boys. "They get to struggle with who's right or wrong, what's a truth or a lie, who's telling the truth, who's lying." He is asking the court to "remove the exchanges so there's no fighting[,] [l]et's quit the Tuesday and Thursday mid-week [parenting times]. It removes the conflict of after school activities that are predominantly on Tuesday and Thursday evenings. And then Sara can put them on the bus Monday morning." (Sara would lose Tuesday and Thursday evenings every week, but would get an extra overnight of parenting time on Sunday on her scheduled weekends.)

Both Sara and Cecil testified about other difficulties they have had beyond the Tuesday and Thursday evening exchanges. Sara testified that in the summer of 2014, she asked Cecil for a schedule of the boys' activities so that she could attend, but he refused. She said Cecil would not tell her until the activity was over or would tell her at the last minute. Sara asked Cecil if on her Christmas parenting time, the boys could participate in the program at her church, and on his Christmas parenting time, the boys could participate in the program at his church, but he refused to bring the boys to the practices at Sara's church during his parenting time. (Both parents are Lutheran, but they go to different churches.) In May 2015, Cecil refused to switch Sundays so that the boys could attend their half brother's confirmation; Cecil said it was Sara who refused to switch weekends.

Sara testified that another reason she filed for modification was "because [Cecil] refuses to give me notification of [the boys'] medical and dental appointments. Not only their appointments, but their conditions. So, I don't know how to

treat them after something has been diagnosed." However, Cecil asked that he, as the custodial parent, be the only person that is allowed to go to routine dental and doctor visits because when he and Sara are both there, the boys "become immature for their age, and they run to [Sara] and cling to her to try and get out of the situation." Additionally, Sara is "[v]ery uncooperative" at appointments, "[s]he'll either try and take control of the show or she'll try and — and make it uncomfortable."

Dr. Jessica Meeske is a pediatric dentist and has been providing dental care for the parties' children since December 2011. She testified that the boys' dental visits are "stressful" for two reasons:

> The first is, is that the boys just have very age-inappropriate behavior, and it makes it difficult to provide both routine dental care as well as dental treatment and — and it takes two to three times as long. Their behavior also spills over to the other patients that are in the clinic or in the waiting room, which can cause a lot of anxiety for other families whose kids are there to be seen that day. The second reason that it becomes stressful is that [Cecil and Sara] in the past in — in the dental office have not always gotten along, and there's times that the focus is on the two of them not getting along as opposed to us being focused on trying to take care of the boys.

According to Dr. Meeske, "there was just a lot of hostility on [Sara's] part directed at [Cecil]." Cecil has "been very helpful" and has been willing to take advice regarding dental care suggestions. And when one of the boys is not behaving during a visit, Cecil is willing to take direction from the staff to step out of the examination room and allow them to work with the child one-on-one. As for Sara, Dr. Meeske testified that it was evident that she clearly loves her boys and wants to do what she can to help the children. However, her intentions are "misplaced" and she

> assumes the role of the helicopter parent and then it's very difficult for the boys to take direction from [staff]

> because the boys act as the victim. And then [Sara] comes in and tries to act as the rescuer. And once the whole theatric starts, it's very hard to get the boys' attention, even for simple things like sitting in the chair and counting their teeth and doing a checkup, let alone treatment.

Dr. Meeske said that recently Sara has made "a better effort" to try to let the boys do more on their own, but "there's been so many negative dental experiences that, you know, now it's been three steps back."

According to Dr. Meeske, Sara also "point[s] the finger at [Cecil]" regarding problems with the boys' dental treatment or behavior, and she even goes so far as "trying to embarrass" him in the dental office. When the boys see that kind of interaction, it causes their behavior to get worse. Dr. Meeske has never observed Cecil "fighting back or picking fights" with Sara. On cross-examination, Dr. Meeske stated that the interaction between Cecil and Sara has "gotten a lot better." However, since 2014, there have been ongoing problems with the boys being apprehensive and scared at dental appointments. Cecil is willing to follow staff suggestions, but Sara's reaction (e.g., saying "don't push him if he doesn't want to do anything") causes the child's behavior to escalate. Dr. Meeske testified that it would be in the boys' best interests if Cecil brought the boys to her office. She is "more than willing to go the extra mile to communicate with [Sara] on the boys' care, whether that be by phone or e-mail or if she wants to come in and visit . . . personally."

In an order filed on August 25, 2016, the district court generally found in favor of Cecil. After recounting the evidence from the modification hearing, the court said that most of Sara's energy is "focused on her anger over the divorce and alienating the children" and that "[s]he has been disruptive, controlling and rude during [parenting time] exchanges." "Based on the totality of the evidence," the court decided to "decrease some of her [parenting time] because she is not

acting in the best interests of the children in promoting their emotional growth." Accordingly, the district court sustained Cecil's "Cross-Complaint" to modify Sara's parenting time to every other weekend; her Tuesday and Thursday parenting times were terminated. "To reduce parental contact," the district court said Sara "shall deliver the children to the school bus on Mondays after her weekend [parenting time]." The court said it was "unable to set out specific parameters on behaviors to be met other than the parties should treat each other with respect in front of the children and not make disparaging remarks about each other." However, the court ordered Sara to attend and complete an anger management course and counseling "to address her co-parenting issues." The district court restricted Sara's participation in medical, dental, optometric, and dermatology appointments as follows:

> A. [Cecil] is not required to notify [Sara] of routine medical, dental, optometric and dermatology appointments. [Sara] may not participate in those appointments as the atmosphere she creates is not in the best interests of the children. [Cecil] shall advise [Sara] of the relevant information on the results of the visits by email or text message after they occur.
>
> B. Both parties shall advise each other of any emergency room visits as soon as possible.

Regarding names and contact information for childcare providers, the district court ordered the parties to notify each other of the names and contact information for "regular" paid providers; this does not include babysitters for short periods of time. Finally, the district court awarded $7,500 in attorney fees to Cecil, because Sara "prevailed on one issue, i.e., day care notification, which [Cecil] agreed to," and because "her modification was frivolous and she acted in bad faith by attempting to alienate the children and then asking for more parenting time." The court denied the parties' other requests. Sara's motion to set aside judgment and application for new trial was overruled. Sara now appeals.

## ASSIGNMENTS OF ERROR

Sara assigns, restated, that the district court erred by (1) admitting irrelevant evidence and excluding relevant evidence; (2) making no finding that a material change in circumstances occurred warranting this modification; (3) reducing, rather than increasing, her parenting time; (4) restricting her notifications of and participation in the children's appointments and activities; (5) ordering her to attend an anger management course and counseling; and (6) ordering her to pay $7,500 of Cecil's attorney fees.

## STANDARD 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. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015). An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

[3] Parenting time determinations are also 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. *State on behalf of Maddox S. v. Matthew E.*, 23 Neb. App. 500, 873 N.W.2d 208 (2016).

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

[5] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed

in the absence of an abuse of discretion. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

## ANALYSIS

*Errors Argued But Not Assigned.*

[6] Sara argues, but does not assign as error, that the district court (1) should have given her the first right to daycare, (2) was biased against her and denied her motion to disqualify the judge, and (3) overruled her motion to have a guardian ad litem appointed for the boys "to help the courts figure out what was in the boys' best interests." Brief for appellant at 21. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Mock v. Neumeister*, 296 Neb. 376, 892 N.W.2d 569 (2017). See, also, *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015) (pro se litigant will receive same consideration as if represented by attorney, and pro se litigant held to same standards as one represented by counsel). Therefore, we will not address these arguments.

*Evidentiary Issues.*

Sara claims that the district court erred in admitting irrelevant evidence and excluding relevant evidence. We briefly address each of her claims in turn.

Sara argues that "[t]he trial court received unknown 'documents' handed to the Judge from [Cecil's] counsel during closing arguments that were unseen by [Sara]." Brief for appellant at 20. The record reflects that during closing arguments, Cecil's counsel approached the bench and stated, "Although I'm not offering it into evidence, I have drafted a proposed order for review." The record does not indicate whether a copy of the proposed order was previously given to Sara or whether she was given a copy at the time it was presented to the court. During closing arguments, Cecil's counsel discussed the evidence from trial alleged to support the proposed order. Although any case-related communication with the judge,

verbal or written, should include the presence of, or a copy to, the opposing party and/or his or her counsel, Cecil's proposed order was neither offered nor received as evidence. To the extent Cecil's counsel failed to provide a copy of the proposed order to Sara simultaneous to or in advance of providing it to the court, such practice is not to be condoned. However, Sara's suggestion that this was an evidentiary error is not supported by the record.

[7] Sara further asserts she was not given an opportunity "to do rebuttal oral arguments or written closing arguments." Brief for appellant at 20. As will be discussed later, the request made by Cecil's attorney during closing arguments that Sara be ordered to attend an anger management course and counseling came as a surprise to Sara, and therefore Sara claims she "did not have an opportunity to defend herself from [Cecil's] closing argument requesting this." *Id*. at 17. However, the conduct of final argument is within the discretion of the trial court, and a trial court's ruling regarding final argument will not be disturbed absent an abuse of discretion. See *Sundeen v. Lehenbauer*, 229 Neb. 727, 428 N.W.2d 629 (1988). We find no abuse of discretion here. The record reflects that both parties were treated equally and fairly by the court in this regard, and both parties were permitted to make closing arguments without any restrictions placed on their time. Further, after the district court's order was entered, Sara filed a "Motion to Set Aside Judgment and Application for New Trial," which specifically raised the issue that Sara did not have an opportunity "to defend herself against the order for these classes." Sara was then provided an opportunity to discuss all matters contained in her motion at the hearing scheduled for that purpose; the district court overruled Sara's requests in an order entered September 13, 2016. We will address the court's order on this issue in more detail later.

Sara also claims the court "relied on psychological assumptions of Sara made by a Pediatric Dentist" and considered actions that happened before the date of the decree. Brief for

appellant at 21. The record does not support Sara's claim the district court "relied on psychological assumptions" made by Dr. Meeske. The court did note Dr. Meeske's testimony that she observed hostility by Sara toward Cecil in the office, that Sara is a "'Helicopter Parent or Rescuer'" of the boys which causes them to act out, and that "[i]n the last 3 or 4 years this has happened more than once." It is true that things that happened "3 or 4 years" ago would have happened before the date of the decree. However, Dr. Meeske testified that there have been "ongoing" problems with Sara's actions at dental appointments which makes it difficult for staff to provide both routine dental care as well as dental treatment. The court did not err in considering the "ongoing" problems testified to by Dr. Meeske.

Sara argues that the court used "double hearsay from [Cecil]" to find that she alienated the boys from him. Brief for appellant at 21. We need not specifically address the "double hearsay" issue, because even without considering such statements (e.g., that Sara told the boys that Cecil lied to the judge), there was sufficient evidence to modify Sara's parenting time. See *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015) (erroneous admission of evidence in bench trial not reversible error if other relevant evidence, properly admitted, sustains trial court's necessary factual findings; in such case, reversal warranted only if record shows trial court actually made factual determination, or otherwise resolved factual issue or question, through use of erroneously admitted evidence).

The remainder of Sara's evidentiary allegations regarding statements made by the court, or evidence "ignored" by the court, brief for appellant at 23, do not go to the actual admissibility of evidence and therefore need not be discussed. See *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004) (in child custody cases, where credible evidence is in conflict on material issue of fact, appellate court considers, and may give weight to, fact that trial judge heard and observed witnesses and accepted one version of facts rather than another).

*Material Change in Circumstances and Parenting Time.*

[8-11] The best interests of the children are the primary and paramount considerations in determining and modifying parenting time. *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001); *State on behalf of Maddox S. v. Matthew E.*, 23 Neb. App. 500, 873 N.W.2d 208 (2016). The right of parenting time is subject to continuous review by the court, and a party may seek modification of a parenting time order on the grounds that there has been a material change in circumstances. *State on behalf of Maddox S. v. Matthew E., supra*. See, also, *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997). In the context of marital dissolutions, 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. *Peterson v. Peterson*, 239 Neb. 113, 474 N.W.2d 862 (1991). The burden is upon the party seeking the modification of decree to show that there has been a material change of circumstances. See *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996).

Sara asserts that the district court "failed to find any material change in circumstances that would warrant any modification." Brief for appellant at 11. Although the district court's order did not specifically say there had been a material change in circumstances, its order nevertheless included findings which implicitly established a material change in circumstances. The court pointed out Sara's behaviors in which she was "attempt[ing] to alienate the boys from [Cecil]." It went on to note, "The more time she gets, the more she wants. She is inflexible in her demands and most of her energy is focused on her anger over the divorce and alienating the children." Further, our de novo review of the record supports that there was a material change in circumstances affecting the boys' best interests, namely, that these parents needed a modified parenting plan that would minimize opportunities for ongoing conflict. See *State on*

*behalf of Maddox S. v. Matthew E., supra* (ongoing conflict can constitute material change in circumstances).

In fact, Sara and Cecil agreed that exchanges after her Tuesday and Thursday parenting time lead to conflict and "chaos" as evidenced by their testimony detailed above. However, they both proposed different solutions: Sara proposed that the court give her overnight parenting time on those nights, and Cecil proposed that the court take away her parenting time on Tuesday and Thursday evenings in exchange for an additional overnight of parenting time on her scheduled weekends. Either scenario would limit the majority of parenting time exchanges between the parties, because exchanges would essentially occur when the boys got on or off the school bus at the appropriate parent's home. However Sara's proposed plan of allowing her Tuesday and Thursday overnight parenting times would result in having the boys switch homes every weeknight; this schedule would not provide structure and stability to the boys' lives. The district court did not abuse its discretion by modifying the parenting plan to eliminate Sara's parenting time on Tuesday and Thursday evenings, and extending her scheduled weekends by adding another overnight of parenting time on Sunday.

*Children's Appointments and Activities.*

Sara argues that the district court erred in restricting her notifications of and participation in the boys' appointments and activities. Sara cites us to *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002), to support her claim that she should not be denied access to her children. However, *Deacon* is a case where the noncustodial parent was denied the right of parenting time, and it is not applicable here.

In its order, the district court denied Sara's request to require Cecil to notify her of medical, dental, and optometric appointments. The district court restricted Sara's participation

in medical, dental, optometric, and dermatology appointments as follows:

> A. [Cecil] is not required to notify [Sara] of routine medical, dental, optometric and dermatology appointments. [Sara] may not participate in those appointments as the atmosphere she creates is not in the best interests of the children. [Cecil] shall advise [Sara] of the relevant information on the results of the visits by email or text message after they occur.
>
> B. Both parties shall advise each other of any emergency room visits as soon as possible.

The court also denied Sara's requests to require Cecil to notify her of school programs, "as [Sara], as a parent, may obtain the school . . . calendar from the School District," and of any special or holiday church programs involving the children, because "as set out in the Decree, [Sara] is disruptive in [Cecil's] church" and "[s]he has the children every other Sunday, where she can participate with the children in her church."

Cecil has sole legal and physical custody of the boys. Having legal custody means that Cecil has the authority and responsibility for making fundamental decisions regarding the children's welfare, including choices regarding education and health. See Neb. Rev. Stat. § 43-2922(13) (Reissue 2016).

The district court did limit Sara's notification of and participation in "routine medical, dental, optometric and dermatology appointments." But the court ordered Cecil to advise Sara of the relevant information on the results of the visits by email or text message after they occur. Furthermore, Sara has a statutory right to access the boys' medical records. See Neb. Rev. Stat. § 42-381 (Reissue 2016) (unless court orders to contrary, each parent shall continue to have full and equal access to education and medical records of his or her child; either parent may make emergency decisions affecting health or safety of his or her child while in physical custody of such parent). After our de novo review of the record, including Dr. Meeske's testimony that Sara's presence interferes with the

staff's ability to work with the children, we find that the district court did not abuse its discretion in limiting notification of and participation in "routine medical, dental, optometric and dermatology appointments."

As to school and church programs, we are reviewing only whether Cecil should be required to notify Sara of such programs. As stated by the court, "[Sara], as a parent, may obtain the school . . . calendar from the School District." See, also, § 42-381 (unless court orders to contrary, each parent shall continue to have full and equal access to education and medical records of his or her child). As to the children's church programs, as noted by the district court, "as set out in the Decree, [Sara] is disruptive in [Cecil's] church." The decree reflects that at the hearing on dissolution, the minister of Cecil's church testified that Sara causes a commotion when she attends and that as a result, the minister "directed her away from the church." Since the entry of the original decree, Sara demonstrated a continued inability to be respectful toward Cecil in a public setting. At a basketball game in December 2014, the boys were standing by Sara when one of the boys asked her for money to buy candy. Sara spoke loudly, "so everybody [could] hear," and said, "I don't have any money. Your daddy took it all." Accordingly, we find the district court did not abuse its discretion when it denied Sara's request to require Cecil to notify her of school and church programs.

As noted, the court addressed only Cecil's obligation to notify Sara of these various school and church activities; the court did not prohibit her from attending them. Naturally, the best situation for the children is for both parents to be in attendance, in a supportive role, at such activities. However, this ideal cannot be achieved if one parent engages in disrespectful behavior toward the other parent in the presence of their children. Not only does this adversely impact the activity for their own children, but it also interferes with the enjoyment of the event by other children and their families. In this case, as in other cases the courts see too often, even though

both parents clearly love their children, they nevertheless fail to see how their inability to get along and cooperatively coparent is adversely impacting their children. Accordingly, it is not an abuse of discretion for a district court to use reasonable measures to minimize the harm of unresolved parental conflict on children.

*Counseling and Anger Management.*

Sara argues that the district court erred in ordering her to attend an anger management course and counseling. She says that this was not addressed at trial, that she did not have an opportunity to defend herself from Cecil's closing arguments requesting the order, and that she was not given the opportunity to give rebuttal closing arguments. She further argues that there is no evidence to support such an order by the district court.

[12] To the extent that Sara was "blindsided" by Cecil's request during closing arguments that she be ordered to attend an anger management course and counseling, Sara did not make an objection at the time the request was made. Further, we have already addressed that the district court has discretion with regard to the conduct of final arguments and also that Sara was able to raise and argue this particular issue at the hearing on her motion for new trial. Assuming without deciding that she properly preserved the issue for appeal, we find no abuse of discretion by the district court. See Neb. Rev. Stat. § 43-2929(1)(b)(ix) (Reissue 2016) (parenting plan shall include provisions for safety when preponderance of evidence establishes child abuse or neglect, domestic intimate partner abuse, *unresolved parental conflict*, or criminal activity directly harmful to child). See, also, Neb. Rev. Stat. § 43-2930(2)(e) (Reissue 2016) (after contested hearing, court shall enter temporary parenting order that includes, if appropriate, requirement that parent complete program of intervention for perpetrators of domestic violence, program for drug or alcohol abuse, *or program designed to correct*

*another factor as condition of parenting time*); Neb. Rev. Stat. § 43-2928 (Reissue 2016) (in all proceedings under Parenting Act, court may order second-level parenting education when factual determination of unresolved parental conflict has been identified; such course shall, among other things, include information about potentially harmful impact of unresolved parental conflict on child and use of effective communication techniques and protocols).

In his amended "Cross-Complaint," Cecil alleged that Sara had engaged in a pattern of taking out her anger at Cecil in front of their children; engaged in a course of action where she willfully and intentionally "poison[ed] the mind[s]" of their children; made false accusations about Cecil in front of their children in an attempt to make them angry or prejudice them against Cecil; engaged in disrupting behavior in front of their children; and engaged in behaviors wherein she set Cecil up for failure, embarrassment, or frustration in front of their children. Although Sara's attendance at an anger management course and counseling were not specifically requested prior to trial, Sara's anger and co-parenting issues were raised. Those issues were also addressed at trial. Although Sara presented testimony from witnesses who did not observe any disruptive behavior by Sara, Cecil testified and presented witness testimony to the contrary. For example, Cecil testified that Sara tells the boys they "can't go to a game because daddy won't let them." He further stated that the past 2 years, after having parenting time with Sara, the boys are sometimes upset with Cecil—they will yell at him, tell him that they hate him, and slam the door in his face. And Dr. Meeske testified that Sara "point[s] the finger at [Cecil]" regarding problems with the boys' dental treatment or behavior, and she even goes so far as "trying to embarrass" him in the dental office. When the boys see that kind of interaction, it causes their behavior to get worse. 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. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

Finally, Sara contends that the closing arguments from Cecil "brought in fictitious opinions from people that did not testify at trial as they referred to a Joel, Dr. Meidlinger and Mr. Snyder." Brief for appellant at 17. However, her argument is not supported by the record. During closing arguments, Cecil's counsel referenced a radio segment she heard on the way to court that morning ("Joel" was the speaker on the radio), as an analogy for the parties' situation; the words of "Joel" were not offered as an opinion. "Dr. Meidlinger" was appointed to perform a custody evaluation for the original divorce, and counsel made a passing reference to that opinion in her closing. During closing arguments, Cecil's counsel mentioned a discussion she had with "Mr. Snyder" (her co-counsel) about what could possibly be done to address Cecil's issues with Sara's behavior, and "Mr. Snyder" said that they should ask the court to order therapy for Sara. Accordingly, contrary to Sara's assertions, there were no "fictitious opinions" offered during closing arguments.

After our de novo review of the record, we cannot say the district court abused its discretion in ordering Sara to attend an anger management course and counseling to address her co-parenting issues. Second-level parenting education can be ordered for situations involving unresolved parental conflict. See § 43-2928. Also, when there is evidence of parental behavior which is harmful to a child, a court shall order provisions for the safety of a child as may be needed when a preponderance of the evidence establishes unresolved parental conflict. See § 43-2929(1)(b)(ix).

*Attorney Fees.*

Cecil submitted an affidavit and itemized bill from his attorney reflecting $17,582.84 in actual legal services and expenses since December 2014, as well as an estimate of an additional

$1,500 for attending the second day of the modification trial, for a total of $19,082.84. The district court ordered that Sara pay $7,500 of Cecil's attorney fees at a rate of $125 per month and that if her payments should "be delinquent for more than 30 days, the remaining amount due is converted to a [j]udgement" with interest accruing until paid.

Sara asserts the district court erred in ordering her to pay Cecil's attorney fees because (1) contrary to the court's finding, her complaint for modification was not frivolous or made in bad faith, and (2) she cannot afford to pay the fees.

[13] Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014). Customarily, attorney fees are awarded only to prevailing parties or assessed against those who file frivolous suits. *Id*. A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases. *Id*. Thus, there was authority, in the present case, for the awarding of attorney fees to Cecil. See *id*.

[14] In awarding such fees, 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. See *id*.

The award of an attorney fee judgment against Sara in favor of Cecil was not an abuse of discretion, even without considering the district court's finding that Sara's modification action was frivolous. The original decree was filed in February 2014, and Sara filed the current complaint to modify custody in December of that year. Counsel for Cecil successfully challenged Sara's complaint to modify parenting time, and counsel pursued and succeeded in a "Cross-Complaint" for modification. As noted by the district court, Sara prevailed on one issue, the daycare notification, to which Cecil agreed.

These parties have been involved in extensive litigation since the entry of the decree in February 2014, and most of the litigation has been instigated by Sara. In addition to the current modification action, Sara filed two other modification pleadings regarding child support: a complaint to modify in June 2014 and a "Motion to Modify Order on Mandate" in December 2015. And this is the fourth appeal filed by Sara. She appealed the following: (1) the original decree (in an unpublished memorandum opinion, this court affirmed the district court's decision regarding custody, but reversed and remanded the child support determination for further proceedings, see *Schriner v. Schriner*, 22 Neb. App. xxv (No. A-14-371, May 22, 2015)); (2) the ruling on the June 2014 complaint to modify child support, which she filed 4 months after the decree was entered (in case No. A-15-055, in a minute entry dated October 5, 2015, this court dismissed Sara's appeal for lack of jurisdiction); (3) the ruling on her December 2015 "Motion to Modify Order on Mandate" as to child support (in case No. A-15-1223, in an order dated January 29, 2016, this court dismissed Sara's appeal for lack of jurisdiction); and (4) the current order on modification. At times, more than one appeal or complaint has been pending simultaneously. These ongoing actions have caused the parties to incur significant legal expenses, except for Sara when proceeding pro se.

Sara claims she cannot afford to pay Cecil's attorney fees in this action because her child support obligation takes her "well below poverty level" and she is already working two jobs. Brief for appellant at 23. The parties' specific financial situations were not discussed at the parenting time modification hearing. But according to the child support worksheet, Sara's monthly net income is $1,640.28. Her child support obligation is $321 per month, leaving her $1,319.28 per month. Payment of $125 per month toward attorney fees would not put her below the "[b]asic subsistence limitation" for one person, but does put her below "the [federal] poverty guidelines updated annually in the Federal Register" for a three-person household

(remembering that Sara has two other children from a prior relationship). See Neb. Ct. R. § 4-218 (rev. 2017). However, we are mindful that Sara received a $300,000 property settlement through mediation with Cecil in 2013. Under the circumstances of this case, we cannot conclude that an award of attorney fees to Cecil was an abuse of discretion.

## CONCLUSION

For the reasons stated above, we affirm the decision of the district court.

Affirmed.

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

# Keith M. Roberts, appellant and cross-appellee, v. Diana S. Roberts, appellee and cross-appellant.

903 N.W.2d 267

Filed October 24, 2017. No. A-16-1104.

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. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
3. **Child Support.** The primary concern in determining child support is the best interests of the children.
4. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective incomes.
5. ____: ____. In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation.
6. **Actions: Equity: Child Support: Rules of the Supreme Court.** The Nebraska Supreme Court has favored a flexible approach to determining a parent's income for child support proceedings because such actions are, despite the Nebraska Child Support Guidelines, equitable in nature.
7. **Child Support.** While a court calculating child support is permitted to add in-kind benefits derived from an employer to a party's income, inclusion of such benefits is not required.

8. **Alimony: Child Support.** Alimony is not an item of income in calculating child support.
9. **Alimony: Child Support: Rules of the Supreme Court.** The language in Neb. Ct. R. § 4-213 of the Nebraska Child Support Guidelines clearly provides that child support obligations are to be calculated prior to the calculation of alimony.
10. **Child Support.** The use of earning capacity in calculating child support is useful when it appears that the parent is capable of earning more income than is presently being earned.
11. **Modification of Decree: Child Support: Proof.** A party can modify a prior child support order by showing that there has been a material change in circumstances since the entry of the court's prior order.
12. **Child Support: Rules of the Supreme Court.** Generally, parties' child support obligations should be set according to the provisions set forth in the Nebraska Child Support Guidelines.
13. ____: ____. A court may deviate from the Nebraska Child Support Guidelines, but only if it specifically finds that a deviation is warranted based on the evidence.
14. ____: ____. Without a clearly articulated justification, any deviation from the Nebraska Child Support Guidelines is an abuse of discretion.
15. **Equity: Modification of Decree: Child Support: Time.** Absent equities to the contrary, the general rule is that the modification of a child support order should be applied retroactively to the first day of the month following the filing day of the application for modification.
16. **Child Custody: Time.** A child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system.
17. **Modification of Decree: Time: Appeal and Error.** The initial determination regarding the retroactive application of a modification order is entrusted to the discretion of the trial court and will be affirmed on appeal absent an abuse of discretion.
18. **Child Support: Time.** There are circumstances to take into consideration wherein a noncustodial parent may not have the ability to pay retroactive support in addition to meeting current support obligations.
19. **Divorce: Attorney Fees: Costs.** Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Donald A. Roberts and Justin A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Lindsay Belmont and Angela Dunne, of Koenig Dunne, P.C., L.L.O., for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Keith M. Roberts appeals from an order entered by the district court for Douglas County that modified his child support obligation to Diana S. Roberts following the dissolution of the parties' marriage. Diana cross-appeals from the same order. For the reasons that follow, we affirm in part and in part reverse, and remand.

## II. BACKGROUND

Keith and Diana were married on April 6, 1991. They had two children together, born in 2002 and 2005. A decree of dissolution was entered by the district court in August 2014. At the time of the parties' divorce, Keith was employed as the "resident agent in charge for Homeland Security Investigation" in Omaha, Nebraska, and his total monthly income was $12,281. Diana was unemployed, and the parties stipulated to an annual earning capacity in the amount of $20,000, which resulted in an imputed monthly income of $1,666.67.

Under the terms of the dissolution decree, Keith was ordered to pay $1,866 per month in child support for two minor children and $1,311 per month when only one child remained a minor. The decree also ordered Keith to pay $3,000 per month in alimony to Diana for a period of 84 months.

The parties were awarded joint legal custody of their children, and Diana was awarded primary physical custody, with Keith to have parenting time pursuant to the terms of the parties' parenting plan. The parenting plan provided that Keith was to have custody of the children every Tuesday from 3 to

8 p.m. and on alternating weekends, commencing Friday after school and concluding Sunday evening. The parenting plan provided that during the summer, Keith was to have custody each Tuesday afternoon through Thursday morning and alternating weekends. Keith and Diana were both ordered to pay "for their own clothing, utilities, food, travel expenses, and living expenses for the minor children when they are in his or her [custody]."

Following entry of the dissolution decree, Keith retired from his employment and began a new position as a personal service contractor for the U.S. Department of State on or around September 27, 2015. Subsequent to his retirement from federal government employment, Keith made a claim for a portion of his federal retirement benefit. Diana made a claim for a portion of this benefit as Keith's former spouse. Diana was to receive a monthly payment of $2,999.72 out of Keith's monthly gross annuity of $8,743, from which the cost of her survivor benefit was then deducted. Diana testified that she was to receive a monthly payment of $2,337.52. Both parties were also to receive a retroactive payment for annuity benefits prior to the commencement of their monthly payments. Keith testified that he received a lump-sum payment of approximately $8,000 and Diana was to receive a payment of $9,116.33.

Keith's new position working with the Department of State required him to relocate to Ankara, Turkey, which he did in November 2015. Keith testified that he usually returns to the United States at least twice per year while escorting foreign dignitaries, although he does not get to choose when those occasions occur. He stated that his trips to the United States typically last "approximately a month." Keith testified that he has been able to visit his two children by taking vacation while he was in the United States on business. For him to return to the United States from Turkey to visit them, Keith estimated that it would cost approximately $3,000 per week, and the expenses related to activities with the children would be an additional $1,000.

As a personal service contractor, Keith has a current salary paid by the Department of State. His annual base salary is $136,833. Keith testified that he also receives a cost-of-living allowance (COLA) and post differential pay while living in Turkey but not when he returns to the United States on travel. Keith is eligible to receive "danger pay," which would replace his post differential pay. Although he testified that he had received an email alerting him to the possibility of receiving danger pay in the future due to changes in security, he had not yet received any danger pay; nor did he know if or when it would be implemented.

In Turkey, Keith resides in an apartment that is rented and paid for by "[t]he embassy." Keith testified that he does not receive a housing allowance or a living quarters allowance and that he does not know how much his rent costs the government.

Diana filed her second amended complaint for modification in January 2016, alleging that a material change in circumstances existed warranting a change in child support. In support of her motion, she stated that Keith had retired from his federal government employment, begun receiving retirement pay, and accepted a position in Turkey for which he received income and that Keith's gross monthly income had increased such that, in applying the Nebraska Child Support Guidelines, there was an increase in child support greater than 10 percent. Diana alleged that while living abroad, Keith had not exercised his parenting time, and that as a result, her expenses for caring for the parties' children had increased. Diana also requested an award of attorney fees.

Trial was held in May 2016. Diana testified at trial, and Keith's deposition was offered into evidence in lieu of live testimony because he was out of the country. The district court entered its order of modification in November 2016, finding that a substantial and material change in circumstances had occurred since entry of the dissolution decree due to "a change in the parties' incomes and [Keith's] relocation to

Turkey that justifies an increase in [Keith's] child support obligation to [Diana]." The court adopted Keith's proposed calculations of child support, which resulted in a payment of $1,935 per month for two children and $1,411 for one child. The court then included an additional support worksheet pursuant to Neb. Ct. R. § 4-203(C) (rev. 2011) of the Nebraska Child Support Guidelines for incomes greater than $15,000 monthly. Pursuant to those calculations, the court increased Keith's child support obligation to $2,022 per month for two children and $1,498 for one child.

The district court determined that an upward deviation from the guidelines was "in the best interests of the minor children." Accordingly, the court ordered Keith to pay child support in the amount of $2,500 per month for two children, which was an upward deviation of $478, and $1,851 per month for one child, which was an upward deviation of $353. The court ordered that each party was to pay his or her own attorney fees. Keith now appeals, and Diana cross-appeals.

## III. ASSIGNMENTS OF ERROR

Keith assigns, restated, that the district court erred in granting Diana's second amended complaint for modification of child support. On cross-appeal, Diana assigns, restated, that the district court abused its discretion in (1) adopting Keith's child support calculation and thereby erring in calculating the parties' respective incomes, (2) denying her request to retroactively modify the award, and (3) failing to award her attorney fees.

## IV. STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Johnson v. Johnson*, 290 Neb. 838, 862 N.W.2d 740 (2015). The same standard applies to the modification of child support. *Id*.

[2] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

## V. ANALYSIS

### 1. Calculation of Parties' Incomes

Diana argues that the district court abused its discretion in adopting Keith's proposed child support calculations and thereby erred in calculating each party's respective income. She claims that the district court did not include all of Keith's sources of income and improperly attributed income to her that should not be considered for purposes of child support.

#### (a) Keith's Income

Diana claims that the district court erred in not including all of Keith's sources of income. Specifically, she alleges that the court should have included Keith's housing allowance as well as his danger pay in the place of Keith's post differential pay.

[3-5] The primary concern in determining child support is the best interests of the children. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective incomes. *Gangwish v. Gangwish, supra*. In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Gangwish v. Gangwish, supra*.

[6,7] Pursuant to Neb. Ct. R. § 4-204 (rev. 2015) of the Nebraska Child Support Guidelines, a court is to consider the total monthly income of both parties, which is defined as "income of both parties derived from all sources, except all

means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages." The Nebraska Supreme Court has favored a flexible approach to determining a parent's income for child support proceedings because such actions are, despite the guidelines, equitable in nature. *Gangwish v. Gangwish, supra*. While a court is permitted to add "'in-kind'" benefits derived from an employer to a party's income, inclusion of such benefits is not required. *Id.* at 911, 678 N.W.2d at 514.

Here, Diana argues that Keith's income should have included an annual housing allowance of $28,400. Diana derived this number from the Department of State's website that lists housing allowances for various locations, including Ankara. According to those listings, the housing allowance for employees living without family in Ankara is $28,400 per year. Diana argues that because Keith is not required to pay his own rent and in-kind benefits may be included as income, the district court abused its discretion in failing to attribute this amount to Keith.

However, Keith testified that he does not personally receive a housing allowance and that "the embassy rents my apartment and pays for it." He stated that he does not know what the actual cost of his apartment is to the government. Keith testified that he is not familiar with the listings from which Diana arrived at the amount of $28,400 per year. Furthermore, while in-kind benefits such as a housing allowance are permitted to be considered in the determination of income, their inclusion is not required; whether or not to include such benefits is left to the discretion of the trial court. Given this discretion, Keith's testimony that he does not receive a housing allowance, and the lack of evidence as to the value of Keith's housing, we find that the district court did not err in excluding the housing allowance as part of Keith's income.

Next, Diana claims that the district court should have included danger pay in its determination of Keith's income in the place of post differential pay. She argues that Keith

received an email on the day of his deposition regarding events in southern Turkey that increased the danger of living in the country and triggered additional danger pay in the amount of $1,710 per month. Diana asserts that the district court erred in not including this amount as part of Keith's income.

While Keith did testify to the receipt of an email alerting him to the possibility of receiving danger pay in the future, as of the date of his deposition he had not received any danger pay and did not know if or when danger pay would be implemented in the future. Keith testified that he had no control over whether danger pay was granted. We find no evidence in the record that Keith did in fact receive danger pay at any point. Instead, the record supports the fact that Keith received post differential pay, which was properly included in the calculation of his income. Therefore, we find no error in the district court's exclusion of danger pay in the determination of Keith's income.

Diana also argues that the district court erred in its calculations determining Keith's retirement annuity and COLA. She claims that the amount of monthly income attributed to Keith's retirement annuity should be $6,405 rather than $5,744 and that Keith's COLA should be $352 rather than $293. We disagree.

Diana claims that Keith's retirement annuity should have been calculated as $6,405 per month. She arrives at this number by subtracting the amount that she receives from the annuity—$2,337.85—from Keith's total monthly annuity, which is $8,743. However, as stated in the letters from the U.S. Office of Personnel Management, the total amount of the monthly payment to Diana from the annuity is $2,999.72. Diana receives less than that full amount because her portion of her survivor benefit is withheld, resulting in a net payment to her of $2,337.85. Subtracting the full amount taken out of Keith's annuity on behalf of Diana results in a net amount of $5,744 that Keith receives each month. This is the same amount used by the district court. We find no error in this calculation.

Diana also claims that the district court should have attributed Keith's monthly income from his COLA as $352, rather than $293. She argues that this amount should be attributed to all 12 months of the year because Keith's return to the United States for 2 months each year (for which he does not receive COLA) is speculative.

Keith testified that he receives his COLA only when he is in Turkey. He testified that he usually returns to the United States at least twice a year while escorting foreign dignitaries and that his trips have typically lasted approximately 1 month each. During those periods, he receives no COLA. The district court relied on this testimony in finding that Keith receives COLA pay for 10 months of the year at the rate of $352 per month. Dividing that amount evenly across the 12 months in a year, the court reached the amount of $293 per month in COLA pay. We find no error in this calculation. The district court relied upon Keith's testimony that he typically returns to the United States for a total of approximately 2 months each year, during which he does not receive his COLA. The court then appropriately divided the COLA that he does receive evenly to reach the amount of $293 per month. Accordingly, we find no error in the district court's calculation of Keith's income.

(b) Diana's Income

Diana argues that the district court erred in calculating her total monthly income. She claims that her income should not have included her alimony or earning capacity and should have consisted solely of the amount she receives from Keith's retirement annuity. For the reasons that follow, we agree that the district court erred by including alimony when calculating Diana's income.

[8,9] In the original decree, Diana was awarded monthly alimony of $3,000 for 84 months. The district court included this amount in its calculation of Diana's total monthly income. However, alimony is not an item of income in calculating child support. See *Gallner v. Hoffman*, 264 Neb. 995, 653

N.W.2d 838 (2002). Neb. Ct. R. § 4-213 of the Nebraska Child Support Guidelines states that the "guidelines intend that spousal support be determined from income available to the parties *after* child support has been established." (Emphasis supplied.) In *Gallner v. Hoffman*, the court stated that this language provided clearly that "child support obligations are to be calculated prior to the calculation of alimony." 264 Neb. at 1003, 653 N.W.2d at 845. It logically follows that if child support is calculated before alimony, such alimony should be excluded when calculating income in a modification proceeding.

Accordingly, we find that the district court erred as a matter of law by including alimony in its calculation of Diana's total monthly income and that Diana's monthly income should be reduced by $3,000.

Diana also claims that the district court abused its discretion by including her earning capacity in the calculation of her income. She argues that because Keith retired subsequent to the entry of the dissolution decree and she now receives a portion of his retirement annuity, that amount should replace her imputed earning capacity of $1,666 per month. Diana asserts that it is unjust to add her earning capacity on top of the amount that she is actually receiving as income through the annuity.

[10] Section 4-204 of the Nebraska Child Support Guidelines states that "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." The Nebraska Supreme Court has held that the use of earning capacity in calculating 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, 838 N.W.2d 300 (2013).

In the parties' dissolution decree, they stipulated to an earning capacity of $20,000 per year for Diana, which results in $1,666 per month. In the modification action, the district

court adopted the same figure as Diana's imputed earning capacity.

Diana testified that at the time of trial, she was 53 years old and had no physical barriers to obtaining employment. She was last employed in 1992, and she had received an associate's degree in fashion merchandising. Diana testified that she assumed she could presently earn minimum wage based on her extended time out of the workforce and that she had not actively pursued employment following entry of the dissolution decree.

We find nothing in the record to suggest that Diana's earning capacity has changed in any way since she and Keith divorced. While Diana is correct that Keith has since retired from the position he held at the time, we find nothing to indicate that she is incapable of earning an income. Therefore, we find no abuse of discretion in the district court's inclusion of her imputed earning capacity in the calculation of her income.

Because the court erroneously included alimony when calculating Diana's income, we reverse the district court's order and remand the cause for recalculation of child support to exclude Diana's monthly alimony.

### 2. Deviation

Keith argues that the district court erred in granting Diana's second amended complaint for modification of child support. He claims that there was not sufficient evidence presented to deviate upward from the amounts set forth in the child support guidelines and that the court did not specify its reasons or set forth its calculations to justify its upward deviation. Furthermore, Keith argues that it was error to impose an upward deviation based upon Diana's speculative evidence of increased expenses caused by his failure to exercise his parenting time. For the reasons that follow, we agree that the district court failed to sufficiently state its reasons in granting the upward deviation.

[11-14] A party can modify a prior child support order by showing that there has been a material change in circumstances since the entry of the court's prior order. *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). Generally, parties' child support obligations should be set according to the provisions set forth in the Nebraska Child Support Guidelines. *Gress v. Gress, supra*. A court may deviate from the guidelines, but only if it specifically finds that a deviation is warranted based on the evidence. *Gress v. Gress, supra*. Without a clearly articulated justification, any deviation from the guidelines is an abuse of discretion. *Gress v. Gress, supra*.

Section 4-203 of the Nebraska Child Support Guidelines articulates the instances in which deviations are permitted. Relevant here are § 4-203(C) and (E), which provide, respectively, that deviations are permissible when the total net income exceeds $15,000 monthly and that they are permissible when application of the guidelines in an individual case would be unjust or inappropriate. Section 4-203 of the guidelines further states that "[i]n the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order, or worksheet 5 should be completed by the court and filed in the court file."

Here, the district court adopted Keith's child support calculations, which resulted in a payment by Keith of $1,935 per month for two children. As part of those calculations, the district court found that the parties' combined monthly net income was $16,275.63. The court then attached an additional worksheet to its order, pursuant to § 4-203(C) of the guidelines, for incomes over $15,000 monthly. Pursuant to those calculations, the court raised Keith's child support contribution from $1,935 to $2,022 per month. However, the court ultimately ordered Keith to pay $2,500 per month for two children, which it stated constituted an upward deviation of $478.

In its order, the district court stated that it found that an upward deviation was in the children's best interests, but it did not specifically explain its reasoning for such a finding.

In finding that a substantial and material change in circumstances existed, the court referenced the change in the parties' incomes and Keith's relocation to Turkey as justification for an increase in his child support obligation, but the court did not explain its reasoning in finding that an upward deviation beyond what was provided for under the guidelines was necessary. Furthermore, the court did not attach worksheet 5, the deviations worksheet, to its order.

In adopting Keith's child support calculations, the district court included Diana's alimony as part of her income. Using this figure, the court found that the parties' combined monthly net income was $16,275.63. However, as discussed above, the inclusion of alimony was in error, and Diana's total income should be reduced by $3,000. Using the correct amount for Diana's income leads to a combined monthly net income of $13,275.63, which is less than the $15,000 net income for which § 4-203(C) permits a deviation. Because we find that the parties' monthly net income is not greater than $15,000, we find that the district court's increase of Keith's child support under the additional § 4-203(C) worksheet was an abuse of discretion.

Furthermore, the district court did not clearly articulate its reasoning for the additional upward deviation of $478. The order simply stated that the court found such a deviation was in the children's best interests. The court did not specifically explain why it found that an upward deviation was justified; nor did it set forth its reasoning for granting the deviation in the amount that it did. Pursuant to § 4-203 of the guidelines, a court must either state its reason for the deviation in its findings or complete and file worksheet 5. Here, the district court did neither. Therefore, we find that the district court abused its discretion in granting the deviation. We reverse the district court's order establishing the parties' child support obligations and remand the cause for recalculation. If, after calculating the parties' child support obligations using the corrected income, the district court finds that a deviation is justified, it

shall specifically state its reason for such a finding in its order or complete and file worksheet 5.

### 3. Retroactivity of Modification

Diana argues that the district court abused its discretion in denying her request to retroactively modify the change in Keith's child support obligation. She claims that because she filed her initial complaint seeking to modify the dissolution decree on August 31, 2015, the modification should have been ordered retroactive to September 1, which was the first day of the month following the filing of her application. Diana asserts that denying such a retroactive award has the effect of penalizing her and the children for the length of time that was required to resolve the matter. She further argues that there was no evidence that such retroactive application would unduly create financial hardship for Keith. We agree.

[15-18] The Nebraska Supreme Court has held that absent equities to the contrary, the general rule is that the modification of a child support order should be applied retroactively to the first day of the month following the filing day of the application for modification. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). The child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Id*. The initial determination regarding the retroactive application of a modification order is entrusted to the discretion of the trial court and will be affirmed on appeal absent an abuse of discretion. *Id*. However, there are circumstances to take into consideration wherein the noncustodial parent may not have the ability to pay retroactive support in addition to meeting current support obligations. See *id*.

In this case, Diana filed her initial application seeking modification on August 31, 2015, and the order of modification was entered more than 1 year later, on November 15, 2016. In the order of modification, the district court denied Diana's request to retroactively modify the award. However, the court did not state any reason for its denial. Furthermore, we note

that the record indicates that a retroactive award would not create financial hardship for Keith. In particular, we note his testimony that he received a lump-sum payment of approximately $8,000 from his retirement annuity. Given the rule set out in *Riggs v. Riggs*, 261 Neb. at 356, 622 N.W.2d at 870, and the apparent absence of any "equities to the contrary" in the record, we find that the district court abused its discretion in denying Diana's request to order the child support modification retroactive to September 1, 2015.

### 4. Attorney Fees

Diana claims that the district court abused its discretion in denying her request for attorney fees. She argues that the record shows that Keith is a high-wage earner and has the ability to pay both his attorney fees and hers. Diana claims that she has incurred over $20,000 in attorney fees litigating this modification action and does not have the ability to pay those fees. She also argues that Keith took actions that contributed to her high legal expenses, such as failing to timely respond to discovery requests and filing an action related to custody that he later dismissed. Therefore, Diana asserts that an award of attorney fees is appropriate. We disagree.

[19] Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). In an action for modification of a dissolution decree, the award of attorney fees is left to the discretion of the trial court and, on appeal, is reviewed de novo on the record and will be affirmed absent an abuse of discretion. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

In this case, we note that Diana did prevail in obtaining an increase in child support in the trial court. However, the trial court did not award Diana attorney fees and ordered both parties to pay their own legal expenses. Furthermore, the fact that Keith may be considered a high-wage earner does

not in and of itself justify ordering him to pay both parties' legal expenses. Therefore, we find that the district court did not abuse its discretion in denying Diana's request for attorney fees.

## VI. CONCLUSION

Based on our review of the record, we find that the district court erred in including alimony in its calculation of Diana's income and that the court abused its discretion in granting an upward deviation from the child support guidelines without explanation and in failing to order retroactive modified support. We find no abuse of discretion in the court's denial of attorney fees. Therefore, we affirm in part and in part reverse, and remand the cause for further proceedings consistent with this opinion.

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

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

# Eunice Nyamatore, appellant, v. Barbara J. Schuerman and Omaha Transit Authority, also known as Transit Authority of Omaha, doing business as Metro Area Transit, appellees.

904 N.W.2d 730

Filed October 31, 2017. No. A-16-881.

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. **Estoppel: Equity: Appeal and Error.** A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Statutes: Immunity: Waiver: Intent.** Statutes that purport to waive sovereign immunity must be clear in their intent and are strictly construed in favor of the sovereign and against the waiver.
4. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
5. **Estoppel.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.
6. **Limitations of Actions: Political Subdivisions.** There is no duty on the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuances of the law.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed.

Paul M. Muia, of Law Offices of Paul M. Muia, for appellant.

Ryan M. Kunhart and Jeffrey J. Blumel, of Dvorak Law Group, L.L.C., and Kelsey M. Weiler, of Abrahams, Kaslow & Cassman, L.L.P., for appellees.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Arterburn, Judge.

## INTRODUCTION

Eunice Nyamatore appeals from an order of the district court which granted summary judgment in favor of Barbara J. Schuerman and Omaha Transit Authority (collectively OTA). On appeal, Nyamatore argues the district court erred in granting summary judgment in favor of OTA. She also asserts that the district court erred in finding that equitable estoppel did not apply in this matter. For the reasons set forth below, we affirm.

## BACKGROUND

On June 19, 2015, Nyamatore was a passenger on a bus owned and operated by OTA. The bus was involved in an accident, and Nyamatore suffered injuries as a result of the accident. Nyamatore, through counsel, sent a letter of notice of claim to Edith A. Simpson, the legal and human resources director for OTA. The letter was dated July 9, 2015. Simpson was the only named recipient of the notice of claim.

As the legal and human resources director for OTA, Simpson is responsible for providing OTA with legal advice and coordinating OTA's outside legal counsel. Additionally, Simpson is responsible for the administration and coordination of OTA's human resources functions. At the time Nyamatore sent her letter to Simpson, Simpson was not a clerk, secretary, or other official whose duty it was to

maintain the official records of OTA, nor had she ever held that position. The executive director of OTA is the only official whose duty it is to maintain the official records of OTA. At the time the notice was received, Curt Simon was the executive director for OTA.

Simpson, on behalf of OTA, responded to Nyamatore's notice in a letter dated April 15, 2016. In the letter, Simpson discussed settling Nyamatore's claim against OTA. Following Simpson's response to Nyamatore, Nyamatore filed a complaint in the district court on May 5, approximately 11 months after the accident.

A few days after Nyamatore filed her complaint in district court, Simpson sent her another letter, dated May 13, 2016. In this letter, Simpson again tried to settle the dispute between Nyamatore and OTA.

OTA filed its answer to Nyamatore's complaint on June 20, 2016. OTA alleged as an affirmative defense that Nyamatore failed to comply with the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012), thereby barring her claim.

OTA filed a motion for summary judgment on July 1, 2016. The district court held a hearing on the motion on August 19. On September 6, the district court entered an order granting OTA's motion for summary judgment. Nyamatore appeals.

## ASSIGNMENTS OF ERROR

Nyamatore argues, restated and consolidated, that the district court erred in (1) granting OTA's motion for summary judgment and (2) finding equitable estoppel did not apply under the facts of this case.

## 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. *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014). An appellate court must 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. *Id.*

In actions brought pursuant to the PSTCA, the factual findings of the trial court will not be disturbed on appeal unless clearly wrong. *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 885 N.W.2d 1 (2016).

[2] A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016).

## ANALYSIS

### Notice Requirements Under PSTCA

Nyamatore argues the district court erred in granting OTA's motion for summary judgment because she substantially complied with the notice requirement under the PSTCA. We disagree.

[3] The PSTCA provides limited waivers of sovereign immunity. *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012). Statutes that purport to waive sovereign immunity must be clear in their intent and are strictly construed in favor of the sovereign and against the waiver. See *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000). Section 13-919 provides in part: "Every claim against a political subdivision permitted under the [PSTCA] shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body." The same limitation applies for suits against an employee of a political subdivision. See § 13-920.

In this case, Nyamatore sent a letter to OTA's legal and human resources director approximately 3 weeks after the

accident. However, OTA argues that Nyamatore's letter did not constitute proper notice "in writing to the governing body" because the letter did not comply with § 13-905, which provides as follows:

> All tort claims under the [PSTCA] shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision. It shall be the duty of the official with whom the claim is filed to present the claim to the governing body. All such claims shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant.

[4] While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the PSTCA. *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003). If a political subdivision, by an appropriately specific allegation in a demurrer or answer, raises the issue of the plaintiff's noncompliance with the notice requirement of § 13-905 of the PSTCA, the plaintiff has the burden to show compliance with the notice requirement. *Id.*

The facts of this case are extremely similar to the facts in *Estate of McElwee, supra*, including that OTA was the defendant therein. In *Estate of McElwee*, the Nebraska Supreme Court found that the plaintiff failed to satisfy the notice requirement of the PSTCA because the plaintiff served notice of claim on the defendant's director of administration and human resources rather than the individual responsible for maintaining the defendant's official records—the defendant's executive director of the board of directors—upon whom service was required by the PSTCA.

Nyamatore concedes that this matter was brought under the PSTCA. She also appears to concede that she did not forward her letter to the correct individual at OTA. However, Nyamatore argues that she substantially complied with the PSTCA because OTA was put on notice with the letter she sent to Simpson. Nyamatore also argues that OTA was put on notice of the claim since Simpson was authorized by OTA to offer two different settlement sums. The Nebraska Supreme Court has applied a substantial compliance analysis when there is a question about whether the content of the required claim meets the requirements of the PSTCA; however, the court has expressly held that if the notice is not filed with the person designated by statute as the authorized recipient, a substantial compliance analysis is not applicable. *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008).

In *Estate of McElwee*, 266 Neb. at 325, 664 N.W.2d at 468, the Nebraska Supreme Court addressed a substantial compliance argument:

> While § 13-905 does facilitate the timely investigation of claims . . . it is also obviously intended to ensure that notice of pending claims is provided to those who have a legal duty to file those claims in the official records of the political subdivision, and to notify the governing body of the subdivision.
>
> While a subordinate employee may ultimately be directed to oversee the administration of the claim, it is still necessary that the claim be filed in the official records and made known to the governing body, and § 13-905 facilitates this purpose by requiring that claims be presented to the officer of the political subdivision with the legal responsibility for filing such records. "It would defeat the purpose of § 13-905 if mere knowledge of an act or omission, by a nondesignated party, was sufficient to satisfy the requirements of that section." . . . In any event, we are not at liberty to ignore the plain language of the statute. In the absence of ambiguity, courts must

> give effect to statutes as they are written. [The human resources director] did not have any of the duties set forth by the unambiguous language of § 13-905, so the notice of claim directed to [her] was not effective notice under the [PSTCA]. The plaintiff's purported claim did not meet the plainly stated requirements of § 13-905.

(Citations omitted.)

This issue was again addressed in *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015). There, the plaintiff filed his claim with the chief executive officer (CEO) of the hospital. The evidence demonstrated that although the CEO actually maintained the records of the hospital (a political subdivision), the secretary of the board of trustees of the hospital was the person who was given the duty to maintain the records of the hospital under its bylaws. Therefore, the secretary of the board of trustees was the person with whom the claim had to be filed. The evidence demonstrated that the CEO discussed the claim with the board of trustees, including the secretary. The court held that filing with an official who does not have the duty to maintain the official records of the political subdivision does not satisfy the PSTCA. The court noted that there was no evidence that the CEO was a de facto clerk, secretary, or official recordkeeper and that no misrepresentation was made by the CEO or the hospital that the CEO was the person designated by statute to receive claims.

The undisputed evidence received at the hearing herein established that Simon, the executive director of OTA, was the only official whose duty it was to maintain the official records of OTA. Simpson was the only named recipient on the letter of notice of claim sent to OTA. Nyamatore failed to present any evidence that she complied with the notice requirements of the PSTCA, nor did she present any evidence that Simpson was a de facto clerk or official recordkeeper. She also provided no evidence that Simpson misrepresented herself as the official recordkeeper of OTA. Therefore, we find that the district court did not err in granting summary judgment in favor of OTA.

### Equitable Estoppel

Nyamatore argues that the district court erred in not finding that equitable estoppel applied in this matter because Simpson's actions led Nyamatore to rely on the premise that OTA received notice of Nyamatore's claim against it. We disagree.

[5,6] The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice. *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016). There is no duty on the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuances of the law. *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003); *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999). 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. *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002).

Two cases with somewhat similar facts to the present case are helpful to our analysis. In *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989), counsel for the claimant sent a letter to a city agency requesting that an insurance representative for the city contact him regarding injuries the claimant

had received while being transported on a city handibus. An insurance adjuster thereafter contacted counsel for the claimant. Additional medical records were provided to the adjuster, and further telephone conversations ensued. No further actions were taken by the city. Following the filing of suit in the district court, the city's motion for summary judgment was sustained. The Nebraska Supreme Court affirmed. The court stated that there was no evidence that any city official informed the claimant or his counsel that proper filing of a claim was necessary under the PSTCA. The court further found that the PSTCA contains a clear procedure for filing a claim against a municipality. Therefore, the city was not estopped from denying the claimant's compliance with the notice requirement of the PSTCA.

In *Lowe v. Lancaster Cty. Sch. Dist. 0001*, 17 Neb. App. 419, 766 N.W.2d 408 (2009), we applied the doctrine of equitable estoppel to allow an action against the Lincoln Public Schools (LPS) to proceed. In *Lowe*, counsel for the claimant made inquiry to LPS employees as to where specifically he should provide the claim on two separate occasions. He was given incorrect information both times. Moreover, he was later provided a carefully worded letter from the person he was instructed to provide the claim to that acknowledged receipt of the claim but did nothing to correct the incorrect information previously supplied by the LPS employees. We found that viewed in the light most favorable to the claimant, the letter could be seen as calculated to convey the impression to the claimant's attorney that the claim was properly filed. As a result, we reversed the district court's grant of summary judgment to LPS.

This case lies between *Willis, supra*, and *Lowe, supra*. However, we find that the offers of settlement sent by OTA to counsel for Nyamatore do not provide a basis for equitable estoppel. Nyamatore, through her counsel, did not lack the knowledge or the means to acquire the knowledge necessary to properly file the claim. The PSTCA details the procedure

for filing a claim against a political subdivision. There is a significant volume of case law on this issue. *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003), involves the same political subdivision and even directs claimants how to properly file the notice of claim to OTA. We further note that (unlike *Lowe, supra*) Nyamatore presented no evidence demonstrating what, if any, steps were taken by her counsel to determine the proper official with whom the claim should be filed. Moreover, there is no evidence that any official of OTA made any affirmative representation to her counsel that misinformed him of the proper manner of filing. As we have stated, there is no duty on the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuances of the law. *Estate of McElwee, supra*; *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999). Upon our de novo review, we find that the district court did not err in finding that equitable estoppel did not apply in this matter.

As was stated by our Supreme Court in *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015), we recognize that the procedural requirements of the PSTCA can lead to harsh results, particularly where, as here, the evidence demonstrates OTA's knowledge and consideration of the claim. However, our Supreme Court has consistently demanded strict compliance with statutory requirements in cases involving a waiver of sovereign immunity. See *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017). It is the province of the Legislature to amend the statute if something less than strict compliance with procedural requirements is to be demanded. The courts do not possess that power. See *Brothers, supra*.

## CONCLUSION

We find the district court did not err in granting OTA's motion for summary judgment. We also find that the district court did not err in finding that equitable estoppel did not apply under the facts of this case.

Affirmed.

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

# State of Nebraska, appellee, v. Herchel Harold Huff, appellant.

904 N.W.2d 281

Filed October 31, 2017. No. A-16-983.

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: Claims.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
4. **Postconviction: Evidence.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact.
5. **Postconviction: Evidence: Appeal and Error.** An appellate court upholds the trial court's findings in an evidentiary hearing on a motion for postconviction relief unless the findings are clearly erroneous.
6. **Judgments: Appeal and Error.** An appellate court independently resolves questions of law.
7. **Effectiveness of Counsel: Appeal and Error.** When a claim of ineffective assistance of counsel presents a mixed question of law and fact, an appellate court reviews the lower court's factual findings for clear error but independently determines whether those facts show counsel's performance was deficient and prejudiced the defendant.
8. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final, appealable order as to the claims denied without a hearing.

9. **Postconviction: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912 (Reissue 2016), a defendant has just 30 days to appeal from the denial of an evidentiary hearing; the failure to do so results in the defendant's losing the right to pursue those allegations further.
10. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
11. **Postconviction: Effectiveness of Counsel: Appeal and Error.** To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
12. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice under the prejudice component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. 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.
13. **Effectiveness of Counsel.** The two prongs of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order.
14. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her. The 14th Amendment makes the guarantees of this clause obligatory upon the states.
15. **Constitutional Law: Trial: Witnesses.** The Confrontation Clause guarantees the accused's right to be present in the courtroom at every stage of his or her trial.
16. **Trial: Due Process.** The general rule is that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.
17. **Trial: Due Process: Waiver.** A defendant has a right to be present at all times when any proceeding is taken during the trial, from impaneling of

the jury to the rendition of the verdict, inclusive, unless he has waived such right.

18. **Trial: Waiver.** If a defendant is to effectively waive his or her presence at trial, that waiver must be knowing and voluntary.
19. **Constitutional Law: Juror Qualifications.** Voir dire plays a critical function in assuring a criminal defendant that his or her constitutional right to an impartial jury will be honored.
20. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of alleged ineffective assistance of counsel, an appellate court affords trial counsel due deference to formulate trial strategy and tactics.
21. **Effectiveness of Counsel: Presumptions: Appeal and Error.** There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.
22. **Effectiveness of Counsel: Judgments: Appeal and Error.** Even if found unreasonable, error owing to ineffective assistance of counsel justifies setting aside the judgment only if there was prejudice.

Appeal from the District Court for Furnas County: James E. Doyle IV, Judge. Affirmed.

Brian J. Davis, of Berreckman & Davis, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Moore, Chief Judge.

## I. INTRODUCTION

Herchel Harold Huff was convicted of motor vehicle homicide, among other charges, in connection with the death of Kasey Jo Warner. Following his direct appeals, Huff filed a motion for postconviction relief in the district court for Furnas County. Following an initial review of Huff's motion, the court dismissed a number of Huff's claims without an evidentiary hearing. Huff appealed, and this court affirmed the dismissal of those claims. Subsequently, the State filed a motion to dismiss the remainder of Huff's postconviction claims. The court sustained the motion in part and overruled it in part. Huff again appealed, and this court affirmed. An evidentiary

hearing was held on Huff's remaining postconviction claims as well as a motion to disqualify or recuse the judge hearing his postconviction motion. The present appeal arises from the district court's order denying the remaining claims in Huff's postconviction motion following an evidentiary hearing. Huff asserts both ineffective assistance of counsel and trial court error in connection with the in-chambers voir dire of certain jurors conducted outside of his presence. Huff's first assigned error is not properly before us in this appeal, and he has not shown that he was prejudiced by his counsel's actions in connection with the in-chambers voir dire. Accordingly, we affirm.

## II. BACKGROUND

### 1. Trial and Direct Appeals

On October 3, 2007, Warner was jogging on a gravel road near her home in Furnas County when she was struck and killed by a vehicle driven by Huff. Huff pled guilty to manslaughter, but not guilty to the other crimes with which he was charged. A jury trial was held, and the jury found Huff guilty of motor vehicle homicide. The district court found Huff guilty of the remaining counts (tampering with a witness and refusal to submit to a chemical test). Huff was sentenced to imprisonment for a term of 45 to 45 years for motor vehicle homicide and a concurrent term of 20 to 20 years for manslaughter. Huff was sentenced to imprisonment for 20 to 60 months for tampering with a witness and 5 to 5 years for third-offense refusal to submit to a chemical test. These sentences were to be served consecutively to the sentences for manslaughter and motor vehicle homicide and to one another. Huff filed a direct appeal and was represented on direct appeal by his trial attorneys. The Supreme Court affirmed Huff's convictions for motor vehicle homicide, tampering with a witness, and refusal to submit to a chemical test, but it remanded the cause for sentencing on the third-offense refusal to submit to a chemical test. The Supreme Court also vacated Huff's conviction and

sentence for manslaughter. See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

After remand, Huff was resentenced on the refusal to take a chemical test to 60 days' incarceration, a $500 fine, and the suspension of his license for 6 months after his release from incarceration. Huff appealed this sentence, and the Nebraska Supreme Court summarily affirmed. *State v. Huff*, 283 Neb. xix (No. S-11-1102, Apr. 11, 2012). Huff was represented by his trial attorneys in this appeal as well.

### 2. Postconviction Motion

On August 20, 2012, Huff filed a verified motion for postconviction relief, alleging numerous claims of ineffective assistance of counsel, prosecutorial misconduct, trial court error, law enforcement misconduct, and denial of his right to appellate counsel, and he requested an evidentiary hearing.

### 3. First Postconviction Appeal

On October 22, 2012, the district court entered an order denying certain of Huff's claims and granting him an evidentiary hearing on others. The court appointed postconviction counsel for Huff. Huff appealed from the order dismissing portions of his postconviction claims. In that appeal, Huff challenged the court's dismissal of two of his claims of ineffective assistance of trial counsel without an evidentiary hearing. In a memorandum opinion, this court affirmed. See *State v. Huff*, No. A-12-1072, 2013 WL 6622896 (Neb. App. Dec. 17, 2013) (selected for posting to court website).

### 4. Second Postconviction Appeal

Following the first postconviction appeal, the State filed a motion to dismiss Huff's remaining postconviction claims. On October 1, 2014, the district court entered an order granting in part and denying in part the State's motion to dismiss. The court detailed the remaining claims for postconviction relief and found that the remaining claims under "[g]rounds 2, 3, and 4" set forth in Huff's motion constituted claims of ineffective

assistance of counsel and were "considered by the court to be preserved through, and to be part of, Huff's ineffective assistance of counsel claims set forth in [g]round 1." To the extent that the court's description of and prior characterization of grounds 2 through 4 "create[d] a different impression, or g[a]ve rise to inferences that the claims can be classified as other than ineffective assistance of counsel claims," the court granted the State's motion to dismiss. The court dismissed additional claims for relief asserted in Huff's postconviction motion and denied the State's motion as to other claims. Huff again appealed, asserting that the court erred when it sustained the State's motion to dismiss in part, denying two additional claims of ineffective assistance of counsel without an evidentiary hearing. In an unpublished memorandum opinion, this court affirmed the dismissal of the additional claims from Huff's postconviction motion. *State v. Huff*, 22 Neb. App. xxxii (No. A-14-985, June 26, 2015).

### 5. Evidentiary Hearing

On May 26, 2016, an evidentiary hearing was held on the remaining claims in Huff's postconviction motion. The district court received exhibits including the bill of exceptions from Huff's trial, various depositions and affidavits, and certain pleadings. We have set forth the evidence relevant to Huff's assignments of error in the present appeal, focusing on the voir dire of certain prospective jurors in the court's chambers outside of Huff's presence.

#### (a) Voir Dire Proceedings

The record shows that voir dire took place on March 9, 2010, and that Huff was present in the courtroom during the voir dire proceedings. During voir dire, the trial judge asked the panel if anyone had ever been arrested for, cited for, or convicted of driving while under the influence of alcohol (DUI). In response, six prospective jurors (jurors Nos. 52, 73, 95, 96, 106, and 139) raised their hands. The judge then

asked the six prospective jurors a series of questions to see if anything about their experience would affect their ability to be fair and impartial. None of the six prospective jurors indicated that they could not be fair and impartial. We note that jurors Nos. 52 and 96 were later excused for cause for other reasons based upon additional in-court questioning and were not among those prospective jurors later questioned in the court's chambers. When selected from the pool after other prospective jurors were excused, both juror No. 91 and juror No. 102 also informed the court of prior DUI convictions. Upon in-court questioning by the judge, they both indicated that they could be fair and impartial.

The attorneys for both sides also conducted in-court questioning of prospective jurors, and Huff was present for this questioning. During the prosecutor's questioning, jurors Nos. 29, 73, 91, 95, 102, 106, and 139 raised their hands to indicate that they had prior DUI convictions. After Huff's counsel questioned the prospective jurors, the judge confirmed that the State wanted to individually question some of the prospective jurors in chambers.

During a sidebar discussion between the district court and counsel for both parties, one of the prosecuting attorneys informed the court that the State wanted more details from the seven prospective jurors who had prior DUI convictions "about how long ago it was" and "what the treatment was" and to "[g]et the personal details out." Upon the court's inquiry, Huff's attorneys indicated they had no objections to such individual questioning of the seven prospective jurors in chambers. Following the sidebar, the court informed the prospective jurors that the attorneys wanted to ask some questions of certain individual jurors in private "to spare any kind of embarrassment to anyone." The court stated that the questioning would occur in a separate room with the attorneys and court reporter present and that each of the seven identified prospective jurors would be called back separately to answer questions outside the presence of the other prospective jurors.

Huff did not express any desire on the record to be present during the in-chambers questioning.

The in-chambers voir dire began at 11:45 a.m. on March 9, 2010. The district court noted the presence of the attorneys for both Huff and the State for the in-chambers voir dire. Neither the court nor the attorneys mentioned Huff's absence, but a notation from the court reporter in the bill of exceptions shows that Huff was not present for the in-chambers voir dire. The seven prospective jurors were then questioned individually about the circumstances of their past DUI convictions. Six of the seven prospective jurors (jurors Nos. 29, 91, 95, 102, 106, and 139) stated that they could set aside their prior convictions and decide Huff's case based on the facts presented to them. However, juror No. 73 was excused for cause during the in-chambers questioning after stating a belief that Huff was guilty. After the seven prospective jurors had been questioned, Huff's attorneys suggested that the court call the next prospective juror from the pool into chambers for questioning in case that individual also had a prior DUI conviction. As the State had no objections, the judge told the attorneys he would ask the clerk to "pull another name" and would then bring that individual into the conference room. After the clerk selected prospective juror No. 48, that person was individually questioned in chambers by the judge and the attorneys for both parties. Juror No. 48 did not have any prior DUI convictions.

After the in-chambers voir dire concluded at 12:19 p.m. on March 9, 2010, the judge and all counsel returned to the courtroom, where Huff was still present. The State and the defense both passed the jury for cause. After the parties exercised their peremptory strikes, the court clerk read the names of those persons who were excused and the judge thanked them for their service. The bill of exceptions shows only which jurors were eliminated via peremptory strikes and does not show which jurors were removed by the State and

which were removed by the defense. Of the eight jurors who were individually questioned in chambers, only jurors Nos. 95 and 106 were selected as members of the jury. Juror No. 91 was selected as the alternate juror but did not participate in deliberations.

### (b) Depositions of Huff's Trial Counsel

At the evidentiary hearing, the district court received the depositions of both of Huff's trial attorneys. We have referred to them as "the first attorney" and "the second attorney" based on the order in which they were appointed to represent Huff. The second attorney did not recall who made the request to conduct the individual in-chambers voir dire of prospective jurors with prior DUI's, but testified that the decision to do so was made to avoid embarrassing those individuals in front of the other prospective jurors. He testified that he did not ask for Huff to be present for those individual interviews or waive Huff's presence in any way and that the trial judge did not ask if he was willing to waive Huff's presence. When asked if he thought "anything of that at the time," he responded that he made the tactical decision not to say anything because he "thought that if things went badly, . . . the fact that [Huff] wasn't present would have been a good issue on appeal if he was convicted." The second attorney stated that the issue of Huff's absence during the in-chambers voir dire was not raised on direct appeal because after researching the issue, he and the first attorney determined that the claim would not be successful.

The second attorney recalled that he spoke with Huff briefly after the in-chambers voir dire and prior to exercising peremptory strikes and that he informed Huff the defense "didn't want to have any of [the prospective jurors questioned in chambers] on the panel because they were not favorable to him." Both of Huff's trial attorneys testified in their

depositions that Huff did not provide any input when it came to deciding which prospective jurors the defense wanted on the jury and which ones the defense wanted to strike.

The first attorney testified about the extent of Huff's involvement in the overall voir dire process. The first attorney recalled that he and the second attorney went through the list of potential jurors with Huff prior to trial to see if Huff recognized any of the names, which Huff did not. He stated that they would have also told Huff to let them know if he recognized anyone on the panel once voir dire began. The first attorney recalled that Huff did not know any of the jurors, and he did not remember Huff's commenting "either way" with respect to keeping or striking specific jurors.

### (c) Huff's Deposition and Affidavit

At the evidentiary hearing, the district court also received Huff's deposition and an affidavit from Huff prepared after the deposition was taken.

In his deposition, Huff acknowledged that prior to trial, his attorneys briefly explained the voir dire process and went through the list of potential jurors with him. He had been provided the list ahead of time and informed by his attorneys that they wanted to know if he knew any of the individuals or anything about them. Huff testified that he was better at remembering faces than names and that he wished he had been provided with pictures of the individuals or a map of their listed addresses to aid him in determining whether he knew anything about them.

With respect to the in-chambers voir dire, Huff testified he would have liked to have been present because he "had a right to be in that room" and "had a right to know what they were talking about and why they were dismissing people without [his] being present." Huff testified that following the in-chambers voir dire, his attorneys did not discuss the questions asked or answers provided by the prospective jurors

during the individual questioning and that there was not time to discuss "why they were going to make any decision" with respect to particular jurors. He testified, "[I]f I would have known what was going on in there, I would have had the ability to maybe help in my case." Huff had not seen the record of the in-chambers voir dire at that point, and he testified that if shown the record, he thought he might be able to be more specific about input he could have provided.

According to Huff, his attorneys did not discuss with him the reason why any jurors were or were not being dismissed prior to exercising the peremptory strikes. He testified that he felt if he had been present for and able to provide input during the in-chambers voir dire, it could have affected the outcome of his trial. Huff explained:

> Well, one of [those] jurors may have been . . . the person that could have [given] me an unbiased trial. They could have had the ability to give me freedom. In the same sense, they could have had the sense to find me guilty, they could have found me not guilty. . . . I'll never know because I wasn't in the room with them. I'll have no ability to defend myself or help myself because I don't know what went on.

Huff testified that the second attorney informed him following the in-chambers voir dire that the attorney needed to research the issue of Huff's absence.

In the affidavit, Huff indicated that he had recently reviewed the portion of the bill of exceptions from his trial that recorded voir dire. Huff stated that if his trial attorneys had "demanded [his] presence, [he] would have been able to see the faces of the jurors that were being questioned, observe their body language, posture, and demeanor while they were being questioned, and provide[] input on whether [he] thought they were being honest" and "whether [he] thought they would be good jurors on [his] case." Huff stated:

> To show how important the process was, 4 out of the 7 jurors questioned while I was not present were stricken.

> One by the Judge and 3 by my own attorneys. In reviewing the record, I don't know why [juror No.] 102 was stricken by my attorneys and I think [juror No.] 91 should have been stricken. I can't provide any details into why those decisions were made because I wasn't present to observe anything about the jurors while they were being questioned.

He stated further:

> This clearly could have affected the outcome of my case had I wanted to strike different jurors or keep different jurors after hearing and observing the relevant information they were providing. How jurors felt about their own DUI's was probably the most important information they could provide, and my lawyers purposely did not allow me to be present during the process.

Huff did not provide any specific reasons as to why he believed juror No. 102 would have made a good juror or why juror No. 91 should have been stricken.

### 6. Order Denying Postconviction Relief

On September 1, 2016, the district court entered an order denying postconviction relief. As relevant to Huff's claim that he received ineffective assistance of trial counsel in connection with the in-chambers voir dire of eight potential jurors outside of Huff's presence, the court found that Huff's absence was inadvertent and that Huff could not establish prejudice. The court also rejected Huff's argument that he did not have to establish actual prejudice. Huff subsequently perfected the present appeal.

## III. ASSIGNMENTS OF ERROR

Huff asserts that the district court erred in (1) denying his claim that the court violated his constitutional rights by allowing voir dire of prospective jurors to proceed in chambers outside of Huff's presence and (2) denying his claim that his

trial attorneys were ineffective in not objecting or moving for a mistrial following the voir dire of prospective jurors in chambers outside of Huff's presence.

## IV. STANDARD OF REVIEW

[1-3] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Ross*, 296 Neb. 923, 899 N.W.2d 209 (2017). Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *Id.* When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. *Id*.

[4-6] In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017). An appellate court upholds the trial court's findings in an evidentiary hearing on a motion for postconviction relief unless the findings are clearly erroneous. *Id.* An appellate court independently resolves questions of law. *Id*.

[7] When a claim of ineffective assistance of counsel presents a mixed question of law and fact, an appellate court reviews the lower court's factual findings for clear error but independently determines whether those facts show counsel's performance was deficient and prejudiced the defendant. *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017).

## V. ANALYSIS

### 1. Claim of Trial Court Error

Huff asserts that the district court erred in denying his claim that the court violated his constitutional rights by allowing voir dire of prospective jurors to proceed in chambers outside of his presence. This claim, found in subparagraph E of ground

3 of Huff's motion, was previously dismissed by the court in its order of October 1, 2014, ruling on the State's motion to dismiss and is not properly before this court in Huff's present appeal.

In its October 2014 order, the district court determined that this claim and the other remaining claims under "[g]rounds 2, 3, and 4" of Huff's postconviction motion all constituted claims of ineffective assistance of counsel. The court denied the State's motion to dismiss in that regard, but it granted the motion to the extent those claims could be "construed or interpreted to be claims for any relief grounded on any theory or basis other than ineffective assistance of counsel." In other words, to the extent that Huff's claims under grounds 2, 3, and 4 of his motion could be interpreted as claims of prosecutorial misconduct, trial court error, or law enforcement misconduct, the court dismissed those claims for reasons including that they were known to Huff and could have been litigated on direct appeal and were thus procedurally barred.

[8,9] Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final, appealable order as to the claims denied without a hearing. *State v. Determan*, 292 Neb. 557, 873 N.W.2d 390 (2016). Pursuant to Neb. Rev. Stat. § 25-1912 (Reissue 2016), a defendant has just 30 days to appeal from the denial of an evidentiary hearing; the failure to do so results in the defendant's losing the right to pursue those allegations further. *State v. Determan, supra*. While Huff did perfect a timely appeal from the district court's October 2014 order, he did not assign error to the court's dismissal of his claim in subparagraph E of ground 3 to the extent the claim could be construed as one of trial court error. Thus, Huff has waived the right to pursue further his allegations of trial court error in connection with the in-chambers voir dire.

[10] Even if Huff had not waived the claim raised in his first assignment of error, the district court was correct in finding in its October 2014 order that any claim of trial court

error in connection with the in-chambers voir dire was procedurally barred because it was known to Huff at the time of his trial and could have been litigated on direct appeal. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

Huff's first assignment of error is without merit. However, we address his arguments below to the extent that they are applicable to his claim of ineffective assistance of counsel.

### 2. Claim of Ineffective Assistance of Counsel

Huff asserts that the district court erred in denying his claim that his trial attorneys were ineffective in not objecting or moving for a mistrial following the voir dire of prospective jurors in chambers outside of Huff's presence.

[11-13] To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *State v. Ross*, 296 Neb. 923, 899 N.W.2d 209 (2017). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Watson*, 295 Neb. 802, 891 N.W.2d 322 (2017). 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. *Id.* The two prongs of this test, deficient performance and

prejudice, may be addressed in either order. *State v. Alarcon-Chavez, supra*.

[14-18] The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her. *State v. Fox*, 282 Neb. 957, 806 N.W.2d 883 (2011). The 14th Amendment makes the guarantees of this clause obligatory upon the states. *State v. Fox, supra.* The Confrontation Clause guarantees the accused's right to be present in the courtroom at every stage of his or her trial. *State v. Fox, supra.* The 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution guarantee the right to due process of law. Article I, § 11, of the Nebraska Constitution further guarantees an accused individual the right to appear at his or her trial. Pursuant to Neb. Rev. Stat. § 29-2001 (Reissue 2016), "[n]o person indicted for a felony shall be tried unless personally present during the trial." The general rule is that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). The Nebraska Supreme Court has stated that a "defendant has a right to be present at all times when any proceeding is taken during the trial, from the impaneling of the jury to the rendition of the verdict, inclusive, unless he has waived such right." *Scott v. State*, 113 Neb. 657, 659, 204 N.W. 381 (1925). If a defendant is to effectively waive his or her presence at trial, that waiver must be knowing and voluntary. *State v. Fox, supra*.

The U.S. Supreme Court has assumed that "even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674

(1934), *overruled in part on other grounds, Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Referring to voir dire, the Supreme Court has noted that

> defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.

*Snyder v. Massachusetts*, 291 U.S. at 106. In further considering the right, the Supreme Court stated, "Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow." *Snyder v. Massachusetts*, 291 U.S. at 106-07. A due process right to be present is not absolute; rather, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." *Id.*, 291 U.S. at 107-08. See, also, *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013).

[19] Voir dire plays a critical function in assuring the criminal defendant that his or her constitutional right to an impartial jury will be honored. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). Clearly, it was important for Huff to have the opportunity to be present and participate in the jury selection process. Huff was present for the portion of the voir dire proceedings that occurred in the courtroom. He also was given a list of the potential jurors and had the opportunity to consult with his attorneys about the voir dire process prior to trial. His attorneys told him to let them know if he recognized anyone on the panel once voir dire began. The in-chambers questioning was directed to the ability of seven prospective jurors to be impartial given their prior DUI convictions. The responses of six of those prospective jurors indicated that they could be fair and impartial. The seventh juror, who stated a belief that Huff was guilty, was dismissed for cause during the in-chambers questioning. The additional prospective juror

selected from the pool and questioned in chambers did not have a prior DUI conviction. Huff's attorneys were present for the in-chambers questioning, which lasted a little more than 30 minutes. At least one of Huff's attorneys spoke with him briefly after the in-chambers voir dire and prior to the parties' exercise of their peremptory strikes. Huff did not provide any input with respect to exercising the defense's peremptory strikes. He was present during this process and for the selection and swearing of the 12 jurors and 1 alternate juror.

In determining that Huff had the burden to prove actual prejudice from his absence during the in-chambers voir dire, i.e., that his absence adversely affected the outcome of the trial, the district court relied on *U.S. v. Tipton*, 90 F.3d 861, 875 (4th Cir. 1996), which held:

> Where absence [from voir dire] has not been total but only intermittent during the process the courts accordingly have not presumed prejudice but have analyzed the circumstances to determine whether prejudice has been specifically established. *See, e.g., United States v. Bascaro*, 742 F.2d 1335, 1349-50 (11th Cir.1984) (although peremptory strike phase of voir dire is critical, no prejudice to defendants where attorneys conferred about peremptories outside their presence, but defendants were present both while questioning took place and when strikes actually entered); *United States v. Alessandrello*, 637 F.2d 131, 137-141 (3d Cir.1980) (absence of defendants from in-chambers questioning of venirepersons respecting pre-trial publicity not prejudicial in view of their presence at substantial part of voir dire and their counsels' presence during in-chambers proceedings).

[20-22] When reviewing claims of alleged ineffective assistance of counsel, an appellate court affords trial counsel due deference to formulate trial strategy and tactics. *State v. Torres*, 295 Neb. 830, 894 N.W.2d 191 (2017). There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions. *Id.*

Even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. See *State v. Duncan*, 293 Neb. 359, 377, 878 N.W.2d 363, 377 (2016). We are not convinced that Huff's trial attorneys were deficient under the circumstances of this case, but even assuming that they were deficient in failing to object to his absence from the in-chambers voir dire of the prospective jurors who indicated that they had prior DUI convictions (and the prospective juror selected after juror No. 73 was struck for cause), Huff cannot demonstrate a reasonable probability that but for his counsel's deficient performance, the result of the proceeding would have been different.

Huff argues that his attorneys' failure in this case was presumptively prejudicial. We disagree.

> Pursuant to [*United States v.*] *Cronic*, [466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984),] under certain specified circumstances, prejudice to the accused is to be presumed. The text of *Cronic* lists the following three circumstances in which prejudice will be presumed: (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial.

*State v. Trotter*, 259 Neb. 212, 218, 609 N.W.2d 33, 38 (2000). Clearly, the first two circumstances are not applicable here, and, as discussed above, Huff has not shown that the surrounding circumstances of this case justify a presumption of prejudice.

Huff cannot show a reasonable probability that but for his attorneys' alleged deficient performance, the result of the proceeding would have been different. Of the prospective jurors who were questioned in chambers, only jurors Nos. 95 and 106 served on the jury and participated in deliberations. Huff complains about only two of the prospective jurors that were

questioned individually—jurors Nos. 102 and 91. Juror No. 102 was stricken from the jury by either the State or defense counsel during the exercise of peremptory strikes, and juror No. 91 was the alternate juror and was dismissed prior to deliberations. The record does not conclusively show which of the prospective jurors at issue were stricken via the defense's peremptory strikes. Huff is not guaranteed a jury comprising particular jurors, only a jury that is fair and impartial. See, *Kloss v. United States*, 77 F.2d 462 (8th Cir. 1935); *Hartzell v. United States*, 72 F.2d 569 (8th Cir. 1934). Huff does not allege that any of the jurors who were selected and deliberated on his case were biased. Nor does he explain why he thought prospective juror No. 102 would have made a good juror. Although Huff did not hear that individual's responses during the in-chambers questioning, he heard the responses of and had the opportunity to observe all of the jurors, with the exception of juror No. 48, who was questioned only in chambers, during the in-court questioning. One of the parties exercised a peremptory strike against juror No. 48, and, as noted above, Huff does not have the right to have a jury comprising particular individuals. Huff has not shown and the record does not demonstrate that a juror with actual bias sat in judgment. Because Huff cannot show a reasonable probability that but for his counsel's alleged deficient performance, the result of the proceeding would have been different, his second assignment of error is without merit.

## VI. CONCLUSION

The district court did not err in denying postconviction relief following Huff's evidentiary hearing.

Affirmed.

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

# State of Nebraska on behalf of Hunter Wade Slingsby, a minor child, appellee, v. Jessie M. Slingsby, now known as Jessie M. Watts, appellant, and Devin W. Oxford, appellee.

903 N.W.2d 491

Filed October 31, 2017. No. A-16-1170.

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. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
3. **Modification of Decree: Child Custody: Proof.** In a child custody modification case, first, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.
4. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known at the time of the initial decree, would have persuaded the court to decree differently.
5. **Child Custody.** While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration.
6. ____. Factors such as the child's age and preference, academic and social benefits, living environment, and general quality of life, go to the welfare of the child, and such evidence can be considered in a change of custody determination.

7. **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.

Appeal from the District Court for Buffalo County: John H. Marsh, Judge. Affirmed.

Nathan T. Bruner, of Bruner Frank, L.L.C., for appellant.

Michael S. Borders, of Borders Law Office, for appellee Devin W. Oxford.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Bishop, Judge.

Jessie M. Slingsby, now known as Jessie M. Watts, appeals from the decision of the district court for Buffalo County modifying custody of Hunter Wade Slingsby. We affirm.

## BACKGROUND

Devin W. Oxford and Jessie are the parents of Hunter, born in November 2000. In September 2002, a stipulation was reached regarding paternity, custody, support, and daycare expenses. Jessie was awarded custody, and Devin received reasonable parenting time. In July 2006, the court modified the 2002 order to provide Devin with specific parenting time of every other weekend, rotating holidays, and 1 month each summer. Although neither the 2002 nor the 2006 orders of the district court appear in our record, the parties agree on the substance of the orders.

In July 2016, Devin filed an amended application asking the court to grant him physical custody of Hunter. Devin alleged that Hunter wanted to reside with him and that Hunter wanted to try going to school in Ansley, Nebraska (where Devin lives), because he was struggling at his current school in Kearney, Nebraska (where Jessie lives).

A hearing on the modification took place on November 1, 2016. Devin testified that he lives in Ansley with his girlfriend of almost 9 years, Danyle Goodman; their son, who was 5 years old at the time of the hearing; and Danyle's son from a previous relationship, who was 9 years old at the time. Devin's home is large enough that each child, including Hunter (who would turn 16 years old later that month), has his own bedroom.

Hunter was a sophomore in high school in Kearney at the time of the hearing, and he participated in wrestling and cross-country. Devin testified that Hunter struggled in high school and had struggled prior to high school as well. Devin agreed that Hunter is "smart," but that he struggles because he does not follow through on his schoolwork or turn in assignments. Jessie had been working with Hunter on his schoolwork, and Devin was supportive of her efforts. On one occasion, Hunter was at a wrestling meet when Devin and Jessie decided Hunter could not participate because he had not completed a class assignment and test. Devin thinks it is important that he and Jessie work together to address Hunter's issues with schoolwork. On cross-examination, Devin acknowledged that at his house there have not yet been any consequences for Hunter for failing to turn in school assignments. Devin attended Hunter's fall 2016 parent-teacher conference, but had not previously participated in conferences. He had communicated with Jessie about going to a previous conference together, but she was not agreeable to attending together.

Devin testified that he talks to Hunter about his grades "[o]nce a week or so." During Devin's parenting time, he helps Hunter complete his homework. Devin wants Hunter to get good grades and would not allow him to "slack off" with his homework if Hunter came to live with him. At Devin's house, "[s]choolwork comes first before anything else"; that rule has already been implemented with the younger children in his household. Devin believes the high school in Ansley could provide Hunter with a good education. Danyle works

for the Ansley public school system and would be present at Hunter's school every day.

Devin also testified about his employment (he owns a fencing company and is self-employed, mostly fencing pastures and building corrals), his finances, and his child support payment history (there had been times when he fell behind, but also times when he paid ahead). He also testified about his hobby of "trapping" animals, which is "just another form of hunting, conservation," an activity he participates in with the children in his household.

Devin asked the court to award him joint legal custody of Hunter with Jessie. Devin claimed that he and Jessie have been able to communicate about Hunter in the past and that Devin was willing to continue communicating with Jessie. A lot of their communication is through text messaging, much of which is through Danyle's cell phone because Devin does not always have cellular service when he is working. According to Devin, Jessie and Danyle have a good relationship and are able to communicate about Hunter.

Devin also asked the court to award him physical custody of Hunter. Hunter brought up the idea of living with Devin 1½ to 2 years earlier, but Jessie was opposed to the idea. Devin said that he loves Hunter and that they want to do more activities like fishing, hunting, and sports together. Hunter gets along well with the younger children in Devin's household, and he also has friends in Ansley. He is interested in the outdoors and "ag-related" activities, and he participates in 4-H in Ansley, showing cattle. He has also expressed an interest in "participat[ing] in FFA," an activity that is not available at his high school in Kearney. Devin thinks it would be in Hunter's best interests to be placed with him because "[i]t's where [Hunter] wants to be right now. He feels like he would get along better in Ansley at the school. He wants to be around me and his brothers more often." Hunter has been struggling at his high school in Kearney for a couple of years, and a change to a new school "[c]an't hurt." "Ansley would

be a good place for him to go." On cross-examination, Devin agreed that Jessie is a fit parent, that she has been primarily responsible for raising Hunter for the entirety of his life, and that her care of him has been appropriate.

Danyle testified that Devin is a "very loving" father and that he "spends time with his kids and does activities that they all enjoy." She said Devin and Hunter "share a lot of the same interests," including fishing, hunting, and agriculture. Danyle further said that she and Hunter have a "great relationship" and that she would "welcome him into [their] home" if Devin was awarded physical custody.

Danyle is a paraeducator for the Ansley public school system. Both of her children attend public schools in Ansley. The rule in Devin and Danyle's home is that schoolwork has to be done before any activities occur. Danyle said that she would help make sure Hunter completes his homework and that if he does not complete it, then he would lose privileges and would not be able to attend activities. She said that although Hunter does not show maturity in completing his schoolwork, he does show maturity in completing his chores and in helping with her children.

Jessie testified she lives in Kearney with her husband of 12 years, Christopher Watts; their three daughters, who were 8, 5, and 3 years old at the time of the hearing; a foster daughter, who was 18 months old at the time of the hearing; and Hunter. Hunter has his own bedroom in Jessie's home. Jessie has been a stay-at-home mother for 8 years, and Christopher is a pharmacist. Jessie and Hunter have a "great relationship" and get to spend a lot of time together. She supports Hunter in his activities and is there for him whenever he needs her. Christopher has a loving relationship with Hunter as well. They spend a lot of time together, do a lot of sporting activities, and Christopher helps Hunter with his homework. Hunter also has a loving relationship with his half sisters. Jessie testified that Hunter is "very easy going and always seems happy and just ready to do anything" and makes friends easily.

According to Jessie, Hunter's struggles to complete schoolwork started in third grade. He took "ADHD" medication for a time in fifth and sixth grade, but was taken off of the medication because the side effects outweighed the benefits. In the sixth grade, he continued to struggle with completing schoolwork up to the time of the hearing. Jessie tried punishments, but those had no effect on Hunter so they changed to reward incentives. The incentives worked for a while but he "would eventually kind of slack off again," and the pattern of inconsistency continued. Jessie communicated with Hunter's teachers, and they tried using organizational planners, but Hunter did not remain consistent with completing or turning in his assignments. Jessie said that Hunter would lie about his homework and that the lying had gotten worse in the past couple of years. She said that he was capable of doing the work, but that he just did not want to. Jessie did not believe a change of schools would benefit Hunter because "these problems are not going to change." Hunter "does not love school," and if he could get by without it, "he would definitely not be in school."

Jessie first learned of Hunter's desire to live with Devin in February 2016 after Hunter spoke to a school counselor about his wishes, and the counselor then contacted Jessie about the meeting. When asked what she thought Hunter's motivation was for wanting to move to Ansley, Jessie responded, "He thinks it will be easier, and he thinks that he has more friends up there which is not true because he doesn't communicate with them on a regular basis like he does with the ones here. He . . . does want to live with his dad and his brothers." Jessie does not have a problem allowing Hunter to spend more time with Devin in the summers, but does not want him to move to Ansley because "it's important that Hunter knows that he can't get out of something, especially school just because he may not like it." "He needs to deal with the consequences," and Jessie feels like Hunter is "running away from it."

Jessie believes Devin loves Hunter, but thinks there is a lack of communication between Devin and Hunter. Hunter rarely has telephone contact with Devin, sometimes not even once per month. Jessie has concerns that Hunter would not attend church regularly if he lived with Devin. And it is important to Jessie that Hunter stay connected with his church in Kearney. The pastor at Hunter's church in Kearney testified Hunter is a "really well-behaved and good, young man," and "[a]s he has grown up, he's very responsible." The pastor said he would describe Jessie as "one of the best parents I've ever seen."

Jessie said that she and Devin "don't communicate a lot" and that "it is only about Hunter and it's rare." She is willing to work with Devin and is fine with either text messages or telephone calls. Jessie has a "really good" relationship with Danyle and said Danyle has been "wonderful to communicate with and [sic] in regards to Hunter and his interests." When asked if Danyle does well with Hunter, Jessie said, "Yes." For the year or two leading up to the modification hearing, Jessie had been able to communicate with Danyle and/or Devin about Hunter's schooling, changing pick-up or drop-off times, changing weekends for parenting time, and activities. She agreed Devin had been supportive of her in dealing with Hunter and his schoolwork, and she was not aware of any attempts by Devin to undermine or challenge her decisions.

Christopher testified he has known Hunter since he was less than 18 months old, when Christopher began dating Jessie. Christopher said that he loves Hunter and that they have a "great relationship." In addition to providing care for Hunter, Christopher is involved in various activities with Hunter. He has coached Hunter's sports teams, and they play sports together, exercise together, and go fishing. The two of them have hunted a few times, and Hunter has also gone hunting with Christopher's brother. Christopher also helps Hunter with homework. Hunter has some maturity issues with regard to lying and taking accountability for his actions. Christopher

does not agree with Hunter's desire to live with Devin because Hunter had lived with Jessie since birth and has been well cared for. Christopher said Jessie and he are doing everything they can to help Hunter be a "successful young man [and] graduate from high school." He further said that they provide a loving and safe environment and that "[t]here is no reason for [Hunter] to go anywhere else."

The assistant principal at Hunter's high school in Kearney, Hunter's school counselor, and several of Hunter's teachers testified. They all agreed that Hunter is a "good kid," but struggles in school because he will not complete or turn in homework, even though he is capable of doing the work. One teacher testified that Hunter "doesn't appear to have grasped yet how important school is and how important doing well in school is for his future success," so there have been challenges. Jessie and Christopher have tried to ensure that Hunter is accountable with his schoolwork. None of the teachers had contact with Devin until October 2016 parent-teacher conferences.

Hunter testified in camera. The bill of exceptions notes that only Hunter and the judge were in the courtroom for Hunter's testimony. Hunter testified that he currently lived with Jessie most of the time and is with Devin every other weekend and that he would like to "just flip" so that he is at Devin's house most of the time and with Jessie every other weekend. When asked about Devin's house, Hunter replied, "I don't really have like all the nicer things that I have at my mom's house because at my mom's house I have my own bathroom that's connected to my room. And at my dad's house, I don't have that but it's not that big of a deal." Hunter testified he likes being in a smaller town and has more friends in Ansley. He also likes being outdoors more at Devin's house, and he likes to hunt. Hunter is involved in 4-H, showing cattle. Devin has cattle, and Hunter enjoys helping with the cattle. Hunter said that he "always feel[s] like [he's] kind of trapped" at Jessie's house and that he "[doesn't] really get out much."

Hunter acknowledged having trouble in school because he does not always turn in his homework. Jessie and Christopher help him with his homework. When asked what he thought would change if he lived with Devin, Hunter said:

> I think that the school there, it would be a lot better for me because they can — they have a lot smaller classes than [in the high school in] Kearney . . . and so smaller classes I will have more time that I can maybe talk to the teachers about questions I might have. And they also would go through a lot of their materials a lot faster because I was talking to one of my friends just a few weekends ago, and he said he was already past the point like in geometry — they were already past where we were. . . . [T]hey're like a week or two ahead of us. And they also have other classes like they have an ag class which I really would like to do that because I have my own cattle and stuff and that would be really nice to have. And they also have things like FFA and FBLA that I would like to be a part of.

At Devin's house the rule is that the children have to get homework done before doing anything else, so they do homework on Friday night and are free the rest of the weekend to do what they want to do. Devin and Danyle help Hunter with homework if needed.

In its amended order filed on November 30, 2016, the district court found both parents to be fit and proper persons to be awarded the custody and care of the child. The court found that "the stated preference of Hunter and his evolving relationship with his father is a material change in circumstances." The court found that Hunter was of "sufficient age of comprehension" and that his preferences were based on sound reasons. The court said:

> While legally a "minor child" Hunter is now a 16-year-old young man. Hunter very clearly gave his reasons for wanting to live with his father. Hunter has great interests in agriculture and a rural lifestyle. He has friends in the

> Ansley area and has discussed their perceptions of the Ansley School with them. Hunter believes that he would do better in the Ansley School. Hunter makes a strong case and the Court finds that the father's application should be granted. The Court realizes that this decision is a disappointment to Hunter's mother and step-father, but trusts that all parties will cooperate and Hunter will continue to become a fine adult.

The court further found that Hunter's stated preference "outweighs the other factors, most of which would favor him continuing to reside with his mother." Among the "other factors" considered by the court was "the attitude and stability of each parent's character." The court noted that Devin is generally supportive of Hunter's education, but has only recently begun attending parent-teacher conferences; the court was also "somewhat concerned" with the planning of activities by Devin "such as a cruise that would take Hunter out of school when [he] was having problems at school." With regard to the "parental capacity to provide physical care and satisfy education needs of the child," the court noted Jessie has provided "excellent care and has carried the bulk of that burden since Hunter's birth." Jessie's and Christopher's efforts at working to ensure Hunter's success in school was "the factor presenting the Court with the greatest difficulty in deciding this case." With regard to "continuing or disrupting an existing relationship," the court found any disruption of Hunter's relationship with half siblings on Jessie's side "may be offset" by an improved relationship with his half sibling on Devin's side; there would be a similar "offset" with his parental relationships. The court said, "While these are not the only factors considered by the Court they are the primary factors weighed against the expressed desires of Hunter."

The court concluded it was in Hunter's best interests for the parties to be awarded joint legal custody, with primary physical custody awarded to Devin, effective June 1, 2017 (after Hunter completed the 2016-17 school year). The district court

ordered that Jessie would have parenting time "at a minimum, as was allowed for the father" in the 2006 order. The court also ordered Jessie to pay child support of $107 per month, beginning June 1, 2017. Jessie timely appealed.

## ASSIGNMENT OF ERROR

Jessie assigns, restated, that the district court abused its discretion by modifying its prior orders to award joint legal custody, with primary physical custody awarded to Devin. However, Jessie does not address the award of joint legal custody in the argument section of her brief, so it will not be addressed. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Waldron v. Roark*, 298 Neb. 26, 902 N.W.2d 204 (2017).

## 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. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

## ANALYSIS

[2-4] Jessie argues that the district court erred by awarding primary physical custody of Hunter to Devin. 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. *Id.* First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015). A material change in circumstances means the occurrence of something which, had

it been known at the time of the initial decree, would have persuaded the court to decree differently. See *Schrag v. Spear, supra*. The party seeking modification of child custody bears the burden of showing as an initial matter that there has been a change in circumstances. See *id*.

Neb. Rev. Stat. § 43-2923(6) (Reissue 2016) provides that in determining custody and parenting arrangements:

> [T]he court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of . . . :
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member. . . ; and
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

Other pertinent factors include the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and parental capacity to provide physical care and satisfy educational needs of the child. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

Jessie argues that (1) Devin did not demonstrate a material change in circumstances, (2) Devin is unfit as a custodial parent, and (3) even if a material change of circumstances had occurred and Devin is a fit parent, it is not in Hunter's best interests to be primarily placed with Devin.

We initially note that the district court found "both parents are fit and have positive qualities to offer Hunter." Jessie contends, however, that Devin is unfit in that Devin cannot financially support himself and relies on his live-in girlfriend to pay bills; Devin did not prioritize his child support obligation over other expenses like hunting and fishing licenses or an extracurricular trip for Hunter; Devin allegedly lied on his hunting and fishing license applications when he represented he was current on his child support obligation; Devin allegedly committed tax fraud when he did not get federally mandated health insurance or pay the alternative penalty; and Devin has "questionable" morality, brief for appellant at 21, based on the fact that after trapping animals, he has "dispatch[ed]" them in front of the young children in his household. Devin's response is that none of Jessie's assertions prove he is an unfit parent, because his financial status is not relevant; although there have been times that he has been behind on his child support obligation, there have been times he has paid ahead; and trapping is a "humane" practice and "rural children begin hunting and fishing at a young age," brief for appellee at 8. Having reviewed the record, we determine the district court did not abuse its discretion in finding Devin to be a fit parent.

We now address the material change in circumstances and the best interests of the child. Like the district court, we find this case is similar to *Floerchinger v. Floerchinger*, 24 Neb. App. 120, 883 N.W.2d 419 (2016), with regard to both. In *Floerchinger*, this court affirmed a district court's modification of physical custody based upon a material change in circumstances stemming from a son's expressed desire to live with his father in Nebraska. The son had been living with his mother in Maine for almost 11 years; at the time of trial, he was 13 years old. In that case, the son testified that he preferred living in Nebraska due to the comfortable and relaxed environment at his father's house and because he enjoyed the interaction he had with his father. In Maine, among other things, the son

stated he was "pestered" by his stepsiblings. *Id.* at 127, 883 N.W.2d at 426.

[5] We noted the Nebraska Supreme Court has stated that "while the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration." *Id.* at 140-41, 883 N.W.2d at 434 (citing *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002)). Further, "in cases where the minor child's preference was given significant consideration, the child was usually over 10 years of age." *Floerchinger*, 24 Neb. App. at 141, 883 N.W.2d at 434. In *Floerchinger*, the district court found a material change in circumstances had occurred subsequent to the decree which justified modification of custody and that such modification was in the best interests of the child. We noted, "The [district] court specifically focused on [the child's] desire to reside with [his father] in Nebraska, concluding that [the child] was articulate and that his decision was based on sound reasoning." *Id*.

Jessie argues *Floerchinger* is inconsistent with *Hossack v. Hossack*, 176 Neb. 368, 373, 126 N.W.2d 166, 169 (1964), which stated that "[s]uch incidents of life as advancing age of minors, remarriage of parents, and particular advantages of one parent's environment do not constitute a legal basis for changing the custody of minor children . . . without an affirmative showing that the welfare of the children demands a change." In *Hossack*, custody was changed by the trial court from the children's mother to their father, and the Supreme Court reversed that decision. The Supreme Court pointed out that the initial divorce decree had found the mother to be an "innocent party [who] was a fit and proper person to have the custody of the two boys until they reach 21 years of age" and that there were no claims made that "the children were neglected or mistreated or that the [mother] was of questionable character or qualifications." *Id*. at 371, 126 N.W.2d at 168. In *Hossack*, evidence that the children were 4 years older

since the time of the initial decree and that the father had since become a professor, remarried, and "could presently furnish them a better-than-average home from an intellectual as well as a physical standpoint," *id.*, was not sufficient to warrant a change in custody, as there was no "affirmative showing that the welfare of the children demands a change," *id*. at 373, 126 N.W.2d at 169. Although the father had taken the children to a psychologist who determined "the children were not intellectually stimulated at home; and that the [mother's] home did not provide motivation for them to use their innate abilities," the court concluded "[t]here was no affirmative showing by the [father] as to how he would accelerate the boys' progress in school or intellectually stimulate them in his home." *Id*. at 372, 126 N.W.2d at 169. Jessie argues that Devin failed to produce evidence that anything would be different in Ansley and that "[a]ccess to 4-H and FFA is simply an advantage of Devin's environment," which *Hossack* says does not constitute a legal basis for changing custody. Brief for appellant at 12.

We first point out that *Hossack* was decided in 1964 under different divorce and parenting laws than exist now and that the appellate standard of review in that case was "for trial de novo," 176 Neb. at 370, 126 N.W.2d at 168, rather than the standard of review applicable today—de novo on the record for an abuse of discretion. In *Hossack*, the Supreme Court observed that the "order modifying the decree included no findings relative to changed circumstances or the best interests of the children." 176 Neb. at 370, 126 N.W.2d at 168. In the record before this court, the district court did make specific findings in that regard, and this court reviews those findings for an abuse of discretion.

[6] Furthermore, we do not read *Floerchinger v. Floerchinger*, 24 Neb. App. 120, 883 N.W.2d 419 (2016), to be inconsistent with *Hossack v. Hossack*, 176 Neb. 368, 126 N.W.2d 166 (1964). In *Floerchinger*, the court considered a number of factors in its custody determination (e.g., child's age and

preference, academic and social benefits, living environment, and general quality of life). Such factors go to the welfare of the child, and as stated in *Hossack*, such evidence can be considered in a change of custody determination. See, also, *Miles v. Miles*, 231 Neb. 782, 438 N.W.2d 139 (1989) (custody modification based on child's preference and deterioration of parent-child relationship).

Similar to *Floerchinger v. Floerchinger, supra*, the court in this case specifically found Hunter's stated preference to live with Devin and his evolving relationship with Devin constituted a material change in circumstances. Hunter clearly stated his reasons for wanting to live with Devin: He is interested in agriculture and likes to help Devin with cattle, he enjoys being outdoors and hunting, he likes being in a smaller town, and he has more friends in Ansley. Devin felt "trapped" at Jessie's house and did not "get out much." Hunter had also struggled in school for a number of years, particularly with regard to completing and turning in assignments; his grades ran the gamut from A's to F's, despite Jessie's and Christopher's efforts to help him. He had spoken to his friends from Ansley about their school experience and felt the high school in Ansley would be a better fit for him. In particular, Hunter was interested in an "ag class" offered at Ansley, the smaller class sizes (which would provide more opportunity to work with teachers), and the study halls (which would help him to get his homework done during the day). After our de novo review of the record, we conclude the district court did not abuse its discretion in finding there had been a material change in circumstances.

[7] Devin and Jessie presented conflicting testimony regarding whether a change in custody would be in Hunter's best interests, including whether Hunter's reasons for wanting to live with Devin were sound. 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. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015); *Floerchinger v. Floerchinger, supra*. The trial court in this case had an opportunity to observe the testimony of both parties, as well as the testimony of Hunter and the other witnesses. The court found Hunter had "very clearly" given his reasons for wanting to live with Devin and that Hunter's stated preference outweighed the other factors for best interests. The court reached this conclusion while also acknowledging the "extraordinary efforts put forth" by Jessie and Christopher and that "their involvement remains essential to Hunter's best interests."

At the time of the modification hearing, Hunter was within weeks of turning 16 years old. As stated above, he clearly stated his reasons for wanting to live with Devin. Although Jessie calls Hunter's reasoning and maturity into question, the district court found Hunter's reasons were sound. Several of Jessie's witnesses testified that, aside from schoolwork, Hunter is mature and responsible and that he has become more mature in the past year. In addition to Hunter's wishes, the district court had an opportunity to consider other best interests factors, including Hunter's academic performance, extracurricular activities, friends, living environment, and general qualities of life at both parents' respective homes. The court found both Devin and Jessie had positive qualities to offer Hunter, but that Hunter's stated preference outweighed the other factors. Upon our de novo review, we can find no abuse of discretion in the district court's decision to award physical custody of Hunter to Devin.

## CONCLUSION

For the reasons stated above, we affirm the district court's decision to award the parties joint legal custody of Hunter, with physical custody awarded to Devin.

Affirmed.

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

# State of Nebraska, appellee, v. Michael R. Thomas, appellant.

904 N.W.2d 295

Filed November 7, 2017. No. A-16-1195.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **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. **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.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language.

7. **Criminal Law: Statutes.** When dealing with penal statutes, it is a fundamental principle of statutory construction that they be strictly construed. In doing so, a court cannot supply language which is absent from the statutory definition for a criminal offense.
8. **Criminal Law: Statutes: Legislature.** A criminal statute includes only those elements which the Legislature explicitly included in its text.
9. **Criminal Law: Minors: Proof.** Neb. Rev. Stat. § 28-707 (Cum. Supp. 2014) only requires proof of the status of the victim as a minor child; the statute does not require proof of the victim's actual identity or birth date.
10. **Trial: Presumptions.** Under Neb. Rev. Stat. § 28-707(1) (Cum. Supp. 2014), triers of fact may apply to the subject before them that general knowledge which any person must be presumed to have.
11. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
12. **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.
13. ____. 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, Kevin R. McManaman, Judge, on appeal thereto from the County Court for Lancaster County, Matthew L. Acton, Judge. Judgment of District Court affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and Matthew Meyerle for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Bishop, Judge.

## I. INTRODUCTION

Michael R. Thomas was convicted of negligent child abuse, a Class I misdemeanor, and disturbing the peace, a Class III misdemeanor, after a bench trial in the county court for Lancaster County. He appealed to the district court for Lancaster County, which affirmed the judgment of the county court. On appeal to this court, Thomas asserts the child abuse statute requires proof of the identity and birth date of the victim. He also claims that the evidence was insufficient for both convictions and that his sentences are excessive. We affirm.

## II. BACKGROUND

At approximately 1:30 a.m. on June 27, 2015, law enforcement officers responded to a disturbance call at an apartment building located on South 16th Street in Lincoln, Nebraska. The officers were responding to the scene of an altercation between Thomas and Yvette Taylor that took place in front of the apartment building. Thomas was eventually issued a citation by one of the officers at the scene.

At trial, the State provided witness testimony from two officers, a neighbor, and a guest of the neighbor on the night in question. The neighbor lives in an apartment on the second floor of the building, with a balcony overlooking the front entrance. She testified that the neighborhood was "pretty quiet" prior to the altercation between Thomas and Taylor and that not many people were around. The neighbor, the guest, and another person were socializing on the balcony at the neighbor's apartment when they heard loud screaming and profanity in front of the building. The neighbor saw Thomas and Taylor arguing loudly, and both appeared to be intoxicated and were screaming obscenities at each other. Both the neighbor and the guest testified a young female child was in between Thomas and Taylor, crying and begging the adults

to stop fighting. The neighbor estimated the child's age was between 4 and 6 years old. The guest estimated the child to be 3 or 4 years old. Both testified their estimates were based on their experience with children of a similar age.

The neighbor testified that during the argument, Thomas became angry and shoved Taylor onto the concrete steps behind her, where she hit her elbow and head. The neighbor recalled the child was in between Taylor and Thomas at the time, whereas the guest stated the child was 3 to 5 inches "[o]ff to the side" of Taylor at the time. After witnessing Thomas shove Taylor, both the neighbor and the guest went inside to call the police. Both testified that while they were inside, they could still hear Thomas and Taylor yelling and the child crying despite the neighbor's balcony door being shut.

When the police arrived, the neighbor observed Thomas run inside the apartment building. The first officer to respond also saw Thomas run into the apartment building when he arrived at the scene and found Taylor being consoled by the child. The officer testified that he was able to identify Taylor based on previous interactions with her and that the child consoling her was her daughter. The officer estimated the child to be between 5 and 6 years old, based on his experience with children.

The first officer was unable to make contact with Thomas in the building, but the second officer testified he was able to do so when he arrived and was able to issue a citation accordingly. Taylor was deemed too intoxicated to care for the child, so both Taylor and the child were transported to central headquarters. Taylor was "'placed at detox,'" and the child was approved by the Department of Health and Human Services to stay with her maternal grandmother for the night. Based on all of these interactions, the first officer stated there was not "any chance" the child was older than 5 or 6 years old. Any further trial evidence relevant to the errors assigned will be discussed in our analysis below.

At the close of the State's case in chief, Thomas moved to dismiss the child abuse charge because the State did not enter the name or birth date of the child victim into evidence. The county court ruled that the exact identity (name and birth date) of the victim is not an element of child abuse and that the State must only show the victim is a minor child.

The county court found Thomas guilty of both negligent child abuse and disturbing the peace and subsequently sentenced him to 3 months' imprisonment on each conviction, to be served consecutively. Thomas appealed his convictions and sentences to the district court. The district court affirmed the convictions and the sentences, and Thomas now appeals from that decision.

## III. ASSIGNMENTS OF ERROR

Thomas assigns that the district court erred when it concluded (1) the identity of the victim is not an essential element of child abuse under Neb. Rev. Stat. § 28-707 (Cum. Supp. 2014), (2) there was sufficient evidence to convict Thomas of negligent child abuse under § 28-707 or of disturbing the peace under Neb. Rev. Stat. § 28-1322 (Reissue 2016), and (3) the sentences imposed by the county court were not excessive.

## IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Beitel*, 296 Neb. 781, 895 N.W.2d 710 (2017).

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether,

after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Lester*, 295 Neb. 878, 898 N.W.2d 299 (2017).

[3,4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016). 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. *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

## V. ANALYSIS

### 1. Essential Elements of Child Abuse

Thomas contends the exact identity of the victim is an essential element of the crime of child abuse under § 28-707, and he further asserts that "whether the identity of a minor child is a required element of child abuse has not been previously addressed by Nebraska appellate courts." Brief for appellant at 18. He argues the State had to offer evidence establishing the name and birth date of the child involved in order to prove the victim was indeed a minor, and he further argues its failure to do so means Thomas could not be convicted of child abuse as a matter of law. The State claims the plain language of the statute controls and does not require the exact name or birth date of the victim. Before addressing these contrary positions, we first consider the legal principles governing statutory interpretation.

[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. *Beitel, supra*. It is not within the province of a court to read a meaning into a statute that is

not warranted by the language. *Id*. When dealing with penal statutes as in this case, it is a fundamental principle of statutory construction that they be strictly construed. See *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). In doing so, a court cannot supply language which is absent from the statutory definition for a criminal offense. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989). The Nebraska Supreme Court has held this to mean a criminal statute includes only those elements which the Legislature explicitly included in its text. *Burlison, supra*.

The text of § 28-707 relevant here states: "(1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) Placed in a situation that endangers his or her life or physical or mental health." When the offense is committed negligently and does not result in serious bodily injury or death, it is a Class I misdemeanor. See § 28-707(3). The statute requires only that the victim be a "minor child"; the status of the victim as a minor child is plain and unambiguous. There is no requirement of proof as to the name or birth date of the minor child anywhere in the text.

Thomas relies on *State v. Gay*, 18 Neb. App. 163, 778 N.W.2d 494 (2009), and *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997), to argue that proving the victim is a minor child implicitly requires evidence of the minor child's name and birth date, making them "essential elements." Brief for appellant at 20. *Gay* involved a prosecution against a defendant for third degree domestic assault of his "intimate partner" under Neb. Rev. Stat. § 28-323 (Reissue 2008), and *Cebuhar* involved a prosecution for an assault on a "peace officer" under Neb. Rev. Stat. § 28-931 (Reissue 1995). Thomas suggests those cases interpret their respective statutes to require proof of the name of the victim as an essential element in order to show the victim was in the specific class of victims the relevant laws sought to protect, e.g., intimate partners or peace

officers. However, neither *Gay* nor *Cebuhar* stands for the proposition that the language of the relevant statutes requires the exact name of the victim be proved as an additional or essential element of the crime necessary for a conviction.

In *Gay, supra*, the statute at issue described third degree domestic assault as causing bodily injury to an "intimate partner" or placing an intimate partner in fear of imminent bodily injury. The convicted defendant argued there was insufficient evidence to prove the victim of domestic assault in that case was his intimate partner. The defendant argued that the evidence did not demonstrate a sexual involvement between himself and the victim, but, rather, a casual relationship, and that therefore, the State failed to present evidence to establish the victim of the assault was his intimate partner. Although this court recognized there was no evidence the defendant and victim had a sexual relationship, the court noted the statute at issue did not provide that proof of a sexual relationship is necessary to establish a dating relationship between the victim and the defendant. Since the evidence was sufficient to demonstrate a dating relationship at the time of the assault, the victim was the defendant's intimate partner pursuant to the domestic assault statute. As correctly noted by the district court in the present matter, the question in *Gay* was the victim's status as an intimate partner, and contrary to Thomas' argument: "[T]he class of persons intended to be protected by that statute did not require establishment of the identity of the individual victim, but rather that person's status as an intimate partner."

With regard to *Cebuhar, supra*, the district court's order in the present matter again correctly determined that the question in *Cebuhar* was the status of the victim as a peace officer, not the officer's actual identity. Notably, the critical issue in *Cebuhar* was the mens rea of the defendant with regard to that status, an issue not presented in this case. The district court further stated:

> While proving the identity of the victim by name and date of birth may be the most common way to prove the status of the victim as a minor child, the Legislature did not dictate that as an exclusive path. Giving the words of . . . § 28-707 their plain and ordinary meaning leads this Court to the conclusion that the State need not prove the identity of the victim of Negligent Child Abuse; rather, the law requires proof of the status of the victim as a minor child.

[9] We agree with the district court that the plain and ordinary meaning of § 28-707 only requires proof of the status of the victim as a minor child; the statute does not require proof of the victim's actual identity or birth date. While offering evidence of the exact name or birth date of a victim might be the most persuasive manner to prove the status of a victim as a minor child, especially if the child is older and the child's status as a minor may be less clear than in the present case, it is not required by the statute. As has been repeatedly stated, it is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

### 2. Insufficient Evidence

#### (a) Negligent Child Abuse

Thomas argues the State did not put on sufficient evidence to convict him of negligent child abuse. He makes this argument based on three facts about the evidence established at trial. First, there was no evidence the child was actually harmed or physically injured. Second, there was testimony that Thomas did not intend to hurt the child, but instead "was posturing by trying to get in the [child's mother's] face." Brief for appellant at 23. Finally, there was testimony that the child tried to console her mother after the altercation.

[10] None of these facts demonstrate there was insufficient evidence to support a conviction of negligent child abuse

under § 28-707. As noted previously, the relevant language of § 28-707(1) states, "A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) Placed in a situation that endangers his or her life or physical or mental health." When interpreting § 28-707(1), "'[t]riers of fact may apply to the subject before them that general knowledge which any person must be presumed to have.'" See *State v. Knutson*, 288 Neb. 823, 844, 852 N.W.2d 307, 324 (2014).

The plain language of § 28-707 does not require evidence showing the minor child suffered actual harm or physical injury. It simply requires the minor child's physical (or mental) health be "endanger[ed]." Additionally, Thomas' intent is not relevant, as his conviction was for negligent child abuse, a separate crime with a lesser punishment than intentional child abuse. Compare § 28-707(3), (5), and (6) with § 28-707(4), (7), and (8). Finally, the fact that the child was consoling her mother does not undermine any of the evidence put on by the State in order to convict Thomas under § 28-707.

The evidence at trial was sufficient for a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Witnesses testified that on the night in question, Thomas was in a heated argument with the child's mother at approximately 1:30 a.m. Thomas was described as very aggressive and drunk at the time, and during the argument, he shoved the mother onto the concrete steps behind her. Two witnesses observed that during the altercation, the child was close to her mother when Thomas pushed the child's mother. The evidence differed as to the exact location of the child, but all testimony placed her very near the altercation. Although three witnesses had different estimates of the child's age, they only varied between the ages of 3 to 6 and were all based on personal experiences with children. No objections were made to any of the testimony regarding the child's age. There was evidence the child was extremely upset and crying throughout the incident as she attempted to protect her

mother, and the child's cries could be heard inside an apartment through a closed door. Given the child's age, the child's proximity to the altercation, and the violence and injuries to her mother which she witnessed, we find that a rational fact finder with a general knowledge of children her age could find the child's physical or mental health was endangered by Thomas' actions.

(b) Disturbing the Peace

Thomas also contends the State did not put on sufficient evidence to convict him of disturbing the peace under § 28-1322, because the evidence did not show Thomas acted with the intention to disturb the peace and quiet of other individuals in the neighborhood. Thomas acknowledges that *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989), and a case cited therein, *The State v. Burns*, 35 Kan. 387, 11 P. 161 (1886), stand for the proposition that a conviction for disturbing the peace is permitted "even where the offensive language or disturbance is not directed at the complaining witness." Brief for appellant at 25. However, Thomas suggests his case is distinguishable because of the following:

> [In both *Broadstone* and *Burns*,] a closer examination of the facts reveals that there was some nexus of intent to annoy or harass or disturb the peace of the complaining witness, in addition to others. By contrast, in [Thomas'] case, no evidence was presented that [Thomas] acted with any intent to annoy, harass, or disturb [the witnesses in his case].

Brief for appellant at 25-26. Thomas asserts he therefore cannot be convicted of disturbing the peace, because the State did not establish that he acted with the intention to disturb the peace and quiet of other individuals in the neighborhood.

However, the plain language of § 28-1322 does not require proof Thomas intended to disturb the peace of others; it requires only that his intentional acts resulted in disturbing the peace of others. Section 28-1322(1) provides, "Any person

who shall intentionally disturb the peace and quiet of any person, family, or neighborhood commits the offense of disturbing the peace." As acknowledged by Thomas, *Broadstone, supra*, affirmed a conviction for disturbing the peace even when the offensive language or disturbance was not directed at the complaining witness.

In *Broadstone*, the defendant was convicted of disturbing the peace based upon evidence that he was observed using foul language and hitting a stick against a telephone pole outside an elementary school. Parents who were waiting for their children to get out of school were nearby when children started exiting the school. The parents heard the defendant use profanity when 15 or 20 children were in the area, so the parents approached the defendant because some of the children appeared to be frightened. Although a complaining parent testified he was not shocked by what he heard, that parent was upset children were being exposed to it. When that parent suggested the defendant should leave the area, the defendant became violent and began shaking the stick and striking the parent on the arm while also yelling obscenities. The Nebraska Supreme Court stated:

> "A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. . . .
>
> ". . . The term 'breach of the peace' is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof."

*State v. Broadstone*, 233 Neb. 595, 599, 447 N.W.2d 30, 33 (1989) (quoting *State v. Coomes*, 170 Neb. 298, 102 N.W.2d 454 (1960)). *Broadstone* also referred to *The State v. Burns*, 35 Kan. 387, 11 P. 161 (1886), noting that in that case the defendant's conviction for disturbing the peace was affirmed even though the objectionable words and acts of the

defendant were directed toward someone other than the complaining witness.

In *Broadstone*, the court noted the evidence established that in addition to the defendant's statements directed at the complaining parent personally, the defendant's use of profanity in the presence of the children disturbed that parent. *Broadstone* makes it clear that a defendant's intentional act, which results in a disturbance of the public peace or tranquility enjoyed by the citizens of a community, does not require proof that the defendant intended to disturb the peace and quiet of other individuals in the neighborhood.

Accordingly, the question is whether a rational fact finder could find Thomas' intentional actions breached the peace or disturbed those who saw or heard him. We find that a rational fact finder could reach that conclusion based on the evidence admitted at Thomas' trial. The evidence shows the altercation took place at 1:30 a.m., and at the time, the neighborhood was "pretty quiet" and not many people were around. Witnesses testified Thomas was acting very aggressive and drunk, arguing loudly and screaming profanity at Taylor before shoving her to the ground. They also testified the screaming could be heard inside a second floor apartment even with the balcony door shut. This evidence could rationally be found to constitute disturbing the peace.

### 3. Excessive Sentences

Thomas contends a sentence of 3 months' imprisonment for each conviction is excessive; he had requested a sentence of probation. Thomas' sentences for each of his convictions fell within statutory limits. Negligent child abuse under § 28-707 is a Class I misdemeanor punishable by not more than 1 year's imprisonment, a $1,000 fine, or both. See Neb. Rev. Stat. § 28-106 (Cum. Supp. 2014). Disturbing the peace under § 28-1322 is a Class III misdemeanor punishable by up to 3 months' imprisonment, a $500 fine, or both. See § 28-106. (We note that Thomas' offenses occurred prior to August 30,

2015, the effective date of 2015 Neb. Laws, L.B. 605, which changed the classification of certain crimes and made certain amendments to Nebraska's sentencing laws.)

[11-13] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016). 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. *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

The presentence investigation report notes that Thomas appeared for his interview but left because he was not feeling well, and the probation officer was unable to reschedule prior to the sentencing hearing (it is not clear how much information Thomas provided before leaving). However, the presentence investigation report does contain other information gathered by the probation officer. The record shows Thomas was 39 years old at the time of sentencing. He was married but separated from his wife, and he had no dependents. He completed his high school education through the 10th grade, but attained his "GED." He has a history of substance abuse dating back to age 14, but reported that since the altercation in this case, he had been sober and attending weekly meetings for alcohol abuse. He also reported finding a job after the altercation, prior to which he was not employed.

Thomas' record of convictions as an adult dates back to a 1995 conviction for unauthorized use of a motor vehicle (14 days' jail time), followed by convictions for assault in 1996 (6 months' jail time and $750 fine), driving under suspension in 1997 (7 days' jail time and 3 months' probation), an open container violation in 1999 (fine), and a separate incident leading to convictions for criminal trespass and criminal mischief also in 1999 (30 days' jail time). In 2000, he was convicted of third degree assault (1 year's imprisonment) and terroristic threats (5 years' imprisonment followed by 5 years' probation; his probation was later revoked). In 2005, Thomas was convicted of family violence in Wyoming (6 months' jail time and $750 fine). In 2006, Thomas was convicted of driving under the influence and no operator's license in Nebraska (7 days' jail time). Two months later, in Wyoming, he was convicted of aggravated assault and battery and reckless endangering (36 to 60 months' imprisonment). In 2011, Thomas was convicted in Nebraska for resisting arrest (1 year's probation, but a probation violation was filed approximately 2 months later). Finally, in 2012, he was convicted of third degree domestic assault, subsequent offense (20 months' to 5 years' imprisonment, which he finished serving 3 months before his arrest in the current case).

Thomas contends the court abused its discretion by failing to give proper weight and consideration to the relevant sentencing factors and all of the facts and circumstances surrounding his life. More specifically, Thomas claims the sentencing court failed to meaningfully consider both the efforts he made following the offense to rehabilitate himself and his compatibility with a probationary sentence, which he asserts would "keep him accountable." Brief for appellant at 28.

The county court stated at the sentencing hearing it could not overlook Thomas' 20-year criminal history which included multiple assault convictions—the most recent sentence of which Thomas had been discharged from serving only 3 months prior to the altercation leading to the convictions in

this case. The court specifically concluded Thomas was not an appropriate candidate for probation based on his criminal history, which includes a prior probation revocation and a separate probation violation being filed.

It is within the discretion of the trial court whether to impose probation or incarceration, and an appellate court will uphold the court's decision denying probation absent an abuse of discretion. *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013). Given the record before us and the court's stated reasoning, we do not find the court's sentences untenable or unreasonable, nor do we find them to be against justice or conscience, reason, and the evidence.

## VI. CONCLUSION

For the reasons set forth above, we affirm Thomas' convictions and sentences.

Affirmed.

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

# Scott Berndt, appellee, v. Tonya Berndt, now known as Tonya DiPasquale-Martinez, appellant.

904 N.W.2d 24

Filed November 14, 2017. No. A-16-1109.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Divorce: Modification of Decree: Visitation.** Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children.
3. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
4. **Visitation.** The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child.
5. ____. The best interests of the children are primary and paramount considerations in determining and modifying visitation rights.
6. **Modification of Decree: Child Custody: Proof.** In a child custody modification case, first, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.
7. **Child Custody.** While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration.

8. **Modification of Decree: Child Custody: Appeal and Error.** In a child custody modification case, an appellate court, in its de novo review, can make a best interests of the child finding if the evidence supports it.
9. **Child Custody.** In determining the best interests of a child in a custody determination, a court must consider pertinent factors, such as the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and parental capacity to provide physical care and satisfy educational needs of the child.

Appeal from the District Court for Sheridan County: Travis P. O'Gorman, Judge. Reversed and remanded with directions.

Desirae M. Solomon for appellant.

Bell Island, of Island Law Office, P.C., L.L.O., for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

## INTRODUCTION

Tonya Berndt, now known as Tonya DiPasquale-Martinez, appeals from an order of the district court for Sheridan County denying her complaint to modify visitation with her children. Based on the reasons that follow, we reverse, and remand with directions.

## BACKGROUND

Tonya and Scott Berndt were divorced by a decree of dissolution on November 30, 2012. The parties have two minor children, Sevanna Berndt, born in 2005, and Tobias Berndt (Toby), born in 2007. The parties entered into a property settlement and custody agreement, which was approved by the court. Pursuant to the custody agreement, the parties had joint legal and physical custody. The parties agreed that the children would primarily reside with Scott. Tonya had parenting time every weekend, except on the third weekend of

each month. The parties alternated holidays, and Tonya was awarded parenting time during the summer break, except for 4 weeks which were awarded to Scott.

On January 25, 2016, Tonya filed a complaint to modify visitation, alleging that since the entry of the decree, there had been a material change in circumstances affecting the best interests of the children. Tonya alleged that the material change in circumstances were that she has a residence in Gordon, Nebraska, and the ability to have regular and continuous contact with the children; the current schedule creates confusion and disagreements between the parties; and the children have expressed a desire to spend more time with her. She sought an order modifying the parenting time to a "week on/week off" schedule, meaning parenting time would alternate between the parties on a weekly basis.

Trial on Tonya's complaint to modify was held on October 18, 2016. The evidence showed that at the time of the divorce, Scott was living on a ranch near Lakeside, Nebraska. The ranch is 36 miles from Gordon. At the time of the hearing on the complaint to modify, Scott continued to live at the ranch with the children and his new wife.

At the time of the divorce, Tonya was awarded the parties' home in Gordon, but she was living in Kimball, Nebraska. She would commute to Gordon for her parenting time. In March 2013, Tonya moved to Gordon and lived in the marital home. In January 2014, she moved to Cheyenne, Wyoming, and subsequently remarried. Since January 2014, Tonya has been commuting from Cheyenne to Gordon for her parenting time. She sold the marital home in Gordon, and she and her husband bought a different home in Gordon. She continues to exercise most of her parenting time in Gordon, but she occasionally takes the children to Cheyenne. Tonya testified that she exercises a large part of her parenting time in Gordon so the children can participate in sports and other activities. Tonya often spends time in Gordon in addition to the time she is there for her scheduled parenting time.

Tonya testified that she and her husband have a "dual residence," and her husband testified likewise. They live in Cheyenne the majority of the time, and both described Cheyenne as their primary residence. Tonya has two older children from another relationship that both live in Cheyenne. At the time of trial, one was in high school and the other had reached the age of majority and was living on her own.

When the decree was entered, Sevanna and Toby were attending a country school located 11 miles from Scott's ranch and 30 miles from Gordon. During the 2013-14 and 2014-15 school years, the children attended school in Lakeside, which then closed at the end of the 2014-15 school year. The children began attending school in Gordon and Rushville, Nebraska, during the 2015-16 school year. They were attending the same school district at the time of trial. Toby's elementary school was located in Gordon, and Sevanna's middle school was located in Rushville. Sevanna would take a bus to school that left from the high school parking lot in Gordon and returned to the same parking lot at the end of the schoolday.

Tonya's home in Gordon is located 1½ blocks from Toby's school and 4 blocks from the high school in Gordon. Tonya testified that during the 2015-16 school year, she spent time in Gordon during the week because she wanted to be close by the children in case they needed a "snack" or a "place to go" after school. She also testified that she was often in Gordon during the week because she was renovating her home.

Tonya testified that Toby has had some issues at school because of his "ethnicity." She stated that the children are "multiracial" and that she feels they "had been a product of some comments that have been said." She testified that she believes it is important that she is there to help the children when they face these issues and it is important that the children are aware of their "full diverse culture."

Sevanna and Toby both participate in various sports and are involved in 4-H. Tonya and Scott both attend the children's sporting events and activities and help the children with their

4-H projects. During the week, Scott gets the children to and from school as well as to their activities. On the weekends, Tonya gets the children to and from their activities. Both parties are also involved in their children's schooling, including helping with homework.

The evidence showed that for the most part, the parties have worked well together regarding the children. They were generally able to communicate about the children's activities and weekend exchanges if there was a conflict. There have been some disputes regarding Scott's parenting time on the third weekend of the month, mostly during times when those weekends fall on a holiday.

Tonya testified that a week on/week off parenting time arrangement would provide stability, be "less back and forth," alleviate frustration in communication, and alleviate disputes over Scott's weekend visitation. She further testified that she would have more bonding time with the children and would be able to participate in their everyday lives. Tonya stated that her parenting time would continue to take place in Gordon.

Scott testified that he was opposed to a week on/week off arrangement, because the children need consistency and he thought it would be detrimental to the children.

Sevanna also testified at trial. She expressed a desire to spend more time with Tonya and stated she would prefer an alternating weekly parenting schedule. She testified that when she is at her father's house during the week, she and her mother send messages back and forth on Facebook almost daily, starting when she gets home after school and continuing throughout the evening. She also testified that there are some issues and problems that she feels more comfortable talking to her mother about. She testified that she loves both parents equally and would like to spend an equal amount of time with them.

The trial court found that Tonya had failed to prove a material change in circumstances occurred which affected the best interests of the children. It noted that at the time of the decree,

Tonya lived in Kimball and was commuting for her parenting time, having it occur in Gordon. At the time of trial, she continued to travel for her parenting time, with the distance from Cheyenne being greater than it was from Kimball. The court found that the only change since the decree was Sevanna's desire to spend more time with Tonya and that this alone did not constitute a material change in circumstances. The court determined that there was insufficient evidence to show a material change in circumstances had occurred which affected the best interests of the children, and it denied Tonya's motion to modify visitation.

## ASSIGNMENTS OF ERROR

Tonya assigns that the trial court erred in (1) failing to find that a material change in circumstances had occurred since the entry of the decree and (2) failing to find that it was in the children's best interests to modify the parenting plan to an alternating weekly schedule.

## STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016).

## ANALYSIS

[2-5] Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children. *Mark J. v. Darla B.*, 21 Neb. App. 770, 842 N.W.2d 832 (2014). A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.* The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the

child. *Id.* The best interests of the children are primary and paramount considerations in determining and modifying visitation rights. *Id.*

[6] In a child custody modification case, first, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *Hopkins v. Hopkins, supra*.

Tonya first assigns that the trial court erred in failing to find that a material change in circumstances had occurred since the entry of the decree. The trial court found that the only change since the decree was Sevanna's desire to spend more time with Tonya.

Sevanna was 11 years old at the time of trial. She testified in court expressing her desire to spend more time with Tonya and stated she would prefer an alternating weekly parenting schedule. She indicated that the amount of time she spends with Tonya is not enough "[b]ecause she like takes good care of us and she's our mom and — you know, yeah." She also testified that there are some issues and problems that she feels more comfortable talking to her mother about. She testified that when she is at her father's house during the week, she and her mother send messages back and forth on Facebook almost daily, starting when she gets home after school and continuing throughout the evening. She testified that an equal amount of time with her parents would be good for her "[b]ecause [she] would get to see both [her] parents equal time and it would work out with like sports and stuff too." Sevanna further indicated that spending equal time was important to her "[b]ecause I love my parents both equally and it's just fun being around them."

[7] While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference

is entitled to consideration. See *Floerchinger v. Floerchinger*, 24 Neb. App. 120, 883 N.W.2d 419 (2016). Further, in cases where the minor child's preference was given significant consideration, the child was usually over 10 years of age. *Id.*

The trial court considered Sevanna's desire to spend more time with Tonya and concluded that her desire alone did not constitute a material change in circumstances. However, the trial court failed to recognize other changes that have occurred since the decree.

When the decree was entered in November 2012, Scott was living near Lakeside and Tonya was living in Kimball and commuting to Gordon for parenting time. The children were attending a country school that was 30 miles from Gordon and 11 miles from Scott's residence.

At the time of the modification trial, Tonya was living in Cheyenne, but also had a different home in Gordon where she was spending a large amount of time. The children were attending school in Gordon and Rushville. Gordon is 36 miles from Scott's residence. Tonya's home in Gordon was within blocks of Toby's elementary school and the high school parking lot from which Sevanna was transported via bus to and from the middle school in Rushville. Tonya was not working, which allowed her to be in Gordon during the week, in addition to when she was there for parenting time. The children were involved in various sports and activities in Gordon, which resulted in them spending a large amount of time in Gordon. It also resulted in a lot of driving back and forth during the week between Gordon and Scott's residence, each way being 36 miles.

We conclude that the change in the children's schools, the location of Tonya's Gordon home and Scott's home in relation to the children's schools, and Tonya's availability during the week, are all changes that have occurred since the decree. When these changes are considered in conjunction with Sevanna's desire to spend more time with Tonya, they result in a material change in circumstances. Accordingly, the

trial court abused its discretion in finding that there was insufficient evidence to show a material change in circumstances had occurred.

[8] Tonya also assigns that the trial court erred in failing to find that it was in the children's best interests to modify the parenting time. The trial court did not address the children's best interests because it found there was no material change in circumstances. However, in our de novo review, we can make a best interests finding if the evidence supports it. See *Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989). We determine that the evidence is sufficient to make a best interests finding in this case.

[9] Neb. Rev. Stat. § 43-2923(6) (Reissue 2016) provides that in determining custody and parenting arrangements:

> [T]he court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of . . . :
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member. . . ; and
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

Other pertinent factors include the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and parental capacity to provide

physical care and satisfy educational needs of the child. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

The evidence shows that the children have a good relationship with both parents. Both parents are actively involved in the children's homework and their extracurricular activities. The parties are able to communicate about the children's activities and exchanges, and they have generally worked well together regarding the children. As previously discussed, Sevanna wants to spend more time with Tonya. She feels more comfortable talking to her mother about certain topics. She communicates with her mother via Facebook almost daily when she is at her father's house. The week on/week off parenting arrangement will allow Sevanna more time with Tonya and will give her more face-to-face communication. Further, the modified schedule will allow the children to be close to their schools and activities during the weeks that Tonya has them. It also will give the children the opportunity to have both parents involved in their day-to-day activities.

Upon our de novo review, we find that modifying custody to a week on/week off parenting schedule is in the children's best interests.

## CONCLUSION

We conclude that the trial court abused its discretion in finding that there was insufficient evidence to show a material change in circumstances had occurred which affected the best interests of the children. Accordingly, the trial court erred in denying Tonya's complaint to modify visitation. We reverse the trial court's order and remand the cause with directions for the district court to enter a modification order and parenting plan consistent with this opinion.

Reversed and remanded with directions.

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

# Morton Moyers, appellee, v. International Paper Company and One Republic Insurance Company, appellants.

905 N.W.2d 87

Filed November 21, 2017. No. A-17-008.

1. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
2. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
4. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
6. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an appellate court may review three types of final

orders: (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.

7. **Workers' Compensation: Appeal and Error.** A party can appeal an order from the Workers' Compensation Court if it affects the party's substantial right.
8. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2016) include those legal rights that a party is entitled to enforce or defend.
9. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
10. ____: ____. When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
11. **Workers' Compensation: Judgments: Final Orders.** A Workers' Compensation Court's finding of a compensable injury or its rejection of an affirmative defense without a determination of benefits is not an order that affects an employer's substantial right in a special proceeding.
12. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
13. **Workers' Compensation: Rules of Evidence: Appeal and Error.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; it has discretion to admit evidence, and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of discretion.
14. **Workers' Compensation: Words and Phrases.** Under the Nebraska Workers' Compensation Act, an occupational disease means only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed.
15. **Workers' Compensation: Time.** Under the Nebraska Workers' Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of

the body and a disability has resulted. In other words, an occupational disease has caused an "injury" within the meaning of the act, at the point it has resulted in disability.

16. **Workers' Compensation.** A workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted.
17. ____. As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
18. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
19. **Workers' Compensation.** Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact.
20. ____. Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
21. **Workers' Compensation: Expert Witnesses.** Although medical restrictions or impairment ratings are relevant to a claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.

Appeal from the Workers' Compensation Court: Julie A. Martin, Judge. Affirmed.

Timothy E. Clarke and Thomas B. Shires, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Terry M. Anderson and David M. O'Neill, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

## I. INTRODUCTION

International Paper Company and One Republic Insurance Company (collectively IPC) appeal the decision of the Nebraska

Workers' Compensation Court in which Morton Moyers was found to be permanently and totally disabled as a result of an occupational disease. The court found Moyers was entitled to weekly permanent disability benefits from and after the date he stopped working, September 20, 2014, except during those periods in which he was entitled to receive temporary total disability benefits. For the reasons that follow, we affirm.

## II. PROCEDURAL BACKGROUND

On February 13, 2015, Moyers filed a petition alleging that he had sustained a personal injury to his respiratory system and lungs arising out of and in the scope and course of his employment with International Paper Company. He alleged the "incident and injury" occurred over the course of his 42 years of employment as he was "continually exposed to paper dust in his work environment which has caused chronic lung and respiratory condition." He alleged that he provided notice of the accident and injury on or about August 27, 2014, and that IPC had failed or refused to pay workers' compensation benefits to him.

IPC generally denied Moyers' allegations and affirmatively alleged that his condition was caused by an inherent condition and that any disability was the result of an independent intervening cause. IPC alleged that Moyers failed to timely file his cause of action and that he failed to give timely notice of his injury as soon as practicable.

On April 14, 2016, this matter was heard before the Nebraska Workers' Compensation Court. An award was issued on July 22, in which the court found Moyers sustained his burden to prove that he sustained an occupational disease arising out of his employment. The court found that Moyers became temporarily totally disabled on September 20, 2014, the date he stopped working at International Paper Company, and that he reached maximum medical improvement on June 29, 2015.

The court found that Moyers was entitled to vocational rehabilitation services and stated that "[a]fter vocational rehabilitation services have been provided to [Moyers] as a result

of the injuries incurred on September 20, 2014, a further hearing may be had on the extent of [his] permanent partial disability measured as a loss of earning power." The court found Moyers was entitled to certain medical expenses, but denied Moyers' requests for future medical expenses, waiting-time penalties, attorney fees, and interest.

Moyers' motion for a determination of loss of earning capacity was filed on October 11, 2016. The vocational consultant, Ted Stricklett, provided his opinion that Moyers was unable to participate in a vocational rehabilitation plan due to his ongoing breathing issues and that he was not a viable candidate in the open labor market. IPC filed a motion to quash Moyers' motion and a motion to compel vocational rehabilitation. The motions were heard on November 9, and an order was filed on December 2. The court found Moyers sustained a 100-percent loss of earning capacity and was "so handicapped that he [would] not be employed regularly in any well-known branch of the labor market." The court found Moyers suffered permanent total disability as a result of his occupational disease and found Moyers was entitled to the sum of $552.87 per week from and after the date of his injury except during those periods of time in which he was entitled to receive temporary total disability benefits.

## III. FACTUAL BACKGROUND

After Moyers graduated from high school in 1972, he began working for Weyerhaeuser, which was subsequently bought by International Paper Company, as a "sheet catcher." He became a "checker" in 1974 and was responsible for placing the "scores and knives" in the machines. He left the company for a short period from September 1975 to May 1976 before returning to Weyerhaeuser.

He worked for Weyerhaeuser from 1976 into the 2000's, when Weyerhaeuser was purchased by International Paper Company. He worked from 2008 to 2009 as a baler and became an assistant checker in 2009. Moyers' last day of work for International Paper Company was September 19, 2014.

Moyers first sought treatment at an emergency room for a respiratory condition in 1997. He reported a 2-month history of cough, a shortness of breath with exertion, and a 2-year history of nasal congestion. He had been treated for seasonal allergies and was taking prednisone and other medications for treatment of allergies and asthma.

Moyers sought treatment in May 2000 for allergic rhinitis. Moyers reported that the use of nasal spray, seasonally, relieved his symptoms. He sought medical treatment regularly from 2002 to 2006 for various respiratory, sinus, and bronchial complaints. He was treated for pneumonia in 2005.

Moyers treated with Dr. Thomas Nilsson at an allergy and asthma clinic from 2008 to 2011. In March 2010, Moyers saw Nilsson for shortness of breath and chest tightness which occurred even though he was using an inhaler. He expressed concerns of possible mold in his workplace and wondered if exposure to conditions in his workplace aggravated his breathing. Nilsson stated that Moyers' mold allergies were probably not related to any of the symptoms he had. In 2011, Nilsson noted Moyers had a history of asthma, allergic rhinitis, and chronic anxiety.

Moyers began treating with a pulmonologist, Dr. George Thommi, in 2013 and reported having breathing problems since 1997. He reported recurrent bouts of allergy symptoms and bronchitis that were usually worse in the spring and fall. Pulmonary function tests showed "moderate obstructive lung disease and normal diffusion."

In June 2014, Moyers reported shortness of breath, wheezing, and "coughing up brown sputum." In July 2014, Moyers reported that he worked in a cardboard factory and that the temperatures in the building sometimes reached 140 degrees. Thommi noted that Moyers was exposed to "high temperatures and dust fumes at work" and opined that Moyers' "work environment would aggravate his underlying pulmonary disease with recurrence of [his] bronchitis/pneumonia." In August 2014, Thommi noted that Moyers improved significantly and

was breathing very well after 2 weeks off of work, but his condition deteriorated after returning to the job. Moyers reported that after his return to work, his symptoms worsened to the point that he thought he needed to go to the emergency room. Thommi "recommended strongly that he not go to work in that current environment" and stated that "[c]ontinued exposure to this environment will cause end-stage respiratory failure." Moyers did not return to work after September 19, 2014.

In January 2015, Moyers continued to report shortness of breath, wheezing, cold symptoms, cough, shakiness, and fatigue. In a functional assessment dated April 8, 2015, Thommi diagnosed Moyers with asthma, occupational lung disease recurrent, chronic upper respiratory infection, and bronchitis. In the workers' compensation medical report prepared by Thommi, he diagnosed Moyers with obstructive lung disease/asthma, nocturnal hypoxemia, occupational lung disease, and hypersomnia and stated that Moyers' condition was "caused, significantly contributed to, or aggravated by an accident or injury arising out of or in the scope of [his] employment."

On September 29, 2015, Moyers was examined by Dr. D.M. Gammel, at IPC's request, and Gammel also reviewed Moyers' medical records. Gammel diagnosed Moyers with progressive obstructive lung disease/asthma, anxiety, depression, and sleep apnea syndrome. Gammel stated his opinion that Moyers' diagnoses were related to preexisting health conditions. Gammel stated that there was no objective evidence to suggest the workplace environment was the cause of Moyers' current condition or no objective evidence of an allergy to any irritant, chemical, or mold in his workplace. Gammel stated that the "dust may cause a respiratory irritant to temporarily exacerbate the pre-existing respiratory condition but not be the cause of the condition." Gammel stated, "Although there is evidence that wood dust exposure can cause respiratory effects to include hypersensitivity pneumonitis and occupational asthma, there are other exposures that . . . Moyers had that can cause the conditions as well . . . ."

## IV. ASSIGNMENTS OF ERROR

IPC asserts the court erred in admitting and excluding certain exhibits, determining Moyers' injury was an occupational disease rather than a repetitive trauma accident, finding Moyers met the burden of proving that he suffered an occupational disease, overruling IPC's motion to quash and motion to compel vocational rehabilitation, and finding Moyers to be permanently and totally disabled.

## V. STANDARD OF REVIEW

[1] Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016).

[2] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Greenwood v. J.J. Hooligan's*, 297 Neb. 435, 899 N.W.2d 905 (2017).

[3] Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence. *Id.*

[4] When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Nichols v. Fairway Bldg. Prods.*, 294 Neb. 657, 884 N.W.2d 124 (2016).

## VI. ANALYSIS

### 1. Jurisdiction

[5] For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment. *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013). Moyers asserts that the July 22, 2016, award was a final order and that IPC failed to appeal the order within 30 days of the judgment. Thus, he argues, this court is without jurisdiction to consider any of the issues adjudicated in the July 22 order. IPC asserts the July 22 order was an interlocutory order, as it "left open" the question of Moyers' entitlement to permanent disability benefits, to be determined after he underwent vocational rehabilitation services. Brief for appellant at 22.

[6-9] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an appellate court may review three types of final orders: (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *Jacobitz v. Aurora Co-op, supra*. A party can appeal an order from the Workers' Compensation Court if it affects the party's substantial right. *Id.* Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend. *Jacobitz v. Aurora Co-op, supra*. A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken. *Id.*

[10] The Nebraska Supreme Court has held, even in workers' compensation cases, that when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Id.* In cases where

the employer's defense is that the claimant failed to prove a work-related injury, the Nebraska Supreme Court has held that an appeal is interlocutory when the trial court has reserved issues for later determination. See *id.*

[11] In *Jacobitz v. Aurora Co-op, supra*, the court found that the employer did not appeal from a final order because the trial court determined only that the claimant's accident occurred in the scope of his employment, but had not yet determined benefits. The Nebraska Supreme Court specifically stated, "From the date of this decision, a Workers' Compensation Court's finding of a compensable injury or its rejection of an affirmative defense without a determination of benefits is not an order that affects an employer's substantial right in a special proceeding." *Id.* at 104, 841 N.W.2d at 383.

In light of the *Jacobitz v. Aurora Co-op* opinion, we find the July 22, 2016, award regarding Moyers was not a final determination of benefits, as the court reserved the issue of "permanent partial disability [benefits] measured as a loss of earning power" until after vocational services had been provided. In the December 2, 2016, order, the court found Moyers was permanently and totally disabled and was entitled to benefits. At that point, there were no further issues to be adjudicated. We find IPC timely appealed from a final order, and this court has jurisdiction to address IPC's assignments of error on appeal.

### 2. Admission of Evidence

#### (a) Exhibits 2 through 4 and 6

At the April 14, 2016, hearing, Moyers offered exhibits 1 through 14. IPC objected to several exhibits on the basis of foundation, hearsay, and relevance, arguing there is insufficient evidence relied upon by the treating physicians to render the opinions they did. The court overruled IPC's objections in the July 22 award without providing explicit reasoning for the rulings. On appeal, IPC asserts the court erred in receiving exhibits 2 through 4 and 6. Exhibit 2 contains the records

and notes from Moyers' medical visits with Thommi. Exhibit 3 is the workers' compensation medical report prepared by Thommi. Exhibit 4 is the functional assessment form prepared by Thommi, and exhibit 6 contains additional notes from Thommi's office from a visit with Moyers in 2014. Each of the exhibits are personally or electronically signed by Thommi.

IPC asserts Thommi's opinion "lacks foundation," as he does not provide a factual basis for his opinion. Brief for appellant at 37. IPC argues that Thommi refers to Moyers' exposure to "high temperatures and dust fumes at work" in the "Impression and Plan" section of the report, even though Moyers alleged that he was exposed to paper dust and not dust fumes. IPC also argues that Thommi did not provide an opinion regarding the causal relationship between Moyers' condition and his exposure to paper dust or dust fumes and that, rather, Thommi focused his recommendations on the role of "heat in [Moyers'] work environment." *Id.*

Workers' Comp. Ct. R. of Proc. 10(A) (2011) provides:

> The Nebraska Workers' Compensation Court is not bound by the usual common law or statutory rules of evidence; and accordingly, with respect to medical evidence on hearings before a judge of said court, written reports by a physician or surgeon duly signed by him, her or them and itemized bills may, at the discretion of the court, be received in evidence in lieu of or in addition to the personal testimony of such physician or surgeon . . . .

See, also, Neb. Rev. Stat. § 48-168(1) (Reissue 2010).

[12] Subject to the limits of constitutional due process, the Legislature has granted the compensation court the power to prescribe its own rules of evidence and related procedure. *Contreras v. T.O. Haas*, 22 Neb. App. 276, 852 N.W.2d 339 (2014). See, also, *Roness v. Wal-Mart Stores*, 21 Neb. App. 211, 837 N.W.2d 118 (2013). Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal

absent an abuse of discretion. *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

In this case, each of the challenged exhibits contain written reports, signed by Moyers' physician, Thommi. These exhibits were received at the discretion of the Workers' Compensation Court in lieu of Thommi's personal testimony. Although IPC may disagree with Thommi's substantive findings, the records are a representation of Moyers' medical history and treatment which is relevant to this case. We cannot find the court erred in receiving exhibits 2 through 4 and 6 over IPC's objections.

(b) Exhibit 32

IPC asserts the district court erred in sustaining Moyers' objection to exhibit 32 and in not allowing it to be admitted for rebuttal purposes.

Prior to the start of trial, IPC made an oral motion for a continuance of the trial or, in the alternative, to allow exhibit 32 to be received into evidence. Exhibit 32 is an "Industrial Hygiene Exposure Assessment" dated October 24, 2008, purportedly for the facility where Moyers was employed. Counsel for IPC stated the report was received 1 week prior to trial, but after the deadline set by the court for disclosure of exhibits. Additional time was requested so the report could be reviewed and its findings analyzed. Moyers objected, stating that the case had been on file since February 2015 and IPC was on notice the case involved respiratory lung disease, that ample discovery had been conducted by the parties, and that Moyers had not worked since 2014 and would be prejudiced by another delay in the trial.

The court did not find good cause was shown as to why IPC should be entitled to a continuance. The court did not find adequate justification for IPC to not have obtained air quality testing reports of its facility until the eve of trial, given the length of time the case had been on file, especially for a report that was approximately 7 years old. The court overruled IPC's motion to continue.

Moyers objected to IPC's offer of exhibit 32 on the basis of hearsay, foundation, and relevance, and he argued that the exhibit was prejudicial as it was not timely disclosed pursuant to the court's pretrial orders. The objection was sustained. Offers of proof were made as to exhibit 32 on two occasions, and the exhibit was received for only that limited purpose.

IPC recognizes that the contents of exhibit 32 were disclosed after the discovery deadline and does not argue that the court erred by not admitting the exhibit as substantive factual evidence. Rather, IPC argues that the court erred by sustaining Moyers' objection to the exhibit as rebuttal evidence which could have been used to impeach him.

After each offer of proof, the court ruled that exhibit 32 should be excluded from evidence. The court reasoned that it was "very clear early on in the case that this was about a respiratory issue" and that air quality testing had been done by International Paper Company since 2005. When the case was filed in 2015, the parties were on notice of the issues involved, and pretrial orders stated that discovery was to be completed 7 days before trial. Because exhibit 32 was not disclosed to Moyers within the timeframe set by the court, it was excluded for all purposes, including rebuttal.

[13] As previously discussed, the Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; it has discretion to admit evidence, and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of discretion. *Jurgens v. Irwin Indus. Tool Co.*, 20 Neb. App. 488, 825 N.W.2d 820 (2013). Upon our review, we cannot find the court abused its discretion in excluding exhibit 32 for rebuttal purposes.

### 3. Occupational Disease or Repetitive Trauma

In his petition, Moyers alleged that he sustained injury as a result of an "incident and injury" that "occurred over the course of his 42 years of continuous employment" with International

Paper Company. He asserted that being "continually exposed to paper dust in his work environment . . . caused a chronic lung and respiratory condition." The July 22, 2016, award contains the court's conclusion that Moyers established, by a preponderance of the evidence, that he sustained an "aggravation to a pre-existing condition through his long-term exposure to paper dust/airborne contaminants arising out of and in the course of his employment with [IPC] resulting in an occupational disease."

IPC asserts the court erred in analyzing Moyers' injury as an occupational disease rather than a repetitive trauma accident.

[14] Neb. Rev. Stat. § 48-101 (Reissue 2010) provides:

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

Occupational disease is defined to mean "only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed." Neb. Rev. Stat. § 48-151(3) (Reissue 2010). Occupational disease cases typically show a "'"long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date." . . .'" *Ludwick v. Triwest Healthcare Alliance*, 267 Neb. 887, 896, 678 N.W.2d 517, 524 (2004). Here, the court found the "continuous exposure to paper dust" was peculiar to Moyers' work and was not something the general public would have been exposed to.

IPC argues that "[Moyers'] exposure to dust was neither characteristic of nor peculiar to his employment," so it cannot be said that he suffered an occupational disease. Brief for appellant at 25. IPC also argues that "[t]here is no evidence in the record supporting a finding that [Moyers] was exposed

to 'paper dust' during the course of his employment." *Id.* IPC appears to draw a distinction between "dust" and "paper dust" in Moyers' testimony where there does not appear to be any difference. Moyers uses both terms interchangeably.

Moyers testified that he was exposed to paper dust throughout his employment at Weyerhaeuser, which was subsequently bought by International Paper Company. He testified that one task that he regularly performed was to use a hose to blow paper dust off of the machines, which then sent the dust into the air. He specifically stated that in "[c]ertain departments of the machine there would be — you would have to do the starch and take all the starch off the machine, grease, just a lot of paper dust mostly . . . ." He stated that after the dust was blown off of the machines, it was swept up and deposited into 55-gallon drums. He testified that when cardboard boxes are being cut, it creates dust, and that vacuum bags were attached to the machines to catch the dust created by the machines. He testified that there were periods of days, months, or even years when the vacuum bags were removed to make the machines more productive. When the machines were operated without the bags, the dust was released into the air. In his deposition, Moyers stated that at times, an individual in his work environment could "[h]old [their] hand out and watch the paper dust fall on [their] hand." Moyers generally did not wear a mask during his shift, except when he was cleaning, because the facility was hot and the mask made it difficult to breathe.

An employee of International Paper Company testified that he worked there for 12 years and has been a supervisor for 10 years. For the 5 or 6 years prior to trial, he was in control of the vacuum bags. He made sure that the bags were on the machines for those years "for dust purposes." He testified that from the time he began working at International Paper Company to the time he was placed in control of the vacuum bags, the bags were off of the vacuums at times for "production purposes, getting the machines to run better." He testified that

he was not sure if the bags were on the machines 100 percent of the time when he was not in control of their use. He stated that the bags are there to catch the dust and that if they are not in place, the dust "goes on the floor."

IPC argues Moyers' claims should have been analyzed in the context of a repetitive trauma, rather than an occupational disease. IPC refers to *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009), in which the Nebraska Supreme Court determined that noise exposure is caused by repetitive external trauma, produced in the work environment. The court found that noise-related hearing loss is not properly classified as an occupational disease because exposure to loud noises does not create a hazard that distinguished the plaintiff's exposure from a myriad of other occupations. In *Risor v. Nebraska Boiler*, the court found that occupational hearing loss does not result from exposure to a "workplace substance." 277 Neb. at 695, 765 N.W.2d at 185.

The Supreme Court has declined to analyze repetitive trauma cases in the context of occupational disease. In reaching its decision in *Risor v. Nebraska Boiler*, the Nebraska Supreme Court compared the plaintiff's condition to a "substance exposure" case, in which the Nebraska Supreme Court found the plaintiff's employment exposed him to unusual amounts of wheat dust, which the court found to be peculiar to and characteristic of grain elevator operations. 277 Neb. at 689, 765 N.W.2d at 181. See *Riggs v. Gooch Milling & Elevator Co*., 173 Neb. 70, 112 N.W.2d 531 (1961). The Supreme Court has considered exposure to other workplace substances that resulted in occupational diseases, including exposure to latex, silica, asbestos particles, dishwashing detergents, and cleansing chemicals. *Risor v. Nebraska Boiler, supra*.

In this case, the Workers' Compensation Court likened Moyers' condition to that of the plaintiff in *Riggs v. Gooch Milling & Elevator Co., supra*, in determining that Moyers had suffered an occupational disease. Upon our review, we find this case is most similar to *Riggs v. Gooch Milling &*

*Elevator Co.,* as there is evidence that Moyers was exposed to a workplace substance, namely an unusual amount of paper dust which would be peculiar to and characteristic of paper or cardboard manufacturing operations. Upon our review, we cannot find the court erred in analyzing Moyers' condition as a potential occupational disease, rather than a repetitive trauma accident.

### 4. Burden of Proving Occupational Disease

As previously discussed, the court found that Moyers' injury was an occupational disease and that he submitted sufficient proof that his underlying condition was aggravated by his work at International Paper Company. IPC asserts the court erred in finding Moyers met the burden of proving that his exposure to "'paper dust'" in his work environment caused his respiratory and lung condition or aggravated his preexisting respiratory or lung conditions. Brief for appellant at 29. IPC argues there is no expert medical opinion establishing a causal relationship between Moyers' alleged exposure to paper dust and aggravation of his lung and respiratory condition, which would warrant the findings of the workers' compensation court.

[15] Under the Nebraska Workers' Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. *Ludwick v. Triwest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004). See § 48-151(4). In other words, an occupational disease has caused an "injury," within the meaning of the act, at the point it has resulted in disability. *Ludwick v. Triwest Healthcare Alliance, supra*. See § 48-151(4). The term "injury" includes disablement from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment. See § 48-151(4).

In 1972, Moyers began work for Weyerhaeuser, which was subsequently bought by International Paper Company. Moyers testified regarding his working conditions and exposure to paper dust throughout his employment. He began experiencing nasal, throat, and lung issues in 1997 and sought treatment. There is evidence that Moyers shared his concerns regarding his working conditions with his treating physicians from the beginning of his treatment. In 1997, Moyers sought treatment at an emergency room and reported having shortness of breath, spasms, and coughing. Notes from that emergency room visit indicate that Moyers worked in the "cardboard manufacturing industry around a lot of dust, and his cough is worse there," and that his cough improved away from work. Moyers reported to Nilsson in 2008 that he was exposed to "paper dust" at work, but, at that time, could not say that his symptoms were worse in his work environment. He experienced these symptoms over a number of years until 2014, when it was recommended that he cease his employment. Moyers' pulmonologist, Thommi, opined that "[c]ontinued exposure to this environment will cause end-stage respiratory failure."

The International Paper Company supervisor testified that precautions were taken at the company in the most recent years to trap or minimize the amount of dust in the air. However, he had no specific knowledge of the safety measures taken prior to his role as supervisor or prior to his period of employment.

Moyers offered a questionnaire signed by Thommi to support his claim, in which Thommi diagnosed "obstructive lung disease/asthma," "nocturnal hypoxemia /occupational lung disease with exacerbation," and "hypersomnia." Thommi checked the box to indicate his opinion that "the diagnosed condition [was] caused, significantly contributed to, or aggravated by an accident or injury arising out of or in the scope of [Moyers'] employment." The court noted, "Although the higher courts have expressed some dissatisfaction with opinions expressed by check marks on a questionnaire, those reports are not to

be rejected outright but should be examined as to a lack of credibility or weight." See *Liberty v. Colonial Acres Nsg. Home*, 240 Neb. 189, 481 N.W.2d 189 (1992). Even though the Workers' Compensation Court found Thommi's opinion was lacking as to whether Moyers' work was the cause of his lung disease, the court found sufficient proof that Moyers' underlying respiratory condition was aggravated by his work at International Paper Company. The court was persuaded by the "progressive nature" of Moyers' medical condition "after returning to work following brief hiatuses therefrom when his condition had improved."

IPC offered the opinion of Gammel, who reviewed Moyers' medical records. Gammel opined that there was no objective evidence to suggest that Moyers' workplace environment was the cause of his current condition based upon a reasonable degree of medical certainty, but there is objective evidence that his condition was related to his personal and non-work-related health issues. These issues included allergies and seasonal symptoms aggravated by house dust, emotional upset, and respiratory infections. Gammel acknowledged that "dust may cause a respiratory irritant to temporarily exacerbate the pre-existing respiratory condition but not be the cause of the condition." Gammel also noted that "wood dust exposure can cause respiratory effects [which] include hypersensitivity pneumonitis and occupational asthma."

[16] The law of this state has consistently recognized that "the lighting up or acceleration of preexisting conditions by accident is compensable." *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 74, 112 N.W.2d 531, 533 (1961). The Nebraska Supreme Court has held that a workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009).

In occupational disease cases, the Nebraska Supreme Court has stated that disability results at the point when "'the injured worker is no longer able to render further service.'" *Ludwick v. Triwest Healthcare Alliance*, 267 Neb. 887, 895, 678 N.W.2d 517, 523 (2004). Here, the court considered the expert opinion of Gammel, but deferred to Thommi's opinion, noting that even though Gammel is a qualified doctor, he is not a pulmonologist or a specialist trained in the field of respiratory conditions or diseases. The court found that, when taking the evidence as a whole, Moyers' asthma and preexisting respiratory condition became an occupational disease on September 19, 2014, when Thommi strongly recommended that Moyers not return to work.

[17,18] As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016). Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court. *Hintz v. Farmers Co-op Assn.*, 297 Neb. 903, 902 N.W.2d 131 (2017).

Viewing the evidence in the light most favorable to Moyers, and giving him the benefit of every inference reasonably deducible from the evidence, we find the court was not clearly wrong in finding Moyers met his burden to prove that he sustained an occupational disease arising out of his employment.

### 5. Motion to Quash

IPC asserts the court erred in overruling IPC's motion to quash Moyers' motion for determination of loss of earning capacity and his motion to compel vocational rehabilitation.

IPC asserts the vocational rehabilitation counselor, Stricklett, ignored the medical opinions of Moyers' physician and the court's adoption of permanent restrictions, and relied only upon "[Moyers'] subjective complaints, despite the lack of any medical evidence demonstrating a change in [his] condition

since the adoption of the permanent restrictions." Brief for appellant at 43. IPC alleges it was prejudiced by Stricklett's decision to allow Moyers to subjectively state that he could not undergo vocational rehabilitation services without medical evidence to support his claims.

Stricklett's letter to counsel for the parties, dated September 22, 2016, stated that he met with Moyers on September 1 to review his vocational rehabilitation options. Stricklett noted that because Moyers was unable to return to International Paper Company in any capacity, his vocational rehabilitation options included a 90-day job search or a period of formal training. During the meeting, Moyers informed Stricklett that he would be unable to work part time or full time due to his severe breathing issues, which require the use of a nebulizer every 4 hours. Moyers stated that he is unable to sit in a classroom, he does not handle hot or cold environments very well, and he does not leave home but for short periods of time in case a breathing treatment is required.

Stricklett concluded with a "reasonable degree of vocational certainty" that Moyers was unable to participate in either of the vocational rehabilitation plans available to him. Stricklett stated that Moyers is not a viable candidate in the open labor market, nor is he a candidate for training due to his inability to be away from his home and his breathing treatments for extended periods of time.

The court noted that the vocational rehabilitation statutes provide that a chosen counselor "shall evaluate the employee and, if necessary, develop and implement a vocational rehabilitation plan." Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010). The statute further provides that "the specialist shall make an independent determination as to whether the proposed plan is likely to result in suitable employment for the injured employee." *Id.* In this case, Stricklett determined, based on the medical records and his interactions with Moyers, that the available options for a vocational rehabilitation plan would not restore Moyers to suitable employment.

The court considered this evidence, as well as Moyers' age, medical condition, education, and lack of transferable job skills, which all have precluded him from the only work he knows. The court observed Moyers in the courtroom and found it "extremely unlikely that any employer, even the very most beneficent employer, would offer him a position." The court found that vocational rehabilitation was not feasible under the circumstances.

Upon our review of the evidence, we cannot find the court was clearly wrong in overruling IPC's motions to quash and to compel vocational rehabilitation under the circumstances.

### 6. Determination of Permanent Total Disability

IPC asserts the court erred in finding that Moyers was permanently and totally disabled, arguing the expert medical evidence did not support the determination and there was not sufficient evidence to warrant the court's finding.

[19,20] Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016). Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform. *Id.* As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.*

IPC argues that Gammel and Thommi provided permanent restrictions which would have allowed Moyers to return to work and that the court adopted these restrictions. IPC asserts the vocational counselor did not provide a loss of earning capacity analysis nor formulate a vocational rehabilitation plan based on the permanent restrictions adopted by the court, "even though the Court specifically indicated [Moyers']

entitlement to permanent disability benefits was to be determined after undergoing vocational rehabilitation." Brief for appellant at 47.

The evidence shows Stricklett prepared a loss of earning capacity analysis in February 2016. In it, Stricklett stated that if consideration is given to the opinion of Thommi, Moyers is unable to lift, stand, or walk and therefore he is completely unemployable and his loss of earning capacity would be 100 percent. However, Stricklett stated, in his analysis, if consideration is given to the opinion of Gammel, Moyers' loss of earning capacity would be 0 percent, because Gammel's opinion was that Moyers' condition was not work-related. In the July 22, 2016, order, the court explicitly disagreed with Gammel's causation opinion and delayed a determination of loss of earning capacity until such time as Moyers underwent vocational rehabilitation services.

As previously discussed, the court allowed the case to proceed for a determination of loss of earning capacity, without the preparation and completion of a vocational rehabilitation plan. The court considered Stricklett's opinion that Moyers was unable to participate in a vocational rehabilitation plan due to his ongoing medical issues. The court found Moyers was an "odd lot employee, i.e. someone who [is] not altogether incapacitated for work [but] is so handicapped that he will not be employed regularly in any well-known branch of the labor market." The December 2, 2016, order noted that the court observed Moyers' "difficulty breathing firsthand and was convinced of the veracity of his complaints."

[21] The court noted that when evaluating a loss of earning capacity, it must consider the ability to procure employment generally, the ability to earn wages in one's employment, the ability to perform tasks of the work in which one is engaged, and the ability to hold a job obtained. The record shows that the court considered each of these factors, as well as the evidence of Moyers' educational background, work history, medical conditions, and vocational options, and concluded

that he was permanently and totally disabled. The Nebraska Supreme Court has stated that although medical restrictions or impairment ratings are relevant to a claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability, but instead may rely on the testimony of the claimant. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016). Upon our review, we find the court considered the appropriate factors and was not clearly wrong in determining that Moyers was permanently and totally disabled.

## VII. CONCLUSION

We affirm the decision of the Nebraska Workers' Compensation Court finding that Moyers is permanently and totally disabled as a result of an occupational disease and that he is entitled to benefits.

Affirmed.

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

# Casandra A. Hedglin, appellant, v. Jerry A. Esch, individually and in his representative capacity, and the City of Hastings, Nebraska, a political corporation and a Nebraska political subdivision, appellees.

905 N.W.2d 105

Filed November 21, 2017. No. A-17-039.

1. **Political Subdivisions Tort Claims Act: Judgments: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless clearly wrong; however, questions of law are reviewed independently of the decision reached by the court below.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **Motions to Dismiss: Rules of the Supreme Court: Summary Judgment: Pleadings.** When matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment and the parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by statute.
4. **Motions to Dismiss: Summary Judgment: Notice.** The purpose of providing notice that a motion to dismiss has been converted to a motion for summary judgment is to give the party sufficient opportunity to discover and bring forward factual matters which may become relevant in the summary judgment context, as distinct from the dismissal context.
5. **Political Subdivisions Tort Claims Act: Waiver: Immunity.** The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision.

6. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
7. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
8. **Political Subdivisions Tort Claims Act: Words and Phrases.** Personal injury, as used in the Political Subdivisions Tort Claims Act, is defined broadly to include every variety of injury to a person's body, feelings, or reputation.
9. **Political Subdivisions Tort Claims Act: Municipal Corporations: Notice.** The primary purpose of Neb. Rev. Stat. § 13-905 (Reissue 2012) is to afford municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities are in a position to intelligently consider the claim and to allow it if deemed just or, in the alternative, to adequately protect and defend the public interest.
10. **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.
11. **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.
12. **Actions: Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act specifies various nonjudicial procedures which have been characterized as conditions precedent to the filing of a lawsuit, and a claimant's failure to follow these procedures may be asserted as an affirmative defense in an action brought under the act.
13. **Political Subdivisions Tort Claims Act.** Under Neb. Rev. Stat. § 13-906 (Reissue 2012) of the Political Subdivisions Tort Claims Act, a claimant must file a tort claim with the governing body of the political subdivision before filing suit.
14. **Political Subdivisions Tort Claims Act: Time.** If the governing body of a political subdivision has not made final disposition of the claim within 6 months after it is filed, the claimant may withdraw the claim and file suit.
15. **Political Subdivisions Tort Claims Act: Notice: Time.** If a notice of a claim under the Political Subdivisions Tort Claims Act is withdrawn before expiration of the 6-month time period specified in Neb. Rev. Stat. § 13-906 (Reissue 2012), the result is the failure of a condition precedent to the filing of a lawsuit under the act.

16. **Political Subdivisions Tort Claims Act: Time.** Because compliance with the statutory time limits set forth in Neb. Rev. Stat. § 13-906 (Reissue 2012) can be determined with precision, the doctrine of substantial compliance has no application.
17. ____: ____. The language of Neb. Rev. Stat. § 13-906 (Reissue 2012) explicitly provides that no suit can be brought in district court unless 6 months have passed without a resolution of a properly filed claim by the political subdivision.

Appeal from the District Court for Adams County: Stephen R. Illingworth, Judge. Affirmed.

Kevin K. Knake, of Johnson Law Office, L.L.C., for appellant.

Jeffrey J. Blumel and Ryan M. Kunhart, of Dvorak Law Group, L.L.C., for appellees.

Inbody, Pirtle, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Casandra A. Hedglin appeals the order of the district court for Adams County which dismissed her complaint for failing to state a claim upon which relief could be granted. Although we treat the motion to dismiss as a motion for summary judgment, we find no merit to the arguments raised on appeal and therefore affirm.

## BACKGROUND

On May 25, 2016, the City of Hastings, Nebraska (the City), received a notification of claim under the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012). The notification stated that Hedglin was making a claim against the City for the "personal injury, mental anguish, and humiliation" she suffered due to the actions of Jerry A. Esch, who was acting in the scope of his employment as a police officer for the City.

On June 9, 2016, Hedglin commenced the present action in the Adams County District Court. Her complaint alleged a cause of action for "Defamation: False Light/Invasion of Privacy" and contained allegations that were essentially the same as those raised in her tort claim. The City had not made a final disposition of the tort claim before Hedglin filed her complaint.

In response to the complaint, the City and Esch (collectively the defendants) filed a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). The motion asserted that the complaint failed to state a claim upon which relief could be granted, because Hedglin failed to comply with the provisions of the PSTCA, specifically § 13-906, and therefore, the lawsuit was premature and not permitted by the PSTCA. After holding a hearing on the motion, the district court agreed and dismissed the complaint. Hedglin now appeals to this court.

## ASSIGNMENTS OF ERROR

Hedglin assigns, restated, that the district court erred in (1) finding that the PSTCA applies to the causes of action alleging defamation and false light invasion of privacy and (2) granting the motion to dismiss.

## STANDARD OF REVIEW

[1] In actions brought pursuant to the PSTCA, the factual findings of the trial court will not be disturbed on appeal unless clearly wrong; however, questions of law are reviewed independently of the decision reached by the court below. *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 885 N.W.2d 1 (2016).

[2] Statutory interpretation presents a question of law. *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Id.*

## ANALYSIS

[3] Before addressing the merits of Hedglin's assignments of error, we note that the defendants' motion was entitled a motion to dismiss based on § 6-1112(b)(6), and the district court ruled that the motion to dismiss should be granted. At the hearing on the motion, however, the court received exhibits into evidence. Generally, when matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to dismiss under § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment and the parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by statute. *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015).

[4] The fact that a party does not receive such notice of the conversion of a motion to dismiss is not dispositive, however. The Supreme Court has recognized that the purpose of providing notice is to give the party sufficient opportunity to discover and bring forward factual matters which may become relevant in the summary judgment context, as distinct from the dismissal context. See *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009). In *Corona de Camargo*, the plaintiff was given a reasonable opportunity to present argument and evidence relevant to the issue of the statute of limitations, upon which the motions to dismiss were based. And on appeal, the plaintiff conceded that the underlying facts pertinent to this issue were not in dispute, i.e., that her claims were made more than 2 years after the occurrence. Thus, the Supreme Court concluded that although the motions to dismiss were converted into motions for summary judgment without notice to the plaintiff, there was no prejudice, because the motions presented an issue of law of which the plaintiff was notified in the motions to dismiss. *Id.*

Similarly, in *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007), the defendants offered evidence at a hearing on a motion to dismiss, the plaintiff raised

no objection to the exhibits, and the plaintiff was given the opportunity to offer evidence in opposition to the motion but declined to do so. On appeal, the plaintiff argued that the trial court erred in converting the motion to dismiss to a motion for summary judgment by receiving evidence outside the pleadings. The Supreme Court observed that the plaintiff was given an opportunity to present evidence and did not do so. *Id.* The court noted that it could not determine from the record whether the plaintiff raised before the trial court the issue of conversion of the motion to dismiss to a motion for summary judgment, but concluded that whether the court erred in its procedure regarding the motion to dismiss was not decisive of the matter and declined to resolve the cause on that basis. *Id.*

In the present case, we first note that Hedglin does not assign as error the conversion of the motion. It is clear from the record that Hedglin was aware the defendants were going to offer exhibits into evidence in support of their motion, did not object to the exhibits at the hearing, and was afforded the opportunity to offer evidence in opposition to the motion but declined to do so. Further, the motion to dismiss was based on an issue of law and the relevant facts to that end are undisputed; in other words, the date the City received notification of Hedglin's claim and the date the complaint was filed in district court are undisputed, as is the fact that the City never issued a formal disposition of Hedglin's claim. We therefore treat the motion as a motion for summary judgment. We now turn to the merits of Hedglin's arguments.

She first claims that the district court erred in finding that the PSTCA applied to her complaint. We find no merit to this argument.

[5-7] It is undisputed that the City is a political subdivision of the State of Nebraska and that at all relevant times, Esch was an employee of the City and acting in the scope of his employment. The PSTCA reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision. *Geddes v. York*

*County*, 273 Neb. 271, 729 N.W.2d 661 (2007). It is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Id*. Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. *Id*.

In the instant case, we first note that the notice of her claim Hedglin provided to the City specifies that she is making a claim pursuant to the PSTCA, thereby recognizing that the PSTCA governs her claim. At oral argument, Hedglin asserted that the notice provided under the PSTCA was for a negligence claim against the City, whereas the lawsuit filed was for intentional acts committed by Esch, an employee of the City. She argues, therefore, that she was not required to file a notice pursuant to the PSTCA for the claims asserted in the lawsuit. We disagree.

In the legislative declarations of the PSTCA, the Legislature declared:

> [N]o political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and . . . no suit shall be maintained against such political subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the [PSTCA].

§ 13-902.

[8] The PSTCA defines a tort claim as

> any claim against a political subdivision for money only . . . on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his or her office or employment, under circumstances in which the political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death . . . .

§ 13-903(4). Personal injury, as used in the PSTCA, is defined broadly to include every variety of injury to a person's body,

feelings, or reputation. *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993).

In addition, § 13-905 requires:

> All tort claims under the [PSTCA] shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision.

Hedglin's complaint seeks money damages from a political subdivision for personal injury caused by the wrongful actions Esch allegedly committed while in the scope of his employment. Specifically, she claims that the defendants "misused personal information" and "published . . . false and reckless statements" about her, placing her in a false light. Thus, she alleges wrongful acts by the defendants and her claims are tort claims that fall within the purview of the PSTCA.

The fact that she claims such acts were intentional instead of negligent does not excuse the requirement that she provide notice as required pursuant to § 13-905, because this requirement applies to "[a]ll tort claims." The Nebraska Supreme Court has recognized the existence of intentional torts in the context of the PSTCA. See *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011) (referencing intentional torts contemplated in § 13-910(7)). Furthermore, the PSTCA is similar to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2014), which is patterned after the Federal Tort Claims Act. See 28 U.S.C. § 2671 et seq. (2012) and *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). Under the federal act, which also contains a notice provision, see 28 U.S.C. § 2675, notice is required prior to initiating a lawsuit even if the tort is an intentional one. See *Santiago-Ramirez v. Secretary of Dept. of Defense*, 984 F.2d 16 (1st Cir. 1993).

[9] The Nebraska Supreme Court has stated that the primary purpose of § 13-905 is to afford municipal authorities

prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities are in a position to intelligently consider the claim and to allow it if deemed just or, in the alternative, to adequately protect and defend the public interest. See *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). We see no basis upon which to differentiate intentional torts from torts of negligence when attempting to accomplish this purpose. We therefore conclude that even if Hedglin's present lawsuit is based upon a cause of action sufficiently different from the negligence claim provided to the City, she was still required to provide notice pursuant to the PSTCA.

[10] Hedglin argues that her complaint also alleges a cause of action for civil conspiracy. This argument was not assigned as error, however. 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. *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015). Hedglin's assignment of error asserts that the district court erred in concluding that the PSTCA applied to her causes of action alleging defamation and false light. We therefore do not address her argument regarding a claim for civil conspiracy. Having found that Hedglin's claims come under the PSTCA, we conclude that the district court did not err in applying the statutory provisions of the PSTCA.

Hedglin next argues that the district court erred in granting the motion to dismiss, which, as determined above, we treat as a motion for summary judgment. We find no error in the court's decision.

[11] 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. *SFI Ltd. Partnership 8 v. Carroll*, 288 Neb.

698, 851 N.W.2d 82 (2014). Here, Hedglin does not dispute the relevant facts. She notified the City of her claim on May 25, 2016, and commenced her lawsuit on June 9. The question is whether these facts satisfy the statutory requirements of the PSTCA.

[12-17] The PSTCA specifies various nonjudicial procedures which have been characterized as conditions precedent to the filing of a lawsuit, and a claimant's failure to follow these procedures may be asserted as an affirmative defense in an action brought under the PSTCA. *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007). Under § 13-906 of the PSTCA, a claimant must file a tort claim with the governing body of the political subdivision before filing suit. *Geddes v. York County, supra*. If the governing body has not made final disposition of the claim within 6 months after it is filed, the claimant may withdraw the claim and file suit. *Id*. If, however, the claim is withdrawn before expiration of the 6-month time period specified in § 13-906, the result is the failure of a condition precedent to the filing of a lawsuit under the PSTCA. See *Geddes v. York County, supra*. Because compliance with the statutory time limits set forth in § 13-906 can be determined with precision, the doctrine of substantial compliance has no application. *Geddes v. York County, supra*. The language of § 13-906 explicitly provides that no suit can be brought in district court unless 6 months have passed without a resolution of a properly filed claim by the political subdivision. *Geddes v. York County, supra*.

In the present case, it is undisputed that Hedglin filed her claim with the City on May 25, 2016, and the City had not made a final disposition when she filed the complaint in district court on June 9. She therefore prematurely withdrew her claim and failed to satisfy a condition precedent to commencement of a lawsuit. As a result, her complaint fails to state a claim upon which relief can be granted, and therefore, the district court did not err in granting the motion for summary judgment.

Hedglin argues that the defendants failed to establish that they were immune to suit under § 13-910 and that her complaint sufficiently pled causes of action for defamation, false light invasion of privacy, and civil conspiracy. These arguments, however, misinterpret the basis for the defendants' motion and the grounds upon which the district court entered judgment. The motion articulates that the complaint fails to state a claim upon which relief can be granted because Hedglin failed to comply with § 13-906 when she prematurely withdrew her claim by filing the lawsuit. The district court agreed, and it was on that basis that judgment was entered against Hedglin. Thus, the defendants were not required to prove immunity or insufficiency of the allegations contained in the complaint. Having determined that the district court did not err in its decision, we affirm.

## CONCLUSION

We conclude that the motion to dismiss should be treated as a motion for summary judgment, because evidence was received in support of the motion. We further find that the PSTCA governs this action and that because Hedglin prematurely withdrew her tort claim, she failed to meet a condition precedent to filing the present lawsuit. Accordingly, the district court did not err in granting the motion for summary judgment. We therefore affirm.

Affirmed.

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

# State of Nebraska, appellee, v. Carl A. Heng, appellant.

905 N.W.2d 279

Filed December 5, 2017. No. A-16-964.

1. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews a trial court's ruling to admit or exclude an expert's testimony for abuse of discretion.
2. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
3. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016), if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
4. **Trial: Rules of Evidence: Expert Witnesses.** When an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by the trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue.
5. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
6. **Trial: Evidence: Records: Proof: Appeal and Error.** An appellate court cannot consider an error assigned on the ground that the trial court excluded evidence unless the record reveals an offer of proof or the offer was apparent from the context within which questions were asked.
7. **Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.

8. **Trial: Rules of Evidence: Police Officers and Sheriffs: Evidence: Extrajudicial Statements.** The admissibility of narrative statements made by law enforcement personnel during an interrogation about the veracity or credibility of the defendant should be analyzed under the ordinary rules of evidence; if the defendant's statement is itself relevant, then it must be considered whether the law enforcement statement is relevant to provide context to the defendant's statement.
9. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.
10. **Trial: Convictions: Evidence.** Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.
11. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
12. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
13. **Jury Instructions.** The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given.
14. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
15. **Self-Defense.** Self-defense is a statutorily affirmative defense in Nebraska.

16. ____. To successfully assert the claim of self-defense, one must, inter alia, have a reasonable and good faith belief in the necessity of using force.
17. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Stuart J. Dornan and Mallory N. Hughes, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Arterburn, Judge.

## I. INTRODUCTION

Carl A. Heng was convicted by a jury of manslaughter and use of a deadly weapon to commit a felony. The district court subsequently sentenced Heng to a total of 14 to 22 years' imprisonment. Heng appeals from his convictions here. On appeal, Heng assigns numerous errors, including that the district court erred in excluding certain evidence, in failing to redact portions of Heng's statement to police before allowing the jury to view it, and in refusing to give the jury an instruction regarding the victim's character for violence and aggression. Heng also alleges that there was insufficient evidence to support both his conviction for manslaughter and his conviction for use of a deadly weapon to commit a felony.

Upon our review, we find no merit to Heng's assertions on appeal. Accordingly, we affirm his convictions.

## II. BACKGROUND

The State filed an information charging Heng with second degree murder pursuant to Neb. Rev. Stat. § 28-304 (Reissue 2016) and with use of a deadly weapon to commit

a felony pursuant to Neb. Rev. Stat. § 28-1205(1)(a) (Reissue 2016). The charges against Heng stem from an incident which occurred on August 24, 2015. Evidence adduced at trial revealed that on the night of August 24, Heng got into an argument with Robert Lane in front of an apartment building located near 99th and Q Streets in Omaha, Nebraska. During the argument, Heng pulled a concealed handgun from a holster on his hip and shot Lane. Immediately after shooting Lane, Heng called the 911 emergency dispatch service and provided aid to Lane. Subsequently, Lane died at a hospital. When Heng spoke with law enforcement, he indicated that he had shot Lane in self-defense because he feared for his own life.

Because Heng admitted that he had shot Lane during their argument, the only disputed issue at trial was whether Heng was justified in shooting Lane in defense of himself or in defense of another.

The State presented evidence to demonstrate that Heng was not justified in shooting Lane. The State called Aubrey Strong (Aubrey) to testify about her version of the events which immediately preceded the argument between Heng and Lane. Aubrey was Lane's girlfriend at the time of the shooting. Lane lived with Aubrey at the apartments near 99th and Q Streets where the shooting took place. Aubrey was also friends with Heng. They had met at their place of employment, and although they had previously been in a brief romantic relationship, they were just close friends at the time of the shooting.

Aubrey testified that in the weeks prior to the shooting, Lane had left her apartment for a period of a 1½ or 2 weeks because he had "relapsed" and began using marijuana and cocaine again. Aubrey believed that Lane had checked into some sort of rehabilitation center. Lane returned to Aubrey's apartment only a few days prior to the shooting. While Lane was away, Aubrey and Heng saw each other often. In fact, they began spending nights at each other's apartments.

In the afternoon of August 24, 2015, Aubrey picked up Lane from work. When she picked him up, Lane was talking

to someone on his cellular telephone. Aubrey testified that Lane was talking loudly and "aggressive[ly]." When they arrived at the apartment, Lane indicated that he was going to go to an "AA meeting" and began to get ready to leave. When Lane left the bathroom after taking a shower, Aubrey smelled marijuana and "confronted" Lane about whether he was again using drugs. Lane got upset and began to yell at Aubrey. He also knocked over her jewelry box. While Lane was yelling, Aubrey became scared, ran into the bedroom closet, and shut and locked the door. While Aubrey was inside the closet, Lane punched a hole in the closet door. He then left the apartment and drove away in Aubrey's car.

After Lane left, Aubrey remained at the apartment, waiting for Lane to return. She testified that Lane returned to the apartment approximately 1½ to 2 hours later. When Lane returned, he brought his friend, Brian Steele, with him. At this time, Lane smelled of alcohol and Aubrey observed a bottle of alcohol hidden in Lane's sock. Aubrey and Lane began to argue again after Lane could not find his wallet. Aubrey testified that during the argument, Lane pushed her "[t]wo steps back" against the bedroom door, which "knocked the wind out of [her]," and she fell to the floor. She testified that she felt "petrified" due to Lane's behavior.

After Lane pushed her against the door, Aubrey crawled from the bedroom into the kitchen to get her keys. She then left the apartment. Lane followed her into the parking lot of the apartment building and would not let Aubrey leave. After unsuccessfully struggling with Lane to get into her car, Aubrey returned to the apartment where Lane accused Aubrey of cheating on him. Lane and Steele then left the apartment in Aubrey's car. Aubrey could not recall whether she had given them permission to take her car. Aubrey testified that by this point, she was "the mo[st] scared [she] ha[d] ever been." She also testified that prior to August 24, 2015, Lane had never threatened her or assaulted her.

Aubrey called her younger sister, Emily Strong (Emily), to tell her what happened. Aubrey did not call the police, but

Emily did suggest that Aubrey call Heng, who lived nearby. After speaking with Emily, Aubrey sent Heng a text message which stated, "'If I ever send you a blank message, call the cops.'" Aubrey and Heng then engaged in multiple conversations via text messaging and telephone calls, during which Aubrey told Heng that Lane showed up at her apartment intoxicated, punched a hole in her door, and took her car without her permission. She also lied to Heng and told him that she had already called the police. Heng eventually convinced Aubrey to leave the apartment and to meet him at a nearby gas station. Aubrey testified that she started packing a few things, but that at some point, she changed her mind and told Heng not to come meet her because she did not want him to be "involved." However, she also testified that she believed "100 percent" that she needed to leave the apartment for her own safety.

At some point after her last conversation with Heng, Aubrey left her apartment building and saw Lane lying on the ground. She observed Heng performing cardiopulmonary resuscitation on Lane.

The State also presented the testimony of several witnesses who contradicted Aubrey's version of the events of the evening hours of August 24, 2015. One of Aubrey and Lane's neighbors testified that on that night, she observed Aubrey and Lane get into Aubrey's car at about 6 p.m., which is around the time that Aubrey testified Lane left for his meeting. The neighbor testified that Aubrey and Lane did not appear to be fighting with each other.

The State also offered the testimony of Lane's friend, Steele, who was in the apartment while Aubrey and Lane were fighting. Steele testified that at about 6 or 6:30 p.m. on August 24, 2015, Lane picked him up because Lane wanted to talk. As they were driving, Lane told Steele that he wanted him to meet his new girlfriend, Aubrey. Lane then drove Steele to Aubrey and Lane's apartment. Steele testified that prior to arriving at the apartment, Lane seemed "all right" and did not appear to be angry or agitated.

When Lane and Steele arrived at the apartment, Steele observed there to be some tension between Aubrey and Lane. Steele testified that Aubrey and Lane were arguing with each other and that Aubrey began to cry during the argument. However, he did not observe Lane physically hurt Aubrey. Steele testified that Aubrey never left the apartment while he was there. He also testified that he did observe Lane to be hiding a bottle of alcohol, but indicated that Lane did not appear to be intoxicated.

After being in the apartment for 30 to 45 minutes, Steele asked if someone could take him home. He testified that Aubrey threw her keys at him, telling him to get Lane out of the apartment. On the way back to Steele's house, Steele told Lane to go back home, sleep on the couch, and make a "sober" decision in the morning. In addition, Steele overheard Lane on the telephone apologizing and saying "'I love you.'" Steele assumed Lane was talking to Aubrey.

The State also offered the testimony of a homicide detective for the Omaha Police Department to contradict Aubrey's testimony. The detective testified that when she entered Aubrey's apartment after the shooting, she observed a hole on the inside of the bedroom closet door. This testimony clearly contradicts Aubrey's testimony that Lane punched the outside of the closet door while she was locked inside. In addition, the detective testified that there was no sign of a struggle or a fight in the apartment.

The State played a recording of Heng's interview with Det. Eugene Watson, another homicide detective for the Omaha Police Department. During this interview, Heng discussed his version of the events leading up to the shooting and maintained that he had shot Lane in self-defense during a physical struggle. Heng told Detective Watson that prior to August 24, 2015, Aubrey had told him that she was afraid of Lane. She also told him that Lane had threatened Heng because Lane believed Aubrey was cheating on him with Heng. In the weeks leading up to August 24, Aubrey told Heng that she had ended her relationship with Lane, that she was no longer speaking

to him, and that she had taken him to a rehabilitation center. Heng believed that by August 24, Lane no longer lived in the apartment with Aubrey.

On August 24, 2015, Aubrey texted Heng and told him that Lane had "showed up" at her apartment, had punched a hole in the door, and had stolen her car. Aubrey also indicated that Lane was intoxicated. She told Heng that she had already called the police. Heng told Aubrey to meet him at a nearby gas station so that she could stay at his apartment. Heng subsequently changed his mind about meeting Aubrey at the gas station. Instead, he drove to the parking lot of the "clubhouse" of her apartment complex to wait for her. When he telephoned Aubrey to tell her where he was, she told him that she had called an off-duty police officer who lived in her building to come to her apartment. While Heng was in the parking lot of the clubhouse and still on the telephone with Aubrey, he observed Aubrey's car arrive at the entrance of the apartment complex. Heng observed Lane driving the car "erratic[ally] and very fast." Heng told Aubrey that Lane was back, and Aubrey "panicked."

Heng followed Aubrey's car to the parking lot in front of her apartment building. He got out of the car and started to approach the door to meet Aubrey. Instead, he encountered Lane, who said, "[H]ey, how are you doing?" in a "sarcastic[]" manner. Lane then pushed Heng, and Heng started to back toward the door of the building while Lane followed him. Heng "plead[ed]" with Lane not to go inside. Lane then threatened Heng by saying he would kill him and that he knew where Heng lived. Lane then "came at" Heng and pushed him up against the wall of the building, pinning him there with his entire weight. At this point, Heng was "terrified" and felt he could not get away from Lane as he was pinned in the corner. He was afraid that Lane was going to hurt him or kill him. He was also afraid that if Lane went inside the building, he would hurt Aubrey. Heng felt "powerless" and believed his only option was to shoot Lane with the gun he had holstered on his hip. Heng told Detective Watson that he drew his gun and

fired two or three times from right by his side. He indicated that when he fired the shots, Lane was still touching him. After the shots, Lane staggered back and fell. Heng immediately started to help him and called 911.

Upon further questioning by Detective Watson, Heng admitted that prior to firing the shots, Lane had not hit him and had not choked him. Lane was holding him by his shoulders against the apartment wall. However, Heng also indicated that he did not go to the apartment intending to hurt Lane. He said he did not want to do that. He explained that he has a valid permit to carry a concealed gun.

The State presented the testimony of several witnesses who contradicted Heng's version of the events of the evening hours of August 24, 2015. Jacob Epperson, who was a volunteer firefighter, lived in Aubrey and Lane's apartment building. On August 24, between 9:45 and 10 p.m., Epperson left his apartment to retrieve his pager, which was located in his vehicle parked in front of the apartment building. When Epperson was in the parking lot, he observed two people arguing near one of the entrances to the apartment building. He did not think the argument was "a big deal," so he returned upstairs to his apartment, using the other entrance. He then went out onto the balcony of his apartment, which overlooked the parking lot. Soon after, he heard a shot and observed a "muzzle flash." He saw Heng moving backward away from the door of the apartment building and toward the parking lot. Epperson testified that he observed Heng holding a gun and that his right arm was fully extended. The shot Epperson observed was fired toward the entrance area of the apartment building. Later, Epperson told police that it appeared to him that Heng was about 5 feet away from Lane when he fired the shot.

Epperson called 911 and then went outside to help Lane. Epperson began conducting cardiopulmonary resuscitation. When Epperson was taking care of Lane, Heng repeatedly told him that he had shot Lane in self-defense. When police arrived, Epperson identified Heng as the shooter and indicated that Heng still had a gun.

Epperson's testimony was contradicted by the testimony of his live-in girlfriend, who testified that at the time the gunshots were fired, Epperson was inside the apartment with her. Despite this testimony, Epperson indicated that he was positive he saw the shooting from his balcony.

The State also presented the testimony of two expert witnesses to refute Heng's version of events. Dr. Michelle Elieff is the forensic pathologist who performed the autopsy of Lane after his death. Dr. Elieff testified that Lane had two "major injuries" at the time of his death: a gunshot wound to his left torso and a gunshot wound to the right leg. The cause of Lane's death was the gunshot wound to his left torso. Dr. Elieff explained that the bullet entered from Lane's left side and had a sideways trajectory. It "lacerat[ed] large blood vessels, the aorta and vena cava, and injur[ed] the liver and blood vessels to the right kidney." Dr. Elieff testified that Lane's injuries were not consistent with Heng's story that he had shot Lane while Lane was "pressed against" him. She testified that there was no evidence of "close range" gunfire on Lane's body. Instead, the evidence revealed that both shots were fired from an "indeterminate range." Dr. Elieff explained that an "indeterminate range" indicates that the shooter was "beyond several feet away" from Lane at the time the shots were fired, depending on the type of firearm used. Dr. Elieff also testified that at the time of his death, Lane had marijuana and alcohol in his system.

Molly Reil is a forensic technician with the Omaha Police Department who specializes in firearms and toolmarks examinations. Reil conducted testing to determine how far the end of the gun was from Lane when he was shot. Reil determined that the end of the gun was 2 to 5 feet away from Lane when he was shot in his left torso. She also determined that the end of the gun was 5 feet or more away from Lane when he was shot in the right leg. Reil also completed testing to determine how far the gun was from Heng's shirt when he fired the shots. Based on her tests in conjunction with her review of testing completed by the defense expert, she determined that

the gun was held within 4 to 6 inches of Heng's shirt when it was fired. However, another shot could have been fired from further away.

After the State rested, the defense presented evidence to prove that Heng acted in self-defense when he shot and killed Lane. This evidence consisted primarily of expert testimony concerning the trajectory of the bullets and concerning the distance between the gun and Lane when the shots were fired and other witnesses' opinions about Lane's character for violence and aggression and Heng's character for peacefulness.

Dr. George Nichols is a forensic pathologist who reviewed the records in this case. Based on his review, he opined that Lane died "as a result of a close-range gunshot wound to his abdomen." Dr. Nichols testified to his belief that Lane was approximately 24 to 30 inches from the end of the gun when he was shot. He also indicated that the trajectory of the bullet from the torso wound was consistent with Lane's reaching toward Heng when Lane was shot. However, he also indicated that the trajectory was consistent with Lane's having his left hand raised to unlock the door of the apartment building when he was shot. Dr. Nichols testified that the trajectory of the bullet from Lane's right leg wound was consistent with Heng's falling to his knees as he was shooting. Dr. Nichols admitted that he is not a certified firearms examiner and that he based his opinions on the testing completed by other experts.

During his testimony, Dr. Nichols also opined that abrasions on Lane's hand at the time of his death were consistent with him having recently punched a door. However, Dr. Nichols indicated that Lane could have acquired the abrasions another way. Dr. Nichols opined that red marks on Heng's neck on the night of the shooting could have been caused by someone grabbing him around the neck. However, again, Dr. Nichols also admitted that Heng could have acquired the red marks another way. In fact, he testified that the marks could have been self-inflicted while Heng was nervously sitting in the police interview room for 6 hours.

Ronnie Freels is a forensic firearms examiner who observed the tests conducted by Reil. Based on Freels' interpretation of these tests, he testified that Lane was approximately 24 to 36 inches from the end of the gun when he was shot in the left torso. He testified that the gun was not pressed up against Lane's body when the shot was fired. Freels opined that the gun was approximately 4 inches away from Heng's right side when he shot. However, Freels indicated that another shot could have been fired from further away from Heng's body. During his testimony, Freels questioned the manner in which Lane's clothing had been handled by the Omaha Police Department. He indicated that too much handling of the clothing by different people could decrease the amount of gunshot residue and could affect the results of the tests.

The defense presented evidence to demonstrate that Lane had a history of violent and aggressive behavior, particularly when he was intoxicated. This evidence revealed that in October 2013, Lane was taken to the hospital by ambulance after someone reported he had "overdosed" on alcohol. During the ride to the hospital, Lane was belligerent and combative. He had to be held down by three firefighters. When Lane arrived at the hospital, he continued to be combative. At one point, Lane kicked a hospital security guard in the shoulder while the guard was attempting to restrain him so that medical personnel could help him. He was later convicted of assaulting the security guard and served 10 days in jail.

In August 2014, police were called to Lane's father's home. Lane's father told police that Lane had "tackled and assaulted" him. Lane was "argumentative and disruptive" when police tried to speak with him. He threatened one police officer. As a result of this incident, Lane pled guilty to assault and was sentenced to 30 days in jail.

Other evidence revealed that one of Lane's previous girlfriends believed Lane to be a violent person after he acted very paranoid while under the influence of methamphetamine and after he would not let her leave her bathroom during an argument. Emily, Aubrey's younger sister, testified that she

also believed that Lane was a "violent and aggressive" person. She referred to Lane as "a ticking time bomb." Emily had briefly lived with Aubrey and Lane the month prior to the shooting. While Emily lived with them, she observed Lane to be "verbally aggressive" toward Aubrey. On one occasion, Emily and Lane were alone in the apartment. She became afraid of Lane because he was upset with Aubrey and yelled at Aubrey over the telephone. Emily indicated that she never observed Lane to physically hurt Aubrey and that Lane never physically hurt her.

The defense presented evidence to demonstrate that Heng had a reputation for being a peaceful person. Heng's friends and family testified that Heng had a reputation for being a peaceful and honest person. These witnesses stated that "[e]veryone loves [Heng]" and that Heng was "a kind and even-keeled and quiet person." These witnesses also testified that Heng took his handgun with him wherever he went. Other evidence presented by the defense indicated that Heng had taken courses to learn to use a handgun and to obtain a permit to carry a concealed gun.

At the close of the defense's case, the State called a rebuttal witness to testify. The rebuttal witness was Lane's "Alcoholics Anonymous sponsor" since 2014. He testified that beginning in 2014, he had met with Lane at least one time per week. He believed that Lane was generally a peaceful person. However, he testified that even Lane admitted to having anger issues, particularly when he was intoxicated. He said that Lane was "very motivated . . . to change his life," though. In addition, Lane was very involved with Alcoholics Anonymous and was very helpful to other members of the group.

After hearing all of the evidence, the jury convicted Heng of manslaughter, rather than second degree murder, as the State charged in the information. The jury also convicted Heng of use of a weapon to commit a felony. The district court subsequently sentenced Heng to a total of 14 to 22 years' imprisonment.

Heng appeals.

## III. ASSIGNMENTS OF ERROR

On appeal, Heng assigns and argues five errors, which we consolidate and renumber for our review. First, Heng argues that the court erred in excluding expert testimony regarding Heng's state of mind at the time of the shooting and erred in excluding the recording of the 911 call made by Epperson after the shooting. Second, Heng asserts that the district court erred in failing to redact portions of Heng's interview with Detective Watson prior to showing the interview to the jury. Third, Heng asserts that the district court erred in failing to provide the jury with an instruction about Lane's character for violence. Finally, Heng asserts that there was insufficient evidence to support his convictions.

## IV. ANALYSIS

### 1. Exclusion of Evidence

On appeal, Heng challenges certain evidentiary decisions made by the district court. Specifically, he challenges the court's decision to exclude the testimony of a psychologist who evaluated Heng after the shootings and the court's decision to exclude a recording of the 911 call Epperson made immediately after the shooting. We address each of Heng's assertions separately below.

#### (a) Psychologist's Opinion

Prior to trial, defense counsel indicated an intention to call Kirk Newring, Ph.D., as a witness. Dr. Newring is a licensed psychologist who conducted a psychological interview of Heng and who completed research on the topic of how individuals respond when presented with extremely stressful, life-threatening situations. The defense intended Dr. Newring to testify to the following conclusions:

> [D]uring the interval of approximately 9:45p.m. - 9:57p.m. Monday August 24, 2015
>
> (1) . . . Heng was not suffering from a mental disease or defect; nor was he under the influence of any prescription or non-prescription medication or substance;

> (2) . . . Heng believed that deadly force was necessary for the purpose of protecting himself against the use of unlawful force being inflicted upon him by . . . Lane;
>
> (3) . . . Heng believed that deadly force was immediately necessary to protect himself against death or serious bodily harm;
>
> (4) . . . Heng believed that . . . Lane initiated an unlawful physical assault against . . . Heng;
>
> (5) . . . Heng believed . . . Lane's threat of "I'll kill you. I know where you live."
>
> (6) . . . Heng could not appreciate, perceive, or access any means of safe escape or retreat;
>
> (7) . . . Heng believed that . . . Lane's threat to kill . . . Heng and . . . Lane's physical assault and confining of . . . Heng was unlawful.

However, defense counsel indicated that Dr. Newring would not testify whether Heng's actions on the night of August 24, 2015, were reasonable.

The State filed a motion in limine asking that Dr. Newring's testimony be excluded from trial. Specifically, the State argued that Dr. Newring did not qualify as an expert witness, that his testimony was not relevant, and that his testimony would not assist the trier of fact in any way. Essentially, the State asserted that Dr. Newring's opinion concerning Heng's state of mind at the time of the shooting should not be admitted because such a finding of fact "should be left to the province of the jury." A pretrial hearing was held on the State's motion in limine.

For purposes of the motion in limine, Dr. Newring's report was received into evidence. The parties agreed that if allowed to testify, Dr. Newring would testify to "exactly" what was contained in his report. The report has essentially five sections. First, Dr. Newring briefly describes his professional education, background, and current areas of practice. A more complete recitation of this information is contained in Dr. Newring's curriculum vitae, which was also admitted at the hearing. Second, he recounts the records and documents he reviewed

pertinent to this case along with reporting that he conducted a psychological evaluation of Heng. Third, he basically describes his own "findings of fact" as to what he believes happened before and during the encounter between Heng and Lane. Fourth, he sets forth a review of literature in the "field of threat assessment" and "the appraisal of risk in interpersonal conflict." This includes literature on the effect of stress and anxiety and its impact on cognitive processes. Finally, he states his seven conclusions as recounted above.

After the hearing, the district court entered an order sustaining the State's motion in limine and precluding Dr. Newring from testifying at trial. The court stated:

> [Dr. Newring's] expert opinions shall be excluded because they are merely being offered as nothing more than an expression of how the trier of fact should decide this case and that the expert's opinions being set forth, which obviously are disputed material issues in [Heng's] defense, are conclusions which may be deduced equally as well by a trier of fact with sufficient evidence on the issue. The Court finds these expert opinions to be superfluous and would not assist the triers of fact in this matter in understanding the evidence or determining a factual issue.
>
> The Court notes that the first finding of Dr. Newring is that there are no factual allegations of any mental disease or defect that [Heng] was suffering at the relevant time. Without at least some finding of this, the Court clearly finds that these opinions would be merely offered for bolstering of [Heng's] testimony.
>
> Although [Heng] argues that they would not be offering these opinions for determination of reasonableness of [his] actions, they clearly are offering these opinions pertaining to what [he] may or may not have believed at the moment of the occurrence of the events that brought about this case. What [Heng] reasonably believed is clearly a material element of the defense of self-defense. That clearly is a determination to be made by the fact finder.

> There being no unique mental illness or defect of [Heng] that exists, the Court does not find that Dr. Newring's opinion would in any way assist the Jury in understanding the evidence in this case.

Defense counsel renewed his motion to have Dr. Newring testify, which renewal occurred on the eve of trial after the district court decided to admit into evidence the entirety of Heng's interview with Detective Watson. The court denied counsel's request.

On appeal, Heng asserts that the district court erred in not allowing Dr. Newring to testify. Specifically, he alleges that because Dr. Newring was not allowed to testify, he was "denied . . . his Sixth Amendment Constitutional right to present a defense under the compulsory clause." Brief for appellant at 32. He also alleges that the district court incorrectly applied the rules of evidence in prohibiting Dr. Newring's testimony. Heng alleges that the court's exclusion of the testimony was particularly egregious in light of the statements made by Detective Watson during his interview with Heng. Upon our review, we conclude that Heng's assertions do not have merit.

*(i) Standard of Review*

[1] An appellate court reviews a trial court's ruling to admit or exclude an expert's testimony for abuse of discretion. *State v. Braesch*, 292 Neb. 930, 874 N.W.2d 874 (2016).

*(ii) Analysis*

[2] Initially, we note that Heng failed to raise his constitutional argument to the district court. Instead, Heng argued only that Dr. Newring's testimony was admissible pursuant to the relevant rules of evidence. Accordingly, we do not address Heng's constitutional claims in this appeal. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

[3] Heng's assertion that the district court erred in excluding Dr. Newring's testimony based on the relevant rules of evidence is without merit. An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016), if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006). In our reading of the State's brief on appeal, it does not appear that the State is challenging Dr. Newring's qualifications to testify as an expert witness. Rather, it appears that both Heng and the State focus their arguments about the admissibility of Dr. Newring's testimony on whether such testimony would have assisted the jury. In addition, we note that in its order sustaining the State's motion in limine, the district court indicated that it based its decision to exclude Dr. Newring's testimony on its conclusion that the testimony "would not be . . . helpful to the jury."

[4] If a witness is qualified as an expert pursuant to rule 702, a court considering admissibility of the expert's testimony, which may include an opinion, must decide whether the testimony is likely to assist the trier of fact to understand the evidence or determine a factual issue. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). The Nebraska Supreme Court has previously held that when an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by the trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue. *Id.*

In this case, if permitted, Dr. Newring would have testified that Heng did not suffer from a mental disease or defect, nor was he under the influence of any drugs or alcohol at the time of the shooting. In addition, Dr. Newring would have testified that considering all of the circumstances of the night of August 24, 2015, he believed that Heng shot Lane due to an imminent fear for his own safety. Given our review of the

record, we do not find that the court abused its discretion in excluding Dr. Newring's testimony.

In Dr. Newring's report, he fails to explain how the literature he reviewed and cited supports his conclusions as to what Heng believed. Our review of the report reveals that the connection between the research and the facts of this case is tenuous. Moreover, summarized, the literature confirms only what would seem to be commonly known: when people are placed under stressful circumstances, such as a shoot/no shoot scenario, their decisions may be affected by a number of variables, including, but not limited to, the nature of the appreciated threat, anxiety, gender, and exertion needed to respond to the situation. There is little in Dr. Newring's report which specifically relates these factors to Heng.

Dr. Newring's testimony would not have assisted the jury in evaluating the circumstances surrounding Lane's death and deciding whether Heng reasonably feared for his life when he shot and killed Lane and thus acted in self-defense. As Dr. Newring, himself, indicated, Heng did not suffer from any mental disease or defect, the effects of which would need to be explained to a jury. Based on our understanding of Dr. Newring's proposed testimony, such testimony would amount to nothing more than a statement by a psychologist that he believed Heng's version of events. Such testimony appears to be relevant only to bolster Heng's credibility. This is not permissible. We affirm the decision of the district court to exclude Dr. Newring's testimony.

We note that in Heng's brief on appeal, he asserts that the court's decision to exclude Dr. Newring's testimony should have been reevaluated in light of the admission of the entirety of his interview with Detective Watson and Detective Watson's statements therein about the law of self-defense. We find Heng's assertion in this regard to be without merit. Principally, the statements made by Detective Watson in the interview do not constitute testimony. Moreover, the court instructed the jury not to consider Detective Watson's statements "regarding self-defense, defense of another[,] or guilt

or innocence" for any purpose other than context for Heng's responses. We will further discuss Heng's interview with Detective Watson later in our analysis.

(b) Epperson's 911 Call

During defense counsel's cross-examination of Epperson, counsel offered into evidence a recording of the telephone call Epperson initiated to 911 immediately after the shooting. The State objected to the admission of this recording on the basis that it was hearsay. Defense counsel argued that the contents of the recording were not hearsay because the statements made by Epperson were excited utterances made close in time to a "startling event" and because the statements relayed Epperson's state of mind at the time of the events. A recess was taken, and the recording was played for the trial judge outside the presence of the jury. After hearing the recording, the court sustained the State's objection and did not allow the jury to hear the 911 call.

On appeal, Heng argues that the district court erred in not admitting the recording of the 911 call into evidence. Specifically, he argues that the court's failure to admit the recording into evidence violated both his constitutional right to confront the witnesses who testified against him and the relevant rules of evidence. We find Heng's assertions to be without merit.

*(i) Standard of Review*

[5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). When judicial discretion is not a factor in assessing admissibility, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review. See *id*. But where 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. *Id*.

*(ii) Analysis*

Again, we note that Heng failed to raise his constitutional argument to the district court. Instead, Heng argued only that the recording should be admissible pursuant to the relevant rules of evidence. Accordingly, we do not address Heng's constitutional claims in this appeal. As we stated above, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

[6] In addition, we conclude that we are unable to address the merits of Heng's assertion that the district court erred in failing to admit the recording based on the rules of evidence. Although defense counsel played the recording for the district court, after the court sustained the State's objection, counsel failed to make an offer of proof in order to include in our record either the recording itself or a transcript of the recording. An appellate court cannot consider an error assigned on the ground that the trial court excluded evidence unless the record reveals an offer of proof or the offer was apparent from the context within which questions were asked. See *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008). Here, defense counsel did not make an offer of proof at trial and therefore the issue of the admissibility of the recording is not preserved for appellate review. Without knowing the specific contents of the complete recording, including the exact language used by Epperson or the tone of his voice, we simply cannot say whether the district court erred in sustaining the State's objection.

However, we also find that even if the district court did err in excluding the recording of Epperson's 911 call, such error was harmless. On appeal, Heng argues that the 911 call was necessary to impeach Epperson's trial testimony

that he had seen Heng shoot Lane. During defense counsel's cross-examination of Epperson, counsel effectively impeached him using excerpts from the 911 call. Counsel questioned Epperson about what he said during his 911 call and how what he said then was different than what he testified to at trial. Specifically, upon questioning by defense counsel, Epperson admitted that during the course of the 911 call, he twice asked Heng where the shooter was, even though at trial he testified that he already knew who the shooter was because he saw Heng shoot Lane. Epperson also admitted that he did not tell the 911 operator that he saw the shooting, only that shots had been fired at his apartment building. In addition, defense counsel further impeached Epperson's testimony using portions of the statements he gave to police and using the testimony of his live-in girlfriend, who specifically testified that Epperson did not see the shooting.

Heng's assertions that the district court erred in sustaining the State's objection to the recording of Epperson's 911 call are without merit.

### 2. Failure to Redact Heng's Interview With Detective Watson

Prior to trial, defense counsel filed a motion in limine asking the court to exclude certain portions of the recording of Heng's interview with Detective Watson prior to showing that interview to the jury. Specifically, counsel requested that the court redact from the recording narratives made by Detective Watson regarding "his interpretation of the law of self-defense." In support of the motion, counsel submitted to the district court a redacted copy of the transcript of the interview. This transcript includes 13 separate redactions of statements made by Detective Watson. Each of these redactions occur toward the end of the interview after Heng described his version of the events surrounding the shooting. While we do not recount each separate redaction here, we do provide two examples of the redacted language which are representative of the theme of the statements in question.

At one point during the interview, Heng reiterates that he felt justified in using deadly force against Lane because Lane threatened to kill him. Detective Watson responds as follows:

> He threatened to kill you. I get threatened all the time . . . by people that are very capable of killing me. I can't just gun them down. If they produce a gun, if they produce a weapon, then that gives you ground to use deadly force. You didn't tell me any of this. Witnesses are not seeing any of this. Witnesses have you with your arm extended, firing two shots, backing away from him. How is that a threat? . . . [Y]ou can't scare yourself into shooting people. And like I said, if that's your mindset, you should have never been carrying a gun on your hip.

Later, Detective Watson stated:

> You can't feel fear and use deadly force. You can't imagine what would happen to you, or someone else, and use deadly force. You have to either see it, and respon[d] to it. Hey, get off of her. Hey, get your hands from around her neck. If you don't stop choking her, I'm going to shoot you. [Lane], get your hands off of me. Don't do that. If you don't back away from me, I'm going to shoot you. If you don't get your hands from my neck, I'm going to shoot you. If you don't stop beating me, like I'm some . . . rag doll, I'm going to shoot you. You understand what I'm saying?

The State objected to the defense's motion in limine. The State argued that Detective Watson's statements concerning the law surrounding the use of force and self-defense were merely an interview technique used to elicit further information from Heng. The State indicated that Detective Watson's statements were relevant to show the context of the entire interview.

Ultimately, the district court denied the motion in limine and allowed the entire interview to be played for the jury. However, during defense counsel's cross-examination of Detective Watson, counsel asked him about his opinions concerning the use of force and self-defense:

> [Defense counsel:] And you were trying to get . . . Heng to agree with your theory, which was that you believed the other witnesses and not him, for the last ten minutes of that interview?
>
> [Detective Watson:] Yes.
>
> [Defense counsel:] As an investigator, you're supposed to develop facts and record facts; right?
>
> [Detective Watson:] That is correct.
>
> [Defense counsel:] Your opinion doesn't mean squat, does it?
>
> [Detective Watson:] My opinion does not mean anything.
>
> [Defense counsel:] None at all?
>
> [Detective Watson:] None at all.

In addition, the district court instructed the jury about Detective Watson's statements during the interview. Jury instruction No. 18 stated:

> During the course of the trial, the State offered into evidence the video recording of [Heng's] statement to Detective Watson. The officer's statements, opinions or assertions are offered solely to provide context to [Heng's] relevant responses. His comments and statements as to the law regarding self-defense, defense of another[,] or guilt or innocence are not to be considered by you. Only [Heng's] responses should be considered as evidence. In applying the law to this case, you must rely on these Instructions alone.

On appeal, Heng asserts that the district court erred in failing to redact from the recording of Heng's interview Detective Watson's narratives about use of force and self-defense. Specifically, Heng asserts that the failure to redact the interview was error because Detective Watson's statements were inadmissible hearsay which is precluded by the Confrontation Clause of the U.S. Constitution, because permitting Detective Watson to testify as an expert witness without first qualifying him as an expert violated his right to due process, and

because failure to redact Detective Watson's statements violated certain evidentiary rules.

(a) Standard of Review

[7] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

(b) Analysis

Heng failed to raise his constitutional arguments to the district court. At trial, he did not argue that the admission of the entirety of the interview violated the Confrontation Clause of the U.S. Constitution or violated his right to due process. Instead, as we discussed above, Heng argued only that portions of the recording should be inadmissible pursuant to the relevant rules of evidence. Accordingly, we do not address Heng's constitutional claims in this appeal. As we stated in our analysis above, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

Heng asserts that the statements made by Detective Watson about the law of self-defense and use of force should have been redacted from Heng's interview with Detective Watson because the statements were not relevant and, essentially, permitted Detective Watson to tell the jury his opinion about whether Heng was acting in self-defense.

[8] Recently, the Supreme Court addressed the admissibility of recorded interviews which include narrative statements by law enforcement personnel about the veracity or credibility of the defendant. In *State v. Rocha, supra*, the court held that the admissibility of narrative statements made by law enforcement personnel during an interrogation about the veracity or credibility of the defendant should be analyzed

under the ordinary rules of evidence; if the defendant's statement is itself relevant, then we must consider whether the law enforcement statement is relevant to provide context to the defendant's statement. The court also stated, "To do this, we consider whether the defendant's statement would be any less probative in the absence of the law enforcement statement. If the law enforcement statement does not make the defendant's statement any more probative, it is not relevant." *Id*. at 741, 890 N.W.2d at 199.

We recognize that there is clearly a distinction between the facts of *State v. Rocha, supra*, and the facts of this case. In *State v. Rocha, supra*, the statements at issue related to whether the defendant was telling the truth during the interview. In this case, the statements at issue relate to whether Detective Watson believed that Heng had acted in self-defense given his version of the events surrounding the shooting. Essentially, the statements concern Detective Watson's interpretation of the law of self-defense and his opinion about whether Heng was legally justified in shooting Lane. Despite this distinction, we find that the analysis laid out in *State v. Rocha, supra*, is applicable here. Given this finding, we analyze first whether Heng's statements in response to Detective Watson's statements were relevant and second whether Detective Watson's statements make Heng's statements any more probative.

We have reviewed Heng's interview with Detective Watson in its entirety. We find that Heng's statements in response to Detective Watson's narratives about the law of self-defense and use of force are relevant to a determination of whether Heng was justified in shooting Lane. Upon Detective Watson's questioning, Heng further describes why he was in fear of Lane at the time of the shooting. He also gives some indication that the events surrounding the shooting happened so fast that he does not necessarily have a clear memory of every detail. In addition, we note that during Detective Watson's questioning, the manner in which Heng answered questions appeared to change. This change in demeanor is also relevant to a determination of Heng's credibility during the interview.

We also find that, with one exception, Detective Watson's statements to Heng about the law of self-defense and use of force were relevant to provide context to Heng's statements and admissions. If Detective Watson's statements were redacted from the interview, Heng's statements could be misinterpreted and Heng's change in demeanor as a result of those statements could be misconstrued. For the most part, we find that Detective Watson's statements about the law of self-defense and use of force constituted an interview technique which was meant to elicit further conversation with Heng.

Additionally, we find that Detective Watson's statements were adequately tempered by the court's explicit instructions to the jury that it was not to consider Detective Watson's statements except to provide context to Heng's statements. Specifically, as we stated above, jury instruction No. 18 instructed the jury to consider only Heng's responses to Detective Watson's statements as evidence. The instruction also stated that members of the jury were not to consider Detective Watson's statements, opinions, or assertions for anything other than to provide context to Heng's statements. In addition, as a part of the jury instructions, in jury instruction No. 8, the court specifically informed the jury of the elements that must be proved to establish a claim of self-defense. We note that Detective Watson, himself, told the jury during cross-examination that his statements about the law of self-defense and use of force were only his opinion, which "does not mean anything." Finally, we note that during a sidebar discussion just prior to the playing of the interview for the jury, Heng's counsel inquired whether the court would give a limiting instruction concerning the interview at the close of the evidence as part of the jury instructions. Counsel did not request that a limiting instruction be given prior to the playing of the interview. The court did note the agreement of the parties that the jury would be advised that the recording would not be provided to them during deliberations.

We do find that the court erred in failing to redact one statement made by Detective Watson during the interview. This

lengthy narrative comes at the end of the interview and states as follows:

> But you cannot scare yourself into using deadly force. There has to be an actual threat. There has to be an attack in progress. He has to be actively punching you, almost to a bloody pulp. Even then are you still justified in using deadly force? I don't know. I can't answer that. But I can tell you other people that's been in your situation that use deadly force, it's not something that they thought was going to happen. It's oh my God, He got a knife. It's oh my God, he got a gun. Oh my God, he's swinging that knife at me. Oh my God, he's choking . . . me, I can't breathe, I feel as though I'm going to pass out. Oh my God, if I get punched one more time by this guy, I think I might get knocked out. What will happen to me if he knocks me out? I don't see any swollen lips, I don't see a bloody nose, I don't see swollen, I don't see a severely broken wrist bone, leg on your person. You can['t] think someone's a bad ass, to shoot them. You can't feel as though someone's going to do something to you and be justified shooting them. It's a different story if you would have showed up there and his hands were wrapped around Aubrey's neck, her eyes are rolled back into the back of her head, she's gasping for air. Then . . . .

After this narrative, Heng does not respond and the interview concludes. Because this lengthy statement by Detective Watson does not elicit any further information from Heng, we find that it should have been redacted from the interview prior to it being shown to the jury. This statement does not have any relevance to Heng's guilt or innocence. The district court erred in failing to redact the statement.

[9,10] However, we conclude that the district court's failure to redact this final statement by Detective Watson was harmless. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty

verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error. *State v. Lester*, 295 Neb. 878, 898 N.W.2d 299 (2017). Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt. *Id*. Detective Watson's concluding statements were a repetition of his previous statements to Heng about the law of self-defense and use of force. In light of Detective Watson's prior statements in the interview which we found to be admissible to provide context, the jury's guilty verdict was surely unattributable to Detective Watson's concluding remarks. This is especially true given the explicit instruction to the jury admonishing them not to consider Detective Watson's statements for any purpose other than as context to Heng's responses.

In its brief to this court, the State acknowledges that given the nature of Detective Watson's comments during his interview with Heng, this issue is a "close[] call." Brief for appellee at 24. We agree with the State's assessment. Detective Watson's explanations in both tone and content come dangerously close to being unfairly prejudicial. However, Heng's responses were relevant and the context to these responses was also relevant. Given the specific instructions provided by the district court, combined with Detective Watson's own testimony on cross-examination regarding the lack of value of his opinion, we cannot find that unfair prejudice occurred. Under our deferential standard of review, we do not find that the district court abused its discretion in failing to redact Detective Watson's comments from the recording of the interview.

We conclude that, with one exception, the district court did not abuse its discretion when it admitted into evidence the entirety of Detective Watson's interview with Heng. In addition, we find that the court's error in failing to redact the final statement of Detective Watson was harmless. Accordingly, Heng's assertions about the admission of the interview are without merit.

### 3. Jury Instruction

Heng requested that the district court include an instruction on Lane's character for violence and aggression. Heng's proposed instruction read in relevant part as follows:

> Evidence of the victim's character for violence, assaultive behavior and aggression has been offered to help you decide whether the defendant acted in self-defense or defense of another, as set forth in Instruction Nos. 7, Section 2. You may consider this evidence along with all the other evidence in making your decision.

The State objected to the proposed instruction. At the jury instruction conference, the district court indicated its refusal to include this proposed instruction in the jury instructions.

On appeal, Heng asserts that the district court erred in refusing his proposed jury instruction about Lane's character for violence and aggression. He argues that failure to instruct the jury in this regard "resulted in a miscarriage of justice." Brief for appellant at 48. We disagree with Heng's assertion.

#### (a) Standard of Review

[11] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

#### (b) Analysis

[12] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Id*. We determine that based on the evidence in this case, the instructions given by the court were adequate and Heng was not prejudiced by the court's refusal to give his proposed instruction.

In his brief on appeal, Heng alleges that his proposed instruction should have been included in the jury instructions based on the language of a pattern jury instruction. Specifically, Heng indicates that NJI2d Crim. 5.5 provides that a court should instruct a jury concerning evidence presented about a particular character trait of a victim, in this case about the victim's character for violence and aggression. However, NJI2d Crim. 5.5 does not discuss the victim's character at all. Instead, that pattern jury instruction relates only to evidence of a particular character trait of the defendant. In addition, Heng cites to this court's decision in *State v. Lewchuk*, 4 Neb. App. 165, 539 N.W.2d 847 (1995), to support his argument about the proposed instruction. We agree that *State v. Lewchuk, supra*, does address the admissibility of evidence concerning a victim's character for violence and aggression in a self-defense case. We held therein that the district court committed prejudicial error by excluding admissible testimony regarding specific instances of prior violent conduct by the victim. However, our opinion in *State v. Lewchuk, supra*, does not address whether a specific jury instruction regarding such evidence should be given. In fact, it does not address jury instructions at all. Accordingly, Heng has failed to provide us with any legal basis which would have required the district court to give the proposed jury instruction.

[13] Moreover, our reading of the jury instructions which were actually provided to the jury reveals that the jury was adequately informed by other instructions that it should consider the evidence presented about Lane's character for violence and aggression in its determination about whether Heng acted in self-defense. As such, Heng's proposed instruction would have been superfluous. The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given. *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980).

Jury instruction No. 7 informed the jury that it should consider whether Heng acted in self-defense when he shot and killed Lane. The instruction informed the jury that in

considering Heng's self-defense claim, it should determine, among other things, whether Lane "attempted to cause or threatened to cause death or serious bodily harm to [Heng]" and whether Heng "reasonably believed that his use of deadly force was immediately necessary to protect himself against any such force used by . . . Lane." In addition, jury instruction No. 13 instructed the jury to consider "[t]he testimony of the witnesses" in coming to its ultimate decision. This testimony would include the substantial amount of testimony produced by the defense regarding Lane's character as it relates to violence and aggression. These instructions, taken together, and in conjunction with the remaining instructions, instructed the jury to consider all of the witness testimony in deciding whether Heng acted in self-defense when he shot Lane. Heng's proposed instruction highlighting Lane's history was not necessary. As a result, the district court's failure to give the proposed instruction did not result in any prejudice to Heng.

### 4. Sufficiency of Evidence

Heng alleges that the evidence presented at trial sufficiently established his claim of self-defense and that there was insufficient evidence to support a finding that he did not act in self-defense. Upon our review, we conclude that the evidence presented at trial was sufficient to support Heng's convictions and, thus, was sufficient to disprove Heng's claim of self-defense. Accordingly, we affirm.

#### (a) Standard of Review

[14] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence

admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

(b) Analysis

[15,16] Self-defense is a statutorily affirmative defense in Nebraska. *Id*. Neb. Rev. Stat. § 28-1409 (Reissue 2016) provides:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> . . . .
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take[.]

The Nebraska Supreme Court has previously held that to successfully assert the claim of self-defense, one must, inter alia, have a reasonable and good faith belief in the necessity of using force. *State v. France, supra*. See *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

Heng had the initial burden of going forward with evidence of self-defense; after he did so, the State had the burden to prove that he did not act in self-defense. See *State v. France, supra*. The recording of Heng's interview with Detective Watson was played for the jury during the trial. In this interview, Heng stated that he acted in self-defense when he shot

Lane. Heng described that he fired his gun while Lane had his entire weight pressed against him and was holding him against the exterior wall of the apartment building. In addition, Heng stated that he believed he had no choice but to shoot Lane and that he believed Lane might seriously hurt or kill him if he did not immediately shoot. However, other evidence presented at the trial contradicted Heng's claim of self-defense. Such evidence included the testimony of Epperson, who testified that he saw from the balcony of his apartment Heng shoot Lane. He told police that when Heng fired at Lane, Heng was approximately 5 feet away from Lane and was backing up toward the parking lot of the apartment building. Epperson's testimony, if believed by the jury, suggests that Heng was not in imminent danger when he fired at Lane and further suggests that Heng could have safely retreated from the situation without firing his gun.

Other evidence presented at trial supports Epperson's testimony. Both the State's expert, Reil, and the defense's expert, Freels, testified that when Heng shot Lane in the left torso, the end of the gun was at least 2 to 3 feet from Lane. Reil opined that the end of the gun could have been as much as 5 feet away from Lane at that time. Both experts agreed that Heng's claim that Lane was pushed up against him at the time he fired his gun was not supported by the physical evidence. In addition, Dr. Elieff testified that there was no evidence of "close range" gunfire when she examined Lane's injuries. She opined that Lane was shot from "beyond several feet away."

Portions of Heng's interview with Detective Watson also contradict his claim of self-defense. Heng specifically indicated to Detective Watson that prior to Heng's firing his gun, Lane had not hit him or choked him. These admissions call into question the reasonableness of Heng's use of deadly force.

Based on the evidence presented at trial, the jury could have concluded that Heng's use of deadly force against Lane was not reasonable given the circumstances surrounding the shooting. As such, the jury could have found that Heng did not act in self-defense when he shot and killed Lane.

[17] The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009). Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *Id*. Because it found Heng guilty of manslaughter and use of a deadly weapon to commit a felony, the jury apparently disbelieved Heng's assertion that he acted in self-defense. Further, as we stated above, there was sufficient evidence presented to support a finding that Heng did not act in self-defense, and we will not reassess the jury's finding on appeal.

## V. CONCLUSION

Upon our review, we affirm Heng's convictions for manslaughter and use of a weapon to commit a felony. We find there was sufficient evidence to support the jury's conclusion that Heng did not act in self-defense when he shot and killed Lane. We also find that Heng's assertions of error on appeal are without merit.

Affirmed.

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

# State of Nebraska, appellee, v. Robert S. Honken, appellant.

905 N.W.2d 689

Filed December 12, 2017. No. A-17-195.

1. **Double Jeopardy: Lesser-Included Offenses: Appeal and Error.** Whether two provisions are the same offense for double jeopardy purposes presents a question of law, on which an appellate court reaches a conclusion independent of the court below.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
5. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
6. **Double Jeopardy.** The Double Jeopardy Clauses of the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
7. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided under the U.S. Constitution.
8. **Criminal Law: Conspiracy: Double Jeopardy.** Under the Double Jeopardy Clause, the subdivision of a single criminal conspiracy into multiple violations of one conspiracy statute is prohibited.

9. **Double Jeopardy.** The traditional test used to determine whether two charged offenses constitute only one offense is the *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), or "same evidence," test.
10. ____. Under the *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), or "same evidence," test, the offenses are considered identical for double jeopardy purposes where the evidence required to support conviction on one offense is sufficient to support conviction on the other offense.
11. ____. A totality of the circumstances test for purposes of double jeopardy considers five factors: (1) time, (2) identity of the alleged coconspirators, (3) the specific offenses charged, (4) the nature and scope of the activity, and (5) location.
12. **Conspiracy.** The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another, although an overt act is also required.
13. ____. A conspiracy is ongoing until the central purposes of the conspiracy have either failed or been achieved.
14. **Conspiracy: Proof: Presumptions.** Upon proof of participation in a conspiracy, a conspirator's continuing participation is presumed unless the conspirator demonstrates affirmative withdrawal from the conspiracy.
15. **Conspiracy.** Withdrawal from a conspiracy must be effectuated by more than ceasing, however definitively, to participate in the conspiracy.
16. ____. A coconspirator must make an affirmative action either by making a clean break to the authorities or by communicating abandonment in a manner calculated to reach coconspirators and must not resume participation in the conspiracy.
17. ____. In order to constitute multiple conspiracies, the agreements must be distinct and independent from each other.
18. ____. There may be a continuing conspiracy with changing coconspirators so long as there are never fewer than two conspirators.
19. ____. A gap wherein there are fewer than two coconspirators breaks the continuity and the subsequent appearance of a new and different coconspirator creates a new and separate conspiracy.
20. ____. It is necessary for one conspiracy to end before a second distinct and separate conspiracy can be formed; the question is whether there was a break, for an appreciable time, in the sequence of events, in order to categorize the agreements as separate and distinct.
21. ____. As a practical matter, the fact that a conspirator in a two-person conspiracy seeks a replacement for a departed would-be cohort is a strong indication of the failure of one conspiracy and the creation of another.

22. **Sentences.** When imposing a sentence, the sentencing court is to consider factors such as the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. However, 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.
24. ____. Traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence.
25. **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.
26. **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.
27. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

Appeal from the District Court for Hamilton County: Rachel A. Daugherty, Judge. Affirmed.

Mitchell C. Stehlik, of Lauritsen, Brownell, Brostrom & Stehlik, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Following a stipulated bench trial, Robert S. Honken was found guilty of two counts of conspiracy to commit first degree

murder. The district court for Hamilton County sentenced him to 45 to 50 years' imprisonment on each count, to be served concurrently. Honken now appeals his convictions and sentences. Following our review of the record, we affirm.

## BACKGROUND

This case arises out of Honken's attempt to hire two different men to kill his wife. The parties agreed upon the following stipulated facts, which were submitted at trial:

On January 16, 2016, Honken contacted Derrick Shirley via text message regarding a construction job. Honken and Shirley met at Honken's residence on January 18. After meeting, Honken asked Shirley if he would kill Honken's wife. The parties entered into an agreement wherein Shirley would kill Honken's wife in exchange for monetary compensation.

Honken and Shirley communicated primarily through text messages. Following Shirley's subsequent arrest, law enforcement recovered 659 text messages between the parties from Shirley's cell phone. In the messages, Honken provided a substantial amount of information regarding his wife, her residence and property, and her daily routine to assist Shirley in planning her murder. The parties also discussed how the murder would occur, and Honken requested on several occasions that Shirley make the incident look like a robbery. Shirley admitted that in the course of his agreement with Honken, he drove by Honken's wife's residence approximately 20 times.

Honken gave Shirley $400 for the purchase of a firearm to kill his wife. Shirley asked a friend to purchase the weapon, a .22-caliber rifle, for him. The rifle was purchased on February 10, 2016, and Shirley took possession of it. Law enforcement later recovered the rifle from his residence.

The final message between Honken and Shirley was sent on February 16, 2016. In that message, Honken wrote to Shirley:

> "I was just wanting to say thank you for backing down when you did. I had a short talk and I think it's going to

> lead to more talks and possibly a [sic] end to all of this? I have [a] friend that said I have through the duration of the divorce to prove to her that I want things to work out. I have deleted the messages on my cloud and phone. Thank you again for backing down and I don't want you to ever reconsider what I requested of you before. I think it was a God [sic] thing that you stepped back. I would like the .22 when it works out because I have a friend down in the Harvard area that said he would keep it so me and the boys can rabbit hunt around his farm! I can't thank you enough for heading [sic] the call and backing down. This and any other messages will be deleted but I'll keep your contact information in the event we're able to work things out and de [sic] the remodel work. Thanks again. . . ."

Shirley later told law enforcement that he did not go through with the murder of Honken's wife because he "had prayed about it and just did not have the heart." Shirley had no further communication with Honken after the final message that Honken sent on February 16, 2016.

On February 24, 2016, Honken left a voice mail for Mario Flores regarding remodeling work at his home. In his voice mail, Honken identified himself as "Sam." Flores returned the call the next day, and the parties agreed to meet at a gas station in Aurora, Nebraska, on February 26. During the meeting, Honken asked Flores if he knew anyone "who could help him kill his wife." Flores responded that he did know people who could help, but that he would not get involved in it himself.

That same day, Flores contacted the Aurora Police Department to report his contact with "Sam." Flores met with an investigator from the Nebraska State Patrol, and during the meeting, Flores made a telephone call to "Sam" that was recorded by law enforcement. During the call, "Sam" stated multiple times that he wanted his wife to be killed, discussed the cost of hiring someone to do so, and discussed how and

when he would like her murder to occur. "Sam" repeatedly affirmed that he was serious about killing her and identified himself as "Robert," the owner of a business in Aurora. Honken told Flores that he had previously paid someone else $400 to kill his wife but that person had backed out and taken his money. While Honken stated he did not recall that person's name, he provided sufficient information that law enforcement was able to identify him as Shirley.

Flores told Honken that he did have the name and telephone number of someone Honken could hire and that this person would contact him in the next several days. Later that day, Honken texted Flores from a different telephone number and stated that he "would like the hitman" to contact him at that number because it was a prepaid cell phone and he intended to dispose of it when he no longer needed it.

On February 29, 2016, an investigator with the Nebraska State Patrol made a recorded telephone call to the number Honken provided and posed as a potential hitman. During the call, Honken identified himself as both "Rob" and "Sam." Honken advised the investigator that he was in need of his services. The investigator stated that he would call Honken again with a time and place for them to meet, and Honken responded that he would be able to do so.

Several hours later, the investigator placed another call to Honken and instructed Honken to meet him at a truckstop in Aurora. Honken drove to the specified location and met with the investigator in the investigator's vehicle. The investigator wore a wire during the meeting to record his conversation with Honken.

Honken told the investigator that he wanted his wife "'gone'" and that he would like her to be killed by March 4, 2016. When the investigator requested "$3000 up front," Honken said that he would be able to obtain the money within several days. He provided the investigator with a photograph of his wife, as well as a map of her residence. Honken showed the investigator his driver's license, identifying him

as Honken, and stated that the address on his license was his wife's current address. Honken provided the investigator with information as to what type of vehicle his wife drove and when she was likely to be home alone. He also requested that the investigator make her death "look like a robbery" and said that he wanted it to be done "'quick and easy.'"

The investigator requested $500 for expenses. Honken withdrew the funds from an automated teller machine inside the truckstop and gave them to the investigator.

Honken was pulled over shortly after departing the truckstop and placed under arrest. He admitted to law enforcement that he had hired Shirley and the undercover investigator to kill his wife. Regarding his agreement with Shirley, Honken stated that Shirley had contacted him approximately 3 weeks prior because he had gotten "cold feet" and decided not to go forward with their plan.

In March 2016, the State charged Honken with two counts of conspiracy to commit first degree murder in the county court for Hamilton County. Following a preliminary hearing, the county court found probable cause and bound the case over to the district court. Honken was charged with the same two counts, both Class II felonies, in district court. In the information, the State charged Honken in count I with conspiracy that began on or about January 1 through February 26, 2016. Count II charged Honken with conspiracy that began on or about February 26 through 29.

Honken filed a plea in abatement, asserting that the evidence at the preliminary hearing was insufficient to show probable cause that the alleged offenses had been committed and that he had committed them. At a hearing on his motion, Honken argued that he should have been charged with only one count of conspiracy rather than two. The district court overruled Honken's motion, finding that there was probable cause for two separate offenses.

Following the denial of his plea in abatement, Honken filed a motion to dismiss either count of the information, claiming

that charging him with both counts violated his right against double jeopardy. In response, the State filed an amended information in which it shortened the time period during which it alleged count I occurred. The amended information asserted that the first offense occurred between January 16 and February 16, 2016, rather than between January 1 and February 26.

Honken waived his right to a jury trial, and a hearing on his motion to dismiss occurred simultaneously with his bench trial on the stipulated facts set forth above. The district court overruled Honken's motion to dismiss, finding that Honken had engaged in two separate conspiracies, and found him guilty of two counts of conspiracy to commit first degree murder. Honken was sentenced to 45 to 50 years' imprisonment on each conviction, with the sentences to run concurrently. Honken now appeals from his convictions and sentences.

## ASSIGNMENTS OF ERROR

Honken assigns, restated, that the district court erred in (1) violating his right against double jeopardy by convicting and sentencing him to multiple punishments for the same offense and (2) imposing excessive sentences. Honken also argues that he received ineffective assistance of his trial counsel.

## STANDARD OF REVIEW

[1] Whether two provisions are the same offense for double jeopardy purposes presents a question of law, on which an appellate court reaches a conclusion independent of the court below. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[2,3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

[4,5] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *Id*. When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion. *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

## ANALYSIS

*Double Jeopardy.*

Honken argues that the district court erred in overruling his plea in abatement and his motion to dismiss and subsequently finding him guilty of two counts of conspiracy to commit first degree murder. He claims that his actions constituted one continuous conspiracy and that his convictions for two separate counts therefore violate his right against double jeopardy. Honken asserts that he had the same objective throughout the course of his agreements with both men he hired to kill his wife and that the addition of a new coconspirator did not mean that his original conspiracy with Shirley had ended.

[6-8] The Double Jeopardy Clauses of the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Kleckner*, 291 Neb. 539, 867 N.W.2d 273 (2015). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided under the U.S. Constitution. *Id*. Under the Double Jeopardy Clause, the subdivision of a single criminal conspiracy into multiple violations of one conspiracy statute is prohibited. See *United States v. Thomas*, 759 F.2d 659 (8th Cir. 1985).

[9-11] "The traditional test used to determine whether [two charged offenses constitute only one] offense is the *Blockburger* 'same evidence' test." See *United States v. Thomas*, 759 F.2d at 661. See, also, *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under this test, the offenses

are considered identical for double jeopardy purposes where the evidence required to support conviction on one offense is sufficient to support conviction on the other offense. See *United States v. Thomas, supra*. However, the "'same evidence'" test has been found to be of questionable value in cases involving issues of conspiracy and double jeopardy due to the possibility that prosecutors could rely on the use of such test to draw up two sets of charges that include different overt acts. See *id*. at 662. Instead, other courts have adopted a "'totality of the circumstances'" test that considers five factors: (1) time, (2) identity of the alleged coconspirators, (3) the specific offenses charged, (4) the nature and scope of the activity, and (5) location. See *id*.

[12-16] Neb. Rev. Stat. § 28-202(1) (Reissue 2008) provides:

> A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

The Nebraska Supreme Court has held that the principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another, although an overt act is also required. See *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016). Section 28-202(3) states that "[i]f a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship." A conspiracy is ongoing until the central purposes of the conspiracy have either failed or been achieved. *Id*. Indeed, upon proof of participation in a conspiracy, a conspirator's continuing participation is presumed unless the conspirator demonstrates affirmative

withdrawal from the conspiracy. *Id*. Such withdrawal must be effectuated by more than ceasing, however definitively, to participate in the conspiracy. See *id*. Rather, a coconspirator must make an affirmative action either by making a clean break to the authorities or by communicating abandonment in a manner calculated to reach coconspirators and must not resume participation in the conspiracy. See *id*.

Honken argues that the district court violated his right against double jeopardy because his actions constituted one continuous conspiracy with both men he hired to kill his wife. He claims that he had the same objective throughout and that the only element that changed was the addition of a new coconspirator. Honken asserts that the district court's finding that his original agreement with Shirley had ended was in error because the central purposes of that conspiracy had neither failed nor been achieved, and therefore was ongoing.

We find little Nebraska case law that is pertinent to the determination of when one conspiracy ends for purposes of double jeopardy. However, looking beyond Nebraska, we find the analysis contained in *Savage v. State*, 212 Md. App. 1, 66 A.3d 1049 (2013) instructive. In *Savage v. State*, the defendant was sentenced on two counts of conspiracy to commit first-degree burglary. On appeal, he argued that the convictions violated double jeopardy principles because he was involved in only one conspiracy. The State argued, however, that his agreements with two separate individuals constituted two conspiracies.

[17-21] The court in *Savage v. State, supra*, found that in order to constitute multiple conspiracies, the agreements must be distinct and independent from each other. See *id*. It held that there may be a continuing conspiracy with changing coconspirators so long as there are never less than two conspirators. See *id*. Such a gap breaks the continuity and the subsequent appearance of a new and different coconspirator creates a new and separate conspiracy. See *id*. The court summarized:

> [I]t is necessary for one conspiracy to end before a second distinct and separate conspiracy can be formed. . . . The question is whether there was a "break," for an "appreciable time, in the sequence of events," in order to "categorize" the agreements as "separate and distinct." *Purnell v. State*, 375 Md. 678, 698, 827 A.2d 68 (2003). As a practical matter, the fact that a conspirator in a two-person conspiracy seeks a replacement for a departed would-be cohort is a strong indication of the failure of one conspiracy and the creation of another.

*Savage v. State*, 212 Md. App. at 25-26, 66 A.3d at 1063.

In the present case, while the statutory offenses that Honken was charged with in both counts were identical, the counts alleged that the offenses occurred over different and distinct time periods. The amended information charged Honken, in count I, with conspiracy to commit first degree murder on or about January 16 through February 16, 2016. Count II charged Honken with the same statutory offense, but alleged that it occurred on or about February 26 through 29. As charged by the State, a 10-day break separates the first conspiracy from the second.

The stipulated facts presented at trial further support this break in the timeline. The district court received into evidence copies of the 659 text messages that Honken exchanged with Shirley. The text messages began on or about January 16, 2016, and the last message was sent to Shirley from Honken on February 16. The content of the final message that Honken sent to Shirley repeatedly thanked Shirley for "backing out of the plot" and "'backing down.'" It further indicated that Honken had spoken with his wife and believed an end to "'all of this'" may be forthcoming. He stated that he did not want Shirley to ever reconsider what he had previously asked Shirley to do. The stipulated facts also state that, while being questioned following his arrest, Honken told law enforcement that Shirley had contacted him approximately 3 weeks before and "said he was getting cold feet and decided to not go

forward with killing [Honken's wife]." Honken then attempted to contact Flores on February 24, and the pair met on February 26. It was during this meeting that Honken asked if Flores knew anyone who would kill his wife.

It is apparent from the February 16, 2016, text that Shirley had advised Honken by that date that he no longer wanted to participate in the murder conspiracy. Ten days later, Honken asked Flores if he knew anyone who would kill his wife. This time period constitutes a break in the sequence of events sufficient to categorize the agreements as separate and distinct. The facts do not indicate that Honken was in contact with anyone regarding his plan to kill his wife during that time nor did he have an agreement with anyone to do so. In fact, his final message to Shirley on February 16 indicated that he no longer wished to pursue his plan to kill her and Honken specifically asked Shirley to never reconsider his previous request to kill his wife. While Honken later entered into an agreement with the same objective, this gap of 10 days between such agreements and the addition of a new and different coconspirator suggests that the later agreement was a new and separate conspiracy. See *Savage v. State*, 212 Md. App. 1, 66 A.3d 1049 (2013).

Furthermore, under Nebraska law, a conspirator may withdraw from a conspiracy through an affirmative action. One such manner of withdrawal is through communication of abandonment in a manner that is calculated to reach coconspirators and subsequent nonparticipation in the conspiracy. See *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016). Here, it is clear that Shirley effectively communicated his abandonment of the conspiracy to Honken, his only coconspirator, and that Honken in fact received such communication, as he acknowledged in his final message to Shirley. It is undisputed that following February 16, 2016, Shirley had no additional communication with Honken nor did he later resume his participation in the conspiracy. These actions constitute Shirley's withdrawal from the conspiracy, effective

February 16. As a conspiracy necessarily requires an agreement between two or more persons, the affirmative withdrawal of one coconspirator from a two-person conspiracy terminates that conspiracy.

We also look to the totality of the circumstances test outlined in *United States v. Thomas*, 759 F.2d 659 (8th Cir. 1985), and the five factors used there in determining whether Honken had engaged in multiple conspiracies or one continuous conspiracy. The first factor to consider is time. As discussed above, the two counts of conspiracy cover two separate and distinct time periods: the first count occurred from January 16 to February 16, 2016, and the second count occurred from February 26 to 29. The stipulated facts do not allege any overlap between the two time periods, which are separated by a period of 10 days.

The second factor to consider is the identity of the coconspirators. Here, Honken's coconspirator in count I was Shirley. The evidence indicates that he withdrew from the conspiracy on or about February 16, 2016, and did not resume participation. The second count of conspiracy involved Honken contacting Flores, who then connected him with the undercover investigator that Honken believed he had hired to kill his wife. There is no overlap of identity between the coconspirators involved in counts I and II.

The third factor is the specific offenses charged. Both counts were brought under the same statute, § 28-202(4), as conspiracy to commit first degree murder.

The fourth factor is the nature and scope of the activity. While the objectives in both counts are the same, to kill Honken's wife, the overt acts taken in furtherance of this objective differ. In count I, Honken's agreement with Shirley, it is alleged that in pursuance of the objective, one or both of the parties exchanged $400, purchased a .22-caliber rifle, and drove around the residence of Honken's wife. Furthermore, it is clear from the text messages between Honken and Shirley that Honken provided substantial information regarding the

residence and his wife's routine to Shirley and that Shirley used that information to surveil Honken's wife and her property and even make contact with her. Shirley admitted that he had driven by her property approximately 20 times during the course of his agreement with Honken.

In count II, Honken's contact with Flores and subsequent agreement with the undercover investigator, it is alleged that in pursuance of the objective, one or both parties met at a previously specified location to discuss a murder for hire, paid $500 as a downpayment for the murder of Honken's wife, and provided the undercover officer posing as a hitman with a photograph of Honken's wife, as well as her address. While there are similarities between some of the overt acts taken in both counts and all of the acts were taken in pursuance of the same objective, there is no overlap between specific acts, and the actors, other than Honken, are entirely different.

The final factor to consider is location. Everything alleged in both counts took place in Hamilton County, Nebraska. However, in count I, the initial meeting between Honken and Shirley took place at Honken's residence in Aurora and Shirley's subsequent surveillance of Honken's wife took place in and around rural Hamilton County. In count II, the initial meeting between Honken and Flores took place at a gas station in Aurora and his meeting with the undercover officer took place at a truckstop in Aurora. The locations involved in each of the two counts are in relative proximity to one another but they do not overlap as to any specific locations.

After taking all five factors into consideration, we find that Honken engaged in two separate and distinct conspiracies. While there are some similarities between several of the factors, the only one in which there was overlap was the offenses charged. We do not find this factor dispositive. The remaining factors and surrounding facts indicate that Honken participated in two conspiracies that were separate in time, involved different coconspirators, and involved distinct locations and acts taken in furtherance of the conspiracies.

Honken's reliance on the proposition of law that a conspiracy is ongoing until its purpose has either failed or been achieved is misplaced. He ignores the fact that a conspirator may withdraw from a conspiracy through an affirmative act. We find that Shirley did withdraw from the conspiracy on or before February 16, 2016, which terminated the conspiracy with Honken. Honken did not engage in a new agreement with anyone to kill his wife until 10 days later, at his meeting with Flores. Shirley's withdrawal and the 10-day break in time between the two agreements indicate that Honken's subsequent conspiracy was separate and distinct from the first. This is further supported by the differences between the parties involved in each agreement, the specific locations involved, and the overt acts taken in furtherance of the agreements.

Because we determine that the district court correctly found that Honken engaged in two separate and distinct conspiracies, we find no double jeopardy violation and no merit to this assignment of error.

*Excessive Sentences.*

Honken argues that the district court erred in imposing excessive sentences. He claims that the court did not adequately consider mitigating factors such as his mental health issues and the lack of violence in the commission of the offenses. Honken also argues that the district court appeared to sentence him for each conviction as if the underlying offense, the murder of his wife, had taken place, rather than sentencing him for the conspiracy to commit such offense.

[22-24] When imposing a sentence, the sentencing court is to consider factors such as the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. However, the sentencing court is not limited to any mathematically applied set of factors.

*State v. Dehning*, 296 Neb. 537, 894 N.W.2d 331 (2017). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*. Traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence. *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017).

Honken was found guilty of two counts of conspiracy to commit first degree murder, a Class II felony, and was sentenced to 45 to 50 years' imprisonment on each count, to be served concurrently. He was also given credit for 327 days served. Class II felonies are punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 2016). Honken's sentences are both within the statutory limits.

Honken argues that the district court did not give adequate consideration to mitigating factors, such as his use of alcohol, sleeping pills, and OxyContin around the time of the offenses, as well as his prior suicidal thoughts. Honken claims that he had previously been a "law-abiding citizen" with only two traffic offenses on his record. Brief for appellant at 28. He argues that he was diagnosed as having bipolar disorder subsequent to his incarceration and believes his mental health issues had affected his actions in this case. Honken claims that the district court should have considered the fact that there was no physical violence involved in the commission of the offenses and that no one was physically harmed.

The evidence shows that Honken sought out two different men to kill his wife over a month apart and then planned how the murder was to occur in a deliberate and calculated manner. Honken's actions included frequent contacts with these men, often on a daily or near-daily basis. While Honken alleges that he was using various substances around the time of the offenses, nothing in the record suggests that he was under the influence of any such substances during the commission

of the offenses, which took place during a period of greater than 1 month. Similarly, there is nothing to suggest that his mental health was impaired either by his past suicidal thoughts or by any bipolar-related disorder when he committed these offenses.

Honken argues that no one was physically harmed in the commission of these offenses. However, as the district court pointed out at sentencing, that was due only to intervening actors. It is clear from the content of Honken's messages to the hitmen and the desperation of his tone that Honken's wife would have been dead if it had been up to him. While Honken argues that the district court improperly sentenced him as if the murder had actually occurred, such argument is not supported by the record. The sentences imposed were properly within the statutory limits for conspiracy to commit first degree murder.

We note that in imposing its sentences, the district court stated that it had considered the factors in Neb. Rev. Stat. § 29-2260 (Supp. 2015), the presentence investigation report, the hundreds of text messages between Honken and Shirley, Honken's statements to probation and during allocution, the victim impact statement and accompanying letters from the victim's friends and family, Honken's diagnosis of unspecified bipolar disorder and unspecified personality disorder, his history of anger issues, the fact that on several occasions Honken sought to have the underlying crime committed in front of his children, the eight sentencing factors specified above, and Honken's lack of acceptance of responsibility for his actions.

The crimes for which Honken was convicted were extremely serious and put his wife at great risk of bodily harm or death. Honken's persistence in seeking out someone to kill his wife is alarming, as are the lengths he went to in order to plan her death, such as providing her photograph, a map of her residence, details about her daily routine, and suggestions for how her death could occur. Honken made a lengthy statement

both in the presentence investigation report and during allocution, but he shifted blame for his actions onto Shirley, onto a friend who allegedly came up with the idea, and even onto his wife, whom he continued to blame for her shortcomings as a spouse. We do not believe that Honken truly understands the very serious nature of these offenses nor does he understand the consequences that his actions have had on others, including his three children. Because the sentences that were imposed are properly within the statutory limits, we find no abuse of discretion by the district court.

*Ineffective Assistance of Counsel.*

Honken claims that his trial counsel was ineffective for failing to raise potential defenses arising out of his mental health issues. He argues that the presentence investigation report indicated that around the time of the offenses, he had been drinking, as well as using sleeping pills and OxyContin; that he had previous suicidal thoughts; and that he had been later diagnosed with bipolar disorder. Although trial counsel raised these issues at sentencing, Honken claims that they should have been raised earlier as potential affirmative defenses.

[25-27] When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred. *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017). 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. *Id*. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

Honken contends that his trial counsel was ineffective for failing to raise his mental health issues as potential affirmative

defenses. However, we find that the record before us on direct appeal is insufficient to resolve this claim. We have nothing before us indicating whether Honken's trial counsel contemplated raising such issues as potential defenses, whether his failure to do so was strategic, when Honken's psychological evaluation took place, or what the results were of such an evaluation. Accordingly, we cannot determine based on the record before us whether Honken's trial counsel rendered ineffective assistance.

## CONCLUSION

Following our review of the record, we find Honken's assignments of error to be without merit or without a sufficient record to resolve on direct appeal and therefore affirm.

Affirmed.

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

# State of Nebraska, appellee, v. Kirk A. Botts, appellant.

905 N.W.2d 704

Filed December 19, 2017. No. A-16-985.

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 protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Trial: Investigative Stops: Warrantless Searches: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
5. **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.
6. **Search and Seizure: Probable Cause: Appeal and Error.** To analyze the legality of the search and seizure, an appellate court must first determine when the seizure occurred and then address whether the seizure was supported by probable cause.

7. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Arrests.** There are three tiers of police-citizen encounters. A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection. A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning. A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention. Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.
8. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
9. **Police Officers and Sheriffs: Search and Seizure.** In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.
10. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** An officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.
11. **Constitutional Law: Arrests: Probable Cause.** The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
12. **Warrantless Searches: Probable Cause: Police Officers and Sheriffs.** Probable cause to support a warrantless arrest exists only if law enforcement has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.
13. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
14. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.

15. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed and remanded with directions.

Matthew K. Kosmicki, of Brennan & Nielsen Law Offices, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

## INTRODUCTION

Kirk A. Botts appeals from his conviction for possession of a knife by a felon in the district court for Lancaster County. He challenges the court's overruling of his motion to suppress evidence and statements, its overruling of objections to certain testimony at trial, its use of a specific jury instruction, and its failure to find the evidence insufficient to find him guilty. We conclude that Botts' motion to suppress should have been granted, and therefore, we reverse, and remand with directions.

## BACKGROUND

The State filed an amended information charging Botts with possession of a knife by a felon, a Class III felony. Botts entered a plea of not guilty. He later filed a motion to suppress evidence and statements, and a hearing was held on the motion.

At the motion to suppress hearing, Officer Jason Drager of the Lincoln Police Department testified that on March 10, 2016, around 2:30 a.m., he was driving back to the police station in his police cruiser. While driving, he saw a vehicle on a side street that was not moving and was partially blocking

the roadway. The vehicle was situated at an angle, with the front end by the curb and the back end blocking part of the street. Drager thought maybe there had been an accident. He turned down the street and saw an individual standing by the driver's side of the vehicle. Drager turned on his cruiser's overhead lights, parked his cruiser behind the vehicle, and contacted the individual, later identified as Botts. He asked Botts "what was wrong," and Botts initially told Drager "to mind [his] own business." When Drager asked Botts again about what had happened, Botts told him "he was out of gas and was trying to push the vehicle to the side of the road." Drager testified that he did not recall Botts' saying that he drove the vehicle there. Botts asked Drager if he could help him, and Drager told him he could not help, based on Lincoln Police Department policy.

Drager testified that he decided he should remain at the location because Botts' vehicle was blocking the roadway and could cause an accident. Drager then stood back by his cruiser and watched Botts push the vehicle back and forth. Drager stated that Botts became "verbally abusive" toward him after he said he could not help him, so Drager decided to ask other officers to come to the location "for safety purposes." Three other officers responded.

One of the officers who responded, Officer Phillip Tran, advised Drager that he had stopped Botts a couple hours earlier that night for traffic violations. Drager testified that Tran told him he had detected an odor of alcohol on Botts at the time of the earlier stop. Based on the information from Tran, Drager decided to approach Botts and ask him if he had been drinking. Drager testified that when he asked Botts if he had been drinking, Botts became angry, started yelling, and started backing up away from him.

Drager testified that Botts' demeanor led him to believe Botts was under the influence of "some kind of alcohol or drug." However, Drager testified that he did not believe alcohol or drugs were affecting Botts' ability to answer

questions. Drager did not recall Botts' stating that he had been drinking.

Drager testified that Botts backed up to the other side of the street and stopped with his back against a light pole. When he was backing up, he was not coming at the officers and was not making threats. The four officers surrounded Botts by the light pole. Botts started yelling "something along the line of shoot me, shoot me." Drager testified that Officer David Lopez, one of the officers at the scene, pulled out his Taser for safety purposes and to try to get Botts to comply with their request to put his hands behind his back. He eventually did so and was handcuffed and placed in the back of Drager's cruiser.

Drager testified that the officers were telling Botts to put his hands behind his back for their safety and Botts' safety. Drager stated that he was concerned for his safety because Botts was being verbally abusive.

Drager testified that after Botts was arrested, the officers decided to tow Botts' vehicle because it was blocking the road. He stated that it is Lincoln Police Department policy to search vehicles that are going to be towed. Tran began to search the vehicle and saw the handle of a machete sticking out from underneath the driver's seat. Drager testified that after discovering the machete, Botts was under arrest for being in possession of a concealed weapon.

Tran also testified at the motion to suppress. He testified that he had contact with Botts around midnight on March 10, 2016, a couple hours before Drager made contact with him. Tran testified that he stopped Botts for not having his headlights on and for driving erratically. Tran testified that during that contact, he noticed a "slight odor of alcohol," and that Botts "and another person in the vehicle had just purchased some alcohol." Botts was the driver of the vehicle, and there was more than one passenger. Tran testified that he did not initiate a driving under the influence investigation because he did not see enough signs to believe that Botts was intoxicated.

Tran testified that he and another officer responded to Drager's call for assistance and that when they arrived, he told Drager about his previous contact with Botts. Tran testified that Drager and Lopez then made contact with Botts at his vehicle, at which time Botts' statements and demeanor became erratic. Tran stated Botts backed away from the two officers and was making statements such as "shoot me, kill me, things like that." He also heard Botts make statements indicating the police were harassing him and treating him differently because of his race. Tran testified that Botts backed up and stopped with his back against a light pole and that the four officers were around Botts. One of the officers asked Botts to put his hands behind his back, and Botts responded that he was not doing anything wrong. Tran testified that during that time, Lopez had his Taser out. Botts eventually put his hands behind his back and was handcuffed.

Tran testified that as soon as Botts was handcuffed, he walked over to Botts' vehicle and looked inside the driver's side front window, which was rolled down. He then saw the handle of a machete sticking out from under the driver's seat. He retrieved the machete out of the vehicle after it was decided that the vehicle would be towed. He testified that the officers were required to do an inventory search every time a vehicle is towed.

The State offered exhibits 1 through 3 into evidence, each of which is a DVD containing a video recording from the encounter with Botts. Exhibit 1 was the video recording from Drager's cruiser. Exhibit 2 was the video recording from Drager's body camera. Exhibit 3 was the video recording from Tran's cruiser. The exhibits showed the interaction between Botts and the officers, including Botts' transport to jail. The video recording from Drager's cruiser showed that when Botts was sitting in Drager's cruiser, he saw Tran remove the machete from his vehicle. Botts then began making statements indicating that the machete was his and that he knew it was in his vehicle. Specifically, he stated multiple times that he used the

machete for his business, which involved cutting weeds. Botts also made statements indicating that the vehicle where the machete was found was his vehicle. Botts was never read his *Miranda* rights.

Following the hearing, the trial court overruled the motion to suppress.

A jury trial was subsequently held on the charge. During the trial, Botts renewed his motion to suppress, which was again overruled. Drager and Tran both testified, and their testimony was consistent with that set forth above.

Lopez also testified at trial. He testified that based on information provided by Tran about the earlier stop, the officers thought Botts' vehicle was possibly positioned as it was because he had an alcohol-related accident. Lopez testified that when he and Drager approached Botts and asked if he had been drinking, he became very agitated. It "just didn't seem like he was acting very rational," and he was yelling. Lopez testified that during the encounter, he drew his Taser because of Botts' agitated behavior. He stated the Taser was displayed as a deescalation tactic and as a means to get Botts to comply with their directions. He testified that he did not deploy the Taser and that Botts was eventually handcuffed.

The State also offered exhibits 6 through 8 into evidence. Exhibit 6 was an edited version of Drager's cruiser video recording, exhibit 7 was the machete found in Botts' vehicle, and exhibit 8 was an edited version of Tran's cruiser video recording. Also, the parties stipulated that Botts had a previous felony conviction. Botts did not present any evidence. The jury returned a verdict of guilty, and the court accepted the jury's verdict.

The trial court sentenced Botts to 1 year's imprisonment and to 1 year of postrelease supervision.

## ASSIGNMENTS OF ERROR

Botts assigns that the trial court erred in (1) failing to sustain his motion to suppress, (2) failing to sustain his objections

to certain testimony, (3) giving an erroneous and prejudicial jury instruction, and (4) finding that the evidence was sufficient to support a finding of guilt.

## STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination. *Id.* The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.*

[3] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress. *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017).

## ANALYSIS

Botts first assigns that the trial court erred in failing to sustain his motion to suppress evidence obtained as a result of his encounter with Drager and the other officers on March 10, 2016, specifically the machete found in his vehicle and statements he made after he was in Drager's cruiser. He argues that the encounter amounted to a seizure and that the arrest was not supported by probable cause.

[4,5] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. *State v. Rogers, supra*. Evidence obtained as the fruit of an illegal search or

seizure is inadmissible in a state prosecution and must be excluded. *Id.*

[6] To analyze the legality of the search and seizure, we must first determine when the seizure occurred and then address whether the seizure was supported by probable cause.

*Classification of Police-Citizen Encounter.*

[7] There are three tiers of police-citizen encounters. A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen. *State v. Rogers, supra.* Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection. *Id.* A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning. *Id.* A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention. *Id.* Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution. *State v. Rogers, supra*.

[8-10] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017). In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. *Id.* But an officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement. *State v. Rogers, supra*.

It is clear that the police-citizen encounter in the instant case began as a tier-one encounter and escalated to a tier-three encounter. The question we must answer is when the encounter became a tier-three encounter, or an arrest. Botts argues that he was arrested for Fourth Amendment purposes when he was standing by the light pole with four officers around him, one with his Taser drawn. The State argues that Botts was not arrested until he was handcuffed.

[11] When Drager and Lopez approached Botts, he became defensive and the situation escalated quickly. He began backing up and was yelling at the officers. All four of the officers on scene followed him across the street until he stopped with his back against a light pole. The officers, all in uniform and armed, were standing around him, and they immediately began telling him to put his hands behind his back. Lopez had his Taser drawn in an effort to get Botts to comply. At this point, there was "the threatening presence of several officers," "the display of a weapon by an officer," and "the use of language . . . indicating the compliance with the officer's request [to put his hands behind his back] might be compelled." See *State v. Rogers*, 297 Neb. at 271, 899 N.W.2d at 632. These circumstances would have made a reasonable person believe that he was not free to leave. We conclude that Botts was seized at that point in time and that such seizure amounted to a tier-three police-citizen encounter. Consequently, for the encounter to be a lawful seizure, the officers needed to have probable cause to believe that Botts had committed or was committing a crime. See *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993) (Fourth Amendment requires that arrest be justified by probable cause to believe that person has committed or is committing crime).

*Probable Cause.*

[12-14] Botts argues that Drager and the other officers did not have probable cause to justify an arrest. Probable cause to support a warrantless arrest exists only if law enforcement

has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013). Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *Id.* An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances. *Id.*

The State contends that the officers had probable cause to believe that Botts had committed the offense of driving under the influence. The evidence showed that Tran had stopped Botts around midnight for traffic offenses and detected a "slight odor of alcohol" and noted that Botts and another person in the vehicle had recently purchased alcohol. Botts was driving, and there were passengers in the vehicle. Tran did not initiate a driving under the influence investigation, because he did not see signs of intoxication. When Drager contacted Botts around 2:30 a.m., about 2½ hours after Tran had stopped Botts, Botts was pushing a vehicle that was inoperable. Botts told Drager that his vehicle had run out of gas and that he was trying to get it to the side of the road. Botts asked Drager for help, and Drager told him he could not help him based on Lincoln Police Department policy. This apparently upset Botts. Botts continued pushing his vehicle and trying to maneuver it to the side of the road while Drager stood back by his cruiser and watched.

It was not until Tran arrived at the scene and told Drager about the earlier stop that Drager decided to approach Botts face to face and ask him if he had been drinking. At this point, all Drager knew was that Tran had smelled an odor of alcohol on Botts and that there was alcohol in the vehicle at the time Tran stopped him. Neither Drager nor any of the officers testified that they smelled an odor of alcohol on Botts. Drager also did not recall Botts' indicating that he had been drinking.

Drager testified that Botts' demeanor led him to believe he was under the influence of alcohol or drugs. However, Botts' demeanor could also be attributed to Drager's telling Botts he could not help him push the vehicle. Drager testified that it was at that point Botts became "verbally abusive" toward him. Botts also indicated that he believed the police were harassing him and that he was being treated differently because of his race.

In addition, Drager did not know if Botts had driven the vehicle to the location where Drager found it. He never saw him in the vehicle, and Botts never indicated that he had been driving the vehicle. The officers did not have probable cause to believe that Botts had been driving under the influence of alcohol.

We conclude that Botts was seized at the time the officers surrounded him by the light pole and Lopez had his Taser drawn and that the officers did not have probable cause to arrest him at that time. Consequently, the trial court erred in overruling Botts' motion to suppress.

[15] Because we have concluded that Botts' motion to suppress should have been granted, we do not address his 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. *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017).

## CONCLUSION

We conclude that Botts was arrested without probable cause, resulting in an unreasonable search and seizure in violation of the Fourth Amendment. Therefore, Botts' statements and the evidence seized following his arrest should have been suppressed. Moreover, because the illegally obtained evidence was the only evidence as to Botts' guilt, the cause is remanded with directions to vacate Botts' conviction and dismiss the charge against him.

Reversed and remanded with directions.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# Summer Haven Lake Association, Inc., a Nebraska corporation, appellee and cross-appellant, v. Ronald G. Vlach, appellant and cross-appellee, and Victory Lake Marine, Inc., a Nebraska corporation, appellee.

905 N.W.2d 714

Filed December 26, 2017. No. A-16-638.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
2. **Principal and Agent.** If an agent intends to bind his principal, the agent must not only name the principal, but must express by some form of words that the writing is the act of the principal.
3. **Contracts.** Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous.
4. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
5. **Contracts: Parties: Intent.** The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.
6. **Corporations.** A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears.
7. **Corporations: Equity: Fraud.** In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice.
8. **Waters.** The State Boat Act, Neb. Rev. Stat. §§ 37-1201 through 37-12,110 (Reissue 2016), was enacted to promote safety for persons

and property in and connected with the use, operation, and equipment of vessels and to promote uniformity of laws relating thereto.

9. ____. The State Boat Act applies to any waters within the territorial limits of Nebraska.
10. ____. The provisions of the State Boat Act and of other applicable laws govern the operation, equipment, numbering, and all other matters relating thereto whenever any vessel shall be operated on the waters of Nebraska or when any activity regulated by the State Boat Act shall take place.
11. **Waters: Administrative Law: Ordinances.** The State Boat Act permits the adoption of any ordinance or local law relating to operation and equipment of vessels so long as the provisions of which are and continue to be identical to the provisions of the State Boat Act or rules or regulations issued thereunder.
12. **Waters: Administrative Law.** The State Boat Act specifically authorizes the Game and Parks Commission to make special rules and regulations with reference to the operation of vessels on any specific water or waters within the territorial limits of Nebraska.
13. ____: ____. Pursuant to authority granted by the State Boat Act, the Game and Parks Commission prescribed certain boating regulations contained in the Nebraska Administrative Code, including special rules and regulations for nonpublic lake associations governing operation of vessels on waters administratively controlled by nonpublic lake associations.
14. **Waters: Administrative Law: Words and Phrases.** The Nebraska Administrative Code defines a nonpublic lake association as an organization of lakeside residents with administrative control over nonpublic waters of this state.
15. **Contracts: Public Policy.** Any contract which is clearly contrary to public policy is void.
16. **Contracts: Parties.** A party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids.
17. **Waters: Administrative Law.** Any subdivision of this state may at any time make formal application to the Game and Parks Commission for special rules and regulations with reference to the operation of vessels on any waters within its territorial limits and shall set forth therein the reasons which make such special rules or regulations necessary or appropriate.
18. **Injunction.** An injunction is an extraordinary remedy, and it ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.

19. **Injunction: Proof.** The party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief.
20. **Restrictive Covenants: Injunction.** A mandatory injunction is an appropriate remedy for a breach of a restrictive covenant.
21. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
22. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
23. **Attorney Fees: Costs.** Customarily, attorney fees and costs are awarded only to prevailing parties, or assessed against those who file frivolous suits.
24. ____: ____. Neb. Rev. Stat. § 25-824(2) (Reissue 2016) permits a court in any civil action to award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.
25. **Actions: Attorney Fees: Words and Phrases.** The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
26. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion.

Appeal from the District Court for Dodge County: Geoffrey C. Hall, Judge. Affirmed.

K.C. Engdahl for appellant.

Thomas B. Thomsen, of Sidner Law, for appellee Summer Haven Lake Association, Inc.

Inbody, Pirtle, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Ronald G. Vlach appeals and Summer Haven Lake Association, Inc. (Summer Haven), cross-appeals the order of

the Dodge County District Court which granted an injunction enjoining Vlach from further violations of Summer Haven's rules and regulations and upheld a 120-day suspension of Vlach's lake privileges. Finding no merit to the issues raised on appeal or cross-appeal, we affirm.

## BACKGROUND

Vlach is the owner and sole shareholder of Victory Lake Marine, Inc. (Victory Lake). Summer Haven is a Nebraska corporation and is the owner of Summer Haven Lake and the real estate surrounding the lake. Persons interested in purchasing a cabin at Summer Haven Lake must commit to purchasing one share of Summer Haven common stock. Summer Haven's bylaws require that each shareholder enter into a shareholder agreement with Summer Haven. Accordingly, in June 2006, a shareholder agreement was executed between Summer Haven and Victory Lake/Vlach. The body of the agreement stated that it was being entered into between Summer Haven as the "Association" and Victory Lake as the "Shareholder." The signature page contained a line for Vlach to sign as shareholder and president of Victory Lake and a separate line for him to sign as shareholder only. The line reserved for the signature of the president of Victory Lake was left blank, and Vlach signed only the line marked "Shareholder." The shareholder agreement also contains an acknowledgment wherein the shareholder acknowledges receiving a copy of Summer Haven's rules and regulations and agrees to abide by them. Vlach again signed only the line marked for "Shareholder" and not the line designated for the signature of the president of Victory Lake.

Summer Haven's safety rules and regulations provide that all members and residents of Summer Haven Lake are responsible for ensuring that they and their guests follow the rules and the terms of the shareholder agreement. A violation of the rules is a ground for suspension of lake privileges for a period of up to 120 days. Relevant to this appeal, the rules

provide that the maximum length for inboard and outboard boats is 18 feet 6 inches and that pontoon boats are restricted to operation on the lake between the hours of 8 p.m. and 10 a.m.

In August 2012, safety violations were reported against Vlach for having a boat longer than the maximum length at his "shore station" and operating a pontoon boat before 8 p.m. Vlach appealed the violations to Summer Haven's board of directors, which voted to reject the appeal and impose a 120-day suspension of lake privileges. Vlach then appealed the decision to the shareholders, and the shareholders voted at a May 2013 meeting to uphold the board's decision. Nevertheless, Vlach was observed operating a boat on the lake on at least three occasions in July 2013, and he ultimately admitted that he operated boats on the lake during the 120-day suspension period.

Accordingly, Summer Haven commenced this action in August 2013, requesting a temporary and permanent injunction restraining Vlach's use of the lake for a period of 120 days as a result of violating Summer Haven's rules and regulations and enjoining him from further violations. Vlach and Victory Lake filed an answer, counterclaim, and third-party complaint joining the individual members of Summer Haven's board of directors as third-party defendants. The relief requested in the counterclaim was limited to dismissal of the claims at Summer Haven's cost and reimbursement of attorney fees and costs expended in defending the action. In their third-party complaint, Vlach and Victory Lake alleged that Summer Haven lacked the authority to institute legal proceedings against them, and because the directors knew or should have known they were exceeding their authority, their actions constitute a breach of trust and fiduciary obligations. Summer Haven filed a motion to dismiss the counterclaim and third-party complaint, and after concluding that the counterclaim and third-party complaint failed to state a claim, the district court granted the motion to dismiss.

Vlach and Victory Lake moved for summary judgment as to the allegations in the amended complaint, and thereafter, the parties agreed to bifurcate the legal issue of Summer Haven's authority to enact and enforce its own rules and regulations from the factual issue of whether Vlach and/or Victory Lake violated the rules. The district court determined that the shareholder agreement was executed by Vlach personally and as authorized representative of Victory Lake, and as such, both entities were bound by its terms. In addition, the court concluded that the State Boat Act, see Neb. Rev. Stat. §§ 37-1201 to 37-12,110 (Reissue 2016) (the Act), does not conflict with or govern the issues in the present case, and therefore, the shareholder agreement controls and is enforceable against the shareholders. The court deemed Summer Haven's rules and regulations to be restrictive covenants, which Summer Haven is entitled to enforce along with their associated penalties.

After holding a trial on the remaining factual issues, the district court incorporated its previous rulings on the legal issues into its order and concluded that the undisputed evidence established that Vlach violated Summer Haven's rules and regulations by operating a pontoon boat outside of the allowed hours and operating a boat that exceeded the maximum length restrictions. The court therefore granted the equitable relief sought by Summer Haven and enjoined Vlach from further violating Summer Haven's rules and regulations and upheld the 120-day suspension of Vlach's lake privileges. The district court ruled, however, that there was no evidence that Victory Lake violated the rules and regulations and dismissed all claims against it. The court subsequently granted Summer Haven's motion for attorney fees in the amount of $5,000. Vlach timely appeals, and Summer Haven cross-appeals.

## ASSIGNMENTS OF ERROR

Vlach assigns, restated and renumbered, that the trial court erred in (1) denying Vlach's motion for summary judgment,

(2) determining that provisions of the Act did not control and govern, (3) finding that Vlach was bound by and had violated Summer Haven's rules and regulations, (4) finding in favor of Summer Haven with regard to its claims and granting an injunction, (5) dismissing Vlach's counterclaim and third-party complaint, and (6) awarding attorney fees in favor of Summer Haven.

On cross-appeal, Summer Haven assigns that the district court erred in dismissing the action against Victory Lake and failing to award attorney fees in the amount of $16,600.

## STANDARD OF REVIEW

[1] An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *ConAgra Foods v. Zimmerman*, 288 Neb. 81, 846 N.W.2d 223 (2014).

## ANALYSIS

*Shareholder Agreement.*

We first address the claims with respect to the capacity in which the shareholder agreement was signed. The district court concluded that the shareholder agreement was executed by Vlach in his personal capacity and as representative of Victory Lake. Vlach argues that there was no evidence that he agreed to be personally bound by the agreement. No one contests the court's determination that Vlach executed the agreement as representative of Victory Lake; thus, we do not address this issue.

The issue before us with respect to the shareholder agreement in the present case is whether Vlach is personally bound to the obligations contained therein. We conclude that he is.

The agreement is the same agreement signed by other shareholders, except for the name of the proposed shareholder and the lot number. There are two separate lines reserved

for the signature of the shareholder of Summer Haven. The top line is labeled "Shareholder" and is designated for the signature of Victory Lake by its president. The bottom line is labeled only as "Shareholder." It is apparent that the name of Victory Lake and the word "President" were typed into the standard shareholder agreement separately, because they are typed using a different font. Vlach elected to sign only on the bottom line, which was designated for shareholder but left blank the space designated for the signature of the president of Victory Lake.

[2] At the bottom of the shareholder agreement signature page appears an acknowledgment, wherein the shareholder of Summer Haven acknowledges having received a copy of Summer Haven's rules and regulations and agrees to abide by them. Underneath the acknowledgment appears a signature block which is identical to the spaces for the shareholder's signatures in the agreement. In other words, the acknowledgment also contains two lines designated for the signature(s) of the shareholder(s) of Summer Haven. Vlach again elected to sign only the bottom line reserved for the shareholder but not the top line reserved for the representative of Victory Lake. In so signing, Vlach agreed to bind himself personally to the terms of the agreement and the rules governing Summer Haven. See *780 L.L.C. v. DiPrima*, 9 Neb. App. 333, 611 N.W.2d 637 (2000) (explaining that if agent intends to bind his principal, agent must not only name principal, but must express by some form of words that writing is act of principal). Where, as here, two signature lines were available, one in which Vlach could have signed in a representative capacity, and another in which he could sign in his individual capacity, and he chose to sign the latter, he is bound individually.

[3,4] Vlach argues that testimony contained in his deposition and affidavit offered into evidence at the summary judgment hearing establish that he did not intend to bind himself personally, but, rather, he only intended to enter into

the shareholder agreement as representative of Victory Lake. However, neither party contends that the shareholder agreement is ambiguous, and extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous. See *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015). When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Id*. Because no one contends that the shareholder agreement is ambiguous, nor do we find it to be ambiguous, we do not consider parol evidence such as Vlach's deposition or affidavit to determine the meaning of the contract.

[5] The Nebraska Supreme Court has stated that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence. See *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014). Here, Vlach resided at Summer Haven Lake and served on Summer Haven's board of directors. The bylaws specifically provide that the board is to be composed of shareholders. There is no indication that Vlach served on the board in his representative capacity as president of Victory Lake or that his residency there was in any way tied to his corporate position.

After reviewing the evidence, we find no error in the court's conclusion that Vlach executed the shareholder agreement in his individual capacity. Accordingly, we find no merit to Vlach's argument that evidence was lacking to support the district court's decision that he personally bound himself to the terms and conditions of the shareholder agreement.

Concluding that Vlach was personally bound under the shareholder agreement, the district court denied Vlach's motion for summary judgment, finding that material issues of fact remained which could not be resolved by summary judgment. Vlach does not challenge this conclusion on appeal; rather, his argument is based on his claim that he was not personally bound under the shareholder agreement. Having rejected that

argument, we affirm the denial of Vlach's motion for summary judgment.

On cross-appeal, Summer Haven contends that the district court erred in dismissing the claims against Victory Lake, because Victory Lake and Vlach were one and the same. In its amended complaint, Summer Haven alleged that Victory Lake was the alter ego of Vlach and that Vlach used Victory Lake "merely as an instrumentality in conducting his own personal business." Thus, Summer Haven asserts that the claims against the corporation should not have been dismissed. We do not agree.

[6,7] Victory Lake is a Nebraska corporation, and a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears. See *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). However, in equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice. *Id*. Among the factors which are relevant in determining to disregard the corporate entity are diversion by the shareholder or shareholders of corporate funds or assets to their own or improper uses and the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity. *Id*.

There was no evidence presented in the case at hand to establish that Victory Lake was a mere alter ego of Vlach. There was also no evidence presented that Vlach violated the rules and regulations violations while acting in his capacity as president of Victory Lake. Summer Haven's assigned error as to the dismissal of the claims against Victory Lake is based solely upon its position that Victory Lake is the alter ego of Vlach. Having rejected this argument, we affirm the district court's decision dismissing the claims against Victory Lake.

*State Boat Act.*

Vlach next argues that Summer Haven lacked the authority to enact and enforce its own rules and regulations, because the Act controls and governs conduct on the lake. We agree that the Act controls and governs Summer Haven Lake; however, we conclude that Summer Haven has the authority to enact and enforce its own administrative rules and regulations provided they do not conflict with the Act or provisions of the Nebraska Administrative Code enacted by the Game and Parks Commission.

[8,9] The Act was enacted to promote safety for persons and property in and connected with the use, operation, and equipment of vessels and to promote uniformity of laws relating thereto. § 37-1201. The Act applies to any waters within the territorial limits of Nebraska. § 37-1206.

[10,11] The provisions of the Act and of other applicable laws govern the operation, equipment, numbering, and all other matters relating thereto whenever any vessel shall be operated on the waters of Nebraska or when any activity regulated by the Act shall take place thereon. § 37-1264. The Act permits the adoption of any ordinance or local law relating to operation and equipment of vessels so long as the provisions of which are and continue to be identical to the provisions of the Act or rules or regulations issued thereunder. § 37-1264.

[12-14] In addition to this restriction, the Act specifically authorizes the Game and Parks Commission to make special rules and regulations with reference to the operation of vessels on any specific water or waters within the territorial limits of Nebraska. See § 37-1266. Pursuant to this authority, the Game and Parks Commission prescribed certain boating regulations contained in title 163, chapter 3, of the Nebraska Administrative Code. Among these regulations are special rules and regulations for nonpublic lake associations. See 163 Neb. Admin. Code, ch. 3, § 015 (2006). These special rules and regulations govern operation of vessels, including waterskiing and other related activities, on waters administratively

controlled by nonpublic lake associations. 163 Neb. Admin. Code, ch. 3, § 015.01 (2006). A nonpublic lake association is defined as an organization of lakeside residents with administrative control over nonpublic waters of this state. § 015.01A1. Included in the rules for nonpublic lake associations are specific rules prescribed for Summer Haven Lake. See 163 Neb. Admin. Code, ch. 3, § 015.020 (2006). There are separate rules which govern operation of vessels on waters administratively controlled by subdivisions of this state. See 163 Neb. Admin. Code, ch. 3, § 016 (2004).

[15,16] Stated another way, the Act grants the Game and Parks Commission the authority to enact special rules and regulations governing boating. Pursuant to this authority, the Game and Parks Commission prescribed rules governing entities such as Summer Haven Lake, which it recognized are administratively controlled by their lakeside residents. In other words, the Game and Parks Commission recognizes that the shareholders of Summer Haven have administrative control over their lake. Therefore, the shareholders have the authority to enact and enforce their own rules and regulations, provided the rules do not conflict with the terms of the Act or the Nebraska Administrative Code. And because neither the Act nor the Game and Parks Commission's rules and regulations addresses hours of operation for pontoon boats or boat size, Summer Haven's rules and regulations do not conflict. Therefore, Summer Haven is not prohibited from requiring that its shareholders abide by additional rules and regulations so long as the rules and regulations do not violate public policy or conflict with state law. See, *Devney v. Devney*, 295 Neb. 15, 886 N.W.2d 61 (2016) (any contract which is clearly contrary to public policy is void); *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004) (party cannot, by contractual agreement with another party, obtain power to do something that state law forbids).

Vlach argues that not only may Summer Haven's rules and regulations not conflict with the Act, they must be identical

to the provisions of the Act. We agree that the Act requires that any ordinance or local law adopted under the Act be identical to the provisions of the Act or rules or regulations issued thereunder. See § 37-1264. However, Summer Haven's rules are not ordinances or local laws, and they therefore do not fall under this requirement.

[17] Vlach also argues that in order to enact its own rules, Summer Haven was first required to obtain permission from the Game and Parks Commission. But the Act requires only such permission from subdivisions of the state. Any subdivision of this state may at any time make formal application to the Game and Parks Commission for special rules and regulations with reference to the operation of vessels on any waters within its territorial limits and shall set forth therein the reasons which make such special rules or regulations necessary or appropriate. § 37-1265. Under the boating regulations of the Nebraska Administrative Code, however, Summer Haven is not a subdivision of the state but is a nonpublic lake association. In addition, the Nebraska Administrative Code recognizes that lake associations, such as Summer Haven, have administrative control over their own waters. As such, Summer Haven was not required to obtain permission before enacting its own rules. We therefore find that Summer Haven has the authority to enact and enforce its own administrative rules governing conduct on its lake.

*Rules Violations.*

Vlach contends that the district court erred in determining that he violated Summer Haven's rules and regulations. And he claims that because evidence of any rules violations was lacking, the extraordinary remedy of issuing an injunction was erroneous. We find no merit to these arguments.

In an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of

the conclusion reached by the trial court. *ConAgra Foods v. Zimmerman*, 288 Neb. 81, 846 N.W.2d 223 (2014).

In his deposition, Vlach admitted that on or around August 6, 2012, he operated a pontoon boat on Summer Haven Lake before 8 p.m. In addition, the president of the Summer Haven board of directors at the time of the violations testified that at a board of directors' meeting on August 6, Vlach acknowledged that he committed the violations he was charged with committing—operating a pontoon boat before 8 p.m. and having a boat that exceeded the maximum size limitation at his shore station. Moreover, meeting minutes from a board of directors' meeting held September 23 indicate that Vlach self-reported the violation of hours of operating a pontoon boat. Accordingly, we hold that the evidence was sufficient to conclude that Vlach committed the violations with which he was charged. Although we note that the court's order of April 22, 2016, states that "Vlach operated a motor boat on the lake which exceeded the length restrictions of the Rules and Regulations," it is clear from the record that the charged violation was for having a boat that exceeded the size limitation in Vlach's shore station. We find no prejudicial error in the court's statement because either scenario is a violation of Summer Haven's rules.

[18-20] The question then becomes whether an injunction was the proper remedy. An injunction is an extraordinary remedy, and it ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *ConAgra Foods v. Zimmerman, supra*. The party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief. *Id*. A mandatory injunction is an appropriate remedy for a breach of a restrictive covenant. *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 434 N.W.2d 703 (1989).

Vlach argues that the extraordinary remedy of an injunction was not warranted by the facts of the case because the

record does not support a finding that he was personally bound by Summer Haven's rules or that he violated the rules. Having rejected those arguments, we conclude that entering an injunction enjoining Vlach from further violations of Summer Haven's rules was not in error. Not only did the evidence support a finding that Vlach violated the rules in August 2012, but the undisputed evidence establishes that he continued to operate a boat during the 120-day suspension period imposed by Summer Haven's board of directors. And when initially confronted with his violations, Vlach's defense was his belief that Summer Haven lacked the authority to enact and enforce its rules. Thus, Summer Haven was left with little choice other than legal proceedings to force Vlach's compliance with its rules. Accordingly, we conclude that the district court did not err in granting Summer Haven's requested relief in the form of an injunction.

*Vlach's Counterclaim and Third-Party Complaint.*

Vlach asserts that the district court erred in dismissing his counterclaim and third-party complaint. We disagree.

We first observe that Vlach notes the "irregular proceedings" in which the motion to dismiss was granted. Brief for appellant at 45. The district court initially denied the motion to dismiss from the bench and in a subsequent written order dated February 18, 2015. Thereafter, the court held a hearing on a pending motion for summary judgment, and in its order denying summary judgment dated July 31, 2015, the court reversed its previous decision and granted Summer Haven's motion to dismiss the counterclaim and third-party complaint, ruling that the complaint failed to state a claim for relief. Although Vlach does not specifically challenge the court's authority to reverse its ruling on its own motion, we recognize that the court does have the power to do so. See, *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013) (in civil cases, court of general jurisdiction has inherent

power to vacate or modify its own judgment at any time during term in which court issued it); *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987) (no abuse of discretion in trial court acting sua sponte to correct earlier order which court determined was conclusively shown to be incorrect).

[21] The question then becomes whether the district court erred in granting the motion to dismiss. Vlach argues that he should have been permitted to join the individual directors as third-party defendants because they knew or should have known that the institution of legal proceedings against Vlach and Victory Lake exceeded their corporate authority and permitting commencement of the suit constituted a breach of trust and fiduciary obligations owed by the directors to the shareholders. As we determined above, however, the decision to grant Summer Haven's request for injunction and enjoin Vlach from further violations of Summer Haven's rules as well as upholding the 120-day suspension is supported by the evidence. We therefore reject Vlach's claim that the directors breached the duty owed to the shareholders by commencing the present action. We note that Vlach does not specifically argue it was error to dismiss his counterclaim, and we therefore do not address that issue. See *Mock v. Neumeister*, 296 Neb. 376, 892 N.W.2d 569 (2017) (to be considered by appellate court, error must be both specifically assigned and specifically argued in brief of party asserting error). Consequently, we conclude that the district court did not err in dismissing Vlach's counterclaim and third-party complaint.

*Attorney Fees Award.*

Finally, Vlach asserts that the district court erred in awarding attorney fees to Summer Haven, and on cross-appeal, Summer Haven contends that the fees award should have been $16,600 rather than $5,000. We find no abuse of discretion in the fees awarded.

[22,23] Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *SBC v. Cutler*, 23 Neb. App. 939, 879 N.W.2d 45 (2016). Customarily, attorney fees and costs are awarded only to prevailing parties, or assessed against those who file frivolous suits. *Id*.

[24] Here, Summer Haven based its request for attorney fees on Neb. Rev. Stat. § 25-824(2) (Reissue 2016), which provides:

> Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

Summer Haven's motion for attorney fees specifically alleged that an attorney fees award was appropriate because Vlach's defense was frivolous and because his refusal to admit certain matters in his deposition and discovery responses necessitated proof of such matters.

[25,26] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous. *SBC v. Cutler, supra*. On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion. *Id*.

At the hearing on the request for attorney fees, Summer Haven's counsel testified that although he did not believe Vlach's defense regarding the Act was frivolous, the numerous motions filed by Vlach as well as his attempt to institute a counterclaim and third-party complaint were frivolous. Counsel's position was therefore that Vlach should be required to reimburse Summer Haven for time spent and fees incurred

for the matters that were frivolous in nature. Counsel then testified that he spent 56.4 hours on frivolous matters and that the rate charged to Summer Haven was $200 per hour. Counsel acknowledged, however, that he entered into an agreement with Summer Haven to represent it in this matter for a total sum of $5,000.

On appeal, Vlach argues that his defense to Summer Haven's action was not frivolous. And despite Summer Haven's counsel's concession at the attorney fees hearing, on appeal, Summer Haven asserts that not only was the defense frivolous, but a fees award is appropriate because of the vexatious manner in which the case was defended.

Based on the record before us, we cannot find that the attorney fees award constitutes an abuse of discretion. Summer Haven's counsel admitted that Vlach's defense based on the Act was not frivolous; thus, attorney fees on those grounds would be unwarranted. Summer Haven's counsel testified that he expended time valued at approximately $11,280 on matters he considered frivolous and unrelated to the allegations in the complaint requesting an injunction for Vlach's violations of Summer Haven's rules and regulations. These included responding to multiple motions to dismiss and the counterclaim and third-party complaint. Despite the total sum to which counsel testified, the court elected to order the payment of only $5,000. The court did not set forth the basis upon which it calculated this amount. Although the award is equal to the amount of fees agreed upon by Summer Haven and its counsel, it would be speculation on our part to conclude that the court found it was limited by that agreement. Based upon the evidence presented and the concession that Vlach's defense was in part not frivolous, we find no abuse of discretion in the award of $5,000 for attorney fees.

## CONCLUSION

We conclude that Summer Haven has the authority to enact its own rules and regulations governing conduct on Summer

Haven Lake provided that such rules do not conflict with the Act or regulations issued thereunder. We also conclude that Vlach personally bound himself under the shareholder agreement and that therefore, he was subject to enforcement of Summer Haven's rules. The evidence was sufficient to establish that he violated those rules and that an injunction was an appropriate remedy. Because the evidence does not support a finding that Vlach violated the rules and regulations in his capacity as president of Victory Lake, the claims against it were properly dismissed. Finally, we find no abuse of discretion in the amount of attorney fees awarded to Summer Haven. As a result, we affirm the order of the district court.

Affirmed.

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

# State of Nebraska, appellee, v. Jacob T. Cheloha, appellant.

907 N.W.2d 317

Filed January 9, 2018. No. A-16-925.

1. **Trial: Juries: Evidence.** The trial judge has discretion to allow the jury to reexamine evidence during deliberations.
2. ____: ____: ____. Trial courts have broad discretion in allowing the jury to have unlimited access to properly received exhibits that constitute substantive evidence of the defendant's guilt.
3. **Trial: Juries: Evidence: Appeal and Error.** A trial court's decision to allow a jury during deliberations to rehear or review evidence, whether such evidence is testimonial or nontestimonial, is reviewed by an appellate court for an abuse of discretion.
4. **Trial: Evidence.** Testimonial evidence refers to trial evidence, including live oral examinations, affidavits and depositions in lieu of live testimony, and tapes of examinations conducted prior to the time of trial for use at trial in accordance with procedures provided by law.
5. ____: ____. Heightened standards which require the trial court to weigh the probative value of the testimony against the danger of undue emphasis and allow the court to strictly control the procedures for reviewing tape-recorded evidence apply only to testimonial evidence.
6. **Pretrial Procedure: Trial: Evidence: Appeal and Error.** Where there has been a pretrial ruling regarding the admissibility of evidence, a party must make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review.
7. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
8. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on some other ground not specified at trial.

9. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
10. **Rules of Evidence: Hearsay.** Whether a statement was both taken and given in contemplation of medical diagnosis or treatment is a factual finding made by the trial court in determining the admissibility of the evidence under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016).
11. ____: ____. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.
12. ____: ____. A declarant's out-of-court statement offered for the truth of the matter asserted is inadmissible unless it falls within a definitional exclusion or statutory exception.
13. ____: ____. The hearsay rule does not exclude statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
14. ____: ____. The hearsay exception for statements made for the purpose of medical diagnosis or treatment is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment.
15. **Rules of Evidence: Hearsay: Police Officers and Sheriffs.** A statement is generally considered admissible under the medical purpose hearsay exception if gathered for dual medical and investigatory purposes, and even the declarant's knowledge that law enforcement is observing or listening to the statements does not necessarily preclude admissibility of a statement as being for a medical purpose.
16. **Rules of Evidence: Hearsay.** In applying the hearsay exception for statements made for the purpose of diagnosis or treatment, the fundamental inquiry to determine whether the statement, despite its dual purpose, was made in legitimate and reasonable contemplation of medical diagnosis or treatment, because if the challenged statement has some value in diagnosis or treatment, the patient would still have the requisite motive for providing the type of sincere and reliable information that is important to that diagnosis and treatment.
17. ____: ____. Statements having a dual medical and investigatory purpose are admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment only if the proponent

of the statements demonstrates that (1) the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.

18. ____: ____. Under the hearsay exception for statements made for the purpose of medical diagnosis or treatment, the appropriate state of mind of the declarant may be reasonably inferred from the circumstances.
19. **Criminal Law: Intent: Intoxication.** Voluntary intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense.
20. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
21. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
22. **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.
23. **Sexual Assault: Words and Phrases.** A person commits third degree sexual assault of a child if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older and does not cause serious personal injury to the victim.
24. ____: ____. Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts and includes only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.
25. **Sexual Assault: Proof.** Whether there is sufficient evidence to prove sexual arousal or gratification (which, by necessity, must generally be inferred from the surrounding circumstances), is extraordinarily fact driven.
26. ____: ____. The relevant question in determining whether there is sufficient evidence to prove sexual arousal or gratification for purposes of third degree sexual assault 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.
27. **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.

28. **Trial: Prosecuting Attorneys.** A prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant, and a lawyer shall not, in trial, state a personal opinion as to the credibility of a witness or the guilt or innocence of an accused.
29. ____: ____. When a prosecutor's comments rest on reasonably drawn inferences from the evidence, the prosecutor is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense.
30. ____: ____. In cases where the prosecutor comments on the theory of defense, the defendant's veracity, or the defendant's guilt, the prosecutor crosses the line into misconduct only if the prosecutor's comments are expressions of the prosecutor's personal beliefs rather than a summation of the evidence.
31. **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.
32. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
33. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Thomas M. Wakeley, and Nicholas Yost, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Riedmann, Judge.

## INTRODUCTION

Jacob T. Cheloha appeals his convictions in the district court for Douglas County of two counts of third degree sexual assault of a child. We find no merit to the arguments raised on appeal and therefore affirm the convictions and sentences.

## BACKGROUND

In May 2015, R.C., then age 12, disclosed to her school counselor that her uncle, Cheloha, had touched her buttocks on multiple occasions while she slept. Cheloha was ultimately charged with two counts of third degree sexual assault of a child. Following a jury trial, he was found guilty of both counts and sentenced to 2 to 2 years' incarceration on count I and 3 years' probation on count II. We will provide additional facts as necessary in our analysis of the assigned errors below. Cheloha timely appeals his convictions and sentences.

## ASSIGNMENTS OF ERROR

Cheloha assigns, renumbered and restated, that the district court erred in (1) failing to exercise discretion in allowing the jury access to the video of his police interrogation during deliberations, (2) denying his motion to suppress, (3) allowing a sexual assault nurse examiner to testify, (4) submitting a jury instruction on intoxication, (5) finding sufficient evidence to sustain the guilty verdicts, (6) failing to find prosecutorial misconduct or granting a mistrial on that basis, and (7) imposing excessive sentences.

## ANALYSIS

*Allowing Jury Access to Video.*

During deliberations, the jury asked the court for access to a video recording of the police interrogation of Cheloha, which had been received into evidence and played during the trial. After discussing the matter with the parties and over Cheloha's objection, the court allowed the jury unrestricted

access to the video. On appeal, Cheloha argues that the district court erred in doing so, because the trial court failed to exercise its discretion. We find no abuse of discretion in allowing the jury access to the video during deliberations.

[1-3] Under Nebraska case law, the trial judge has discretion to allow the jury to reexamine evidence during deliberations. *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013). Under this rule, trial courts have broad discretion in allowing the jury to have unlimited access to properly received exhibits that constitute substantive evidence of the defendant's guilt. *Id*. A trial court's decision to allow a jury during deliberations to rehear or review evidence, whether such evidence is testimonial or nontestimonial, is reviewed by an appellate court for an abuse of discretion. *State v. Vandever*, 287 Neb. 807, 844 N.W.2d 783 (2014).

[4] In the present case, the district court characterized the video as substantive, nontestimonial evidence, and we agree. As explained in *State v. Vandever, supra*, testimonial evidence refers to trial evidence, including live oral examinations, affidavits and depositions in lieu of live testimony, and tapes of examinations conducted prior to the time of trial for use at trial in accordance with procedures provided by law. Here, although verbal in nature, the recording was not prepared as or admitted into evidence as a substitute for live testimony at trial. Therefore, the trial court had broad discretion in allowing the jury to have unlimited access to the exhibit during deliberations.

Cheloha argues that based upon the comments of the court, it appears as though the trial judge mistakenly believed the law required that he allow the jury access to the video. The court specifically stated that "[the video] is substantive evidence. Therefore, although I — whether I say I agree with you or not, I feel like I'm controlled by rules of law and I think I have to allow [the jury] to review it." In response to a question from defense counsel as to whether the decision was discretionary, the court further stated:

> I understand. That's — you may find different rulings from different judges, but I consider it to be — my personal opinion may be different than what I'm saying on the record, but my understanding of the state of the law is that [the jury is] allowed to review it, so I'm going to permit that.

While the court may have been mistaken in thinking that it was required to allow the jury to review the video, we find no abuse of discretion in its decision allowing the jury to do so. At oral argument, Cheloha argued that the video in the instant case was dangerously close to being testimonial and that thus, there was a risk of the jury impermissibly placing undue emphasis on the video compared to other evidence. Cheloha also argued that the present case is distinguishable from *State v. Vandever, supra*, because the video here was much longer than the 8-minute video in *Vandever*; there was no physical evidence to corroborate R.C.'s claims like there was in *Vandever*; the tone of the conversation here was more akin to an interrogation; and the jury in the present case was allowed unfettered access to the video, which allowed it to view the video an unlimited number of times and closely scrutinize Cheloha's statements and body language.

[5] Heightened standards which require the trial court to weigh the probative value of the testimony against the danger of undue emphasis and allow the court to strictly control the procedures for reviewing tape-recorded evidence apply only to testimonial evidence, however. See *id.* And it is undisputed that the video here was substantive, nontestimonial evidence. Thus, the court was not required to weigh the danger of the jury placing undue emphasis on the video before allowing access to it.

In addition, we find no basis by which to distinguish the instant case from *State v. Vandever*, 287 Neb. 807, 844 N.W.2d 783 (2014). We acknowledge the differences Cheloha points out, but find no abuse of discretion in allowing the jury to review the video. Trial courts have broad discretion in allowing the jury *unlimited* access to properly received exhibits that

constitute substantive evidence. *Id*. Thus, the fact that the court allowed the video into the jury room without limitations was within the court's discretion. Accordingly, we find no merit to this assignment of error.

*Motion to Suppress.*

Cheloha argues that the district court erred in denying his motion to suppress statements he made during his recorded interview, because they were unconstitutionally coerced. We conclude that this issue has not been preserved for appellate review.

[6-8] Where there has been a pretrial ruling regarding the admissibility of evidence, a party must make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review. *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016). The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal. *Id*. Furthermore, an objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on some other ground not specified at trial. *Id*.

In the instant case, when the video recording of the interview was offered into evidence, defense counsel did not object to the evidence on the constitutional grounds raised in the motion to suppress and did not renew the motion to suppress at that time; rather, defense counsel instead objected on hearsay grounds, which the court overruled. Then, at the close of all evidence, Cheloha renewed his motion to suppress. Thus, because he failed to timely renew his constitutional objection at trial, Cheloha waived his assignment of error concerning his motion to suppress.

*Admissibility of Cleaver's Testimony.*

Cheloha argues that the district court erred in allowing Sarah Cleaver, a pediatric nurse practitioner who is also trained

as a sexual assault nurse examiner, to testify at trial about the statements R.C. made to her. Cheloha claims that Cleaver's testimony was hearsay not within the medical diagnosis and treatment exception. See Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016). We disagree.

[9,10] Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds. *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017). Whether a statement was both taken and given in contemplation of medical diagnosis or treatment is a factual finding made by the trial court in determining the admissibility of the evidence under rule 803(3). *State v. Jedlicka, supra*.

[11,12] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2016). See, also, *State v. Jedlicka, supra*. A declarant's out-of-court statement offered for the truth of the matter asserted is inadmissible unless it falls within a definitional exclusion or statutory exception. See, Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2016); *State v. Jedlicka, supra*.

[13,14] Rule 803(3) provides that the hearsay rule does not exclude statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. Rule 803(3) is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment. *State v. Jedlicka, supra*.

Cheloha claims that in order to fall within the rule 803(3) exception to the hearsay rule, the statement must be made for

the primary purpose of treatment, and not forensic or investigatory purposes. He asserts that Cleaver's examination of R.C. was forensic in nature and for the purpose of gathering evidence rather than for the purpose of medical treatment. He notes that the examination was scheduled "with the hope of [R.C.] disclosing additional [abuse]" and that therefore, the primary purpose of the examination was for investigatory purposes, making it outside the realm of the rule 803(3) exception. Brief for appellant at 22.

[15,16] However, a statement is generally considered admissible under the medical purpose hearsay exception if gathered for dual medical and investigatory purposes. *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012). Even the declarant's knowledge that law enforcement is observing or listening to the statements does not necessarily preclude admissibility of a statement as being for a medical purpose. *Id*. Further, the predominant purpose of the statement is not the real question in determining admissibility. *Id*. The fundamental inquiry is whether the statement, despite its dual purpose, was made in legitimate and reasonable contemplation of medical diagnosis or treatment, because if the challenged statement has some value in diagnosis or treatment, the patient would still have the requisite motive for providing the type of sincere and reliable information that is important to that diagnosis and treatment. *Id*.

[17,18] Statements having a dual medical and investigatory purpose are admissible under rule 803(3) only if the proponent of the statements demonstrates that (1) the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional. *State v. Vigil, supra*. Under rule 803(3), there need not be direct evidence of the declarant's state of mind; instead, the appropriate state of mind of the declarant may be reasonably inferred from the

surrounding circumstances. *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017).

In the present case, Cleaver is a pediatric nurse practitioner who is also trained as a sexual assault nurse examiner. R.C. told her grandmother about some symptoms she was experiencing and about which she was worried. The concerns were relayed to the Child Protective Services worker, who requested that Cleaver examine R.C. Cleaver's examination of R.C. was conducted 2 days after R.C. disclosed the abuse. At the outset of the examination, Cleaver explained to R.C. that she was a nurse practitioner and was going to give R.C. a checkup to make sure that she was healthy. R.C. voiced particular symptoms she was experiencing, which Cleaver testified are important for her to know in order to help guide the examination and so that she can make a diagnosis and formulate a treatment plan including any appropriate testing or medication.

Over Cheloha's hearsay objection, Cleaver testified that R.C. told her she had some intermittent burning with urination and vaginal discharge. Cleaver explained to R.C. that in order to do the appropriate testing, she needed to know more about the sexual abuse. R.C. told her that beginning in the summer of 2014 and continuing until 4 days prior to the examination, while she was sleeping, Cheloha would touch her buttocks with his hand and that most of the time the touching occurred over her clothes. Cleaver explained that she could conduct a vaginal examination and/or test for sexually transmitted diseases. R.C. declined the vaginal examination, but Cleaver completed a general medical examination. Disease testing was also completed, and the results were negative. Despite Cheloha's claim, Cleaver testified that the examination she performed on R.C. was not a forensic examination.

Based on the foregoing, we conclude that R.C.'s statements to Cleaver were made for the purpose of medical diagnosis and treatment and that thus, they fall within the medical exception of the hearsay rule. Accordingly, the trial court did

not err in allowing Cleaver to testify about R.C.'s statements regarding the assault.

*Jury Instruction on Intoxication.*

Cheloha asserts that the district court erred in instructing the jury that intoxication is not a defense to the crime charged. He claims the instruction was erroneous because he was charged under a crime requiring specific intent, and under common law, intoxication may be considered to negate the specific intent of a crime. We find no merit to this argument.

[19] Whether intoxication is a defense under common law is irrelevant, because in 2011, the Legislature enacted a statute that provides that voluntary intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense. Neb. Rev. Stat. § 29-122 (Reissue 2016) specifically states:

> A person who is intoxicated is criminally responsible for his or her conduct. Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense unless the defendant proves, by clear and convincing evidence, that he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.

The instruction given to the jury in the present case mirrored the language of § 29-122.

[20-22] Whether jury instructions given by a trial court are correct is a question of law. *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016). When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court. *Id.* In an appeal based on a claim of an erroneous jury instruction, the appellant has

the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016).

Here, it is undisputed that any intoxication on the part of Cheloha was voluntary. Therefore, under § 29-122, such intoxication does not negate the intent required to commit third degree sexual assault of a child. Accordingly, the court did not err in instructing the jury that intoxication is not a valid defense. We therefore reject Cheloha's argument to the contrary.

*Sufficiency of Evidence.*

Cheloha argues that the evidence was insufficient to sustain the verdicts. We disagree.

[23,24] The information alleged that Cheloha committed third degree sexual assault of a child between May 1, 2014, and May 15, 2015, and again on or about May 16, 2015. A person commits third degree sexual assault of a child if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older and does not cause serious personal injury to the victim. See Neb. Rev. Stat. § 28-320.01(1) and (3) (Reissue 2016). Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Neb. Rev. Stat. § 28-318(5) (Reissue 2016). Sexual contact includes "only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." *Id.*

Here, the parties' ages and the lack of injury to R.C. are not in dispute. R.C. testified that Cheloha intentionally touched her buttocks, conduct which meets the definition of sexual contact. The question then becomes whether the evidence was sufficient to prove that the touching was done for the purpose of sexual arousal or gratification.

[25,26] Whether there is sufficient evidence to prove sexual arousal or gratification (which, by necessity, must generally be inferred from the surrounding circumstances) is extraordinarily fact driven. *State v. Brauer*, 287 Neb. 81, 841 N.W.2d 201 (2013). 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. *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014). The Supreme Court has previously affirmed a conviction for third degree sexual assault of a child where the assault consisted of one touch over the clothes, a decision based in large part on our deferential standard of review. See *State v. Brauer, supra*.

The present case consists of more instances of touching coupled with additional circumstances supporting the jury's decision. Here, Cheloha and R.C. lived with the woman who is both Cheloha's mother and R.C.'s grandmother. Cheloha is R.C.'s uncle and was "in charge" when her grandmother was ill. Cheloha was aware of R.C.'s history of being in foster care and knew that she had had a "tough" upbringing. The touching occurred at night while R.C. and her grandmother were sleeping. R.C. explained that Cheloha would move his hand around her buttocks and sometimes lightly squeeze. R.C. testified that during the summer of 2014, Cheloha touched her inappropriately on more than three occasions. She explained that the inappropriate touching stopped for a while but started again in May 2015. On Friday, May 15, 2015, R.C. told her school counselor what Cheloha was doing to her. The following Monday, R.C. again reported Cheloha's behavior to her school counselor and explained that Cheloha had touched her again the previous weekend.

Cheloha admitted that he sometimes watched pornography at the house. After Cheloha touched R.C. on or around May 16, 2015, she said he went back to his bedroom where she observed him watching a video on his cell phone from which she could hear moaning. A jury could reasonably infer that

Cheloha was watching a pornographic video. Viewing all of the facts presented in the present case in the light most favorable to the prosecution, a rational jury could conclude that an adult touching and squeezing the private parts of a vulnerable young girl on multiple occasions and subsequently watching pornography was done for the purpose of sexual arousal or gratification. Accordingly, we conclude that the evidence was sufficient to sustain the guilty verdicts.

*Prosecutorial Misconduct.*

Cheloha assigns that the district court erred in failing to find prosecutorial misconduct and failing to grant a mistrial on that basis. We find no merit to this argument.

During closing arguments, Cheloha's counsel questioned why, after the inappropriate touching had allegedly been ongoing for more than a year, R.C. chose that particular day in May 2015 to report the abuse to her school counselor. He observed that R.C. had recently begun spending time with her biological mother, with whom she had an estranged relationship, and noted that after R.C. reported Cheloha's actions, R.C. had been removed from her grandparents' house and was living closer to her mother. Thus, he inferred that R.C. and her mother made up allegations of sexual assault against Cheloha so that R.C. could be closer to her mother. During the State's rebuttal closing argument, the prosecutor responded to Cheloha's inference, observing that R.C. had disclosed the abuse to her grandmother on at least one occasion in 2014 and stating:

> And if mom is the one feeding this to her, don't you think mom's the one who would have called the police, shouting at the rooftops, [m]y daughter's being molested? Don't you think she'd be in here crying her eyes out for all of you to see the show she wants to put on about her daughter?

Cheloha objected to the comments and moved for mistrial, arguing that the State's reference to R.C.'s mother and why

she did not testify was improper because the State could have called her as a witness. The court denied the motion for mistrial, finding that even if the comment was improper, it constituted harmless error.

[27] 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. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[28-30] A prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant, and a lawyer shall not, in trial, state a personal opinion as to the credibility of a witness or the guilt or innocence of an accused. See *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016). But when a prosecutor's comments rest on reasonably drawn inferences from the evidence, the prosecutor is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. *Id*. Thus, in cases where the prosecutor comments on the theory of defense, the defendant's veracity, or the defendant's guilt, the prosecutor crosses the line into misconduct only if the prosecutor's comments are expressions of the prosecutor's personal beliefs rather than a summation of the evidence. *Id*.

Here, we conclude that the prosecutor was commenting on the defense's theory that R.C. and her mother colluded to falsify the allegations against Cheloha and arguing that the theory was illogical and not supported by the evidence. The prosecutor argued to the jury that if R.C.'s mother had participated in making up the sexual abuse, there would have been evidence that she called the police or otherwise reported the ongoing abuse, and she likely would have testified at trial regarding R.C.'s disclosures to her, but there was no such evidence. We disagree with Cheloha's assertion that the prosecutor's comments focused on why R.C.'s mother did not testify at trial; rather, the comments focused on the lack of evidence

supporting the defense's theory of collusion between R.C. and her mother. We therefore find that the comments did not constitute misconduct. Accordingly, the district court did not abuse its discretion in denying Cheloha's motion for mistrial.

*Excessive Sentences.*

Cheloha argues that the sentences imposed by the district court are excessive. We find no abuse of discretion in the sentences imposed.

Third degree sexual assault of a child is a Class IIIA felony. § 28-320.01. At the time of Cheloha's offenses, a Class IIIA felony carried a punishment of up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014). Thus, Cheloha's sentences of 2 to 2 years' incarceration on count I and 3 years' probation on count II fall within the statutory limits.

[31-33] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id*. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *Id*.

At sentencing, the court determined that a period of incarceration was warranted for the benefit of society and in considering the impact Cheloha's actions had on R.C. and the rest of the family. Thus, the court imposed a sentence of incarceration on count I. Additionally, the court found a period

of probation was appropriate for count II so that Cheloha could continue to be monitored and required to abide by certain conditions.

As the State recognized at sentencing, Cheloha took advantage of his young, vulnerable niece, for whom he was a parental figure, over a long period of time. R.C.'s mother stated at sentencing that as a result of the abuse, R.C. now "cring[es] whenever someone gives her a hug or kiss on the cheek" and she will be "in therapy for . . . years" to address her trauma. Based on the record before us, we cannot find that the sentences imposed constitute an abuse of discretion.

## CONCLUSION

We find no merit to the errors Cheloha raised on appeal. We therefore affirm his convictions and sentences.

Affirmed.

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

# In re Interest of Lizabella R., a child under 18 years of age. State of Nebraska, appellee, v. Elizabeth L., appellant.

907 N.W.2d 745

Filed January 9, 2018. No. A-17-401.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches conclusions independently of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, 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. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
4. ____. Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
5. **Parental Rights: Proof.** Parental rights may be terminated pursuant to a showing of best interests of the child and by establishing, through clear and convincing evidence, one of the 11 statutory bases for termination under Neb. Rev. Stat. § 43-292 (Reissue 2016).
6. **Evidence: Words and Phrases.** Clear and convincing evidence is the amount of evidence that produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
7. **Parental Rights.** Neb. Rev. Stat. § 43-292(2) (Reissue 2016) provides for termination when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.
8. ____. A parent's incarceration, standing alone, does not provide a ground for termination of parental rights.
9. **Parental Rights: Abandonment.** In a termination of parental rights case, parental incarceration may properly be considered along with other

factors in determining whether parental rights should be terminated based on neglect.

10. **Parental Rights.** Although incarceration itself may be involuntary, the underlying criminal conduct that resulted in incarceration is voluntary.
11. ____. Neb. Rev. Stat. § 43-292(6) (Reissue 2016) provides for termination when, following a determination that a juvenile is one as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), reasonable efforts to preserve and reunify the family under the direction of the court have failed to correct the conditions leading to the determination.
12. ____. A court order to complete relinquishment counseling is, by its very nature, not an effort intended to preserve and reunify the family.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it.
14. **Parental Rights: Proof.** Neb. Rev. Stat. § 43-292(7) (Reissue 2016) states that the statutory grounds for termination are met if the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months.
15. ____: ____. In addition to proving a statutory ground, the State must also show that termination of parental rights is in the best interests of the child.
16. **Constitutional Law: Parental Rights.** A parent's right to raise his or her child is constitutionally protected.
17. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of the child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.
18. **Constitutional Law: Parental Rights: Words and Phrases.** In the context of the constitutionally protected relationship between a parent and a child, parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being.
19. **Parent and Child.** The law does not require perfection of a parent; rather, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.

Appeal from the Separate Juvenile Court of Douglas County: Elizabeth Crnkovich, Judge. Reversed and remanded for further proceedings.

Maureen K. Monahan for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, and Laura Elise Lemoine, Senior Certified Law Student, for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Elizabeth L. appeals from an order of the separate juvenile court of Douglas County terminating her parental rights. For the reasons that follow, we reverse the order and remand the cause for further proceedings.

## II. BACKGROUND

Elizabeth is the biological mother of Lizabella R., born in January 2015, and Jose R., born in February 2016. The children have different biological fathers. The juvenile court terminated the parental rights of Lizabella's biological father, and Jose's biological father has indicated that he would like to relinquish his parental rights. This appeal, however, involves only the termination of Elizabeth's parental rights to the two children.

In August 2015, the State of Nebraska filed a petition to adjudicate Lizabella pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) based upon the fault or habits of Elizabeth. The State subsequently filed an amended petition adding a second count, which alleged improper support through no fault of Elizabeth. The petitions arose from an incident wherein Lizabella, who was in the care of Elizabeth's sister and her boyfriend, was found "unresponsive . . . unclean, and with a yeast infection on her skin." At the time of this incident, Elizabeth was incarcerated on federal drug charges. The juvenile court granted an ex parte order for immediate temporary custody and placed Lizabella in foster care. Lizabella has remained in foster care since that time.

Elizabeth was released from her pretrial incarceration in November 2015 on the condition that she enter residential

treatment. She remained out of custody until trial on her federal charges in late May 2016.

Jose was born in February 2016, while Elizabeth was out of custody. The State did not file for his removal immediately following his birth.

The juvenile court adjudicated Lizabella in April 2016 and, the following month, entered a dispositional order in which it ordered Elizabeth to have unsupervised visitation that could transition to overnight visits, to abide by the rules and regulations of her federal probation, and to maintain safe, stable housing and a source of legal income.

In late May 2016, after entry of the dispositional order, Elizabeth was found guilty of two federal drug charges and was thereafter sentenced to 10 years' imprisonment on each of two convictions, with the sentences to be served concurrently. She was remanded into custody at the end of May.

Following Elizabeth's incarceration, the State filed a second supplemental petition, in June 2016, to adjudicate Jose pursuant to § 43-247(3)(a) based upon the fault or habits of Elizabeth and Jose's biological father. The juvenile court granted an ex parte order for immediate temporary custody and placed Jose in foster care.

The juvenile court adjudicated Jose in September 2016. Elizabeth was subsequently ordered to complete relinquishment counseling as to both children. In November, the State filed a motion to terminate Elizabeth's parental rights to the children, and trial was held on March 8, 2017.

At trial, the State presented testimony from Allison McElderry and Kati Caniglia, each of whom had worked with Elizabeth and her children as a family permanency specialist (FPS). McElderry, the FPS who worked with the family from the inception of the case through August 2016, testified that Elizabeth was originally incarcerated on her federal charges but was released from jail in early November 2015 to enter residential treatment. McElderry stated that Elizabeth successfully completed that program. She also testified as to the

voluntary services that Elizabeth participated in while out of custody, which included working with her family support worker, early development network services, and a children's respite care center; working with Lizabella's doctor's regarding her special needs; and receiving support from her licensed alcohol and drug counselor and therapist through her residential treatment facility.

In a court memorandum from November 2015, McElderry recommended a number of services for Elizabeth. McElderry testified that Lizabella is blind, immobile, uses a "G-tube" for feeding, has permanent brain damage, and will be a paraplegic for the rest of her life. As a result of these conditions, one of her recommendations was for Elizabeth to participate in training to learn how to provide for Lizabella's special needs. McElderry's other recommendations for Elizabeth included participating in supervised visitation, following the recommendations through the residential program, participating in drug testing, completing a parenting assessment, and obtaining appropriate housing and employment. At trial, McElderry testified that Elizabeth completed each of these recommendations other than the parenting assessment, which she did not set up for Elizabeth. McElderry further testified that Elizabeth never had a positive drug test, she consistently participated in visitation with Lizabella three to five times a week for 3 hours at a time, and she never missed a visit.

After Jose was born in February 2016, McElderry did not file an affidavit for his removal because she believed that Elizabeth was an appropriate care provider for him at the time and that Elizabeth had been making progress through the services offered. At the time of Jose's birth, Elizabeth had stable, appropriate housing and was working through a staffing agency. McElderry testified that the only change that later made Elizabeth an inappropriate care provider was the fact that she was incarcerated.

Following Elizabeth's federal convictions, McElderry asked Elizabeth if she had any information regarding her

final sentencing and Elizabeth stated that "she was facing ten years." Due to Lizabella's health conditions, McElderry testified that Lizabella would not be able to travel to visit Elizabeth while incarcerated.

The State also presented the testimony of Caniglia, the FPS who worked with Elizabeth and her children from August 2016 through the time of the termination hearing. Caniglia testified that Elizabeth is currently incarcerated in a federal prison in Minnesota and that although she has not had visitation with either child since her incarceration, she maintains telephone contact with both children. Caniglia further testified that Elizabeth has a "very open relationship with the foster parent[s]." She stated that she believed Elizabeth "had done very well" prior to incarceration and that Elizabeth was a good caretaker when not in custody. However, Caniglia testified that she believed it was in the children's best interests to terminate Elizabeth's parental rights due to the length of time Elizabeth will be incarcerated and the resulting inability to provide them with a safe, stable placement.

The juvenile court found, by clear and convincing evidence, that the State had established the statutory grounds set forth in Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2016). Furthermore, the court concluded that it was in the children's best interests to terminate Elizabeth's parental rights. Elizabeth now appeals.

## III. ASSIGNMENTS OF ERROR

Elizabeth assigns, restated, that the juvenile court erred in (1) finding her children to come within the meaning of § 43-292(2), (2) finding her children to come within the meaning of § 43-292(6), and (3) determining that it would be in the best interests of the children to terminate her parental rights.

## IV. STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches conclusions independently of the

juvenile court's findings. *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017). When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

## V. ANALYSIS

### 1. Jose

Elizabeth assigns that the juvenile court erred in terminating her parental rights to both of her children. However, we find that the analysis for each child differs due to the fact that Lizabella was removed in August 2015 and Jose was not removed until June 2016. Accordingly, we address each child in turn.

[3,4] We note that the juvenile court found that both children came within the meaning of § 43-292(7), which provides for termination when the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months. However, it is clear from the record that Jose had been in an out-of-home placement for approximately 9 months as of the time of the termination hearing. The juvenile court's finding that Jose came within the meaning of § 43-292(7) constitutes plain error. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Id*. Finding that Jose did not come within the meaning of § 43-292(7), we turn to subsections (2) and (6).

#### (a) § 43-292(2)

Elizabeth argues that the juvenile court erred in finding that Jose came within the meaning of § 43-292(2) because she was

found to be an appropriate caretaker for Jose from his birth until she was incarcerated on her federal charges. She claims that her parental rights were terminated solely due to her incarceration and that incarceration alone cannot constitute a ground for termination. We agree.

[5-7] Parental rights may be terminated pursuant to a showing of best interests of the child and by establishing, through clear and convincing evidence, one of the 11 statutory bases for termination under § 43-292. Clear and convincing evidence is the amount of evidence that produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). Section 43-292(2) provides for termination when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.

[8-10] The Nebraska Supreme Court has held that a parent's incarceration, standing alone, does not provide a ground for termination of parental rights. See *In re Interest of Kalie W., supra*. However, in a termination case, parental incarceration may properly be considered along with other factors in determining whether parental rights should be terminated based on neglect. *Id*. Similarly, a parent's inability to perform his or her parental obligations due to imprisonment may likewise be considered. *Id*. Although incarceration itself may be involuntary, the underlying criminal conduct that resulted in incarceration is voluntary. See *id.*

The State argues that Elizabeth's voluntary conduct resulted in her incarceration and has now put her in a position where she is unable to provide for the needs of her children. The State claims that if Elizabeth's rights are not terminated, her children will spend the majority of their lives in foster care awaiting permanency. On this basis, the State argues that it is appropriate to consider her incarceration and 10-year sentence in finding that Jose comes within the meaning of § 43-292(2).

In this case, the State's evidence concentrated on Elizabeth's federal convictions and sentences. The court received into evidence a certified copy of the indictment and judgment in Elizabeth's federal criminal case. The judgment states that Elizabeth was sentenced to 120 months' imprisonment for each of two convictions, with the sentences to be served concurrently.

At the termination hearing, the State presented evidence from each FPS who worked with Elizabeth and her children. That testimony with respect to neglect focused on Elizabeth's incarceration and her subsequent inability to provide for her children. The State presented no additional evidence to prove that Elizabeth neglected either Jose or Lizabella pursuant to § 43-292(2).

The State correctly argues that a parent's incarceration as well as the voluntary conduct that resulted in incarceration may be considered when determining whether that parent has neglected his or her child. However, it is well established that incarceration alone does not provide a sufficient ground for termination. See, *In re Interest of Leland B.*, 19 Neb. App. 17, 797 N.W.2d 282 (2011); *In re Interest of Josiah T.*, 17 Neb. App. 919, 773 N.W.2d 161 (2009). In this case, the State focused solely on Elizabeth's incarceration and her resulting inability to provide for her children while imprisoned. Without other evidence that Elizabeth has neglected Jose or Lizabella, we cannot find that her incarceration alone justifies termination of her parental rights under § 43-292(2).

Each FPS testified that Elizabeth's incarceration was the primary obstacle preventing her from being able to provide for and take care of her children. Caniglia testified that she believed Elizabeth's rights should be terminated based on the length of time Elizabeth will be incarcerated and the resulting inability to provide stable placement for Jose and Lizabella. However, she also testified that Elizabeth was a very good caretaker when not incarcerated. Similarly, McElderry testified that when she was assigned to the case, she did not file for

Jose's removal following his birth in February 2016 because, at that time, Elizabeth was an appropriate care provider for him. She testified that the only change that subsequently made Elizabeth an inappropriate care provider was that "[Elizabeth] was incarcerated." Neither FPS testified to any neglect of the children aside from Elizabeth's inability to provide for them while incarcerated.

While it is undisputed that Elizabeth is currently incarcerated and that she was sentenced to a total term of 10 years' imprisonment, we find nothing in the record indicating how much of that sentence Elizabeth will likely serve before being paroled. McElderry testified that when she asked Elizabeth if she had any information on her final sentencing, Elizabeth indicated only that "she was facing ten years." Given the lack of evidence regarding an expected release date, we cannot say with precision how long Elizabeth will be away from her children. See *In re Interest of Josiah T., supra*.

The State also presented evidence that Elizabeth has shown a desire to maintain contact with her children while incarcerated. Caniglia testified that since Elizabeth has been incarcerated, she has maintained telephone contact with both children and has a "very open" and "very good" relationship with the children's foster parents. Furthermore, Caniglia stated that she would support continued telephone contact pending any appeal of the termination of Elizabeth's parental rights. While it is clear that Elizabeth has not been able to care for and provide for her children since she has been incarcerated, she has shown a continued desire and interest in playing a role in their lives and keeping up to date with their development.

We also note that the State presented no evidence indicating that Elizabeth had previously been incarcerated or had prior involvement with the Department of Health and Human Services. From the record before us, it appears that this family first came to the attention of the department in August 2015 when Lizabella was injured by her aunt's boyfriend while in the care of the aunt during Elizabeth's pretrial incarceration.

There is nothing in the record to indicate that, prior to that incident, Elizabeth had failed to provide Lizabella with necessary care and protection.

We recognize that incarceration has played a role in supporting termination of parental rights. For example, in *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015), the Nebraska Supreme Court upheld the termination of a father's parental rights based, in part, upon his incarceration. However, in *In re Interest of Zanaya W. et al.*, the father admitted the allegations of the petition that he had substantially, continuously, and repeatedly neglected his children; that he refused to give them parental care and treatment; and that termination would be in their best interests. The factual basis presented by the State to support the allegations involved more than the fact that he was incarcerated. According to the Supreme Court, the State also showed that the father committed an additional crime while incarcerated, thus extending his sentence. It also showed that he used marijuana daily while the children were in his custody. The court concluded that these factual bases were sufficient to support the father's admission to the allegation that he had substantially and continuously or repeatedly refused to give the children proper parental care.

While in the present case the State presented evidence of Elizabeth's crimes and the anticipated length of her sentences, it did not present any additional evidence similar to that in *In re Interest of Zanaya W. et al., supra*. We have no evidence that she used drugs while Jose was in her custody, nor do we have any admission by Elizabeth that she neglected and refused to provide parental care to Jose prior to her incarceration.

Upon our de novo review of the record, we find that the State failed to present clear and convincing evidence that Elizabeth has neglected Jose pursuant to § 43-292(2). The State's evidence focused solely on Elizabeth's current incarceration, and a parent's incarceration, standing alone, does not provide a

ground for termination of parental rights. Accordingly, we reverse the juvenile court's order finding that Jose came within the meaning of § 43-292(2).

(b) § 43-292(6)

Elizabeth claims that the juvenile court erred in finding that Jose came within the meaning of § 43-292(6) because she voluntarily participated in a number of services while she was out of custody and the additional services that were ordered postadjudication could not be completed or offered through the juvenile court. We agree.

[11] As stated above, parental rights may be terminated following a showing of best interests and establishing, by clear and convincing evidence, the existence of one of the statutory grounds for termination in § 43-292. Section 43-292(6) provides for termination when, following a determination that a juvenile is one as described in § 43-247(3)(a), reasonable efforts to preserve and reunify the family under the direction of the court have failed to correct the conditions leading to the determination.

In this case, Lizabella was removed in August 2015 but was not adjudicated until April 2016. From the time Elizabeth was released from pretrial custody in November until she was convicted in late May 2016, she underwent a number of voluntary services, including residential treatment. She further participated in services, which included working with her family support worker, early development network services, and a children's respite care center; working with Lizabella's doctors regarding her special needs; and receiving support from her licensed alcohol and drug counselor and therapist through her residential treatment placement.

Elizabeth participated in and completed all of the recommendations made by her FPS, with the exception of a parenting assessment because the FPS failed to set one up. She never tested positive on a drug test and visited her children three to five times a week without missing a visit. By the time Jose was

born in February 2016, Elizabeth had obtained stable, appropriate housing and soon thereafter obtained employment.

Following Elizabeth's incarceration in May 2016, McElderry stated that she was no longer able to provide Elizabeth with services. McElderry testified that she did not request visitation for the children with Elizabeth because it was not clear whether Elizabeth was allowed to have visits and Lizabella's health prohibited her from traveling to visit Elizabeth.

Both McElderry and Caniglia testified that Elizabeth had made progress with the services she was participating in when she was out of custody. McElderry stated that it was because of this progress that she did not file for Jose's removal immediately following his birth. She testified that, at that time, Elizabeth was an appropriate care provider for Jose. Additionally, Caniglia testified that Elizabeth had been doing very well prior to her incarceration and that she was a very good caretaker when not incarcerated.

The juvenile court adjudicated Lizabella pursuant to § 43-247(3)(a) in April 2016. The following month, the court entered a dispositional order in which it ordered Elizabeth to have unsupervised visitation with Lizabella; to maintain safe, stable housing and a source of legal income; and to abide by the rules and regulations of her federal probation. However, at that time, Elizabeth had not yet been sentenced on her federal convictions. Several days later, Elizabeth was sentenced to prison, rather than probation. She was subsequently taken into custody and has remained incarcerated since then. Because Elizabeth was sentenced to prison rather than probation, which the juvenile court appears to have anticipated, she could not comply with the court's order to abide by the rules of federal probation.

Jose was adjudicated pursuant to § 43-247(3)(a) in September 2016. Thereafter, the juvenile court ordered Elizabeth to complete relinquishment counseling for Jose and Lizabella. It is undisputed that Elizabeth never participated in relinquishment counseling for either child.

In its motion for termination of Elizabeth's parental rights, the State asserted that Elizabeth had been ordered to comply with various rehabilitation plans, which included the dispositional orders wherein she was ordered to have unsupervised visitation with Lizabella, to maintain housing and a source of income, to abide by the rules of her federal probation, and to complete relinquishment counseling. At the time that the first dispositional order was entered, Elizabeth had stable, appropriate housing and was employed. She had also been consistently participating in supervised visitation. However, Elizabeth was sentenced to 10 years' imprisonment after the juvenile court entered this order, which prevented her from complying with its orders. In particular, we note that she could not abide by the rules of her federal probation because, as of the date of the order, she had not yet been sentenced and was subsequently sentenced to incarceration rather than probation. Elizabeth also did not complete relinquishment counseling because she did not wish to relinquish her parental rights to either child.

The evidence presented by the State shows that Elizabeth voluntarily participated in many services prior to the adjudication of either child. Each FPS testified that Elizabeth was making progress and doing well with those services, so much so that McElderry found her to be an appropriate caretaker and did not file for removal following Jose's birth until Elizabeth was sentenced and incarcerated on her federal convictions. McElderry testified that Elizabeth successfully complied with all of her recommendations except for completing a parenting assessment, which McElderry failed to set up.

[12] We do not find Elizabeth's failure to comply with the court's orders to abide by the rules of her federal probation and to complete relinquishment counseling to be indicative of the failure of reasonable efforts to preserve and reunify her with her children. A court order to complete relinquishment counseling is, by its very nature, not an effort intended to preserve and reunify the family. Additionally, it was not possible

for Elizabeth to comply with the court's order to abide by the rules of federal probation when she was not sentenced to federal probation; therefore, we find Elizabeth's failure to comply with such a provision to be outside of her control.

Upon our de novo review of the record, we find that the State failed to present clear and convincing evidence that reasonable efforts failed to correct the conditions leading to the adjudication of Jose pursuant to § 43-292(6). Elizabeth participated in an extensive number of services, demonstrating her commitment to improving her parenting skills and regaining custody of her children, and she complied with every court order that she could. We therefore reverse the order of the juvenile court terminating Elizabeth's parental rights to Jose and remand the cause for further proceedings.

#### (c) Best Interests

[13] Elizabeth also argues that the juvenile court erred in determining that termination of her parental rights is in her children's best interests. However, because we conclude that the State failed to provide sufficient evidence to prove that termination of Elizabeth's parental rights to Jose was warranted pursuant to § 43-292(2) or (6), and because we accordingly remand the cause for further proceedings, we do not address this assignment of error with respect to Jose. An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it. *In re Interest of Darryn C.*, 295 Neb. 358, 888 N.W.2d 169 (2016).

### 2. Lizabella

We turn next to whether the juvenile court erred in terminating Elizabeth's parental rights to Lizabella.

#### (a) Statutory Grounds for Termination

[14] While Elizabeth argues that the juvenile court erred in terminating her parental rights under § 43-292(2) and (6), she does not assign as error the termination of her parental rights

under § 43-292(7). Section 43-292(7) states that the statutory grounds for termination are met if the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months. Here, it is undisputed that Lizabella was removed in August 2015 and remained in foster care through the time of the termination hearing in March 2017. Therefore, it is clear that the statutory grounds under § 43-292(7) are met with respect to Lizabella.

(b) Best Interests

Elizabeth argues that the juvenile court erred in finding that it was in Lizabella's best interests to terminate Elizabeth's parental rights. She claims that the court's finding rests solely on the fact that she is incarcerated and is contrary to evidence that she continues to have a relationship and telephone contact with her children. Elizabeth argues that incarceration alone does not make her an unfit parent. We agree.

[15-19] In addition to proving a statutory ground, the State must also show that termination of parental rights is in the best interests of the child. *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015). A parent's right to raise his or her child is constitutionally protected. Therefore, before a court may terminate parental rights, the State must show that the parent is unfit. *Id*. There is a rebuttable presumption that the best interests of the child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. *Id*. In the context of the constitutionally protected relationship between a parent and a child, parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being. *Id*. The best interests analysis and the parental fitness analysis are fact-intensive inquiries, and while they are separate, each examines

essentially the same underlying facts. *Id*. The law does not require perfection of a parent; rather, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

As addressed above, incarceration is a factor that may be considered in determining whether parental rights should be terminated, but incarceration alone cannot be the sole basis for termination. *In re Interest of Jahon S., supra*. However, it is proper to consider a parent's inability to perform his or her parental obligations due to incarceration. *Id*.

The evidence presented by the State with regard to Lizabella's best interests focused on Elizabeth's inability to provide for Lizabella while Elizabeth is incarcerated. Caniglia testified that based on the length of time Elizabeth will be incarcerated and the resulting inability to provide stable placement, she believed termination of Elizabeth's parental rights was in the children's best interests. However, she conceded that Elizabeth had been doing very well and had made progress toward rehabilitating herself as a parent prior to her incarceration.

As addressed above, the evidence presented by the State indicates that during the pendency of this case, Elizabeth has participated in numerous voluntary services. The testimony presented indicated that she was a good caretaker and an appropriate parent to Jose while she was not incarcerated. Elizabeth regularly participated in visitation with Lizabella three to five times per week for 3 hours at a time. Immediately prior to her incarceration, the juvenile court ordered unsupervised visitation that could transition to overnight visits. Since Elizabeth has been incarcerated, she has maintained contact with her children by telephone and keeps up to date with their lives through their foster parents and caseworker.

The record shows that Elizabeth parented Lizabella from the time of her birth in January 2015 until Elizabeth's initial incarceration on her federal charges. Since then, she has actively worked to improve her parenting skills and to

maintain a relationship with Lizabella. The progress that she made is reflected in the juvenile court's order immediately prior to her incarceration wherein she was allowed to have unsupervised visitation transitioning into overnight visits. Due to Lizabella's health conditions, she requires a substantial amount of special care. Elizabeth voluntarily participated in all recommended services to obtain the training necessary to be able to properly provide such care for Lizabella. Furthermore, Elizabeth has demonstrated her commitment to a continuing relationship with Lizabella despite Elizabeth's incarceration. Upon consideration of the above, we cannot find that it is in Lizabella's best interests to terminate Elizabeth's parental rights despite the fact that she is incarcerated. We therefore reverse the order of the juvenile court terminating Elizabeth's parental rights to Lizabella and remand the cause for further proceedings.

## VI. CONCLUSION

Based upon our de novo review of the record, we reverse the juvenile court's order terminating Elizabeth's parental rights and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# In re Interest of Iyana P., a child under 18 years of age. State of Nebraska, appellee, v. Iyana P., appellant.

907 N.W.2d 333

Filed January 9, 2018. No. A-17-494.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. ____: ____. In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings.
3. **Juvenile Courts: Due Process.** Complying with the procedures under Neb. Rev. Stat. § 43-286(5) (Reissue 2016) is important because in a revocation proceeding, the juvenile is entitled to procedural protections, including the right to confront and cross-examine adverse witnesses.
4. **Juvenile Courts: Probation and Parole.** Under Neb. Rev. Stat. § 43-286 (Reissue 2016), a juvenile court may not change a disposition unless the juvenile has violated a term of probation or supervision or the juvenile has violated an order of the court and the procedures established in subsection (5)(b) have been satisfied.
5. **Juvenile Courts.** An original dispositional order cannot be changed at the whim of the juvenile court judge, but only as provided in Neb. Rev. Stat. § 43-286(5)(b) (Reissue 2016).
6. **Juvenile Courts: Appeal and Error.** Once a court has entered a disposition, it is plain error to change that disposition when the State has not complied with the applicable statutory procedures.
7. **Juvenile Courts: Probation and Parole.** Neb. Rev. Stat. § 43-286 (Reissue 2016) does not allow the juvenile court to place a juvenile on probation or exercise any of its other options for disposition and at the same time continue the dispositional hearing.

8. ____: ____. When the State contends that a juvenile placed on probation has violated a term of probation or an order of the court, it is required to file a motion to revoke or change the disposition.
9. **Juvenile Courts.** A motion to revoke or change a disposition shall set forth specific factual allegations of the alleged violations, a copy must be served on all persons entitled to service, and the juvenile is entitled to a hearing to determine the validity of the allegations.

Appeal from the Separate Juvenile Court of Douglas County: Elizabeth Crnkovich, Judge. Reversed and remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Ryan T. Locke for appellant.

No appearance for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Pirtle, Judge.

## INTRODUCTION

Iyana P. appeals from an order of the separate juvenile court of Douglas County which changed the terms of her probation and a subsequent order which denied her motion to vacate the order that changed her probation. Because we determine that the juvenile court did not follow applicable statutory procedures in changing the terms of her probation and that it denied her due process, we reverse the juvenile court's order denying Iyana's motion to vacate and remand the matter to the juvenile court with directions to vacate its order which changed Iyana's probation and for further proceedings consistent with this opinion.

## BACKGROUND

On August 9, 2016, a petition to adjudicate was filed in the separate juvenile court of Douglas County alleging that Iyana was within the meaning of Neb. Rev. Stat. § 43-247 (Reissue 2016) in that she had committed third degree assault. Following a detention hearing, the court entered an order on

August 18 which ordered that Iyana be detained at the Douglas County Youth Center until further order of the court.

A detention review hearing was held on August 24, 2016, and the juvenile court entered an order that Iyana be placed in "shelter care," as arranged by the Office of Probation Administration, and be released from the Douglas County Youth Center.

On October 17, 2016, the court entered an order adjudicating Iyana as a child within the meaning of § 43-247(1). Following a disposition hearing, the court entered an order on November 21 placing Iyana on probation for 6 months, subject to certain terms and conditions of probation. It further ordered that the probation "may automatically terminate on May 22, 2017 unless sooner extended or revoked for cause by the Court or unless a capias has been issued during the term of this probation."

On November 23, 2016, Iyana was released from the Douglas County Youth Center to the custody of her parent for placement at home. On January 6, 2017, a juvenile warrant was issued for Iyana because she was missing from a court-ordered placement—the parental home.

On January 11, 2017, following a detention hearing, the court entered an order recalling the warrant and placing Iyana on the "HOME Program," an alternative to detention.

On January 25, 2017, an order was entered placing Iyana in "shelter care" and set a "Check Hearing" for February 6. On January 30, the issue of Iyana's placement at a shelter was brought before the court. There was no objection made to placement at a shelter due to concerns for her well-being if she was to remain in the home of her parent. An order was entered placing Iyana at "Youth Links" shelter and the "HOME Program" was relieved of further responsibility.

A "Check Hearing" was held on February 6, 2017. The juvenile court ordered the Office of Probation Administration to seek foster care placement for Iyana and to make application for group home placement.

On March 21, 2017, another "Check Hearing" was held regarding the placement of Iyana. On April 25, the juvenile court entered an order placing Iyana at "Uta Halee" group home and further ordered that "[she] shall remain under the supervision of a probation officer, for an open ended period of time."

On April 27, 2017, Iyana filed a motion to vacate the court's April 25 order, alleging that the statutory procedures to change a juvenile's dispositional orders under Neb. Rev. Stat. § 43-286 (Reissue 2016) were not followed. The juvenile court denied the motion to vacate.

## ASSIGNMENTS OF ERROR

Iyana assigns that the juvenile court erred by extending her probation without a hearing, thereby violating her due process rights, and by denying her motion to vacate.

## STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Candice H.*, 284 Neb. 935, 824 N.W.2d 34 (2012). In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings. *Id.*

## ANALYSIS

Iyana assigns that the juvenile court violated her due process rights when it extended her probation without a hearing. More specifically, she contends that the juvenile court did not follow the procedures established under § 43-286 in changing her original disposition ordered by the court.

[3] Section 43-286 sets out a juvenile court's disposition options for juveniles who have been adjudicated under § 43-247(1), (2), or (4). The procedures for changing an existing disposition are set forth in § 43-286(5). Complying with the procedures under § 43-286(5) is important because in a

revocation proceeding, the juvenile is entitled to procedural protections, including the right to confront and cross-examine adverse witnesses. See *In re Interest of Alan L.*, 294 Neb. 261, 882 N.W.2d 682 (2016).

Section 43-286(5)(b) governs the procedure for revoking a juvenile's probation or court supervision and changing the disposition:

> When a juvenile is placed on probation or under the supervision of the court for conduct under subdivision (1), (2), (3)(b), or (4) of section 43-247 and it is alleged that the juvenile has violated a term of probation or supervision or that the juvenile has violated an order of the court, a motion to revoke probation or supervision or to change the disposition may be filed and proceedings held as follows:
>
> (i) The motion shall set forth specific factual allegations of the alleged violations and a copy of such motion shall be served on all persons required to be served by sections 43-262 to 43-267;
>
> (ii) The juvenile shall be entitled to a hearing before the court to determine the validity of the allegations. . . .
>
> (iii) The hearing shall be conducted in an informal manner . . . .
>
> (iv) The juvenile shall be given a preliminary hearing in all cases when the juvenile is confined, detained, or otherwise significantly deprived of his or her liberty as a result of his or her alleged violation of probation, supervision, or court order. . . .
>
> (v) If the juvenile is found by the court to have violated the terms of his or her probation or supervision or an order of the court, the court may modify the terms and conditions of the probation, supervision, or other court order, extend the period of probation, supervision, or other court order, or enter any order of disposition that could have been made at the time the original order was entered; and

> (vi) In cases when the court revokes probation, supervision, or other court order, it shall enter a written statement as to the evidence relied on and the reasons for revocation.

[4,5] Under § 43-286, a juvenile court may not change a disposition unless the juvenile has violated a term of probation or supervision or the juvenile has violated an order of the court and the procedures established in subsection (5)(b) have been satisfied. See *In re Interest of Torrey B.*, 6 Neb. App. 658, 577 N.W.2d 310 (1998). In other words, the original dispositional order cannot be changed at the whim of the juvenile court judge, but only as provided in subsection (5)(b). *In re Interest of Torrey B., supra*.

[6] The Nebraska Supreme Court and this court have both held that once a court has entered a disposition, it is plain error to change that disposition when the State has not complied with the applicable statutory procedures. See, *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008); *In re Interest of Torrey B., supra*.

[7] In *In re Interest of Torrey B., supra*, the juvenile was adjudicated under § 43-247(1) and the court placed the juvenile on indefinite probation with placement in the parental home. The court subsequently committed the juvenile to the Office of Juvenile Services (OJS) for placement at a youth rehabilitation and treatment center. The juvenile court did this without any pleading, motion, or notice by the State, claiming the juvenile had violated the terms of his probation. On appeal, this court stated that the juvenile court apparently assumed that by putting a provision in the original dispositional order continuing the matter, it could change the order without pleadings, notice, or evidence. We held that § 43-286 does not allow the juvenile court to place a juvenile on probation or exercise any of its other options for disposition and at the same time continue the dispositional hearing. *In re Interest of Torrey B., supra*. We further held that the juvenile court committed plain error in committing the juvenile to OJS, as

it had the effect of revoking the juvenile's probation without following applicable statutory procedure. *Id.*

Similarly, in *In re Interest of Markice M., supra*, the juvenile argued that the court erred in changing the terms of his probation from inhome placement to group home placement without following the procedures in § 43-286(4), now found in § 43-286(5). The juvenile was adjudicated under § 43-247(1), and the juvenile court subsequently entered a dispositional order placing him on probation, but allowing him to remain in his home. A few months later, the juvenile court conducted an "'evaluation hearing'" at which time the probation officer informed the court that she was concerned about the juvenile's safety in the home and recommended that he be placed in a group home. *In re Interest of Markice M.*, 275 Neb. at 910, 750 N.W.2d at 347. The juvenile court entered an order requiring the probation officer to make application for group home placement. The State argued that the hearing which led to the change was a "'continued dispositional hearing'" and that the order requiring group home placement was part of the original dispositional phase, not a subsequent modification. *Id.* at 912, 750 N.W.2d at 349.

[8,9] The Nebraska Supreme Court disagreed with the State's position and reversed the juvenile court's order requiring the probation officer to make application for group home placement. In doing so, the court agreed with our holding in *In re Interest of Torrey B.*, 6 Neb. App. 658, 577 N.W.2d 310 (1998), that § 43-286 does not allow the juvenile court to place a juvenile on probation or exercise any of its other options for disposition, and at the same time continue the dispositional hearing. It held that the disposition was complete upon entry of the court's order placing the juvenile on probation and permitting him to remain in his home. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008). The court further held that the subsequent order requiring group home placement constituted a change in the terms of probation specified in the dispositional order. *Id.* It stated that when the State

contends that a juvenile placed on probation has violated a term of probation or an order of the court, it is required to file a motion to revoke or change the disposition. *Id.*, citing *In re Interest of Torrey B., supra*; § 43-286. The motion "'shall set forth specific factual allegations of the alleged violations,'" a copy must be served on all persons entitled to service, and the juvenile is entitled to a hearing to determine the validity of the allegations. *In re Interest of Markice M.*, 275 Neb. at 913, 750 N.W.2d at 349, citing § 43-286.

The *In re Interest of Markice M.* court concluded that the order requiring the juvenile to be placed in a group home had the effect of changing a term of his previously ordered probation without following the applicable statutory procedure. The court ordered that the order changing the disposition be vacated and that the matter be remanded to the juvenile court for further proceedings.

More recently, in *In re Interest of Alan L.*, 294 Neb. 261, 882 N.W.2d 682 (2016), the Nebraska Supreme Court did not reverse the order changing the disposition even though the procedures did not comply with § 43-286(5). Rather, it concluded that despite procedural flaws, the juvenile was not denied due process. The juvenile was adjudicated under § 43-247(1), and he was subsequently placed on probation and allowed to live with his parent. After the juvenile was placed on probation, the State filed three different commitment motions related to the juvenile's noncooperation with his probation terms. But the State never filed a motion to revoke his probation. Following a hearing on a second amended motion to commit the juvenile to OJS for placement at a youth rehabilitation and treatment center, the court found that allegations for commitment were true, placed the juvenile on intensive supervision probation, and committed him to OJS for placement at the treatment center.

On appeal, among other arguments, the juvenile claimed that the commitment hearing deprived him of his due process right to confront and cross-examine his accusers. He argued

that if the State had filed a motion to revoke his probation, he would have had a statutory right to confront and cross-examine witnesses against him.

The *In re Interest of Alan L.* court found that because the motion rested on probation violations, the State should have filed a motion to revoke probation to support its requested change in the disposition. It recognized its previous holding in *In re Interest of Markice M.*, 275 Neb. 908, 912-13, 750 N.W.2d 345, 349 (2008): "When the State contends that a juvenile placed on probation has violated a term of probation or an order of the court, it is required to file a motion to revoke or change the disposition." The *In re Interest of Alan L.* court found that although the State did not comply with its previous holding, the State's motion had put the juvenile on notice that it was seeking a commitment to OJS because of his probation violations. The Supreme Court further noted that the juvenile did not contend he did not have notice of the claim and that he had not shown the State denied him any protections he would have received had the State filed a revocation motion. Further, at the commitment hearing, the juvenile was represented by counsel and not precluded from presenting evidence. The Supreme Court found that despite procedural flaws, the juvenile court's procedures did not deny the juvenile an opportunity to challenge the State's recommendations for the commitment, so he was not denied due process. *In re Interest of Alan L., supra*.

The present case is similar to all three cases discussed above in that the State did not follow the statutory procedures in § 43-286(5). Iyana's dispositional order placed her on probation for 6 months. The juvenile court subsequently ordered that "[she] shall remain under the supervision of a probation officer, for an open ended period of time." The subsequent order constituted a change in the terms of Iyana's probation, and the court made this change without following the statutory procedures under § 43-286 to change a juvenile's dispositional orders.

We further determine that, unlike the juvenile in *In re Interest of Alan L.*, 294 Neb. 261, 882 N.W.2d 682 (2016), Iyana was denied due process. Although Iyana had notice that her probation would not automatically terminate on May 22, 2017, if a capias was issued during the term of probation, and one was issued on January 6, 2017, the State did not file a motion to revoke her probation and there was no hearing to determine if Iyana violated a term of her probation. Because there was no hearing, Iyana could not confront or cross-examine witnesses against her. Therefore, in addition to the statutory procedural flaws, the juvenile court's procedures denied Iyana an opportunity to challenge a change in the terms of her probation and she was denied due process.

We conclude that the juvenile court erred in extending Iyana's probation indefinitely, as it had the effect of revoking her probation without following the applicable statutory procedures under § 43-286. The juvenile court's procedures also denied Iyana due process. Therefore, the trial court erred in denying Iyana's motion to vacate.

## CONCLUSION

We conclude that the juvenile court erred in changing the terms of Iyana's probation without following the statutory procedures set forth in § 43-286 and in denying her due process. Accordingly, we reverse the juvenile court's order denying Iyana's motion to vacate and remand the matter to the juvenile court with directions to vacate its order entered April 25, 2017, and for further proceedings consistent with this opinion.

Reversed and remanded with directions.

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

# State of Nebraska, appellee, v. Ali E. Khalil, appellant.

908 N.W.2d 97

Filed January 16, 2018. No. A-17-085.

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 or the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are any outstanding warrants for any of its occupants.
4. ____: ____: ____. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** To expand the scope of a traffic stop and continue to detain the motorist, an officer must have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the interference.
6. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
7. **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.
8. **Probable Cause.** Reasonable suspicion exists on a case-by-case basis.
9. ____. Factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively.
10. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's suspicion of criminal activity may reasonably grow over the course of a traffic stop as the circumstances unfold and more suspicious facts are uncovered.
11. **Investigative Stops: Motor Vehicles: Probable Cause.** In determining whether a continued detention of a defendant following a stop for a traffic violation is reasonable, a court considers both the length of the continued detention and the investigative methods employed.
12. **Miranda Rights.** The safeguards provided by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
13. ____. *Miranda* warnings are required only when there has been such a restriction on one's freedom as to render one in custody.
14. **Miranda Rights: Arrests: Words and Phrases.** A person is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on his or her freedom of movement to the degree associated with such an arrest.
15. **Miranda Rights: Investigative Stops: Motor Vehicles.** Persons temporarily detained pursuant to an investigatory traffic stop are not in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
16. **Miranda Rights: Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver in custody and entitled to *Miranda* warnings.

17. **Miranda Rights: Self-Incrimination: Right to Counsel.** The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent, and the safeguards include advisements of the right to remain silent and the right to have an attorney present at questioning.
18. ____: ____: ____. Under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), if the suspect in custody indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease.
19. **Miranda Rights: Right to Counsel.** In order to require cessation of custodial interrogation, the subject's invocation of the right to counsel must be unambiguous and unequivocal.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Steven B. Muslin, of Muslin & Sandberg, and Thomas J. Olsen, of Olsen Law Offices, for appellant.

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

Pirtle, Riedmann, and Arterburn, Judges.

Riedmann, Judge.

## INTRODUCTION

Ali E. Khalil was convicted of delivery or possession with intent to deliver marijuana following the discovery of 128 pounds of marijuana in his vehicle during a traffic stop. On appeal, he claims that his motion to suppress should have been granted because of violations of his rights under the Fourth and Fifth Amendments. We find no merit to the arguments raised on appeal and therefore affirm.

## BACKGROUND

The events giving rise to this case, and the issues raised on appeal, are substantially intermingled with those in a companion case filed today in *State v. Abu-Serieh, post* p. 462, 908 N.W.2d 86 (2018). Khalil and Issa Abu-Serieh were driving

separate rental vehicles but traveling together on Interstate 80 when the relevant events occurred.

On January 25, 2015, Lancaster County Deputy Sheriff Jason Henkel was patrolling Interstate 80 near mile marker 397 when he observed a Nissan Altima that was following a semi-truck too closely. He observed another vehicle, a Ford Edge, following the Nissan too closely and believed the Nissan and Ford were traveling together based on "their driving habits." Henkel called for Deputy Sheriff Jason Mayo to assist him. Henkel performed a traffic stop on the Nissan, and Mayo stopped the Ford.

The driver of the Nissan, later identified as Khalil, provided his driver's license and a vehicle rental agreement when requested. While at the window of the Nissan, Henkel noticed a faint odor of what he believed to be raw marijuana, but he could not confirm it at that point due to strong winds. Henkel asked Khalil to accompany him to Henkel's patrol car in order to talk with him while Henkel prepared the warning ticket for following too closely. Khalil did so and sat in the front passenger seat. He was not in handcuffs and was not under arrest, but was detained for the traffic violation.

Henkel made general conversation with Khalil while preparing the warning ticket by asking questions about his travels. Khalil said that he had attended a convention in Salt Lake City, Utah, for the trucking company he owns and was trying to obtain additional business. Khalil said that he lives in the Chicago, Illinois, area. Henkel asked if Khalil was traveling with the driver of the Ford, and Khalil said yes, the driver of the Ford, Abu-Serieh, was his friend. Throughout the time Henkel and Khalil sat in Henkel's patrol car, Henkel exchanged communication with Mayo via the mobile data terminal in each of their patrol cars. Mayo told Henkel that Abu-Serieh said he was not traveling with Khalil. Khalil and Abu-Serieh provided additional inconsistent information, with Abu-Serieh reporting that he had attended a bachelor party in California and was returning home to Chicago,

while Khalil stated that Abu-Serieh lived in the Salt Lake City area.

After issuing the warning ticket to Khalil, Henkel asked if there were any guns, bombs, cocaine, heroin, or marijuana in the vehicle, and Khalil said no. Henkel then asked Khalil for permission to search the vehicle because he suspected that there was criminal activity afoot, and Khalil responded that "he wanted to be on his way." Henkel was suspicious based on several factors: the odor of raw marijuana coming from the vehicle, which he was unable to confirm; the business attire hanging in the window of the Nissan and a suitcase in the back seat; the vehicle had a "lived-in look," and it appeared that Khalil had slept in the vehicle; Khalil exhibited signs of nervousness, including shaking and trembling hands, labored breathing, and "a pulse [visible] in his stomach"; and the numerous air fresheners in the front and back of the Nissan. In addition, Khalil was driving a rental vehicle and traveling with a companion who drove a separate vehicle, but both vehicles were rented in Khalil's name, and when questioned, Khalil and the other driver provided inconsistent information.

Less than 3 minutes after issuing the warning ticket to Khalil, Henkel deployed his drug dog, which was in his patrol car, and the canine alerted and indicated to the odor of narcotics coming from the Nissan. Upon searching the vehicle, Henkel discovered 128 pounds of marijuana in the trunk. While at the scene of the traffic stop, Henkel handcuffed Khalil and read him his *Miranda* warnings. Henkel asked Khalil if he would be interested in participating in a controlled delivery of the marijuana, and Khalil indicated that "he'd have to talk to his attorney first." Henkel asked whether Khalil was requesting an attorney at that point, and Khalil responded that it "depends on the questions you ask me." Throughout further questioning later at the jail, Khalil admitted that he was receiving $7,000 to deliver the marijuana.

Khalil was ultimately charged with delivery or possession with intent to deliver marijuana. Prior to trial, he filed a

motion to suppress the statements he made and the results of the search of the Nissan. A suppression hearing was held, and the testimony revealed the information detailed above. The district court subsequently announced its findings from the bench. The court determined that there was probable cause for the traffic stop based on the traffic violation of following too closely. The court additionally found that Henkel had reasonable suspicion to detain Khalil in order to conduct a canine sniff and had probable cause to search the Nissan based on the alert and indication of the canine. Finally, the court concluded that Khalil did not unequivocally invoke his right to counsel and that therefore, his statements were admissible. The motion to suppress was therefore denied.

Thereafter, a stipulated bench trial was held. The evidence presented consisted of the video recordings of the traffic stops from Henkel's patrol car and Mayo's patrol car, law enforcement reports, and the transcript of the suppression hearing. The court ultimately found Khalil guilty of delivery or with possession with intent to deliver marijuana. He was sentenced to 18 to 36 months' incarceration. He now appeals to this court.

## ASSIGNMENT OF ERROR

Khalil assigns, summarized, that the district court erred in denying his motion to suppress.

## 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 or 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), we apply a two-part standard of review. See, *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012); *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011). Regarding historical facts, we review the trial court's findings for clear error. *State v. Bauldwin, supra*; *State v. Nelson, supra*. But whether those facts trigger or violate Fourth Amendment or

Fifth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Bauldwin, supra*; *State v. Nelson, supra*.

## ANALYSIS

Khalil argues that the district court erred in denying his motion to suppress because of perceived violations of his rights under the Fourth and Fifth Amendments.

*Fourth Amendment.*

Khalil first argues that his motion to suppress should have been granted because his Fourth Amendment rights were violated when Henkel impermissibly extended the scope of the traffic stop beyond what was reasonable to issue the warning for the traffic violation.

[2] At the outset, we note that in his brief, despite several arguments to the contrary, Khalil acknowledges that the "evidence is unrebutted that the traffic stop was properly initiated by Deputy Henkel." Brief for appellant at 27. We agree. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Nelson, supra*. Here, Henkel explained how he determined that Khalil's vehicle was following another vehicle too closely in violation of Neb. Rev. Stat. § 60-6,140(1) (Reissue 2010). The fact that Khalil committed a traffic violation is not challenged on appeal, and thus, the initial stop of the Nissan was justified.

Khalil claims that any questions Henkel posed to him during the stop before the warning ticket was issued that were unrelated to the traffic violation "create[d] an unwarranted and nonconsensual expansion of the seizure from a routine traffic stop to a drug investigation." Brief for appellant at 31. We disagree.

[3,4] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *State v. Nelson, supra*. This investigation may include asking the driver for an operator's license and registration,

requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id*. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are any outstanding warrants for any of its occupants. *Id*. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. *Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).

In the present case, the amount of time that elapsed between the time Henkel initiated the traffic stop of the Nissan until the time he issued the warning ticket was a total of approximately 10 minutes. While Khalil was seated in the passenger seat of the patrol car, Henkel asked him a variety of questions, such as where he had been, where he lived, and where he was going. During this time, Henkel was also communicating with Mayo, and the deputies were exchanging the information provided to them by Khalil and Abu-Serieh, discovering discrepancies in their responses. Khalil references this communication between deputies in his brief, but he provides no authority to support a finding that doing so was improper or unconstitutional, particularly when the exchange of communication did not extend the traffic stop beyond the length of time necessary to issue the warning ticket. Given the total length of time it took for Henkel to process Khalil's information and issue the warning ticket, approximately 10 minutes, we conclude that any questioning did not measurably extend the duration of the stop and was therefore permissible.

Khalil also argues that Henkel impermissibly extended the length of the traffic stop in order to conduct a canine sniff of the vehicle after issuing the warning ticket to him. We do not agree.

[5-10] To expand the scope of a traffic stop and continue to detain the motorist, an officer must have a reasonable,

articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the interference. See *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011). Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id.* Reasonable suspicion exists on a case-by-case basis. *Id.* Factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively. *Id*. An officer's suspicion of criminal activity may reasonably grow over the course of a traffic stop as the circumstances unfold and more suspicious facts are uncovered. *U.S. v. Murillo-Salgado*, 854 F.3d 407 (8th Cir. 2017).

In this case, Henkel suspected that there was criminal activity afoot based on several factors: the odor of raw marijuana coming from the vehicle, which he was unable to confirm; the business attire hanging in the window of the vehicle and a suitcase in the back seat; the "lived-in look" of the vehicle; Khalil's nervousness; and the numerous air fresheners in the vehicle. In addition, Khalil was driving a rental vehicle and traveling with a companion who drove a separate vehicle, and when questioned, Khalil and the other driver provided inconsistent information, with the other driver denying that he was even traveling with Khalil. Given the totality of the circumstances, Henkel had a reasonable suspicion to expand the scope of the traffic stop and continue to detain Khalil in order to perform a canine sniff of the vehicle.

[11] Khalil takes issue with Henkel's testimony that "as an interdiction officer, it was always his intention to deploy his dog." Brief for appellant at 33. Regardless of Henkel's thought process or motivation for doing so, we find that he had reasonable, articulable suspicion supporting extending

the stop in order to conduct a canine sniff of the vehicle. As such, this argument lacks merit. Having determined that reasonable suspicion existed to support continued detention, the next question is whether the detention was reasonable in the context of an investigatory stop. See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). We consider both the length of the continued detention and the investigative methods employed. *Id*.

Henkel had the canine with him in his vehicle, and the amount of time that elapsed from the time he issued the warning to Khalil until the time the canine was deployed was less than 3 minutes. In *State v. Voichahoske, supra*, the Supreme Court found that a 15-minute period of time from the conclusion of the traffic stop until arrival of a drug dog was not unreasonable. And the Supreme Court has previously determined that nearly an hour delay between the request of a canine unit and its arrival was not unreasonable. See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). The record in the instant case shows no lack of diligence on Henkel's part nor any unreasonable delay. And because a canine sniff is not a search under the Fourth Amendment, using the drug dog during a lawful detention did not violate any constitutionally protected right. See *State v. Voichahoske, supra*. Accordingly, the length and method of detention in the present case were reasonable.

We note that Khalil relies upon *Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015), when arguing that the traffic stop was impermissibly extended. Khalil acknowledges, however, that the question in *Rodriguez* was whether police may extend "an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." Brief for appellant at 34. Thus, because we found that reasonable suspicion existed to allow Henkel to extend the stop, *Rodriguez* would not change the outcome of our decision.

Finding no merit to any of Khalil's arguments with respect to the Fourth Amendment, we conclude that the district court properly denied his motion to suppress on those grounds.

*Fifth Amendment.*

Khalil argues that Henkel's question to him of whether he had any drugs "created a hazard of incrimination" and that he was compelled to answer the question or be penalized for asserting his right to refuse to answer. Brief for appellant at 40. He therefore concludes that Henkel was required to read him his *Miranda* rights prior to posing the question. Khalil also argues that he later invoked his right to counsel, but Henkel continued to question him in violation of his Fifth Amendment rights. We disagree.

[12-14] We reject Khalil's argument that Henkel was required to read him his *Miranda* rights because Khalil was not in custody. The safeguards provided by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *State v. Landis*, 281 Neb. 139, 794 N.W.2d 151 (2011). *Miranda* warnings are required only when there has been such a restriction on one's freedom as to render one in custody. *Id*. A person is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on his or her freedom of movement to the degree associated with such an arrest. See *State v. Landis, supra*.

[15,16] Persons temporarily detained pursuant to an investigatory traffic stop are not in custody for purposes of *Miranda*. *State v. Landis, supra*. When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver in custody and entitled to *Miranda* warnings. *Id*. In *State v. Landis*, the Supreme Court observed that the defendant's presence in the trooper's cruiser did not raise the interaction to the extent analogous to an arrest, because there was no indication that the trooper used

force or threats to get the defendant to enter the cruiser or to remain there.

Likewise here, Khalil was temporarily detained pursuant to a traffic stop and voluntarily entered Henkel's patrol car while Henkel prepared the warning ticket. Thus, some further action or treatment by the deputy that would raise Khalil's detention to an extent analogous to an arrest was required. Because there was none, Khalil was not "in custody," and thus, *Miranda* warnings were not required before he could be questioned. Having determined that Khalil was not in custody for *Miranda* purposes, we need not address whether he was subjected to an interrogation during that time. Accordingly, any statements he made to Henkel while seated in the patrol car were not obtained in violation of his Fifth Amendment rights and were admissible. As such, the motion to suppress was properly denied on these grounds.

Khalil further asserts that he invoked his right to counsel and that Henkel unconstitutionally continued to question him after he had done so.

[17,18] The U.S. Supreme Court adopted a set of prophylactic measures to protect suspects from modern custodial interrogation techniques. *Miranda v. Arizona, supra*. See, also, *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *State v. DeJong, supra*. The safeguards include the familiar *Miranda* advisements of the right to remain silent and the right to have an attorney present at questioning. *Id*. If the suspect in custody indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease. *Id*.

[19] In order to require cessation of custodial interrogation, the subject's invocation of the right to counsel must be unambiguous and unequivocal. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). "Statements such as '"[m]aybe I should talk to a lawyer"' or '"I probably should have an

attorney"' do not meet this standard." *Id*. at 959, 774 N.W.2d at 744-45.

In the case at hand, Khalil never unambiguously and unequivocally invoked his right to counsel. When discussing whether Khalil would be interested in assisting law enforcement by participating in a controlled delivery of marijuana, Khalil remarked that "he'd have to talk to his attorney first." Henkel then asked whether Khalil was requesting an attorney at that point, and Khalil responded that it "depends on the questions you ask me." We cannot find that this language constitutes an unambiguous and unequivocal request for counsel, particularly when Khalil's reference to speaking with his attorney was made in the context of agreeing to participate in a controlled delivery rather than discussing specifics about the events of this case. Therefore, law enforcement's continued questioning of Khalil did not violate his Fifth Amendment rights and the district court did not err in denying the motion to suppress.

## CONCLUSION

Having found no merit to Khalil's arguments with respect to the Fourth and Fifth Amendments, we find no error in the district court's denial of his motion to suppress. We therefore affirm his conviction and sentence.

Affirmed.

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

# State of Nebraska, appellee, v. Issa Abu-Serieh, appellant.

908 N.W.2d 86

Filed January 16, 2018. No. A-17-151.

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 or the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Standing: Warrantless Searches.** Before a party may challenge a search without a warrant, he or she must have standing in a legal controversy.
3. **Standing: Words and Phrases.** "Standing" means that a person has a sufficient legally protectable interest which may be affected in a justiciable controversy, entitling that person to judicial resolution of the controversy.
4. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.
5. **Standing: Courts: Jurisdiction: Parties.** Because the requirement of standing is fundamental to a court's exercise of jurisdiction, a litigant or a court before which a case is pending may raise the question of standing at any time during the proceeding.
6. **Constitutional Law: Search and Seizure.** Ordinarily, two inquiries are required to determine whether an individual may make a challenge

under the Fourth Amendment. First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.

7. **Standing: Motor Vehicles: Search and Seizure: Contracts.** The driver of a rental vehicle may have standing to challenge the search or seizure of such vehicle if he or she can demonstrate that he or she received permission to drive the vehicle from the individual authorized on the rental agreement.
8. **Standing: Warrantless Searches.** Mere possession of a key granting access to a house does not necessarily create standing to raise an objection to a warrantless search.
9. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
10. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant.
11. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
12. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** A law enforcement officer may conduct certain unrelated checks during an otherwise lawful traffic stop, so long as doing so does not measurably extend the duration of the stop.
13. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the motorist, a law enforcement officer must have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which justified the initial stop.
14. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
15. **Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
16. **Miranda Rights.** The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.

17. **Miranda Rights: Investigative Stops: Motor Vehicles.** Persons temporarily detained pursuant to an investigatory traffic stop are not in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
18. **Miranda Rights: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Neither detention pursuant to a traffic stop nor continued voluntary contact with law enforcement constitutes a formal arrest or restraint on an individual's freedom sufficient to require *Miranda* warnings.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Steven B. Muslin, of Muslin & Sandberg, and Thomas J. Olsen, of Olsen Law Offices, for appellant.

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

Pirtle, Riedmann, and Arterburn, Judges.

Riedmann, Judge.

## INTRODUCTION

Following a stipulated bench trial, Issa Abu-Serieh was found guilty of one count of delivery or possession with intent to deliver a controlled substance, marijuana. The district court for Lancaster County sentenced him to 18 to 36 months' imprisonment. Abu-Serieh now appeals his conviction. Following our review of the record, we affirm.

## BACKGROUND

The events giving rise to this case, and the issues raised on appeal, are substantially intermingled with those in a companion case filed today in *State v. Khalil, ante* p. 449, 908 N.W.2d 97 (2018).

On January 25, 2015, Lancaster County Deputy Sheriff Jason Henkel observed two vehicles traveling eastbound on Interstate 80. The first was a Nissan Altima; immediately behind the Nissan was a Ford Edge. Henkel observed that both

vehicles had out-of-state license plates and that both appeared to be following the vehicle in front of them too closely. Henkel believed that the two vehicles were traveling together based on "their driving habits" and the fact that they appeared to be staying close to one another. Henkel used a stopwatch to time both vehicles' speed and distance traveled and determined that both vehicles were following at a closer distance than is considered safe. Henkel contacted Deputy Sheriff Jason Mayo and requested that he initiate a traffic stop of the Ford for following too closely while Henkel initiated a traffic stop of the Nissan.

Mayo initiated a traffic stop of the Ford and made contact with the driver and sole occupant, who was later identified as Abu-Serieh. Abu-Serieh provided Mayo with a copy of the rental agreement for the vehicle, which was not rented in his name. Abu-Serieh stated that he was coming from California and that a cousin had rented the vehicle for him there. When Mayo asked Abu-Serieh if he was traveling with anyone, Abu-Serieh responded that he was not.

Mayo informed Abu-Serieh that he would be issuing a warning citation for following too closely and requested that Abu-Serieh accompany him to his cruiser while he completed the paperwork. Abu-Serieh complied and sat in the front passenger seat of Mayo's cruiser.

During this time, Mayo maintained contact with Henkel via the mobile data terminal in each of their cruisers. The deputies exchanged details regarding the information that Abu-Serieh and the other driver, who was identified as Ali E. Khalil, gave them. Henkel informed Mayo that Khalil had stated that he and Abu-Serieh were traveling together and that he had rented the vehicle Abu-Serieh was driving. Mayo was ultimately able to confirm that the vehicle driven by Abu-Serieh was rented in Khalil's name. Furthermore, Khalil reported that he was coming from a trucking convention in Salt Lake City, Utah, while Abu-Serieh stated that he was coming from California.

After Mayo completed the paperwork and gave the warning citation to Abu-Serieh, he asked Abu-Serieh if he could ask a few additional questions. Abu-Serieh consented. Mayo then asked Abu-Serieh if he had any illegal items in his vehicle such as marijuana. Mayo also informed Abu-Serieh that he had smelled the odor of raw marijuana when he initially made contact at the vehicle's window. Abu-Serieh responded that he did not have marijuana in his vehicle. Mayo then asked Abu-Serieh if he could search the vehicle, and Abu-Serieh consented.

During his search, Mayo found two marijuana joints in a plastic container along with a piece of drug paraphernalia and two driver's licenses for Abu-Serieh. In the back cargo area, Mayo found a spare tire for another vehicle, as well as its component parts, and the contents of another vehicle's trunk.

While Mayo was searching Abu-Serieh's vehicle, Henkel was simultaneously searching Khalil's vehicle. During Mayo's search, Henkel contacted Mayo and asked if he had found a "trunk lock key" for the Nissan. Mayo found a key that appeared to match this description in a backpack on the front passenger seat of the Ford.

Both deputies testified that in order to open the trunk, the trunk lock located inside the glovebox had to be turned off. The key found in Abu-Serieh's backpack turned off the trunk lock which allowed the deputies to open the trunk. After the Nissan's trunk was opened, the deputies found 128 pounds of marijuana inside. Abu-Serieh and Khalil were both subsequently placed under arrest. Mayo testified that he placed both parties in the back seat of his cruiser and read them their *Miranda* warnings. After being booked at the jail, Abu-Serieh admitted to Mayo that he was to receive $6,000 to be another driver for the transportation of the load of marijuana from California to Chicago, Illinois.

Abu-Serieh was charged with delivery or possession with intent to deliver a controlled substance, marijuana, in violation of Neb. Rev. Stat. § 28-416(1) and (2)(b) (Cum. Supp.

2014). He filed a motion to suppress, claiming that his rights under the Fourth and Fifth Amendments had been violated. The district court held a hearing on the motion and overruled it, finding that there was probable cause to stop Abu-Serieh's vehicle, that the statements he made in Mayo's cruiser were not custodial and not subject to *Miranda* warnings, that Abu-Serieh freely and voluntarily consented to the search of his vehicle, and that there was probable cause based on the totality of the circumstances for Abu-Serieh's arrest. The district court additionally found that Abu-Serieh waived his *Miranda* rights and that his postarrest statements were admissible.

The district court subsequently held a stipulated bench trial and found Abu-Serieh guilty. The court sentenced Abu-Serieh to 18 to 36 months' imprisonment. Abu-Serieh now appeals.

## ASSIGNMENT OF ERROR

Abu-Serieh assigns, restated, that the district court erred in denying his motion to suppress.

## 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 or 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), we apply a two-part standard of review. See, *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012); *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011). Regarding historical facts, we review the trial court's findings for clear error. *State v. Bauldwin, supra*; *State v. Nelson, supra*. But whether those facts trigger or violate Fourth Amendment or Fifth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Bauldwin, supra*; *State v. Nelson, supra*.

## ANALYSIS

Abu-Serieh argues that the district court erred in denying his motion to suppress. Specifically, he claims that the district

court erred in finding that the deputies did not violate his rights under the Fourth and Fifth Amendments.

*Fourth Amendment.*

Abu-Serieh claims that the deputies violated his Fourth Amendment rights by stopping his vehicle on a pretextual basis and improperly extending the scope of the traffic stop. He also argues that he had a legitimate expectation of privacy in the trunk of Khalil's vehicle due to his possession of the key that opened the trunk. He argues that due to this expectation of privacy, the violation of Khalil's Fourth Amendment rights in the search and seizure of Khalil's rental vehicle violated his Fourth Amendment rights as well.

[2-6] Before a party may challenge a search without a warrant, he or she must have standing in a legal controversy. See *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993). "Standing" means that a person has a sufficient legally protectable interest which may be affected in a justiciable controversy, entitling that person to judicial resolution of the controversy. *Id*. A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment. *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011). Because the requirement of standing is fundamental to a court's exercise of jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *State v. Baltimore, supra*. To determine whether an individual may make a challenge under the Fourth Amendment, we must determine whether an individual has a legitimate or justifiable expectation of privacy. See *State v. Nelson, supra*. Ordinarily, two inquiries are required for such a determination. First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. *Id*.

[7] Both the U.S. Supreme Court and the Nebraska Supreme Court have held that individuals have a lesser expectation of privacy in a motor vehicle than in a home or office because a motor vehicle's "function is for transportation purposes and it seldom serves as one's residence or as the repository of personal effects." See *State v. Konfrst*, 251 Neb. 214, 224, 556 N.W.2d 250, 259 (1996), citing *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977). The expectation of privacy in one's vehicle extends to rental vehicles. See *State v. Nelson, supra*. Nebraska law has held that the driver of a rental vehicle may have standing to challenge the search or seizure of such vehicle if he or she can demonstrate that he or she received permission to drive the vehicle from the individual authorized on the rental agreement. See *id*.

Here, Abu-Serieh contends that he had a legitimate expectation of privacy in the trunk of Khalil's vehicle because he was in possession of the key that opened the trunk. However, nowhere in his brief does he explain why he believes possession of the key gives rise to a reasonable, legitimate expectation of privacy. Instead, his argument on this issue consists of only conclusory statements that such a legitimate expectation of privacy exists.

The State argues that Abu-Serieh lacks standing to challenge the search and seizure of Khalil's vehicle. The State claims that there is no evidence that Abu-Serieh ever drove or traveled in Khalil's vehicle, that he had any belongings in Khalil's vehicle, or that he ever had dominion or control over Khalil's vehicle or any of its contents. Although Abu-Serieh was in possession of the key to the vehicle's trunk, the State argues that there is a difference between a party having access to the trunk and a party having a reasonable expectation of privacy in the trunk.

In *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993), the Nebraska Supreme Court considered whether a party had standing to challenge the search of the house where he was arrested when he did not reside in the house. There, Steave

Baltimore had permission and "'sometimes'" had a key to his neighbor's home for the limited purpose of using the neighbor's garden hose. *Id.* at 572, 495 N.W.2d at 928. On the night that Baltimore was arrested, he had asked for and received his neighbor's house key and permission for the purpose of using the neighbor's bathroom. Law enforcement officers made contact with Baltimore at the door to the house and subsequently entered the home and found prescription drugs.

[8] On appeal, Baltimore argued that the search of the house was unlawful. The Supreme Court found that Baltimore had a key to his neighbor's house for a very limited purpose, never exercised control over the house or its contents, did not keep his personal belongings there, and did not have an unlimited right to enter the house. *State v. Baltimore, supra*. The court held that "[a]lthough Baltimore places much stock in his having a key for access to [his neighbor's] house, more than possession of a house key is necessary for access to the Constitution for an objection against the police search of [his neighbor's] house without a warrant." *Id*. at 573, 495 N.W.2d at 928. Finding that Baltimore's limited access to his neighbor's house was insufficient to demonstrate a legitimate expectation of privacy in the home, the Supreme Court held that Baltimore lacked standing to challenge the search. Thus, mere possession of a key granting access to a house does not necessarily create standing to raise an objection to a warrantless search. See *State v. Baltimore, supra*.

While we find no Nebraska case law directly on point for the issue of whether possession of a key to the trunk of a vehicle rented in another individual's name is sufficient to give rise to a legitimate expectation of privacy, we believe that the factors outlined in *State v. Baltimore, supra*, can be applied in this case.

Here, Abu-Serieh claims to have a legitimate expectation of privacy in the trunk of Khalil's vehicle due to his possession of the key that opened the trunk. However, there is no evidence in the record to indicate that Abu-Serieh ever exercised any

type of control over the trunk or any other part of Khalil's vehicle. The law enforcement officers found no evidence that Abu-Serieh kept any personal belongings anywhere in Khalil's vehicle. Furthermore, the vehicle was rented in Khalil's name, not Abu-Serieh's.

While Abu-Serieh did possess the key that opened the locked glovebox, thereby giving access to the trunk lock, that was the key's only purpose; it was not a key to the vehicle itself. Additionally, Henkel and Mayo testified that in order to use the key to open the trunk, it must be inserted into a lock in the glovebox that would then allow the trunk lock to be turned either on or off. Based on this testimony, it appears that a person must first have access to the passenger compartment of the vehicle in order to use the trunk key. This indicates that Abu-Serieh did not have an unlimited right to access the trunk, as use of the key required Khalil to grant him access to the vehicle's passenger compartment.

Based on these factors, as well as the lesser expectation of privacy an individual has in a vehicle, we find that Abu-Serieh did not have a legitimate expectation of privacy in the trunk of Khalil's rental vehicle and therefore does not have standing to challenge the search and seizure of the vehicle. Other jurisdictions addressing the issue of whether possession of a key creates a reasonable expectation of privacy in the item which the key unlocks have similarly found a lack of standing. See, e.g., *U.S. v. Stokes*, 829 F.3d 47 (1st Cir. 2016) (no standing to maintain Fourth Amendment challenge to search of post office box to which defendant held key); *U.S. v. Reyes*, 908 F.2d 281 (8th Cir. 1990) (possession of key to rental locker does not create reasonable expectation of privacy in locker); *United States v. Sanchez*, 635 F.2d 47 (2d Cir. 1980) (possession of keys insufficient to give defendant constitutionally protected interest in privacy of car).

Because Abu-Serieh lacks standing to challenge the search of the Nissan, our analysis will focus solely on the stop of the Ford driven by Abu-Serieh.

Abu-Serieh argues that Mayo improperly expanded the scope of the traffic stop by asking him questions unrelated to the offense of following too closely and by extending the scope past the time at which Mayo issued him a warning citation. We disagree.

[9,10] Before addressing the merits of his argument, we note that Abu-Serieh spends a significant portion of his brief arguing that the stop of his vehicle was pretextual. However, he also concedes that "[t]he evidence is unrebutted that the traffic stop was properly initiated . . . ," brief for appellant at 27, and that Henkel had "both reasonable suspicion . . . and probable cause" to stop Abu-Serieh's vehicle for the offense of following too close, *id.* at 31. It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Jasa*, 297 Neb. 822, 901 N.W.2d 315 (2017). If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). It is clear from the record that the stop of Abu-Serieh's vehicle was lawful.

[11,12] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011). This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id*. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are any outstanding warrants for any of its occupants. *Id*. The U.S. Supreme Court has held that an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, so long as doing so does not measurably extend the duration of the stop. *Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).

[13,14] In order to expand the scope of a traffic stop and continue to detain the motorist, an officer must have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the stop. See *State v. Nelson, supra*. Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id*.

Here, Mayo testified that during the course of the traffic stop, he asked Abu-Serieh where he was from, what he did for a living, as well as his general itinerary and travel plans. Abu-Serieh stated that he was coming from California, where his cousin had rented the vehicle for him, and that he was not traveling with anyone else. After completing the paperwork for the warning citation and handing it to Abu-Serieh, Mayo sought permission to ask a few additional questions and Abu-Serieh consented. At that point, Mayo asked Abu-Serieh if he had any illegal items such as marijuana in his vehicle and informed Abu-Serieh that he had smelled the odor of raw marijuana upon making initial contact at the vehicle's window. Abu-Serieh denied having marijuana in the vehicle and consented to Mayo's request to search the vehicle.

Although Mayo conceded that some of the questions he asked Abu-Serieh during the traffic stop were unrelated to issuing a warning citation, there is nothing in the record to suggest that such questions extended the duration of the stop. Furthermore, after Mayo completed the warning citation and handed it to Abu-Serieh, thereby completing the traffic stop, Abu-Serieh consented to additional questioning. At that time, we find that Abu-Serieh was no longer detained and was instead engaged in a voluntary contact with Mayo. Such voluntary contact does not require reasonable suspicion because Abu-Serieh was no longer detained and was free to terminate the encounter. Abu-Serieh also consented to a search of his vehicle thereby agreeing to an extension of the scope of

the stop. Accordingly, we find no merit to this assignment of error.

*Fifth Amendment.*

Abu-Serieh argues that Mayo's question to him of whether he had any drugs "created a hazard of incrimination" and that he was compelled to answer the question or be penalized for asserting his right to refuse to answer. Brief for appellant at 39. He therefore concludes that Mayo was required to read him his *Miranda* rights prior to posing the question. This argument fails for two reasons. First, Abu-Serieh was not in custody. Second, Mayo posed the question only after Abu-Serieh consented to additional questioning.

[15-17] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). A person is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on his or her freedom of movement to the degree associated with such an arrest. See *State v. Landis*, 281 Neb. 139, 794 N.W.2d 151 (2011). Persons temporarily detained pursuant to an investigatory traffic stop are not in custody for purposes of *Miranda*. *State v. Landis, supra*.

Because Abu-Serieh was only temporarily detained pursuant to an investigatory traffic stop when he was seated in the cruiser, he was not in custody for purposes of *Miranda*. Furthermore, Abu-Serieh consented to additional questioning. See *State v. Landis, supra* (determining defendant voluntarily stayed in cruiser for additional questioning at officer's request and therefore was not in custody).

[18] Neither detention pursuant to a traffic stop nor continued voluntary contact with law enforcement constitutes a formal arrest or restraint on an individual's freedom sufficient to require *Miranda* warnings. Therefore, we find no merit to this assignment of error.

## CONCLUSION

Following our review of the record, we find Abu-Serieh's assignment of error to be without merit and therefore affirm.

Affirmed.

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

# In re Interest of Michael N., a child under 18 years of age. State of Nebraska, appellee and cross-appellee, v. Heather N., appellant, and Robert N., appellee and cross-appellant.

908 N.W.2d 400

Filed January 23, 2018. No. A-17-218.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Appeal and Error.** On a question of law, an appellate court reaches a conclusion independently of the court below.
4. **Juvenile Courts: Parental Rights: Notice.** In a juvenile court case, following the issuance of an ex parte order for temporary immediate custody, a prompt detention hearing is required in order to protect a parent against the risk of an erroneous deprivation of his or her parental interests. Because parents have the right to a prompt detention hearing, they must also have a right to receive notice of that detention hearing.
5. **Judicial Notice: Records.** When a fact is judicially noticed by a trial court, papers requested to be judicially noticed must be marked, identified, and made a part of the record. In addition, testimony must be transcribed, properly certified, marked, and made a part of the record.
6. **Juvenile Courts: Parental Rights: Notice.** In a juvenile court case, if a detention hearing is held promptly, but without the parent's presence and without any evidence of actual or constructive notice of the hearing to the parent, then the parent's right to such a hearing is meaningless.

Appeal from the Separate Juvenile Court of Douglas County: Elizabeth Crnkovich, Judge. Reversed and remanded for further proceedings.

Karen S. Nelson and Alexis S. Mullaney, of Carlson & Burnett, L.L.P., for appellant.

Donald W. Kleine, Douglas County Attorney, and Jennifer C. Clark for appellee State of Nebraska.

Kristina B. Murphree, of Marks, Clare & Richards, L.L.C., for appellee Robert N.

Pirtle, Riedmann, and Arterburn, Judges.

Arterburn, Judge.

## INTRODUCTION

Heather N. appeals and Robert N. cross-appeals from an order of the juvenile court, which order granted the Department of Health and Human Services (the Department) continued custody of their son, Michael N., and provided that placement of Michael was to be outside of Heather and Robert's home. Both Heather and Robert challenge, among other things, the juvenile court's decision to enter its order granting the Department continued custody of Michael when they were not provided notice of the detention hearing. Upon our de novo review, we conclude that Heather and Robert had a right to notice of the detention hearing. Because there was no evidence that they were provided such notice or, at least, that such notice was attempted, we reverse that part of the juvenile court's order which awarded the Department continued custody of Michael and remand the cause for further proceedings.

## BACKGROUND

The juvenile court proceedings below involve Heather, Robert, and their son, Michael, who was born in December

2011. On February 2, 2017, the State filed both a petition and a supplemental petition alleging that Michael was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) due to the faults or habits of Heather and Robert. Specifically, the pleadings alleged that Heather and Robert had failed to provide Michael with proper parental care, support, and supervision; had failed to provide Michael with safe, stable, and appropriate housing; and had failed to place themselves in a position to parent Michael. The pleadings also alleged that termination of Heather's and Robert's parental rights was warranted pursuant to Neb. Rev. Stat. § 43-292(1), (2), and (9) (Reissue 2016) and that such termination was in Michael's best interests. Finally, the pleadings alleged that pursuant to Neb. Rev. Stat. § 43-283.01 (Reissue 2016), reasonable efforts to reunify Michael with his parents were not required.

Also on February 2, 2017, the State filed ex parte motions requesting that the juvenile court place Michael in the immediate custody of the Department and outside his parents' home. The juvenile court granted the State's request and placed Michael in the temporary custody of the Department in a foster home. The court scheduled a detention hearing to review Michael's custody and placement for February 7. On February 6, the day prior to the scheduled detention hearing, the court appointed both Heather and Robert with counsel.

On February 7, 2017, the detention hearing was held. Neither Heather nor Robert appeared at the hearing. However, counsel for both Heather and Robert appeared and made oral motions to dismiss the petition and supplemental petition because neither Heather nor Robert had been properly served with notice of the pleadings or with notice of the detention hearing. The State conceded that Heather and Robert had not been provided notice of the pleadings or of the detention hearing because "the whereabouts of the parents [are] unknown."

The juvenile court denied the motions to dismiss the petition and the supplemental petition. The court stated, "I do not know

of any pre-adjudication motion to dismiss under the Juvenile Code or under the law." The court also stated, "Notice and service must occur before any adjudication. This is the protective custody hearing, which is often . . . a matter of immediacy." The court then, sua sponte, took judicial notice of a "previous docket, 16-1277 . . . and the fact that the whereabouts of [the parents] are unknown." The court indicated that it would rule on the State's request to continue its ex parte custody order placing Michael in the custody of the Department and outside of Heather and Robert's home.

The court asked the State to present evidence concerning Michael's custody and placement. In response, the State asked the court to take judicial notice of the affidavit for removal. The court agreed to take judicial notice of the affidavit, but that affidavit was not offered into evidence. No other evidence was offered at the detention hearing. The juvenile court ordered that the Department be granted continued custody of Michael with placement to exclude Heather and Robert's home. The court then scheduled the adjudication hearing for April 26, 2017. The court ordered the State "to do their diligent search if they cannot personally serve [the parents] and secure service by publication as the law allows" prior to the scheduled adjudication hearing.

Heather appeals and Robert cross-appeals from the juvenile court's order.

## ASSIGNMENTS OF ERROR

On appeal, Heather assigns four errors, which we consolidate and restate into the following three assertions: (1) The juvenile court erred in failing to grant Heather's motion to dismiss the petition, (2) the juvenile court erred in ruling on the State's motion for continued custody when Heather had not been served with notice of the detention hearing, and (3) there was insufficient evidence presented to support the juvenile court's order granting continued custody of Michael to the Department.

On cross-appeal, Robert assigns five errors, which we consolidate and restate into the following two assertions: (1) The juvenile court erred in failing to grant Robert's motion to dismiss the supplemental petition, and (2) the juvenile court erred in ruling on the State's motion for continued custody when Robert had not been served with notice of the detention hearing.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings. *In re Interest of Carmelo G.*, 296 Neb. 805, 896 N.W.2d 902 (2017).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Id*. On a question of law, an appellate court reaches a conclusion independently of the court below. *Id*.

## ANALYSIS

### Motions to Dismiss

Heather asserts that the juvenile court erred in denying her motion to dismiss the petition because she had not been properly served with that pleading prior to the detention hearing. Likewise, Robert asserts that the juvenile court erred in denying his motion to dismiss the supplemental petition because he had not been properly served with that pleading prior to the detention hearing. Upon our review, we cannot say that the juvenile court erred in denying the motions to dismiss.

The State filed the petition and the supplemental petition in the juvenile court on February 2, 2017. The detention hearing was held 5 days later on February 7. At the detention hearing, the State admitted that it had not yet served Heather and Robert with a copy of the pleadings. Heather and Robert argued to the juvenile court that the pleadings should be dismissed because of the failure to perfect service upon them.

They make similar arguments in their appeal and cross-appeal to this court.

The dismissal of the petition and supplemental petition was not warranted due to a lack of service only 5 days after those pleadings had been filed in the juvenile court. We note that in civil actions, plaintiffs have 6 months in order to perfect service on a defendant. See Neb. Rev. Stat. § 25-217 (Reissue 2016). While there is no specific length of time delineated in the Nebraska Juvenile Code for the service of a petition, presumably the time allowed is more than 5 days.

Given the short amount of time that passed between the filings of the petition and supplemental petition and the detention hearing, it was reasonable for the juvenile court to deny the motions to dismiss in order to give the State more time to perfect service of the pleadings. In fact, after denying the motions to dismiss, the court specifically instructed the State to properly serve the parents prior to the adjudication hearing, which was scheduled for less than 3 months after the detention hearing. We would hope that the juvenile court's admonition would motivate the State to expeditiously seek service of the petitions on the parents so as to avoid the need for further continuances in the case.

Based upon the facts presented by this case, we cannot say that the juvenile court erred in denying the motions to dismiss so that the State could perfect service on the parents.

### Notice of Detention Hearing

Heather and Robert also assert that the juvenile court erred in ruling on the State's motion for continued custody when neither of them had been served with notice of the detention hearing. Upon our review, we find that Heather's and Robert's assertions have merit.

[4] The Nebraska Supreme Court has recently held that in a juvenile court case, following the issuance of an ex parte order for temporary immediate custody, "'[a] prompt detention hearing is required in order to protect the parent against

the risk of an erroneous deprivation of his or her parental interests.'" *In re Interest of Carmelo G.*, 296 Neb. 805, 814, 896 N.W.2d 902, 908 (2017), quoting *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Stated another way, a parent has a right to a prompt detention hearing after the issuance of an ex parte order for temporary immediate custody. Because parents have the right to such a detention hearing, they must also have a right to receive notice of that detention hearing.

In this case, at the February 7, 2017, detention hearing, the State affirmatively indicated that it had not provided notice of the hearing to Heather and Robert because their whereabouts were unknown. The State did not, however, provide any evidence by way of affidavit, or otherwise, to demonstrate that it had made efforts to locate Heather and Robert or that those efforts had been unsuccessful.

[5] We note that the juvenile court sua sponte took judicial notice of previous juvenile court proceedings to support its finding that the parents' whereabouts were unknown. However, nothing from this previous juvenile court case was submitted into evidence, and thus, nothing from this previous case is included in our record on appeal. The Supreme Court has held that when a fact is judicially noticed by a trial court, papers requested to be judicially noticed must be marked, identified, and made a part of the record. See, e.g., *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017). In addition, testimony must be transcribed, properly certified, marked, and made a part of the record. *Id*. The trial court's ruling should state and describe what it is the court is judicially noticing, otherwise a meaningful review of its decision is impossible. *Id*.

Here, the juvenile court did not precisely indicate what in the previous case file supported the notion that the parents' whereabouts were unknown despite any efforts to locate them. While a court is permitted to take judicial notice of its own records, this is only proper "'"where the same matters

have already been considered and determined."'" *Id.* at 758, 901 N.W.2d at 270, quoting *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992). Because the juvenile court in this case did not specifically identify what it was taking judicial notice of, we are simply unable to determine exactly what the court was taking judicial notice of within the previous case file. As a result, we are unable to determine whether such judicial notice was proper and are left with no evidence to support the juvenile court's finding that Heather's and Robert's whereabouts are unknown.

Because Heather and Robert did not receive notice of the detention hearing and because there is nothing in our record to indicate that the State made any effort to provide notice of the hearing, we conclude that they were denied their due process right to notice of the detention hearing. The juvenile court should not have ruled on the State's request for continued custody of Michael outside of his parents' presence and in the absence of any evidence that the State had made diligent efforts to locate the parents and notify them of the hearing.

Had the State presented evidence at the detention hearing which made an affirmative record that efforts to locate, serve, or otherwise give notice of the hearing to the parents were ongoing, the juvenile court would have had a basis to enter a further order of custody which would allow the State additional time to locate the parents. Here, not only was there no such evidence properly admitted before the court, but the court, in granting continued custody to the Department, ordered that no further hearing take place for nearly 3 months. The next scheduled hearing was an adjudication hearing.

While we recognize that counsel was appointed for Heather and Robert on the day prior to the detention hearing and that counsel did appear on their behalf at the hearing, we also recognize that counsel had little, if any, opportunity to contact or converse with their clients. This, coupled with the complete lack of evidence adduced as to what, if any, efforts had been

made to locate the parents, rendered the February 7, 2017, hearing more akin to an ex parte hearing than one in which the parents were present. Consequently, we find that had evidence been adduced to support continuing custody with the Department, the juvenile court should have scheduled a further detention hearing within a reasonable time pursuant to the parameters discussed in *In re Interest of Carmelo G.*, 296 Neb. 805, 896 N.W.2d 902 (2017), and *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), rather than scheduling a subsequent adjudication hearing nearly 3 months later.

Accordingly, we reverse the juvenile court's order continuing the Department's custody of Michael and remand the cause for further proceedings consistent with this opinion. The juvenile court's prior order of temporary custody shall remain in effect for a period of only 10 days following the issuance of the mandate from this court. If the parents have not received notice of the subsequently set hearing, the State must present evidence of its efforts to serve and to notify both Heather and Robert of the hearing's occurrence. The juvenile court shall continue the foregoing procedure, including holding continued detention hearings periodically in compliance with the guidelines described in *In re Interest of Carmelo G., supra*, and *In re Interest of R.G., supra*, until such time as either service is perfected or actual notice of a scheduled hearing is accomplished.

We recognize the State's arguments with regard to the practicality of obtaining service or providing notice to parents who may have absented themselves from the jurisdiction. However, the State has not cited to any authority which would justify anything less than diligent efforts to locate and serve the parents with proper notice of the proceedings. The statutes clearly identify the procedures available for service, including publication if all other efforts at finding the parents fail. Due process requires these efforts. While holding frequent hearings

on continued detention during the interim period may appear burdensome, such hearings necessarily safeguard the parents' due process rights.

[6] We find that implicit in a parent's right to a prompt detention hearing is the parent's right to notice of such a hearing. If a detention hearing is held promptly, but without the parent's presence and without any evidence of actual or constructive notice of the hearing to the parent, then the parent's right to such a hearing is meaningless. The State must make diligent efforts to promptly notify the parents of the occurrence of a detention hearing so that the hearing can be held within a reasonable time under the unique facts of each case.

## Sufficiency of Evidence to Support Continued Custody

Given our finding that the juvenile court erred in conducting the detention hearing under the facts of this case and our reversal of the continued custody order, we need not address Heather's final assignment of error concerning the sufficiency of the evidence to support the juvenile court's decision to award continuing custody of Michael to the Department.

## CONCLUSION

We reverse that portion of the juvenile court's order granting the Department continued custody of Michael and remand the cause for further proceedings. The juvenile court shall promptly hold a new detention hearing where the parents are present or where there is evidence of the State's diligent, but unsuccessful, efforts to locate the parents and notify them of the hearing.

Reversed and remanded for
further proceedings.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Michael W. McCurdy, appellant.

908 N.W.2d 407

Filed January 30, 2018. No. A-17-061.

1. **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.
2. **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.
3. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews a trial court's ruling to admit or exclude an expert's testimony for abuse of discretion.
4. **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.
5. **Rules of Evidence.** Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2016), irrelevant evidence is inadmissible.
6. **Rules of Evidence: Words and Phrases.** Under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2016), relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
7. **Evidence.** Relevancy requires only that the degree of probativeness be something more than nothing.
8. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), even relevant evidence is properly excluded if its probative value is substantially outweighed by its potential for unfair prejudice.

9. **Motions to Suppress: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a statement made to law enforcement based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an 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 an appellate court reviews independently of the trial court's determination.
10. **Miranda Rights: Waiver: Proof.** If a defendant seeks suppression of a statement because of an alleged violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the State must prove that the defendant validly waived his or her *Miranda* rights by a preponderance of the evidence.
11. **Miranda Rights.** The rule established in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.
12. **Constitutional Law: Police Officers and Sheriffs.** The U.S. Constitution does not require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.
13. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion.
14. **Trial: Prosecuting Attorneys.** In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper.
15. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.
16. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. 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.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Arterburn, Judge.

## I. INTRODUCTION

Michael W. McCurdy was convicted by a jury of three counts of first degree sexual assault of a child, one count of first degree sexual assault, and one count of intentional child abuse. He appeals from his convictions here. On appeal, McCurdy assigns numerous errors, including that the district court erred in making certain evidentiary rulings, in overruling his motion to suppress the statement he made to law enforcement, and in denying his motion for a mistrial after the State committed misconduct during its closing argument. McCurdy also alleges that there was insufficient evidence to support his conviction for first degree sexual assault. Upon our review, we affirm McCurdy's convictions.

## II. BACKGROUND

The State filed a second amended information charging McCurdy with five separate counts: three counts of first degree sexual assault of a child, one count of first degree sexual assault, and one count of intentional child abuse. Each of the charges stemmed from the reports of the eldest daughters of McCurdy's ex-girlfriend that McCurdy had been sexually abusing them for years.

Count I of the second amended information alleged that McCurdy, being 19 years of age or older, did subject J.U., a person of less than 12 years of age, to sexual penetration. Count II alleged that McCurdy, being 25 years of age or older,

did subject J.U., a person who was at least 12 years of age but less than 16 years of age, to sexual penetration. Count III alleged that McCurdy subjected J.U. to penetration without her consent or at a time when McCurdy knew or should have known that J.U. was mentally or physically incapable of resisting or appraising the nature of his conduct. Count IV alleged that McCurdy, being 25 years of age or older, did subject K.O., a person who was at least 12 years of age but less than 16 years of age, to sexual penetration. Count V alleged that McCurdy knowingly and intentionally caused or permitted J.U. and/or K.O. to be placed in a situation that endangered their lives or physical or mental health, or placed them in a situation to be sexually abused.

A jury trial was held in October 2016. At the trial, the State's key evidence was the testimony of both J.U. and K.O. Because of the importance of this testimony, both to the State's case in chief and to the issues raised in this appeal, we outline this evidence in some detail.

J.U. was 18 years old at the time of the trial. She testified that McCurdy has been in her life for as long as she can remember. J.U.'s mother and McCurdy used to be in a long-term romantic relationship, and they share three children together. J.U. testified that McCurdy had been sexually abusing her since she was in middle school. J.U. indicated that since the sexual abuse began, she and her family, including McCurdy, had lived in four different houses. She used these houses to organize her testimony about the years of sexual abuse.

J.U. lived in the "yellow house" from the time she was 5 years old until she was almost 10 years old. While she lived there, she and her younger sister, K.O., shared a bedroom in the attic of the house. One day, when J.U. was approximately 9 years old, she was alone in the bedroom when McCurdy entered the room. J.U. testified, "[H]e came in the room and started taking my pants off and then had intercourse." J.U. testified that after this initial incident, McCurdy would come into her bedroom three to four times per week in order to have

sexual intercourse with her. She testified that she would tell McCurdy "no" and push him away, but that she was unable to stop McCurdy from having sexual intercourse with her. J.U. testified that she did not tell anyone what was happening because she was afraid she would get into trouble and no one would believe her.

J.U. and her family next moved into the "white house." They resided in this house from the time J.U. was 10 years old until she was 13 years old. While J.U. and her family lived in the white house, McCurdy continued to have sexual intercourse with J.U. three to four times per week in her bedroom. She testified that she continued to tell McCurdy "no," but that she did not push him away anymore. She explained that even if she tried to push him away, he would "still do it anyway." J.U. continued to keep the abuse a secret because she was scared.

J.U. and her family moved into the "blue house" when she was 13 years old. They lived at that house until J.U. was almost 15 years old. At the blue house, the abuse continued. J.U. testified that by this time, McCurdy was no longer in a romantic relationship with her mother; however, he continued to reside with the family. J.U. testified that McCurdy continued to have sexual intercourse with her three to four times per week, both in her bedroom and occasionally in her mother's bedroom. In addition, while they were living in the blue house, McCurdy began to rub J.U.'s vagina with his hands and put his mouth on her vagina. J.U. described that McCurdy would put lotion all over her body, including on her breasts, her buttocks, and her vagina. J.U. indicated that she had stopped saying "no" to McCurdy, "[b]ecause he still did it anyway." She continued to keep the abuse a secret.

When J.U. was almost 15 years old, she, her mother, and her siblings moved into "the Sandstone house." McCurdy did not reside at this residence; however, he stayed overnight at the home on a regular basis, oftentimes without J.U.'s mother's knowledge. At the Sandstone house, J.U. slept in

the basement on a futon. When McCurdy would sleep at the Sandstone house, he would typically sleep with J.U. on the futon. McCurdy had sexual intercourse with J.U. three to four times per week in her basement bedroom. In addition, McCurdy put his hands and mouth on her vagina. J.U. no longer resisted McCurdy's actions.

In 2014, just prior to J.U.'s turning 16 years old, she became pregnant. J.U. testified that McCurdy was the father of the baby. In fact, she testified that she had never had sexual intercourse with anyone other than McCurdy. When McCurdy discovered that J.U. was pregnant, he told her to tell her mother that someone else was the father. J.U. testified that she followed McCurdy's directions and "ma[d]e up a name" to tell her mother. J.U.'s pregnancy did not result in a live birth.

During the summer of 2015, when J.U. was 17 years old, she became pregnant for a second time. The parties stipulated at trial that McCurdy was the father of J.U.'s baby. J.U. testified that when McCurdy found out she was pregnant, he instructed her "[t]o make up a name again" to tell her mother. However, on August 7, 2015, J.U. told her mother that she was pregnant with McCurdy's baby. J.U.'s mother then called police.

K.O. was 16 years old at the time of the trial. She testified that she has known McCurdy for her entire life. She also testified that McCurdy had been sexually assaulting her since she was approximately 10 years old. Like J.U., K.O. organized her testimony about the years of sexual abuse using the houses where she and her family had lived in the last few years.

When K.O. lived in the blue house, she was between the ages of 11 years old and 13 years old. She testified that while she lived in this house, McCurdy gave her a video game system as a present. He took her out of school so that they could play the game together all day and into the night. McCurdy then told K.O. to sleep in his bed so the younger children did not wake her up. McCurdy laid down with K.O. in the bed. K.O. testified that while they laid together, he attempted to "put[] his penis in [her] shorts." She pulled away from him

and nothing further happened on this occasion. Subsequently, however, McCurdy asked K.O. to rub his penis and "scratch[]" his "balls." He would sometimes tell her to use lotion when she was touching his penis. Eventually, McCurdy put his penis in K.O.'s vagina. He then continued to have sexual intercourse with her twice per week. McCurdy also put his fingers in K.O.'s vagina.

K.O. testified that she tried to resist McCurdy by pushing him away or trying to get away from him. She also told him "no." She indicated that sometimes she was able to successfully resist his actions. However, other times, McCurdy would "punish" her for her resistance. Such punishment included using his fingers to "[g]o higher up . . . in [her] vagina" to cause her pain. Additionally, K.O. testified that McCurdy would be "violent" with her sometimes. He would slap her, punch her, choke her, and hold her arms down.

K.O. testified that she did not tell her mother what was happening because she did not think her mother would believe her. She also testified that before McCurdy began abusing her, she observed J.U. and McCurdy having sexual intercourse in her mother's bedroom.

When K.O. and her family moved to the Sandstone house, K.O. was 13 years old. K.O. testified that at the Sandstone house, the sexual intercourse and sexual contact continued. K.O. indicated that the sexual contact included McCurdy rubbing lotion all over her body. At the Sandstone house, McCurdy had sexual intercourse with K.O. approximately twice every other week. K.O. believed that the abuse happened less often at the Sandstone house because she continued to resist McCurdy and actively tried to stay away from him.

K.O. described three specific instances of sexual contact at the Sandstone house that she remembered. First, she described one occasion where McCurdy attempted to have her put her mouth on his penis, but she successfully resisted him. Then, she described an occasion where McCurdy put his fingers in her vagina while they were in the living room watching a

movie with her younger siblings. K.O. indicated that she and McCurdy were under a blanket. Finally, she described an incident where she resisted McCurdy and he got mad and put his hands around her neck.

K.O. testified that she did not tell her mother about what was happening because she did not think her mother would believe her. K.O. admitted that she had lied to her mother about other things. K.O. did not tell her mother about the abuse until after J.U. had reported her experiences to police.

The State offered evidence in addition to J.U.'s and K.O.'s testimony. Such additional evidence included DNA evidence from the Sandstone house, the testimony of an expert witness concerning behaviors of child sexual assault victims, and a recording of an interview between law enforcement and McCurdy which was conducted just prior to McCurdy's arrest. The substance of this evidence will be detailed in our analysis below. The State also offered into evidence numerous photographs of J.U. and K.O. which were located on McCurdy's cellular telephone and on the family's computer under a user account titled "Mike." Some of these photographs had comments of a sexual nature electronically superimposed on them.

McCurdy did not testify at trial, nor did he offer any evidence in his defense. However, throughout the cross-examination of the State's witnesses and during closing arguments, McCurdy's counsel indicated that McCurdy did not dispute that he and J.U. engaged in sexual intercourse after she turned 16 years old. McCurdy contended that his sexual relationship with J.U. at that time was consensual. McCurdy did dispute that he had ever had sexual intercourse with K.O. He also disputed that he had sexual intercourse with J.U. prior to her turning 16 years old. Much of McCurdy's defense involved attacking the credibility of J.U. and K.O. during their cross-examinations. McCurdy pointed out numerous inconsistencies between J.U.'s and K.O.'s trial testimony and their prior statements about the sexual abuse.

After hearing all of the evidence, the jury convicted McCurdy of all five counts alleged in the second amended information. The district court subsequently sentenced McCurdy to a total of 95 to 115 years' imprisonment.

McCurdy appeals his convictions here.

## III. ASSIGNMENTS OF ERROR

On appeal, McCurdy assigns five errors, which we consolidate to four errors for our review. He first argues that the district court erred in making certain evidentiary rulings. Specifically, he asserts that the court erred in failing to further redact the laboratory report concerning DNA testing that was submitted into evidence. He also asserts that the court erred in permitting the State's expert witness to testify concerning the credibility of the victims. Second, McCurdy argues that the district court erred in finding that his statement to law enforcement was knowingly and voluntarily given and in consequently overruling his motion to suppress that statement. Third, he argues that the district court erred in overruling his motion for a mistrial after the State committed prosecutorial misconduct during its closing argument. Finally, McCurdy argues that there was insufficient evidence to convict him of count III, first degree sexual assault.

## IV. ANALYSIS

### 1. Evidentiary Rulings

On appeal, McCurdy alleges that the district court erred in allowing "[i]nconclusive, [n]o-[c]onclusion DNA [t]esting [r]esults" into evidence, brief for appellant at 21, and in allowing the State's "[e]xpert [w]itness to [t]estify as to the [c]redibility and [a]ccuracy" of the victim's in-court testimony, *id.* at 25. Upon our review, we do not find that the court erred in allowing into evidence either the DNA results or the testimony of the expert witness.

#### (a) Standard of Review

[1-3] 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. *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015). A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value. *Id*. In addition, an appellate court reviews a trial court's ruling to admit or exclude an expert's testimony for abuse of discretion. *State v. Braesch*, 292 Neb. 930, 874 N.W.2d 874 (2016).

[4] 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. *State v. Johnson, supra*.

(b) DNA Evidence

Prior to the trial, McCurdy filed a motion in limine requesting that a laboratory report which provided the results of DNA testing completed on items taken from the Sandstone house be redacted prior to being submitted into evidence and shown to the jury. Specifically, McCurdy asked that the portions of the report which discussed "uninterpretable" or "inconclusive" results be redacted because such information was not relevant. At a hearing on McCurdy's motion in limine, the State agreed to redact much of the information McCurdy objected to. However, the parties disagreed about whether certain information contained in the report had to be redacted. Included within the disputed information were portions of the report's appendix, which detailed the known DNA profiles for McCurdy, J.U., and K.O., and which listed the specific alleles that were taken from samples of objects located in the Sandstone house. In particular, McCurdy asked that the State redact the list of alleles found within item 5C, which was K.O.'s mattress. Ultimately, the district court allowed this information to remain in the report when it was submitted to the jury.

During the trial, the State offered the testimony of the technician who performed the DNA testing in this case, Heidi Jo Young Ellingson. During her testimony, Ellingson provided a

brief explanation of how DNA testing is performed. In addition, she explained the results delineated in her report. Ellingson indicated that K.O.'s DNA was only found on one item tested, item 5C, which was K.O.'s mattress. In comparison, Ellingson testified that J.U.'s and McCurdy's DNA was found together on multiple items. The DNA report indicates that on item 5C, "A mixture of at least three individuals was detected in which a major female contributor could be determined." The major female contributor was identified as K.O. The report also indicates that McCurdy was excluded as a major contributor to the DNA on K.O.'s mattress.

Ellingson went on to explain the appendix on the report. The appendix details the specific alleles that were found on each item tested. The alleles found on the tested items can then be compared to the reference samples provided by McCurdy, J.U., and K.O. Ellingson reiterated that the appendix demonstrates that the DNA testing revealed multiple items with J.U.'s and McCurdy's DNA together and only one item with K.O.'s DNA. A careful review of the appendix, as it relates to K.O.'s mattress, reveals that the alleles found on the sample from K.O.'s mattress match K.O.'s DNA profile at each locus. Some of the alleles also match McCurdy's DNA profile. However, McCurdy's full DNA profile was not found on K.O.'s mattress. His known alleles are not found at some loci, and alleles not matching either K.O. or McCurdy are found at other loci.

On appeal, McCurdy alleges that the district court erred in failing to redact the information about item 5C which was included in the DNA report's appendix. McCurdy argues that this information was not relevant and, furthermore, "could be interpreted to show the presence of [his] DNA on K.O.'s mattress, [and] that result could be prejudicial to the defense." Brief for appellant at 24. Upon our review, we do not find that the district court abused its discretion in failing to further redact the DNA report to exclude the results of the testing of K.O.'s mattress.

[5-7] Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2016), irrelevant evidence is inadmissible. *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015). Under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2016), 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. *State v. Johnson, supra*. Relevancy requires only that the degree of probativeness be something more than nothing. *State v. Johnson, supra*. We find that the evidence demonstrating that K.O.'s DNA is present on the mattress she said she slept on in the basement of the Sandstone house to be at least minimally relevant to the issues presented at trial. Such evidence corroborates K.O.'s testimony that she slept in the basement in her bed while J.U. and McCurdy slept in J.U.'s bed.

[8] However, under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), even relevant evidence is properly excluded if its probative value is substantially outweighed by its potential for unfair prejudice. *State v. Johnson, supra*. McCurdy alleges that the evidence contained in the appendix regarding K.O.'s mattress "could be prejudicial" to him if the jurors utilized the information to try and conclude that McCurdy's DNA was present along with K.O.'s DNA on the mattress. Brief for appellant at 24.

As we explained above, the DNA report specifically indicates that K.O. was identified as a major contributor to the DNA sample taken from her mattress. It also specifically indicates that McCurdy was excluded as a major contributor to the DNA sample on the mattress. Ellingson's testimony about K.O.'s mattress does not hint or suggest that McCurdy's DNA could also be on the mattress. Her testimony was limited to the conclusion that K.O.'s DNA was found on the mattress. McCurdy's assertion that the jury could have concluded that his DNA was also on the mattress by utilizing the information contained in the appendix is not supported by the evidence and is entirely speculative.

A thorough reading of the information in the appendix reveals that the alleles found on the sample from K.O.'s mattress match K.O.'s DNA profile at each locus. Some of the alleles also match McCurdy's DNA profile. However, McCurdy's DNA profile is not an exact match at each locus. Specifically, McCurdy's DNA profile does not match the sample taken from K.O.'s mattress at six separate loci. If the jurors had done a careful review of the appendix, their analysis should not have prejudiced McCurdy. Rather, the analysis would have revealed that it is not at all clear whether McCurdy's DNA was on the mattress. The DNA on the mattress cannot be definitively linked to anyone but K.O. Moreover, it is entirely speculative to assume that the jurors completed this analysis, especially given the other evidence presented in the report and in Ellingson's testimony, which did not provide any indication that McCurdy's DNA was also present on the mattress.

Although we conclude that the evidence in the report's appendix which demonstrated that K.O.'s DNA was found on her mattress was only minimally probative, we also conclude that the evidence was not prejudicial to McCurdy. This evidence does not link McCurdy to the mattress. As such, we do not find that the district court abused its discretion in failing to further redact the DNA report by omitting item 5C from the appendix.

(c) Expert Testimony

Prior to trial, McCurdy filed a motion requesting that the district court exclude expert testimony at trial regarding "whether [J.U. could] consent to sexual intercourse with [McCurdy] after she turns 16 if she has been in a sexual relationship with [him] prior to her 16th birthday." A hearing was held on the motion. At the hearing, the State offered the deposition testimony of Barbara Sturgis, Ph.D., a licensed psychologist. Her deposition testimony included a discussion of delayed or partial disclosures by child sexual assault victims. In addition, she discussed the theory of "learned helplessness"

as it relates to child sexual assault victims. McCurdy's primary objection to Sturgis' testimony concerned her discussion of learned helplessness. He argued that this theory had not been adequately studied in human populations, "especially the sub-set at issue in this case which are victims of child sexual assault." Ultimately, the district court determined that Sturgis would not be permitted to testify regarding the learned helplessness theory. However, she was permitted to testify about disclosure patterns in child sexual assault victims.

At trial, Sturgis testified that, in general, "[K]ids don't tell about abuse or sexual abuse right away. When they do tell they don't tell everything and many never tell at all." She explained that there were various reasons for children's delayed or nondisclosure of sexual abuse, including a lack of understanding about what is happening, feelings of guilt or shame, and fear of retribution. In addition, she testified that a child victim of sexual abuse may outwardly appear to be normal and happy.

The State asked Sturgis about the presence of inconsistencies in a victim's various interviews and trial testimony. McCurdy objected to this line of questioning, arguing that the State was attempting to have Sturgis bolster the credibility of J.U. and K.O. The court overruled the objection, and Sturgis testified, generally, about the potential veracity of inconsistent statements:

> The research into this area [sic] certainly consistent statements are highly accurate from one time to the next. Even forgotten statements and reminiscences[,] ones that are remembered the first time not the second time, or not remembered the first time and the second time are also highly accurate in general. And contradictions are at most accurate only half the time because [sic] has to be one way or the other.

Sturgis also testified that she had never met or spoken to J.U. or K.O. She had not read any police reports about this case and was only "[r]oughly" familiar with the facts of the case.

Sturgis indicated that everything that she testified to was based on general theories and knowledge within her field.

On appeal, McCurdy alleges that the district court erred in permitting Sturgis to testify about the veracity of inconsistent statements. He argues that such testimony "ascribes levels of accuracy to a child victim's testimony when that testimony is different than statements made before trial to investigators." Brief for appellant at 30. He also argues that Sturgis' testimony on this topic bolstered the credibility of J.U. and K.O. Upon our review, we do not find that the court abused its discretion in permitting Sturgis' testimony.

The primary purpose of Sturgis' testimony, as limited after McCurdy's pretrial motion in limine, was to provide the jury with background concerning child victims and how they differ from adult victims. The Nebraska Supreme Court has previously approved of the use of the type of testimony given by Sturgis. See, e.g., *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010). The court has noted that this type of evidence is helpful because "'"[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship," and "the behavior exhibited by sexually abused children is often contrary to what most adults would expect."'" *Id*. at 973, 792 N.W.2d at 154, quoting *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992).

McCurdy alleges that the State drifted from Sturgis' discussion about disclosure patterns in child victims of sexual assault when it asked her about the veracity of inconsistent statements. However, a reading of the entirety of Sturgis' testimony reveals that the State's questions about inconsistent statements was merely an extension of Sturgis' previous testimony about how and why child victims report sexual abuse and why they may not report or remember exact details of their abuse. Just prior to the State's specific questions about inconsistent statements, Sturgis testified about why child victims may not be able to recall exact details of each instance of abuse or why they may confuse instances when recalling

the facts years later. Sturgis had also previously testified about why child victims may not disclose certain "icky things" about the abuse when recounting the sexual abuse. When we consider this testimony, along with Sturgis' testimony that child victims may provide inconsistent statements if they are asked different questions in different interviews and that inconsistent statements are not necessarily inaccurate statements, we do not find that Sturgis drifted from the primary purpose of her testimony. All of Sturgis' testimony related to disclosure patterns in child victims.

Moreover, we note that in Sturgis' testimony, she specifically indicated that she had never interviewed J.U. or K.O. and that she knew very little about the actual facts of this case. Nothing in Sturgis' testimony was directed at these particular witnesses, but, rather, her testimony was a discussion of child witnesses in general. At no point did Sturgis ever come close to opining on whether J.U. or K.O. had been sexually assaulted, nor did she ever come close to opining on whether she believed the allegations made by J.U. or K.O.

We find that the district court did not err in permitting Sturgis to testify about the potential veracity of inconsistent statements. McCurdy's assertion on appeal has no merit.

### 2. Motion to Suppress

McCurdy alleges that the district court erred in admitting into evidence McCurdy's interview with law enforcement. He alleges that he did not validly waive his right against self-incrimination prior to making a statement. Upon our review, we affirm the decision of the district court to admit McCurdy's interview into evidence.

#### (a) Standard of Review

[9] In reviewing a motion to suppress a statement made to law enforcement based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an 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 an appellate court reviews independently of the trial court's determination. See *State v. Grimes*, 23 Neb. App. 304, 870 N.W.2d 162 (2015).

(b) Analysis

After J.U. reported to police that McCurdy had been sexually abusing her and that she was pregnant with his child, police went with J.U. to the Sandstone house. When police arrived at the house, they did an initial search to determine if McCurdy was present. They did not find him upon this initial search. However, later, they found McCurdy hiding in the downstairs bathroom. He was hiding in the shower "curled up in a little ball." After the police located McCurdy, he was taken to the police station where he was interviewed by Sgt. Ben Miller.

Prior to Sergeant Miller's asking McCurdy any questions about the sexual assault investigation, he advised McCurdy of his *Miranda* rights. After informing McCurdy of his rights, Sergeant Miller asked him: "Okay, and then knowing your rights in this matter, are you willing to answer some questions or—or make, talk to me about, basically about what's goin' on? That okay with you?" The following exchange between Sergeant Miller and McCurdy then took place:

> MICHAEL MCCURDY: I don't know what's going on. I've been sittin' here.
>
> . . . .
>
> [SERGEANT] MILLER: If—if you don't want to, I can't force ya to answer somethin' or talk to me, but in order for us to even talk about, why we're here, I have to let you know these things and it's gotta be okay with you that we, that we talk about it. Okay? And I, I'm just letting you know that it's your choice if you don't wanna know what's going on, that's your prerogative, but I would imagine that you would want to know what, why you're down here. Is it okay if you and I talk?

MICHAEL MCCURDY: It's okay.

[SERGEANT] MILLER: Is that yes?

MICHAEL MCCURDY: Yeah, yes.

[SERGEANT] MILLER: Okay. I'm just gonna have you sign right here. You can read these. These are the quest—these are the things I read you. These are your answers and if that's okay with you, I'll just have you sign right there. It's just saying that I read that to you, you understand those things, and that it's okay for us to have a conversation. And it would just be where, right here . . . .

MICHAEL MCCURDY: . . . You're not gonna tell me why I'm here without signing this?

[SERGEANT] MILLER: Well, you don't have to sign it if you don't want to. I—I'm just . . .

MICHAEL MCCURDY: I don't understand the . . .

[SERGEANT] MILLER: What don't you understand? I'll explain it to you.

MICHAEL MCCURDY: Why do you need, why do you need this?

[SERGEANT] MILLER: It's just a formality that we go through. That's all that it is because you were brought down here in a police car, uhm, I—it's just somethin' that our department has us do. It's all that it is. I pretty much give that to everybody that I talk to. Do you have any questions about that? 'Cause I'd be, I mean I'm, I'm not tryin' to hide anything from you here I'm just, I wanna make sure you understand.

During Sergeant Miller's last statement, McCurdy signed the form acknowledging that he had been read his rights and indicating his decision to speak with Sergeant Miller. Their discussion then continued, as follows:

MICHAEL MCCURDY: I don't know, I just, uhm, I've never been here.

[SERGEANT] MILLER: Okay, and if you have questions just ask me. Okay? I—I will do my best to answer

> 'em, uhm, I'll, it's important for me, that you understand I—I'll be as honest as I can with you and tell you what I can. There's just some things I, I may not be able to answer for you and I'll tell you that. Okay? Uhm, but whenever I talk to people it's important for me that you understand I'm not here to try to hide things from you. I'm not here to try to lie to you about things. My belief is if, I treat you with respect I hope that you'll do the same to me. Okay? Uhm, because I don't wanna waste your time any more than you probably wanna be wasting my time, and, so as long as, you know, we're good with that things will go, go fairly well here. Okay?

After this exchange, Sergeant Miller began asking McCurdy about the events of that night and about his relationship with J.U. and K.O.'s mother. Then, Sergeant Miller informed McCurdy that J.U. had told police that McCurdy had been sexually abusing her. McCurdy denied ever having sexual contact with J.U. When Sergeant Miller informed McCurdy that J.U. was pregnant again and that DNA testing was going to be conducted to determine the father, McCurdy stated, "I don't have anything else to say."

Prior to trial, McCurdy filed a motion to suppress his statement to Sergeant Miller. A hearing was held on the motion. After this hearing, the district court entered an order noting that the State conceded that any statement McCurdy made after he told Sergeant Miller that he did not have anything else to say should be suppressed as an invocation of McCurdy's right to remain silent. The court found that the remainder of the statement was admissible. Specifically, the court found that McCurdy had knowingly, intelligently, and voluntarily waived his *Miranda* rights:

> It is clear to the court that [McCurdy's] statements indicating he did not understand refer to him not knowing why he had been brought to the police station for questioning. Neither party pointed the court to any authority indicating police have to advise a suspect of the nature

> of the investigation prior to giving the suspect *Miranda* warnings and/or obtaining a waiver of *Miranda* rights. The court can't say [Sergeant Miller's] refusal to tell [McCurdy] why he was there amounted to coercion. Once [McCurdy] was advised of why he was there, he continued to speak to [Sergeant Miller] and answer questions. Again, [McCurdy] ultimately exercised his right to remain silent making it clear that he understood his rights, the consequences of waiving those rights, and that he could invoke his right to remain silent.

On appeal, McCurdy alleges that the district court erred in denying his motion to suppress the entirety of his statement to Sergeant Miller. Specifically, he asserts that he did not validly waive his *Miranda* rights prior to making a statement. He argues that Sergeant Miller "induce[d]" and compelled him to make a statement by withholding information from him until he agreed to talk. Brief for appellant at 36.

[10,11] *Miranda* warnings are "'"an absolute prerequisite to interrogation" . . . and "fundamental with respect to the Fifth Amendment privilege."'" *State v. Burries*, 297 Neb. 367, 388, 900 N.W.2d 483, 503 (2017), quoting *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). If a defendant seeks suppression of a statement because of an alleged *Miranda* violation, the State must prove that the defendant validly waived his or her *Miranda* rights by a preponderance of the evidence. *State v. Burries, supra*. We look to the totality of the circumstances to determine whether a defendant validly waived his or her *Miranda* rights during an interrogation:

> *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. In determining whether a waiver is knowingly and voluntarily made, a

> court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct.

*State v. Goodwin*, 278 Neb. 945, 956, 774 N.W.2d 733, 743 (2009). "'The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.'" *State v. Burries*, 297 Neb. at 389, 900 N.W.2d at 504, quoting *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

Before questioning McCurdy about the sexual assault allegations, Sergeant Miller read him the following *Miranda* advisements: "You have the right to remain silent, not make any statements, or answer any of my questions"; "[a]nything you may say, can be, and will be used against you in a court of law"; "[y]ou have the right to talk to a lawyer before answering questions and have a lawyer with you during questioning"; and "[i]f you cannot afford a lawyer, you have the right to have a lawyer appointed for you, prior to questioning, at no cost to you." After each statement, Sergeant Miller asked McCurdy if he understood and McCurdy indicated his understanding.

McCurdy acknowledges that he was informed of his *Miranda* rights. However, he asserts that he informed Sergeant Miller that he did not understand what was to happen during the interrogation, nor did he understand why he was there. He further asserts that Sergeant Miller's refusal to inform him of why he was there before he agreed to answer any questions amounted to "unconstitutional inducement." Brief for appellant at 36.

Upon our review of McCurdy's statement to Sergeant Miller, there is no indication that McCurdy did not understand his *Miranda* rights. He indicated a clear understanding of each right as it was read to him. Moreover, only a few minutes after Sergeant Miller began asking McCurdy about his relationship with J.U., McCurdy validly invoked his right to remain

silent and to terminate any further questioning. This action indicates that McCurdy had a clear understanding of his *Miranda* rights.

We agree with McCurdy that Sergeant Miller specifically indicated that he would not explain why McCurdy was present at the police station until McCurdy agreed to talk to Sergeant Miller. However, we disagree with McCurdy's assertion that Sergeant Miller's withholding of that information negated the voluntariness of McCurdy's subsequent statement. Contrary to McCurdy's assertion on appeal, Sergeant Miller did not have to inform McCurdy of the allegations against him in order to ensure that his waiver of rights was voluntarily given. Rather, Sergeant Miller only had to inform McCurdy of his *Miranda* rights and ensure that McCurdy understood those rights.

[12] The U.S. Supreme Court has previously held, "'[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.'" *Colorado v. Spring*, 479 U.S. 564, 576-77, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987). The Court went on to state, "Accordingly, the failure of the law enforcement officials to inform [the defendant] of the subject matter of the interrogation could not affect [the defendant's] decision to waive his Fifth Amendment privilege in a constitutionally significant manner." *Id*., 479 U.S. at 577.

Additionally, we note that contrary to McCurdy's assertions during the interview with Sergeant Miller and on appeal, there is evidence to suggest that McCurdy did, in fact, know why he was being questioned before Sergeant Miller informed him of the sexual assault allegations. McCurdy was found hiding in the shower in the basement of the Sandstone house. Before police found him, McCurdy had apparently begun steps to wash all of J.U.'s bedding, and when J.U. had spoken to McCurdy prior to talking with police, she had indicated to him that she had done something that would make him hate her.

Given the totality of the circumstances surrounding McCurdy's waiver of his *Miranda* rights and his decision to speak with Sergeant Miller, we find no indication that McCurdy was coerced or induced into making a statement. There is nothing to indicate that McCurdy's will was overborne or that his waiver of his rights was not knowingly and voluntarily given. We affirm the decision of the district court to admit into evidence a redacted version of McCurdy's statement to police.

### 3. Motion for Mistrial

McCurdy alleges that the district court erred in overruling his motion for a mistrial after the State committed prosecutorial misconduct in its closing arguments. Upon our review, we find that the district court did not abuse its discretion in denying the motion for a mistrial.

#### (a) Standard of Review

[13] The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion. *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009).

#### (b) Analysis

During the State's closing arguments, McCurdy objected to the following statements made by the prosecutor:

> You know, [the] State is going [to] digress for a second. People are different and people react to different things. Now [J.U.], you saw her. She is a broken young woman, broken young woman. Not a fighter. He broke her. And when she finally has the courage to say what happened, her worst nightmares came to fruition. Right?
>
> Why don't people report? . . . Sturgis told you, you know, people don't report because they are afraid they are not going to be believed. They are afraid to go through the produces [sic] of getting justice. And you saw that

> play out in this courtroom, what that can do to a person. You saw her called a liar by . . . McCurdy's attorney. You saw her words twisted.

McCurdy argued that the State's comments were improper because they insinuated that J.U. should not have had to go through the legal process and invoked sympathy for J.U. The prosecutor explained that his comments were merely meant to explain J.U.'s "demeanor on the stand." The court overruled McCurdy's objection and allowed the prosecutor to proceed with his closing. The prosecutor continued to try to explain J.U.'s demeanor on the stand: "Her words tried to be twisted. She was bullied. But, you saw this girl, this broken girl there. The State is asking you to understand why she was like that. Okay. The fear of people going through the process, and you understand why."

After the prosecutor finished his argument, McCurdy made a motion for a mistrial. He argued that the prosecutor committed misconduct:

> Talking about [J.U.] having to go through the legal process and having to come to court. We believe it is improper to allege that she had to come through the legal process and go to court and it is an infringement on my client's right to a fair trial and demand a jury trial to go through the process.
>
> Also, Your Honor, the jury sympathizes, that it is unduly prejudicial for the jury to hear that, that they will sympathize that she had to go through the process. Also gives an inference that he does not have a right to go through the trial and make her go through this.

The district court overruled McCurdy's motion for a mistrial.

On appeal, McCurdy asserts that the district court erred in overruling his motion for a mistrial. McCurdy alleges that the prosecutor committed misconduct by commenting on his decision to exercise his right to a jury trial and the effect that decision had on J.U. He also alleges that the prosecutor improperly "generated sympathy" for J.U. and criticized defense counsel

when the prosecutor stated that defense counsel had "bullied" J.U. Brief for appellant at 43.

[14,15] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. *State v. Balvin*, 18 Neb. App. 690, 791 N.W.2d 352 (2010). A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct. *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016). But if we conclude that a prosecutor's acts were misconduct, we next consider whether the misconduct prejudiced the defendant's right to a fair trial. *Id*.

Upon our review of the entirety of the State's closing arguments, we do not find that the prosecutor's remarks about J.U.'s struggles with the legal process constituted prosecutorial misconduct. While we agree with McCurdy's general assertion that a prosecutor should not comment about a criminal defendant's decision to exercise his right to a jury trial, we do not find that the prosecutor's comments about J.U.'s struggles improperly referenced McCurdy's right to a trial. Instead, when we read the prosecutor's closing arguments in light of the evidence presented at trial, and particularly in light of J.U.'s direct and cross-examinations, we understand the prosecutor's comments to be an explanation of J.U.'s demeanor on the stand.

During J.U.'s trial testimony, she provided inconsistent answers to questions posed by the State and by defense counsel. In addition, defense counsel brought out multiple inconsistencies between J.U.'s testimony at trial and her statements during previous interviews. Defense counsel accused J.U. of being untruthful and insinuated that she was making up the allegations of sexual abuse. The record reveals that J.U. was very emotional throughout her testimony, and particularly during cross-examination. The prosecutor's comments about J.U. during closing arguments appear to be an attempt to try to rehabilitate J.U.'s testimony and to explain the inconsistencies in her testimony. The prosecutor did not directly comment about McCurdy's decision to go to trial, and how that affected

J.U., but, rather, he commented on J.U.'s struggles with the legal process as a whole. The prosecutor's comment that J.U. was "a broken young woman," in the context of the entire closing argument, does not appear to be a plea to the jury's sympathies. Instead, it appears to be a way of explaining why J.U. may have acquiesced to defense counsel's accusations during the cross-examination.

In light of J.U.'s testimony at trial, we cannot say that the prosecutor's comments about her struggles with the legal process during closing argument were improper. The comments were not meant to mislead or unduly influence the jury. Instead, the comments were an attempt to rehabilitate the testimony of a witness who provided inconsistent testimony. As a result, we do not find that the district court abused its discretion in denying McCurdy's motion for a mistrial.

### 4. Sufficiency of Evidence

McCurdy argues the State failed to present sufficient evidence to convict him of count III, first degree sexual assault on J.U. Upon our review, we conclude that the evidence was sufficient to support the conviction.

#### (a) Standard of Review

[16] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. 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. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

#### (b) Analysis

Count III of the second amended information alleged that McCurdy committed first degree sexual assault on J.U.

pursuant to Neb. Rev. Stat. § 28-319 (Reissue 2016). Section 28-319(1) provides, in pertinent part:

> Any person who subjects another person to sexual penetration (a) without the consent of the victim, [or] (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree.

In Neb. Rev. Stat. § 28-318(8)(a) (Reissue 2016), "[w]ithout consent" is defined to mean:

> (i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor.

Notably, § 28-318(8)(c) provides, "A victim need not resist verbally or physically where it would be useless or futile to do so[.]"

McCurdy does not dispute that he engaged in sexual intercourse with J.U. after she turned 16 years old. In fact, at trial, he stipulated that J.U. was pregnant with his child at the time he was arrested. As such, McCurdy's argument on appeal concerns only whether the State sufficiently proved that J.U. did not consent to having sexual intercourse with him after she turned 16 years old, as was alleged in count III of the information. He asserts:

> The evidence is that [J.U.] did not resist sexual activity during the ages of 16 and 17. There is evidence that she even initiated sexual activity. There is no evidence that J.U. was compelled by threat of force to have sex. There is no evidence that she expressed a lack of consent through either word or conduct.

Brief for appellant at 48.

In its brief on appeal, the State asserts that there was sufficient evidence presented at trial to demonstrate that McCurdy

committed first degree sexual assault, as alleged in count III of the information. Specifically, the State asserts that the evidence presented at trial supports a finding that McCurdy knew or should have known that J.U. was incapable of consenting when she was 16 years old because of the prior years of sexual abuse and manipulation she suffered at his hands. In addition, the State asserts that the evidence presented supports a finding that prior to turning 16 years old, J.U. had repeatedly physically and verbally resisted McCurdy's sexual advances without success and that, as a result, by the time she turned 16 years old, any further resistance to McCurdy "would have been useless and futile." Brief for appellee at 26.

Upon our review of the record, we conclude that, at a minimum, there was sufficient evidence presented at trial to demonstrate that in the years McCurdy subjected J.U. to sexual contact prior to her 16th birthday, he had never respected J.U.'s repeated physical or verbal resistance to his sexual advances. As such, by the time J.U. was 16 years old, it was clear to her that any further resistance would have been futile.

At trial, J.U. testified that when McCurdy first began sexually assaulting her, she would tell him "no" and try to push him away. She also testified that her active resistance did not stop him from having sexual intercourse with her. J.U. testified that as the sexual assaults continued, she would still try to push McCurdy away, but that she stopped saying "no," because he would "do it anyway." Eventually, J.U. testified that she stopped resisting the abuse altogether because "he still did it anyway." J.U. also testified that after she turned 16 years old, McCurdy continued to have sexual intercourse with her. She testified that she did not want to have sex with McCurdy and never considered herself to be in a relationship with McCurdy. She also testified that saying "no" would not have made McCurdy stop. She testified that resisting McCurdy's sexual advances had never worked for her.

J.U. also testified that she told McCurdy that she loved him and that she sent him "selfies" of herself in her underwear,

because that is what McCurdy asked her to do. She also admitted during cross-examination that when McCurdy had sent her a text message asking to have sex with her when she came home from work, she had agreed. However, she explained her actions by stating that she was only telling McCurdy "what he wanted to hear." She also again reiterated that McCurdy would not take no for an answer.

Based on J.U.'s testimony as a whole, the jury could have found that J.U. had repeatedly resisted McCurdy's sexual advances verbally and physically without success and that by the time she was 16 years old, any further resistance on her part would have been futile. Therefore, the jury could find the essential elements of the crime of first degree sexual assault beyond a reasonable doubt.

## V. CONCLUSION

Upon our review, McCurdy's convictions and sentences are in all respects affirmed.

Affirmed.

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

# State of Nebraska, appellee, v. Justin Lindberg, appellant.

908 N.W.2d 678

Filed February 6, 2018. No. A-17-154.

1. **Rules of Evidence: Hearsay: Appeal and Error.** An appellate court reviews for clear error the trial court's factual findings underpinning the excited utterance hearsay exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. ____: ____: ____. An appellate court reviews de novo the trial court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.
3. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error.
4. **Trial: Testimony: Appeal and Error.** When an objection has been made once to the admission of testimony and overruled by the court, it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.
5. **Rules of Evidence: Hearsay: Words and Phrases.** 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.** A hearsay statement may be admissible if it qualifies as an excited utterance. An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
7. ____: ____. For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the

statement must have been made by the declarant while under the stress of the event.

8. ____: ____. The underlying theory of 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.
9. **Constitutional Law: Criminal Law: Witnesses.** The Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution provide for the accused in a criminal prosecution to be confronted with the witnesses against him.
10. **Constitutional Law: Trial: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there has been a prior opportunity for cross-examination.
11. ____: ____: ____. If statements offered at trial are nontestimonial, then no further Confrontation Clause analysis is required.
12. **Constitutional Law: Hearsay.** The initial step in determining whether there has been a Confrontation Clause violation usually involves a determination of whether the statements at issue are testimonial in nature.
13. **Constitutional Law: Trial: Witnesses.** The purpose of the Confrontation Clause is to allow an accused the opportunity to personally examine the witness and give him or her the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jurors in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.
14. ____: ____: ____. The Confrontation Clause is not violated by admitting a declarant's out-of-court statements so long as the declarant testifies as a witness and is subject to full and effective cross-examination.

Appeal from the District Court for Hall County, Teresa K. Luther, Judge, on appeal thereto from the County Court for Hall County, Philip M. Martin, Jr., Judge. Judgment of District Court affirmed.

Robert W. Alexander, Deputy Hall County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Joe Meyer for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Riedmann, Judge.

## INTRODUCTION

Following a bench trial, Justin Lindberg was found guilty of domestic assault, third degree. The county court for Hall County sentenced him to 183 days' imprisonment. On appeal, the district court affirmed the county court's ruling. Lindberg now appeals his conviction to this court. Following our review of the record, we affirm.

## BACKGROUND

In September 2015, the State of Nebraska filed a complaint charging Lindberg with domestic assault, third degree, in violation of Neb. Rev. Stat. § 28-323(1)(a) or (b) (Reissue 2016), a class I misdemeanor. The alleged victim was Lindberg's wife, M.L.

The county court held trial in February 2016. The State subpoenaed M.L. to testify but did not call her as a witness. The State's sole witness at trial was Aaron Kleensang, a deputy with the Hall County Sheriff's Department. Kleensang testified that on the night of the incident, he was dispatched to an apartment complex. Upon his arrival, he observed a male and female, later identified as Lindberg and M.L., standing outside in close proximity to one another. Kleensang stated that he immediately made contact with the female and separated the parties in order to check on her well-being. He testified that M.L. was "visibly shaking and crying. She was very upset at the time." Kleensang also observed what appeared to be several injuries to M.L.'s person. He initially spoke with M.L. outside the residence, and after he "started getting a better account of events, she took [him] inside the residence and explained further to greater detail of what had occurred."

On direct examination, the State asked Kleensang what M.L. informed him happened that evening. Lindberg objected on hearsay and confrontation grounds, arguing that M.L. was present in court and therefore not unavailable. The county

court overruled Lindberg's objection, finding that her statement to Kleensang was an excited utterance. Kleensang then testified that M.L. reported that she had been in a fight with her husband, Lindberg. Over Lindberg's continuing objection on confrontation grounds, Kleensang stated that M.L. advised that an argument turned physical inside their residence. M.L. said that Lindberg hit her across the left side of her face, which resulted in injury and caused her to fall to the ground. M.L. stated that once she was on the ground, Lindberg got on top of her and "banged her head into the floor" approximately 15 times before she was able to get back on her feet. Kleensang testified that the injuries he observed on M.L.'s person were consistent with her description of the assault, including a red mark on the left side of her face, an abrasion on her left hand, and an abrasion on her knee. The court admitted photographs of these injuries into evidence.

After the State rested, Lindberg called M.L. to testify on his behalf. She was his only witness. She testified that she suffers from vertigo, which was triggered on the night of the incident by stress and an argument with Lindberg. M.L. testified that her dizziness caused her to trip over a stool in their residence and land on the left side of her face. She stated that she did not tell Kleensang that Lindberg struck or threatened her and that her injuries were sustained in the fall. M.L. admitted that she was upset and crying when law enforcement arrived, but testified that she was upset due to her injuries from tripping over the stool and that "[n]othing happened" with Lindberg on that night.

On rebuttal, the State recalled Kleensang, who testified that M.L. did not report that she had tripped and fallen and that she had told him that Lindberg struck her.

The county court found Lindberg guilty of domestic assault, third degree, and sentenced him to 183 days' imprisonment.

Lindberg appealed his conviction to the district court for Hall County. He assigned as error the county court's decision to overrule his objection to Kleensang's testimony as to M.L.'s

statements on confrontation grounds, the failure to find that M.L. was unavailable as a witness, and the finding that M.L.'s statements to Kleensang fell within the excited utterance hearsay exception.

The district court held a hearing on Lindberg's appeal in January 2017. The court affirmed Lindberg's conviction, finding that M.L.'s statements qualified as excited utterances and were properly admitted at trial. Lindberg now appeals.

## ASSIGNMENTS OF ERROR

Lindberg assigns, restated and reordered, that the district court erred in (1) finding that M.L.'s statements to law enforcement constituted excited utterances and (2) finding that Kleensang's testimony as to M.L.'s statements did not violate Lindberg's Sixth Amendment right to confrontation.

## STANDARD OF REVIEW

[1,2] We review for clear error the trial court's factual findings underpinning the excited utterance hearsay exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011). We review de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds. *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

[3] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error. *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

## ANALYSIS

*Excited Utterances.*

Lindberg argues that the district court erred in finding that M.L.'s statements to law enforcement constituted excited

utterances and were thus admissible as exceptions to the rule prohibiting hearsay. He claims that the State did not lay sufficient foundation for M.L.'s statements to be considered excited utterances. Lindberg argues that M.L. admitted to being stressed on the day of the incident but such stress was not caused by a startling event. He further claims that her statements included fabrications, which indicated that she had the time and capacity to reflect and construct a response. We disagree.

[4] Before we turn to the merits of this assigned error, we note that the State asserts that because Lindberg did not make a continuing objection to Kleensang's testimony on hearsay grounds, he has only properly preserved his hearsay objection to the first question during Kleensang's testimony regarding M.L.'s statements. However, Neb. Rev. Stat. § 25-1141 (Reissue 2016) provides that when an objection has been made once "to the admission of testimony and overruled by the court it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received." Because Lindberg's objection related to testimony by only one witness, Kleensang, and Kleensang's testimony was of the same nature as the question to which Lindberg did object, we find that Lindberg was not required to make a continuing objection in order to preserve this issue for appeal. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998) (applying § 25-1141 to criminal prosecution).

[5] Neb. Rev. Stat. § 27-801(3) (Reissue 2016) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, that is offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible except as provided for 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. *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[6,7] A hearsay statement may be admissible if it qualifies as an excited utterance. *Id*. An excited utterance is a

"statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Neb. Rev. Stat. § 27-803(1) (Reissue 2016). For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. *State v. Smith, supra*. The key requirement is spontaneity, which requires a showing that the statement was made without time for conscious reflection. See *id*.

[8] The underlying theory of 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. *Id*. The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue. *Id*. Statements need not be made contemporaneously with the exciting cause but may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005).

At trial, Kleensang testified that he was dispatched to the apartment complex at approximately 10:30 p.m. and that upon his arrival, he saw Lindberg and M.L. standing in close proximity outside the residence. He observed that M.L. was "visibly shaking and crying." He testified that during his interaction with M.L., she was "very upset at the time." Kleensang also observed physical injuries to M.L.'s person. While there was no exact timeframe established at trial, Kleensang testified that upon his arrival, he "made immediate contact" with M.L. and separated her from Lindberg.

Kleensang testified that M.L. told him that she had been in a fight with Lindberg. He stated that M.L. reported that an

argument with Lindberg became physical inside their residence and that Lindberg hit her across the left side of her face, causing injury. M.L. said that she fell to the ground when Lindberg struck her in the face and that Lindberg then "repeatedly banged her head into the floor." Kleensang testified that he observed redness on the left side of M.L.'s face, which was consistent with her report that Lindberg hit her in that area. Kleensang also observed an abrasion on M.L.'s left hand that he opined may have been a defensive wound. Photographs of both of these injuries, as well as an abrasion on M.L.'s knee, were admitted at trial.

We find that the record before us establishes the existence of a startling event—Lindberg's assault on M.L., which included striking her in the face and repeatedly banging her head into the floor. The occurrence of such an event was corroborated by the physical injuries to M.L.'s person that Kleensang observed.

M.L.'s statements to Kleensang clearly related to this event as they described how the assault had occurred. We find that M.L. was still under the stress of the nervous excitement and shock of the assault when she made these statements. Kleensang testified that he immediately made contact with M.L. upon his arrival at the residence and that she was visibly shaking and crying and was very upset during his interaction with her. Her demeanor indicates that M.L. was still under the stress of the startling event at the time that she spoke with Kleensang. Accordingly, we find that the district court did not err in finding that M.L.'s statements to Kleensang constituted excited utterances and were therefore admissible through Kleensang's testimony at trial. We therefore find no merit to Lindberg's first assignment of error.

*Confrontation Clause.*

Lindberg argues that M.L.'s statements to Kleensang were testimonial and therefore subject to the Confrontation Clause. He claims that M.L. was available to testify for the State

and that he had not previously had the opportunity to cross-examine her. Lindberg argues that the district court therefore erred in finding that Kleensang's testimony as to M.L.'s statements did not violate his right to confrontation. We disagree.

[9] The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Article I, § 11, of the Nebraska Constitution provides, "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." The Nebraska Supreme Court has held that the analysis is the same under both the federal and state constitutions. *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[10-12] Where testimonial statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there has been a prior opportunity for cross-examination. *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004). If the statements are nontestimonial, then no further Confrontation Clause analysis is required. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). Accordingly, the initial step in determining whether there has been a Confrontation Clause violation usually involves a determination of whether the statements at issue are testimonial in nature. See *id*. However, the State does not argue that M.L.'s statements to Kleensang are nontestimonial; rather, the State argues that even if the statements are testimonial, Lindberg waived any objection he had to such testimony on Confrontation Clause grounds by calling M.L. to testify at trial. We agree.

[13] The purpose of the Confrontation Clause is to allow an accused the opportunity to personally examine the witness and give him or her the

> "'opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jur[ors] in order that

> they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' . . ."

*California v. Green*, 399 U.S. 149, 157-58, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), quoting *Mattox v. United States*, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895). Indeed, the U.S. Supreme Court has found that confrontation serves three purposes: (1) it ensures that the witness will give his statements under oath, thus impressing upon him the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) it forces the witness to submit to cross-examination, the "'greatest legal engine ever invented for the discovery of truth'"; and (3) it permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, which aids the jury in assessing his credibility. *California v. Green*, 399 U.S. at 158.

[14] The U.S. Supreme Court has applied this logic to find that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements so long as the declarant testifies as a witness and is subject to full and effective cross-examination. *California v. Green, supra*. By testifying at trial, the three purposes of the Confrontation Clause are satisfied: the declarant testifies under oath, which guards against untrue statements; the declarant subjects himself or herself to cross-examination regarding his or her statements; and the jury is able to assess the demeanor of the declarant and determine whether it finds him or her to be credible. Indeed, the Supreme Court has held that "so long as the declarant is present at trial to defend or explain" his or her statement, the Confrontation Clause does not bar admission of such statement. *Crawford v. Washington*, 541 U.S. 36, 59-60 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). See, also, *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013). While *Crawford v. Washington, supra*, affected the application of the Confrontation Clause to situations in which the declarant was unavailable at trial, it did nothing to vitiate the principles established in

*California v. Green, supra*, concerning declarants who do testify at trial. *People v. Argomaniz-Ramirez*, 102 P.3d 1015 (Colo. 2004).

In this case, the record shows that the State did subpoena M.L. to testify at trial but did not call her as a witness. However, after the State rested, Lindberg called M.L. on his behalf, and she subsequently testified as to the incident in question as well as her statements to Kleensang. In her testimony, M.L. recanted the statement she initially made to Kleensang and said that her injuries were caused by tripping and falling over a stool. M.L. specifically testified about the statements that she made to Kleensang, claiming that she advised him that she had tripped while feeling dizzy. She denied telling Kleensang that Lindberg assaulted her.

By calling M.L. as a witness on his behalf, Lindberg had the opportunity to examine her under oath and the jury was able to assess her demeanor and credibility as a witness. Furthermore, Lindberg specifically questioned M.L. about the statement that Kleensang testified she had made to him on the night of the incident. M.L. gave a different version of events, in which she claimed that she did not tell Kleensang that Lindberg had assaulted her. Presented with the testimony of both Kleensang and M.L., the fact finder could then determine whose testimony it found to be credible. Based on M.L.'s testimony as a witness, we find that Lindberg had a sufficient opportunity to examine her regarding her statement as testified to by Kleensang and that she was able to defend or explain such statement.

We acknowledge that in cases of this nature, the declarant who testifies at trial typically is called by the State. However, the relevant case law does not differentiate between whether the declarant testifies for the State or for the defendant; rather, the case law simply focuses on the fact that the declarant does testify at trial. See, *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970); *State v. Smith, supra*; *State v. Holliday*, 745 N.W.2d 556 (Minn. 2008). Here, it is clear

that M.L. was present and did testify at trial. Because M.L. did testify at trial, we find no violation of the Confrontation Clause in the county court's admission of her statements through Kleensang's testimony regardless of whether such statements were testimonial.

## CONCLUSION

Following our review of the record, we find Lindberg's assignments of error to be without merit and therefore affirm.

Affirmed.

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

# Gerson Saul Del Cid Escobar, appellee and cross-appellant, v. JBS USA, appellant and cross-appellee.

909 N.W.2d 373

Filed February 6, 2018. No. A-17-227.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may only modify, reverse, or set aside a Workers' Compensation Court decision when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. ____: ____. Factual determinations by a workers' compensation trial judge have the effect of a jury verdict and will not be disturbed unless they are clearly wrong.
4. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
5. **Workers' Compensation: Evidence: Proof.** When an employee in a workers' compensation case presents evidence of medical expenses resulting from injury, he or she has made out a prima facie case of fairness and reasonableness, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable.
6. **Workers' Compensation: Expert Witnesses: Records.** Outside expert testimony is not required to establish a causal link between the work-related injury and a worker's hospitalization where the records establish a relationship to the work-related injury.

7. **Workers' Compensation.** Whether medical treatment is reasonable or necessary to treat a workers' compensation claimant's compensable injury is a question of fact.
8. **Workers' Compensation: Proof.** The burden rests on the employee to make out a prima facie case that the medical treatment the employee received is a result of a work-related injury.
9. ____: ____. Once a prima facie case is established, the burden shifts to the employer to rebut the employee's evidence.
10. **Workers' Compensation: Words and Phrases.** Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
11. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
12. ____. Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact.
13. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
14. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
15. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
16. ____: ____. Although an expert witness may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
17. ____: ____. Although medical restrictions or impairment ratings are relevant to a claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
18. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-121 (Reissue 2010), a workers' compensation claimant may receive permanent or

temporary workers' compensation benefits for either partial or total disability.

19. ____. Temporary disability benefits should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury.
20. ____. When an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, permanent.
21. **Rules of the Supreme Court: Attorney Fees: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(F) sets forth the procedure for a successful party to request attorney fees.

Appeal from the Workers' Compensation Court: Julie A. Martin, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Dallas D. Jones and Thomas B. Shires, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Arterburn, Judge.

## I. INTRODUCTION

JBS USA (JBS) appeals and Gerson Saul Del Cid Escobar cross-appeals from an order entered by the Nebraska Workers' Compensation Court finding Escobar had sustained a work-related injury, finding that Escobar had reached maximum medical improvement, awarding a 15-percent loss of earning capacity, ordering JBS to pay for specific emergency room medical services, and awarding Escobar future medical care. On appeal, JBS argues the compensation court erred in finding that certain portions of medical bills incurred by Escobar during a period of hospitalization were related to his work injury and erred when it found that Escobar was entitled to temporary total disability from February 17 through March 15, 2016. On cross-appeal, Escobar argues the compensation court erred

by failing to award temporary partial benefits from June 28, 2015, through maximum medical improvement. Escobar also argues he is entitled to attorney fees. For the reasons set forth below, we affirm in part, and in part reverse and remand for further proceedings.

## II. BACKGROUND

The present appeal primarily concerns the nature and extent of the injury sustained by Escobar as a result of his accident. Escobar was 31 years old at the time of trial. Escobar had been employed by JBS for approximately 1½ years at the time of his accident. On June 25, 2015, Escobar sustained an injury to his lower back as a result of an accident arising out of and in the course of his employment with JBS. At the time of the accident, Escobar worked as a beef "tenderloin puller." His duties included removing tenderloins off of a conveyor belt and trimming the meat. These tenderloins could weigh up to 135 pounds. At some point during his shift on June 25, Escobar left the conveyor line to use the restroom. Escobar testified that upon his return to the line, his supervisor had pulled tenderloins from the line and placed them in a large bin. Escobar testified that he had to bend over the bin, lift the tenderloins, and place them onto his workstation. Escobar testified that he injured his back while lifting tenderloins out of the bin.

Escobar went to the company nurse that day to seek treatment for his back injury. The company nurse, Jana Elwood, noted in her report that Escobar did not appear to be in any physical distress. Elwood also noted that Escobar told her that he hated his job and wanted a new job, but did not want to have to bid for a new job. Elwood testified that she asked Escobar "if he was okay," and he responded that he was "mad," but was "okay."

Escobar did not seek further treatment from the company nurse until July 7, 2015. Escobar informed Elwood that he had dull pain in his lower back. Elwood did not note anything

remarkable about Escobar's condition in her report. Elwood treated Escobar with a "Biofreeze massage" and allowed him to return to work. Elwood applied the same treatment the following 2 days. Elwood then referred Escobar to a doctor for an examination on July 14.

Escobar was seen initially by Dr. Thomas Dunbar. Escobar stated that his pain was 10 out of 10, but Dr. Dunbar's report stated that the examination was normal except for some tenderness on Escobar's lower back. Dr. Dunbar prescribed some medication and released Escobar to work. Escobar returned to the physician's office 1 week later with no reported change to his pain level. The physician placed Escobar on work restriction and prescribed physical therapy.

During Escobar's first visit with the physical therapist, the therapist noted "[d]ecreased lumbar lordosis" and range of motion of the lumbar spine. At Escobar's last physical therapy session, which was August 24, 2015, Escobar stated that the pain had decreased some and the therapist noted improvement. However, Escobar still complained of pain, so the physical therapist referred Escobar to a physiatrist.

On August 27, 2015, Escobar sought treatment at the University of Nebraska Medical Center (UNMC) for a reported 2-month history of constant left-sided low-back pain after lifting at work. After examination, Escobar was diagnosed with a "[l]arge flank ecchymosis" of the left lumbar back and tenderness of the lower back, but normal range of motion. Escobar was prescribed medication and told to visit his regular physician.

On August 31, 2015, Escobar underwent an examination by Dr. Christopher Anderson, a physiatrist. Escobar complained of "10/10" left-sided lumbar pain. Dr. Anderson diagnosed Escobar with "[l]eft [l]umbar [r]adiculitis" resulting from his work-related injury. Dr. Anderson ordered additional medications, an MRI, and no work for 1 week. Escobar learned on September 1 that JBS would not pay him benefits for his week off of work, so Escobar requested that Dr. Anderson lift the

work restriction. Dr. Anderson subsequently released Escobar to work but restricted him to light-duty work.

Escobar had an MRI conducted on September 3, 2015. The MRI showed mild degenerative changes of the lumbar spine and an "L4-5 annular tear with disc bulge." At the following visit, Dr. Anderson noted that Escobar's manual muscle strength was normal and that he had better range of motion. However, Escobar still complained of severe pain, and he scored at the maximum score on the pain disability questionnaire. Escobar continued his medications and light-duty work and was subsequently referred for more physical therapy.

Escobar continued to treat with his physical therapist and Dr. Anderson until January 2016. On January 6, by request of JBS, Escobar was evaluated by Dr. Dennis Bozarth, an orthopedic surgeon. Dr. Bozarth determined that Escobar's subjective back pain was out of proportion to the physical examination, which was likely exacerbated by biopsychosocial stressors. Escobar continued his treatment with Dr. Anderson, and on February 17, Dr. Anderson took Escobar off of work for 4 weeks and referred him for more physical therapy.

On February 23, 2016, Escobar sought treatment at the UNMC emergency room. Escobar complained of sharp low-back pain radiating down his left leg to his foot. At trial, Escobar testified that he went to the emergency room because "half of my body got numb." Escobar was admitted to the hospital and underwent a battery of tests. Escobar remained in the hospital for 2 days. We will discuss the numerous procedures Escobar underwent as they become relevant in our analysis.

On March 2, 2016, Dr. Bozarth authored a letter in response to JBS' request for an opinion regarding Escobar's ability to perform his job. Dr. Bozarth opined that he disagreed with Dr. Anderson's assessment and believed that Escobar could perform light to medium work. Dr. Bozarth stated that he believed Escobar should undergo a functional capacity evaluation (FCE) in order to determine exactly what restrictions

and work capacity Escobar could handle. Dr. Bozarth stated in his letter that he believed Escobar had reached maximum medical improvement.

After being provided with Dr. Bozarth's letter, Dr. Anderson agreed that an FCE would be appropriate. Dr. Anderson did not agree with Dr. Bozarth's work restrictions, but believed Escobar could return to work with light-duty restrictions. Escobar underwent an FCE on April 4, 2016. No restrictions could be prescribed because the therapist determined that Escobar performed with "submaximal effort." Dr. Anderson was unable to utilize the FCE for permanent work restrictions but did place Escobar at maximum medical improvement on April 21. Escobar underwent a second FCE on September 26. The results were found to be valid by the therapist and indicated that Escobar could work medium to heavy physical demand for an 8-hour day.

Escobar sought treatment with Dr. John McClellan on September 26, 2016. Dr. McClellan evaluated Escobar at a spine and pain center. Dr. McClellan specifically opined that the aggravation of Escobar's preexisting lumbar degeneration arose when Escobar was lifting heavy tenderloins from the bin at work on June 25, 2015.

Escobar filed a petition in the compensation court on January 7, 2016. The matter went to trial on November 21. The compensation court received stipulations of fact, heard testimony, and received documentary evidence. There being no dispute, the compensation court found that Escobar had presented sufficient evidence to support his claim of a work-related low-back injury. The compensation court found that Escobar had reached maximum medical improvement on April 21, the date Dr. Anderson noted in his report. The compensation court awarded temporary total disability benefits from February 17 to March 15. The compensation court also awarded Escobar a 15-percent loss of earning capacity. Additionally, the compensation court ordered JBS to pay certain costs associated with Escobar's medical treatment

from February 23 through 25. Finally, the compensation court awarded future medical care.

## III. ASSIGNMENTS OF ERROR

JBS argues the compensation court erred in (1) finding that certain hospital bills incurred by Escobar were related to his work injury and (2) finding that Escobar was entitled to temporary total disability from February 17 through March 15, 2016. On cross-appeal, Escobar argues the compensation court erred by failing to award temporary total and temporary partial disability from June 28, 2015, through maximum medical improvement on April 21, 2016. Escobar also argues that he is entitled to attorney fees.

## IV. STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may only modify, reverse, or set aside a Workers' Compensation Court decision when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016).

[2-4] Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence. *Id.* Factual determinations by a workers' compensation trial judge have the effect of a jury verdict and will not be disturbed unless they are clearly wrong. *Gardner v. International Paper Destr. & Recycl.*, 291 Neb. 415, 865 N.W.2d 371 (2015). In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, every controverted fact must be considered in the light most favorable to the

successful party and that party must be given the benefit of every inference reasonably deducible from the evidence. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

## V. ANALYSIS

### 1. JBS' Appeal

#### (a) Hospital Treatment

JBS argues the district court erred in ordering it to pay $16,840.18 for charges relating to Escobar's hospitalization from February 23 through 25, 2016. JBS argues that Escobar did not meet his burden to prove that these costs were a result of his work-related low-back injury. JBS further contends that the compensation court erred when it ordered JBS to pay for treatment incurred by Escobar for which the compensation court could not determine whether it was attributable to the work-related low-back injury or another ailment.

[5] Neb. Rev. Stat. § 48-120 (Cum. Supp. 2014) provides in pertinent part, "The employer is liable for all reasonable medical, surgical, and hospital services . . . which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . ." "When an employee in a workers' compensation case presents evidence of medical expenses resulting from injury, he or she has made out a prima facie case of fairness and reasonableness, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable." *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 547, 667 N.W.2d 167, 187 (2003), *overruled on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

The compensation court stated in its order:

> Therefore, based upon the totality of the evidence, [Escobar's] testimony as to the need for treatment, the

> documented reports of continued complaints of pain, and the opinions of the experts that support a work-related injury to his low back, the Court finds that [JBS] is responsible for those emergency room charges related to treatment for his low back. . . .
>
> That being said, the Court appreciates [JBS'] arguments as to the relatedness of some of the charges as some of the incurred expenses were for tachycardia and unrelated infections. However, no evidence was offered as to which charges were not related to the low back so the Court was left to try and sort out any unrelated expenses. Any treatments or medications that the Court was not familiar with, could not find documentation in the medical records to explain the charge, or were for treatment for the combined diagnoses, the Court has assessed those charges against [JBS]. The Court has determined that [JBS] shall pay the following expenses incurred at UNMC from February 23, 2016, through February 25, 2016 . . . .

The compensation court went on to list numerous medications, procedures, and tests performed at UNMC during Escobar's hospitalization which met its stated criteria. However, the court did not delineate which of these charges it found to be related to Escobar's injury and which charges lacked documentation in the record or were otherwise unfamiliar. We note that two itemized statements of services provided and the associated charges with them are present in the record. One statement contains a total of $28,033.75 in charges. The other statement lists charges totaling $2,745.70. It is apparent, therefore, that the compensation court found almost half of the total charges to be unrelated to Escobar's back injury.

JBS argues that without expert testimony tying his hospitalization and the various charges incurred to the work-related injury, Escobar could not prove that any of the UNMC charges were payable by it. JBS further argues that the

compensation court's requirement that JBS pay these charges for which it was not familiar or could not find explanatory documentation constituted a shift in the burden of proof from the employee to the employer.

[6,7] We first note that outside expert testimony is not required to establish a causal link between the work-related injury and Escobar's hospitalization where the records establish a relationship to the work-related injury. See *Lounnaphanh v. Monfort, Inc.*, 7 Neb. App. 452, 583 N.W.2d 783 (1998). "Whether medical treatment is reasonable or necessary to treat a workers' compensation claimant's compensable injury is a question of fact." *Yost v. Davita, Inc.*, 23 Neb. App. 482, 489, 873 N.W.2d 435, 443 (2015), *modified on denial of rehearing* 23 Neb. App. 732, 877 N.W.2d 271 (2016).

As to the link between the specific charges incurred by Escobar while hospitalized, we find guidance for this issue in *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009). In *Visoso*, we considered whether a series of doctor's visits by an employee were related to the workplace injury and thus payable by the employer. The clinic reports recounted various medical conditions assessed during the visits. However, in each case, the claim reports noted that the employee's neck pain was assessed, and in some instances, treated. The billings in *Visoso* were for general office visits. There were not specific charges for treatment of the various complained of ailments.

We held that the medical records "clearly made out a prima facie case of fairness, reasonableness, and necessity because each visit included evaluation, treatment, or followup from his work injury. Therefore, the burden shifted to [the employer] to adduce evidence that the expenses are not fair and reasonable." *Id.* at 212, 778 N.W.2d at 513. While we did require evidence from the medical records to establish a causal connection between the work-related injury and the doctor visits, we did not require the employee to produce independent medical testimony to establish that connection.

[8,9] Here, there is no issue regarding whether the expenses are fair and reasonable; however, we see no reason not to apply the same burden of proof analysis to the issue of whether the medical treatment that was incurred was a result of the work-related injury. Therefore, the burden does rest on the employee to make out a prima facie case that the medical treatment the employee received is a result of a work-related injury. Once a prima facie case is established, the burden shifts to the employer to rebut the employee's evidence.

Here, the compensation court clearly excluded charges found not to be related to the work-related injury. The court included charges found to be related to that injury. The compensation court erred, however, by requiring JBS to pay for the medical services rendered which were unfamiliar and undocumented. Because the compensation court grouped these charges together with the charges found to be related to the workplace injury, we must remand the issue to the compensation court for further consideration. The court shall list separately those charges it found to be related to the workplace injury. JBS shall be required to pay only those related charges. JBS shall not be required to pay those charges which were unfamiliar or undocumented. Therefore, we must reverse the award of $16,840.18 by the compensation court to Escobar, and remand the issue for further consideration.

### (b) Award of Temporary Total Disability Benefits

JBS argues the compensation court erred in finding that Escobar was entitled to temporary total disability benefits from February 17 through March 15, 2016. JBS argues that there was no evidence that Escobar was submitting to treatment or that he was convalescing, suffering, and unable to work. Additionally, JBS argues that the hospitalization that occurred during this period was mainly due to other ailments, not the work-related low-back injury.

[10,11] Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. *Kim v. Gen-X Clothing*, 287 Neb. 927, 845 N.W.2d 265 (2014). Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform. *Id.*

[12-14] Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact. *Id.* In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013). Moreover, as the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

[15-17] If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Although an expert witness may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Id.* Although medical restrictions or impairment ratings are relevant to a claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Id.*

The compensation court received into evidence reports from Drs. Anderson and Bozarth. Dr. Bozarth opined in his

report that Escobar did not need to be off work, but should have some restrictions. Dr. Anderson directed that Escobar not work during the timeframe for which temporary total disability benefits were awarded. On March 24, 2016, Dr. Anderson released Escobar to work with some restrictions. The compensation court stated in its order that it gave more weight to Dr. Anderson, because he was Escobar's treating physician. Viewing every controverted fact in favor of Escobar and giving the benefit of every inference that is reasonably deducible from the evidence to Escobar, we cannot say that the compensation court was clearly wrong in its decision to award Escobar temporary total disability benefits. Therefore, we affirm the decision of the compensation court in this respect.

### 2. Escobar's Cross-Appeal

Escobar argues the compensation court erred in not awarding him temporary disability benefits from June 28, 2015, through April 21, 2016, the date the compensation court determined Escobar had reached maximum medical improvement. Escobar argues that in order to perform a light-duty job, he had to change positions from tenderloin puller to cleanup. Escobar argues that he should have been awarded temporary partial disability benefits as a result of having to switch positions due to his work-related injury.

[18-20] Under Neb. Rev. Stat. § 48-121 (Reissue 2010), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity. *Gardner v. International Paper Destr. & Recycl.*, 291 Neb. 415, 865 N.W.2d 371 (2015). Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained. *Id.* In other words, temporary disability benefits should be paid only to

the time when it becomes apparent that the employee will get no better or no worse because of the injury. *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013). Simply stated, when an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, permanent. *Gardner, supra*.

The compensation court determined that Escobar had bid on two lighter duty jobs 2 weeks before the date of his work-related injury. The compensation court noted that these jobs were lower-paying jobs than the tenderloin puller job Escobar was working. The compensation court determined that even though Escobar worked a lower-paying job after the work-related injury, it was voluntary. We find that the compensation court was not clearly wrong in this respect and affirm its finding.

### 3. Escobar's Request for Attorney Fees

[21] Finally, we note in Escobar's initial brief that he requests attorney fees for having to defend an appeal of the compensation court's award in his favor. However, Neb. Ct. R. App. P. § 2-109(F) (rev. 2014) sets forth the procedure for a successful party to request attorney fees. Escobar's request contained in his brief is not in compliance with that procedure, and although this court has not ordered a reduction of the amount awarded to him, we are remanding the cause to the compensation court for further proceedings involving the amount it ordered JBS to pay. See Neb. Rev. Stat. § 48-125 (Cum. Supp. 2014). Therefore, we do not address this request at this time.

## VI. CONCLUSION

We find that the compensation court erred in finding that the entirety of $16,840.18 in hospitalization charges should be taxed against JBS. We reverse that portion of the court's award and remand it for further consideration of whether

Escobar met his prima facie burden to prove whether the charges were related to his injury. We find that the compensation court did not err in finding that Escobar was entitled to temporary total disability benefits from February 17 through March 15, 2016. We find the compensation court did not err by failing to award Escobar temporary partial disability benefits from June 28, 2015, through maximum medical improvement. Finally, we find that Escobar is not entitled to attorney fees.

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

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

# State of Nebraska, appellee, v. Patrick Kresha, appellant.

909 N.W.2d 93

Filed February 13, 2018. No. A-17-525.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **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.
3. **Convicted Sex Offender: Sentences.** Any sex offender convicted of a registrable offense under Neb. Rev. Stat. § 29-4003 (Reissue 2016) punishable by imprisonment for more than 1 year and convicted of an aggravated offense shall register on the sex offender registry for life.
4. **Convicted Sex Offender.** An aggravated offense for purposes of the Sex Offender Registration Act means any registrable offense under Neb. Rev. Stat. § 29-4003 (Reissue 2016) which involves the direct genital touching of (1) a victim age 13 years or older without the consent of the victim, (2) a victim under the age of 13 years, or (3) a victim who the sex offender knew or should have known was mentally or physically incapable of resisting or appraising the nature of his or her conduct.
5. **Convicted Sex Offender: Words and Phrases.** The definitions of sexual conduct under Nebraska law and federal law make a distinction between the direct touching of a victim's private parts and the touching of the clothing covering the victim's private parts.
6. ____: ____. The term "direct genital touching" for purposes of finding an aggravated offense under the Sex Offender Registration Act requires evidence that the actor touched the victim's genitals under the victim's clothing.

7. **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.
8. ____. 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 Polk County: Rachel A. Daugherty, Judge. Affirmed as modified.

Timothy P. Matas for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Riedmann, Judge.

## INTRODUCTION

Patrick Kresha appeals his plea-based convictions of two counts of third degree sexual assault of a child and two counts of third degree sexual assault. He claims that the district court erred in imposing excessive sentences and in determining that he was subject to lifetime registration under Nebraska's Sex Offender Registration Act (SORA), Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2016). We conclude that the court erred in finding that Kresha committed an aggravated offense for purposes of SORA and therefore modify the sentencing order to require that he instead register as a sex offender for 25 years. We otherwise affirm.

## BACKGROUND

Kresha pled no contest to an amended information charging him with two counts of third degree sexual assault of a

child and two counts of third degree sexual assault. According to the factual basis provided by the State at the plea hearing, on or about August 17, 2010, and May 18, 2011, Kresha, who was born in 1962, went into the bedroom of M.K., who was born in 1998, while M.K. was sleeping and touched her genitalia for the purpose of his own sexual gratification. Similarly, between January 1, 2010, and December 31, 2012, Kresha touched the breast and buttocks of J.G., who was born in 1998, for the purpose of his own sexual gratification. In addition, between January 1, 2010, and May 6, 2013, Kresha subjected E.S., who was born in 1996, and A.G., who was born in 1995, to sexual contact without their consent. All of the events occurred in Polk County, Nebraska.

The district court accepted Kresha's pleas and found him guilty. He was sentenced to consecutive terms of imprisonment of 5 to 5 years, 5 to 5 years, 1 to 1 year, and 1 to 1 year. At the sentencing hearing, the court also determined that Kresha had committed an "aggravated offense" as defined in SORA and that he would therefore be required to register on Nebraska's sex offender registry for life. Kresha now appeals to this court.

## ASSIGNMENTS OF ERROR

Kresha assigns, restated and renumbered, that the district court erred (1) in determining that his offenses were aggravated offenses for purposes of the lifetime registration requirement of SORA and (2) in imposing excessive sentences that constituted an abuse of discretion.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009).

[2] An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its

discretion in establishing the sentences. *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

## ANALYSIS

*Aggravated Offense Under SORA.*

[3,4] Pertinent to this case, any sex offender convicted of a registrable offense under § 29-4003 punishable by imprisonment for more than 1 year and convicted of an aggravated offense shall register on the sex offender registry for life. See § 29-4005(1)(b)(iii). For purposes of SORA and as relevant to this case, the term "aggravated offense" means any registrable offense under § 29-4003 which involves the "direct genital touching" of (1) a victim age 13 years or older without the consent of the victim, (2) a victim under the age of 13 years, or (3) a victim who the sex offender knew or should have known was mentally or physically incapable of resisting or appraising the nature of his or her conduct. § 29-4001.01(1). The registrable offenses under § 29-4003 include third degree sexual assault of a child, but SORA does not define "direct genital touching."

Kresha asserts that "direct genital touching" requires the touching of the victim's genitals under the clothing. He argues that there is no evidence in the record to support a finding of any touching which occurred under the clothing and that therefore, the court erred in finding that the offense was an aggravated offense subject to lifetime registration. The State agrees that there is no evidence of genital touching under the clothing regarding the two counts of third degree sexual assault of a child; thus, the State concedes that the court erred in finding the offenses to be aggravated.

[5] We agree with the parties that "direct genital touching" is not defined under Nebraska law. The term "sexual contact" is defined under Nebraska law and provides in part:

> Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of

> the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor.

Neb. Rev. Stat. § 28-318(5) (Reissue 2016). Similarly, the term "sexual contact" is defined under federal law as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3) (2012). Thus, these definitions make a distinction between the direct touching of a victim's private parts and the touching of the clothing covering the victim's private parts.

[6] Likewise, the term "sexual act" is defined under federal law to include "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." § 2246(2)(D). And this definition has been summarized as "the direct touching of genitals with certain sexual or abusive intents." *U.S. v. White*, 782 F.3d 1118, 1137 (10th Cir. 2015). See, also, *U.S. v. Jennings*, 496 F.3d 344 (4th Cir. 2007) (direct touching under definition of sexual act in § 2246(2) means touching of victim's unclothed private parts). We also note that the federal law's definition of "sexually explicit conduct" makes a distinction between direct touching and touching through clothing. See 18 U.S.C. § 3509(a)(9)(A) (2012). Based on the foregoing, we conclude that the term "direct genital touching" for purposes of finding an aggravated offense under SORA requires evidence that the actor touched the victim's genitals under the victim's clothing.

For purposes of lifetime registration under SORA, the defendant must have been convicted of a crime that is a

registrable offense and punishable by more than 1 year in prison. Thus, in the present case, only the convictions for third degree sexual assault of a child could constitute aggravated offenses. We concur with the parties that there is no evidence in the record of direct genital touching.

The record establishes that Kresha touched J.G.'s breasts and buttocks, which does not constitute genital touching, and that he touched M.K.'s vaginal area over her clothing. Therefore, the evidence is insufficient to support a finding of direct genital touching for purposes of an aggravated offense under SORA. Accordingly, the district court erred in finding that Kresha was required to register for life. Instead, he is required to register for 25 years. See § 29-4005. We therefore modify the sentencing order to require that Kresha register for 25 years rather than life.

*Excessive Sentences.*

Kresha also asserts that the sentences imposed by the district court are excessive and constitute an abuse of discretion. We disagree.

Third degree sexual assault of a child is a Class IIIA felony. Neb. Rev. Stat. § 28-320.01 (Reissue 2016). At the time of Kresha's offenses, this offense was punishable by a maximum of 5 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 2008). Third degree sexual assault is a Class I misdemeanor, which carries a punishment of up to 1 year's imprisonment. See Neb. Rev. Stat. §§ 28-320 and 28-106 (Reissue 2008). Thus, Kresha's sentences fall within the statutory limits. Nevertheless, he argues that they are excessive because the district court relied heavily on the nature and circumstances of the offenses when there were other factors that should have mitigated his sentences.

An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

[7,8] 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. *Id*. The sentencing court is not limited to any mathematically applied set of factors. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

At the sentencing hearing, the court made clear that it considered the required factors as well as the information contained in the presentence investigation report. We recognize that there were mitigating factors present here, including Kresha's lack of a significant criminal history, his employment record and ties to the community, and the lack of violence in the offenses. However, as the district court emphasized, the circumstances of the offenses support a more significant sentence. Kresha victimized four teenage girls, one of whom was his own daughter. There were letters in the presentence investigation report from each victim detailing the impact Kresha's actions have had on their lives, and two of the victims spoke at sentencing.

The court emphasized the effect Kresha has had on all of his victims, and most importantly, his own daughter with whom he violated the core of the parent-child relationship. The court opined that had the victims not reported his actions, he would have continued to victimize young women. The court explained its responsibility to look out for the welfare of those who cannot look out for themselves, which, in this case, is Kresha's own daughter and her teenage friends. It therefore found that probation was not appropriate. Similarly, the probation officer who conducted the presentence investigation opined that probation was not appropriate and recommended

a sentence of incarceration, because Kresha took advantage of his daughter's friends for his own sexual gratification. Based on the record before us, we cannot conclude that the district court abused its discretion in the sentences imposed.

## CONCLUSION

We conclude that the district court erred in finding evidence in the record of direct genital touching for purposes of lifetime registration pursuant to SORA. We therefore modify the sentencing order to require that Kresha register for 25 years. Finding that Kresha's sentences are not excessive, we otherwise affirm his convictions and sentences.

Affirmed as modified.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
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# Aldwin R. Foster-Rettig, appellee, v. Indoor Football Operating, L.L.C., appellant.

908 N.W.2d 426

Filed February 20, 2018. No. A-17-048.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the Workers' Compensation Court's findings, an appellate court considers the evidence in the light most favorable to the successful party. The appellate court resolves every controverted fact in the successful party's favor and gives that party the benefit of every inference that is reasonably deducible from the evidence.
3. **Workers' Compensation: Appeal and Error.** The Workers' Compensation Court's factual findings have the effect of a jury verdict, and an appellate court will not disturb them unless they are clearly wrong.
4. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
5. **Workers' Compensation.** Pursuant to the Nebraska Workers' Compensation Act, the term "wage" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such

advantages shall have been fixed by the parties at the time of hiring, except that if the workers' compensation insurer shall have collected a premium based upon the value of such board, lodging, and similar advantages, then the value thereof shall become a part of the basis of determining compensation benefits.

6. ____. When determining whether payments for an employee's meals or lodging should be included in a calculation of weekly wages, there must be evidence to demonstrate that (1) the money value of the advantages was fixed by the parties at the time of hiring and (2) the advantages constitute a real and reasonably definite economic gain to the employee.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed.

James D. Garriott, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Jeffrey F. Putnam, of Law Offices of Jeffrey F. Putnam, P.C., L.L.O., for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Arterburn, Judge.

## INTRODUCTION

Indoor Football Operating, L.L.C. (Indoor Football), appeals from the Nebraska Workers' Compensation Court's award of benefits to Aldwin R. Foster-Rettig. On appeal, Indoor Football asserts that the compensation court erred in calculating Foster-Rettig's average weekly wage. For the reasons set forth herein, we affirm the decision of the compensation court.

## BACKGROUND

On April 28, 2014, Foster-Rettig was playing football for the Omaha Beef football team when he suffered a back injury. As a result of the injury incurred by Foster-Rettig, he was unable to continue to play football and was ultimately placed on an "injured reserve" status by the Omaha Beef football team for the remainder of the season. He remains unable to

play football; however, he has since found employment in a different capacity. Although it is not entirely clear from our record, it appears as though the Omaha Beef football team was owned by Indoor Football and, as such, Foster-Rettig was an employee of Indoor Football when he was playing for the Omaha Beef football team.

Foster-Rettig subsequently filed a claim in the compensation court alleging that he was entitled to disability benefits from Indoor Football as a result of his work-related injury. After a trial, the compensation court entered an award in favor of Foster-Rettig, awarding him both temporary total disability payments and permanent partial disability payments. Indoor Football appeals from the award.

Indoor Football's appeal concerns only the compensation court's calculation of Foster-Rettig's average weekly wage. Accordingly, we focus our recitation of the evidence presented at trial on that evidence which is relevant to the calculation of Foster-Rettig's average weekly wage.

Foster-Rettig testified at trial that when he played for the Omaha Beef football team, he received a weekly salary of between $225 to $250. This salary equated to a payment of $225 per game he played in, with the ability to earn an additional $25 per game if the team won or if Foster-Rettig played particularly well. In addition to this salary, Foster-Rettig testified that he received "room and board" from Indoor Football. In fact, he testified that his receiving "room and board was required" to his playing for the Omaha Beef football team, because he was not from Omaha, Nebraska.

Indoor Football paid for Foster-Rettig to stay at a particular hotel in Omaha 7 days a week during the football season. If he chose not to stay at the hotel on a particular night, however, he did not receive any additional compensation from Indoor Football. Foster-Rettig testified that he never paid anything to stay at the hotel and that he did not know exactly how much his staying at the hotel cost Indoor Football. He did offer into evidence a letter from a local travel agent who estimated that

from March to June 2012, the average nightly rate at that particular hotel was $50.

During the football season, Indoor Football also provided to Foster-Rettig "a stack of meal vouchers" every week so that he could eat three meals a day at local restaurants. Foster-Rettig testified that he would receive at least 21 meal vouchers per week. Some of those vouchers entitled him to a "free meal[]" and others entitled him to spend a specific amount of money on a meal, typically between $10 and $25. Foster-Rettig testified that each voucher would "take[] care" of the cost of a meal. However, he never received any additional money from Indoor Football if he did not use the full amount of a voucher or if he did not use all the vouchers allotted to him. In addition, he never had to return any unused vouchers to Indoor Football. Foster-Rettig offered into evidence a document indicating that the daily meal rates for traveling employees across the country ranged from $46 per day to $69 per day.

At trial, Foster-Rettig alleged that his average weekly wage should include the amount that Indoor Football paid for his lodging and for the value of his meals. To the contrary, Indoor Football alleged that Foster-Rettig's average weekly wage should be calculated based only on his salary of either $225 or $250 per week. Specifically, Indoor Football alleged that based on what Foster-Rettig actually earned while he played for the Omaha Beef football team, his average weekly wage should total $231.25.

In its award, the compensation court calculated Foster-Rettig's average weekly wage to be $903.25. In calculating this amount, the court stated:

> The court finds [Foster-Rettig's] average weekly wage was $231.25 without adding in the per diem of meals and lodging. . . . When adding in $350.00 per week for lodging and $322.00 per week for meals, the average weekly wage of [Foster-Rettig] is $903.25 per week. The Court so finds.

The compensation court went on to explain:

> The Court finds the lodging [Indoor Football] paid on behalf of [Foster-Rettig] should be included in [his] average weekly wage calculation. The Court finds the payment of [Foster-Rettig's] lodging constituted real and definite economic gain to [him]. [Foster-Rettig] had no other home. This hotel was his home. . . . Consequently, the payment of his lodging did not "offset" his costs of travel. . . .
>
> The same is true of the meals paid by [Indoor Football]. [Foster-Rettig] had no wife or child to support. He lived in Omaha. He was not living on the road. The meals that were paid for by [Indoor Football] obviated the need for [Foster-Rettig] to pay for his own meals out of his paycheck. This provided a real and economic gain to [Foster-Rettig].

The compensation court then calculated the amount of disability benefits owed to Foster-Rettig by utilizing its calculation of his average weekly wage.

Indoor Football appeals from the compensation court's award.

## ASSIGNMENT OF ERROR

On appeal, Indoor Football asserts that the compensation court erred in calculating Foster-Rettig's average weekly wage.

## STANDARD OF REVIEW

[1-4] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Damme v. Pike Enters.*, 289 Neb. 620, 856 N.W.2d 422 (2014). In testing the sufficiency of the evidence to support the Workers'

Compensation Court's findings, an appellate court considers the evidence in the light most favorable to the successful party. *Id.* The appellate court resolves every controverted fact in the successful party's favor and gives that party the benefit of every inference that is reasonably deducible from the evidence. *Id.* The Workers' Compensation Court's factual findings have the effect of a jury verdict, and an appellate court will not disturb them unless they are clearly wrong. *Id.* An appellate court independently reviews questions of law decided by a lower court. *Id.*

## ANALYSIS

On appeal, Indoor Football alleges that the compensation court erred in calculating Foster-Rettig's average weekly wage. Specifically, Indoor Football alleges that the court erred in including in its calculation estimates of what Indoor Football spent on meals and lodging for Foster-Rettig when he was employed as a football player. Upon our review, we find that the compensation court did not err in its calculation of Foster-Rettig's average weekly wage. Accordingly, we affirm the decision of the compensation court which calculated Foster-Rettig's average weekly wage to be $903.25 per week.

[5] Neb. Rev. Stat. § 48-126 (Reissue 2010) defines how to calculate a person's wages for the purpose of determining workers' compensation benefits. Section 48-126 provides, in relevant part:

> Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring, except

> that if the workers' compensation insurer shall have collected a premium based upon the value of such board, lodging, and similar advantages, then the value thereof shall become a part of the basis of determining compensation benefits.

The first case which addressed the issue before us is *Maryland Casualty Co. v. Geary*, 123 Neb. 851, 244 N.W. 797 (1932). In that case, George Geary was employed by a company as a truckdriver. Geary's weekly wage "was $10 a week, plus the cost of his meals and lodging while he was employed." *Id*. at 854, 244 N.W. at 798. The record revealed that the cost of Geary's meals and lodging was at least $12.50 per week. On appeal, the employer argued that the meals and lodging provided to Geary should not be considered a part of his weekly compensation "because the money value of these items was not fixed at the time of hiring." *Id*. In support of this argument, it cited to § 48-126.

In the opinion, the Nebraska Supreme Court analyzed the language of § 48-126 to determine whether the cost of Geary's meals and lodging should be included in a calculation of his weekly wage. Specifically, the court examined the following statutory language: "'[T]he term "wages" . . . shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring.'" *Maryland Casualty Co. v. Geary*, 123 Neb. at 854, 244 N.W. at 798. The court then stated, "Were it not for the statutory limitation above quoted, there would be no doubt that the meals and lodging furnished by the employer would constitute a part of the employee's weekly wage." *Id*. The court went on to consider that the value of Geary's meals and lodging was not specifically fixed by the parties at the time of his hiring. Instead,

> [Geary] was required to obtain his meals at various cafes, restaurants and hotels, and his lodging at various

> hotels and boarding houses. Neither the employer nor the employee could know what the precise amount would be until such items were furnished to the latter. Whatever the cost of these items was, they were within the contemplation and agreement of the parties.

*Id*. at 855, 244 N.W. at 798.

Ultimately, the court found, "[A] liberal interpretation of [§ 48-126] requires us to hold that the cost of meals and lodging was a part of the compensation which [Geary] received." *Maryland Casualty Co. v. Geary*, 123 Neb. at 855, 244 N.W. at 799. The court explained:

> In this case, the cost of the meals and lodging was capable of being, and actually was, rendered certain. The money value of the meals and lodging was fixed at the time of hiring. [Geary] furnished weekly a sheet on which these items were listed, and he was reimbursed therefor.

*Maryland Casualty Co. v. Geary*, 123 Neb. 851, 855, 244 N.W. 797, 798-99 (1932). In reaching its conclusion, the court cited to the beneficent purposes of the workers' compensation law. *Maryland Casualty Co. v. Geary, supra*.

[6] In a subsequent case which raised the issue of whether payments for meals or lodging should be included in a calculation of weekly wages, the Supreme Court interpreted the statutory language of § 48-126 to require evidence to demonstrate that (1) the money value of the advantages was fixed by the parties at the time of hiring and (2) the advantages constitute a real and reasonably definite economic gain to the employee. See *Solheim v. Hastings Housing Co.*, 151 Neb. 264, 37 N.W.2d 212 (1949).

Here, there is no question that the meals and lodging provided to Foster-Rettig as a part of his employment constituted a real and reasonably definite economic gain. The issue in contention is whether the money value of the meals and lodging was fixed by the parties at the time that Indoor Football hired Foster-Rettig. Upon our review of the record, we conclude that, based upon the rationale of the Supreme

Court in *Maryland Casualty Co. v. Geary, supra*, the money value of the meals and lodging was fixed at the time of hiring. Accordingly, the compensation court did not err in including the value of these advantages in its calculation of Foster-Rettig's average weekly wage.

At trial, Foster-Rettig testified that at the time he started playing football for the Omaha Beef football team, he and Indoor Football agreed that Indoor Football would provide him with meals and lodging during the football season. In fact, Foster-Rettig testified that "room and board was required" to his employment with Indoor Football. Indoor Football did not present any evidence to contradict Foster-Rettig's assertion that "room and board" was to be a part of his compensation package. In fact, during its cross-examination of Foster-Rettig, Indoor Football appeared to concede that Foster-Rettig was provided with these benefits during his employment. Indoor Football questioned Foster-Rettig about both the meal vouchers and the lodging he received. Based on the evidence presented at trial, we find support for the compensation court's determination that Indoor Football agreed, at the time of hiring Foster-Rettig, to provide him with meals and lodging as a part of his compensation.

However, similar to the situation presented in *Maryland Casualty Co. v. Geary*, 123 Neb. 851, 244 N.W. 797 (1932), Indoor Football and Foster-Rettig did not agree to a particular value for the meals and lodging which was to be a part of Foster-Rettig's compensation package. As the Supreme Court found in *Maryland Casualty Co. v. Geary, supra*, though, whatever the cost of the meals and lodging was, it was clearly within the contemplation and agreement of the parties. Given the Supreme Court's decision in *Maryland Casualty Co. v. Geary, supra*, and given the beneficent purpose of the workers' compensation law, we do not find that the compensation court erred in concluding that the cost of meals and lodging was a part of the compensation which Foster-Rettig contracted to receive.

Unlike the employee in *Maryland Casualty Co. v. Geary, supra*, however, Foster-Rettig was unable to establish with precision the amount that Indoor Football actually spent on his meals and lodging while he was employed by the company. The evidence Foster-Rettig presented about the value of the meals and lodging he received from Indoor Football did not demonstrate exactly what Indoor Football paid for these advantages, but, rather, it only estimated what such advantages may have cost during the spring of 2012 when Foster-Rettig was playing for the Omaha Beef football team.

Foster-Rettig testified that he did not know how much Indoor Football paid the hotel for members of the team to stay there, because Indoor Football paid the hotel directly. Prior to the trial, Foster-Rettig was unable to obtain records about the payments directly from the hotel, because it had gone out of business since the time he stayed there. In addition, Exhibit 17 reveals that when Foster-Rettig made discovery requests to Indoor Football regarding his accomodations for room and board, Indoor Football did not provide him with any payment records. In fact, during the discovery process the company denied paying for such benefits, even though it conceded at trial that such benefits were provided to Foster-Rettig. Instead of pursuing additional discovery from Indoor Football, Foster-Rettig chose to seek out estimates of the value of his lodging at the hotel. He offered into evidence a letter from a local travel agent, who estimated that from March to June 2012, the average nightly rate at the hotel was $50.

Foster-Rettig had similar difficulties in supplying the compensation court with an exact value of the meals he was given by Indoor Football during his employment, because he was provided with meal vouchers for each meal, rather than with a specific dollar amount or reimbursement for the amount he spent on food. Foster-Rettig indicated during his testimony that many of the meal vouchers he received were from restaurants that sponsored the Omaha Beef football team. As we stated above, during the discovery process, Indoor Football denied

providing this benefit to Foster-Rettig. As such, Foster-Rettig was unable to provide the compensation court with records of exactly how much was spent on his meals during his employment. Instead, he offered into evidence a document indicating that the daily meal rates for traveling employees across the country ranged from $46 per day to $69 per day.

The compensation court utilized Foster-Rettig's evidence regarding the estimated values of his meals and lodging in calculating his average weekly wage. We cannot say that the court erred in relying on such evidence. Foster-Rettig attempted to obtain the exact values of the benefits he received from his employment with Indoor Football, but, due to intervening factors such as the closing of the hotel, and due to Indoor Football's failure to cooperate with discovery requests, Foster-Rettig was unable to obtain precise figures. Under these circumstances, we find Foster-Rettig's evidence of the value of the benefits to be sufficient to warrant inclusion in a calculation of his average weekly wage. Accordingly, we find that the court did not err in calculating Foster-Rettig's average weekly wage to be $903.25.

## CONCLUSION

We affirm the finding of the compensation court that Foster-Rettig's average weekly wage totaled $903.25. As such, we affirm the award to Foster-Rettig in its entirety.

Affirmed.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# In re Interest of Jaydon W. & Ethan W., children under 18 years of age. State of Nebraska, appellee, v. Mathew W., appellant.

909 N.W.2d 385

Filed February 20, 2018. Nos. A-17-497, A-17-498.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: 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. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** Juvenile court proceedings are special proceedings, 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.
5. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
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. **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.

8. **Juvenile Courts: Judgments: Appeal and Error.** A dispositional order which merely continues a previous determination is not an appealable order.
9. **Child Custody: Visitation: Final Orders: Appeal and Error.** Orders which temporarily suspend a parent's custody and visitation rights do not affect a substantial right and are therefore not appealable.
10. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
11. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
12. **Parental Rights: Due Process: Appeal and Error.** In deciding due process requirements in a particular case, an appellate court must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use. Due process is flexible and calls for such procedural protections as the particular situation demands.
13. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers, including the State, to the parent-child relationship and the preferences of the child.
14. **Constitutional Law: Public Policy: Child Custody: Parental Rights.** Unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child.
15. **Constitutional Law: Parental Rights: Presumptions.** Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.
16. **Juvenile Courts: Parental Rights.** The parental preference doctrine is applicable even to an adjudicated child.
17. **Parental Rights: Proof.** Forfeiting the right to custody under the parental preference doctrine must be proved by clear and convincing evidence.
18. **Parental Rights.** Parental rights may be forfeited by a substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
19. **Parental Rights: Proof.** Substantial, continuous, and repeated neglect of a child may be established by the complete indifference of a parent for a child's welfare over a long period of time.

20. **Child Custody: Parental Rights: Proof.** The initial burden of proving parental unfitness or forfeiture of a parent's right to custody is on the State.
21. **Constitutional Law: Parental Rights.** Whether termination of parental rights is in a child's best interests is not simply a determination that one environment or set of circumstances is superior to another, but it is instead subject to the overriding recognition that the relationship between parent and child is constitutionally protected.
22. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent that is overcome only when the parent has been proved unfit or there has been a forfeiture.
23. **Child Custody: Parental Rights.** While the best interests of the child remain the lodestar of child custody disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child.
24. ____: ____. A court may not deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.
25. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the juvenile code must be construed to assure the rights of all juveniles to care and protection.

Appeals from the County Court for Platte County: Frank J. Skorupa, Judge. Reversed and remanded with directions.

Susanne M. Dempsey-Cook for appellant.

Breanna Anderson, Deputy Platte County Attorney, for appellee.

Eugene G. Schumacher, of Sipple, Hansen, Emerson, Schumacher & Klutman, guardian ad litem.

Pirtle, Riedmann, and Arterburn, Judges.

Riedmann, Judge.

## INTRODUCTION

Mathew W. appeals the orders of the county court for Platte County, sitting as a juvenile court, which denied his motion for custody of his minor children who had been adjudicated

under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013) as to their mother. Mathew argues that the court erred in concluding that he had forfeited his right to custody. We agree, and therefore, we reverse the order of the juvenile court and remand the cause with directions consistent with this opinion.

## BACKGROUND

Mathew is the father of the two children at issue here: Jaydon W., born in July 2008, and Ethan W., born in September 2009. Mathew and the children's mother, Kylee M., were married in 2000 and divorced in 2007; however, they attempted to coparent the boys until Ethan was around 18 months old. Mathew remained in Columbus, Nebraska, where Kylee and the boys have continuously resided, until 2012 or 2013, describing himself as the "primary parent" of the children during that time. In June 2013, Kylee obtained a protection order which prohibited Mathew from having contact with her or the boys. Because of the protection order, Mathew moved to Georgia for several months and stopped paying child support during that time. Once the order expired, around June 2014, Mathew returned to Nebraska and resided in Omaha.

Jaydon and Ethan were removed from Kylee's care in August 2013 and adjudicated under § 43-247(3)(a) in November. They were placed in a foster home at that time. According to Mathew, at some point after August, he became aware that the children were in the custody of the State and attempted to contact the State on numerous occasions, but he was apparently unsuccessful, and as he noted, he was unable to have contact with the children until June 2014 due to the protection order. Between February 2015 and February 2016, however, Kylee would try to talk with Mathew at least four or five times per week and would take the children to visit him at his home in Omaha at least twice per month when they would all spend the night at his house.

On August 31, 2015, Jaydon and Ethan were placed back in Kylee's home, but they were removed again on October 15 due to allegations of physical abuse by Kylee's husband. When

Mathew learned that the children had been removed from Kylee's care again, he called the Department of Health and Human Services (DHHS) and asked to become involved in the case. Beginning that month, Mathew was permitted supervised visits with the children twice per week, traveling from Omaha to Columbus for a weekday visit and having the boys visit his home on Saturdays.

In January 2016, Mathew filed a motion for custody in which he requested that the court issue an order placing custody of the children with him. The State objected to the motion because Mathew had just recently become involved in the case and because placing the children with Mathew would require another move for the children. The current and former DHHS caseworkers testified at the hearing on the motion that they each believed that a longer transition period was preferable to allow the children to rebuild their relationship with Mathew before granting him custody of the boys. Kylee testified that she did not object to Mathew's motion and that despite having obtained protection orders against Mathew in the past, she opined that the children would not be in danger if they lived with him. After the hearing, the juvenile court entered an order denying Mathew's motion.

Thereafter, Mathew was allowed overnight visits on the weekends in addition to his weekday visits. During that time period, the boys were also having separate visits with Kylee twice per week. Unfortunately, both boys began displaying significantly increased behaviors during that time, so in May 2016, the court suspended all visitation with both parents. Psychological evaluations were then completed on Kylee, Mathew, Jaydon, and Ethan. Jaydon's evaluation recommended "Parent-Child Interactive Therapy" (PCIT) for him with Kylee and separately with Mathew. Because the case plan goal remained reunification with Kylee, DHHS elected to focus on her and initially arranged PCIT for just her and Jaydon. Jaydon began acting out, however, and therapy was placed on hold pending Kylee's evaluation.

Mathew's psychological evaluation and parenting risk assessment was completed over the course of several days in September and October 2016 with a psychologist. The psychologist diagnosed Mathew with adult attention deficit hyperactivity disorder, and he found that Mathew showed "significant defensiveness" and "was guarded in any personal wrong doings involving his children" and displayed "some antisocial, narcissistic, and turbulent" personality traits. However, Mathew was not diagnosed with a personality disorder, and the psychologist was supportive of PCIT for Mathew and the children and recommended that Mathew be "brought up to speed" on the children's individual needs.

In April 2017, Mathew filed a second motion for custody of the children. By that time, Mathew had moved to Columbus in order to be closer to the children, had his own residence, and was employed full time. He had resumed paying child support and was attempting to "catch up" on the arrearage. DHHS continued to object to placing the children with Mathew, claiming that allowing the boys to remain in their foster home would be in their best interests. The caseworker testified at the hearing that the boys' behaviors immediately and significantly improved after visitation with both parents was suspended in May 2016 and that although there was a slight regression by Jaydon in November or December when PCIT with Kylee began, both boys exhibited much better behavior during the 2016-17 school year than they had in the spring of 2016.

In a subsequent order, the juvenile court denied Mathew's motion for custody. The court noted that visitation had been suspended in May 2016 because of the children's behavior and that the cause of the behavioral issues had not yet been resolved or adequately addressed. Thus, the court instructed DHHS "to immediately and as quickly as possible address those matters by way of [any necessary] assessments." Pending those assessments, Mathew's motion for custody was denied. Mathew timely appeals to this court.

## ASSIGNMENT OF ERROR

Mathew assigns that the juvenile court violated his due process rights and erred in denying his motion for custody of the children.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Sloane O.*, 291 Neb. 892, 870 N.W.2d 110 (2015).

## ANALYSIS

*Jurisdiction.*

Pursuant to this court's request, the parties' briefs addressed the issue of whether the juvenile court's April 2017 order denying Mathew's motion for custody was a final, appealable order. The State and the guardian ad litem contend that the court's order did not affect a substantial right and was a temporary order, and, as such, it was not a final, appealable order and this court lacks jurisdiction over this appeal. Conversely, Mathew contends that the order does affect a substantial right and that therefore, it is final and appealable.

[2-4] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015). 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. *Id*. Juvenile court proceedings are special proceedings, 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. See *id*. Thus, if the juvenile court's order denying Mathew's motion for custody of the children affected his substantial right to raise Jaydon and Ethan, the order was final and appealable. But if the order did not affect a substantial right, we lack jurisdiction and must dismiss the appeal.

[5-8] A substantial right is an essential legal right, not a mere technical right. *In re Interest of Octavio B. et al., supra*. 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. *Id*. 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. *Id*. Thus, a dispositional order which merely continues a previous determination is not an appealable order. *Id*.

The question here is whether the denial of Mathew's April 2017 motion was merely a continuation of the denial of his January 2016 motion. We conclude it was not. At the time Mathew first moved for custody of the children, he had just recently become part of the case and begun formal visitation with the children. In denying the motion, the court noted that Mathew waited more than 2 years before participating in the case. In addition, the court observed that placing the children with Mathew would entail removing the children from their community and locating new health care providers, while the permanency plan remained reunification with Kylee who continued to reside in Columbus.

At the time Mathew filed his second motion, however, he had moved to Columbus and had been participating in the case for more than 2 years. By that time, he had been permitted visitation, including overnights, and had completed a psychological evaluation and parenting risk assessment, which supported his participation in PCIT with the children. As a result, the juvenile court had different factors to consider when assessing Mathew's second motion, and some of the concerns expressed in the order denying Mathew's first motion had been alleviated by April 2017, namely, Mathew had moved to the children's community and had gradually been transitioning to playing a larger role in their lives. Therefore, we conclude

that the order from which Mathew has appealed was not a mere continuation of a prior order.

The State additionally asserts that this court lacks jurisdiction over the appeal because the order from which the appeal was taken was "temporary in nature." Brief for appellee at 12. We disagree.

[9] 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. *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013). Orders which temporarily suspend a parent's custody and visitation rights do not affect a substantial right and are therefore not appealable. *Id.* In *In re Interest of Danaisha W. et al., supra*, the Nebraska Supreme Court 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 the scheduled hearing on a motion to terminate parental rights, which was to be held approximately 5 weeks later.

To the contrary, in *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015), the juvenile court's order prohibited a parent from homeschooling one of the children, pending further order of the court. On appeal, the Supreme Court noted that the juvenile court's order gave no indication that the court would revisit the issue prior to the next review hearing which was scheduled for approximately 6 months in the future. The Supreme Court also observed that because juvenile courts are statutorily required to review the cases of adjudicated juveniles every 6 months, virtually no order would have a longer duration than that. The court therefore concluded that the order was not temporary in nature and was a final, appealable order.

We conclude that the instant case is more akin to *In re Interest of Cassandra B. & Moira B., supra*, than to *In re*

*Interest of Danaisha W. et al., supra.* Here, the juvenile court's order denied Mathew's motion for custody of the children pending assessments to determine the cause of their behavioral issues. The order instructed DHHS to complete the necessary assessments, and there was no indication of the timeframe by which the assessments would be completed. This is particularly relevant given that visitation had been suspended since May 2016, and by April 2017, a cause had yet to be determined and visitation remained suspended. Thus, it does not appear that the cause of the children's behaviors is an issue that can be quickly determined and resolved.

Additionally, there was no indication that Mathew had any control over when the assessments could be completed or had the power to gain custody of the children before the next scheduled review hearing. See *In re Interest of Nathaniel P.*, 22 Neb. App. 46, 846 N.W.2d 681 (2014) (order suspending mother's right to direct child's education was temporary in nature because mother had power to regain her rights before next scheduled review hearing). We therefore conclude that the denial of Mathew's motion for custody was of sufficient duration as to render the order final and appealable. As a result, this court has jurisdiction to consider the merits of Mathew's argument.

*Motion for Custody.*

Mathew argues that the juvenile court violated his due process rights and erred when it denied his motion for custody of the children without sufficient evidence proving that he had forfeited his right to custody. We agree.

[10-12] The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of Sloane O.*, 291 Neb. 892, 870 N.W.2d 110 (2015). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Id.* In deciding due process requirements in a particular case, we

must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use. *Id*. Due process is flexible and calls for such procedural protections as the particular situation demands. *Id*.

[13-16] Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers, including the State, to the parent-child relationship and the preferences of the child. *Id*. Therefore, unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child. *Id*. Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child. *Id*. The doctrine is applicable even to an adjudicated child. *Id*.

[17] There are no allegations in the present case that Mathew is unfit to have custody of the children. Therefore, the question before us is whether the State proved by clear and convincing evidence that Mathew forfeited his right to custody. See *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011) (proof of parental unfitness or forfeiture of right to custody requires proof by clear and convincing evidence). The juvenile court's conclusion in April 2017 that there had been a forfeiture was based primarily on the time period of August 9, 2013 (the filing of the petition against Kylee), to December 2015 (the date Mathew's visitation was ordered).

[18-20] Generally, parental rights may be forfeited by a substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005). Substantial, continuous, and repeated neglect of a child may be established by the complete indifference of a parent for a child's welfare over a long period of time. See *id*. The initial

burden of proving parental unfitness or forfeiture of a parent's right to custody is on the State. See *In re Interest of Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651 (2017).

In the instant case, we note that the State argues that the juvenile court properly denied Mathew's motion for custody, because refusing to move the children from their current foster home into Mathew's home was in the children's best interests—they have lived in their foster home for nearly 4 years, are bonded to their foster parents, and have "consistency and stability" there. Brief for appellee at 17. However, this type of analysis does not come into play until after there has been a finding of parental unfitness or forfeiture. See *In re Interest of Lakota Z. & Jacob H., supra*.

[21,22] Although the name of the best interests of the child standard may invite a different intuitive understanding, the standard does not require simply that a determination be made that one environment or set of circumstances is superior to another. *Id*. Rather, the best interests standard is subject to the overriding recognition that the relationship between parent and child is constitutionally protected. *Id*. There is a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent. *Id*. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the parent has been proved unfit or there has been a forfeiture. See *id*.

[23,24] Additionally, while the best interests of the child remain the lodestar of child custody disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). In other words, a parent retains the right to custody unless it is proved that the parent is unfit or has forfeited his or her right to custody. A court may not deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. *In re Interest of Lilly S. & Vincent S., supra*. Stated another way,

"the fact that the State considers certain prospective adoptive parents 'better' [does not] overcome the constitutionally required presumption that reuniting with [a parent] is best." *In re Interest of Xavier H.*, 274 Neb. 331, 350, 740 N.W.2d 13, 26 (2007). The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. *In re Interest of Xavier H., supra*.

Thus, in the instant case, the initial question is not whether the children's best interests are served by remaining in their current foster home because it would be "'better'" for them, but, rather, whether the presumption that their best interests are served by reuniting with Mathew has been rebutted by clear and convincing evidence that Mathew is unfit or has forfeited his right to custody. See *id.* at 350, 740 N.W.2d at 26. As noted above, there are no allegations that Mathew is unfit and the juvenile court made no such finding. Accordingly, we must determine whether the State produced clear and convincing evidence that Mathew substantially, continuously, and repeatedly neglected the children and failed to discharge the duties of parental care and protection. We conclude that the evidence falls short of this standard.

In support of its argument that the evidence supports a finding that Mathew forfeited his right to custody, the State continually references the "28 months" that Mathew failed to participate in the case, referencing the time period from August 2013, when the children were removed from Kylee's care, until December 2015, when Mathew first appeared in this case. See brief for appellee at 17, 22, and 24. We initially observe that there was a protection order in place until June 2014, prohibiting Mathew from having contact with the children. The record is unclear as to what contact, if any, Mathew had with the children after the expiration of the protection order, but Mathew's uncontroverted testimony established that he attempted, unsuccessfully, to contact the State on many occasions regarding the children. And at least as early as February 2015, Kylee and Mathew were speaking by telephone several

times per week and Kylee regularly took the children to visit him at his home in Omaha. Thus, Mathew was having consistent contact with the children during that time.

The children were placed back with Kylee in August 2015, and then once Mathew learned they had been removed again in October, he contacted DHHS and began participating in the case. Since that time, Mathew has driven to Columbus from Omaha to participate in visitation, made himself available for visits with the children at his residence, and completed a psychological evaluation and parenting risk assessment. We note that despite Mathew's efforts, DHHS has repeatedly elected to focus on Kylee, rather than Mathew, because the goal of the case remained reunification with her. Thus, despite Jaydon's psychological evaluation recommending PCIT with Mathew, the psychologist's support for Mathew's participation in PCIT, and the juvenile court's scheduling a review hearing for January 2017 in order to assess the progress being made in PCIT for *both* Kylee and Mathew, DHHS has never even attempted to begin PCIT between Mathew and either child. Nor had DHHS scheduled a bonding assessment to be completed between Mathew and the children, as it had done for Kylee and the children, despite affirming that it could have done so in order to evaluate the relationship between Mathew and the boys and gain recommendations for strengthening their bond. As it stood, at the April 2017 hearing on Mathew's motion for custody, Mathew had not had significant visitation with the children since May 2016 through no fault of his own. Yet at that time, the court was still instructing DHHS to determine the cause of behavioral issues that peaked 11 months earlier.

Further, Mathew acknowledged that when he moved to Georgia, he stopped paying child support and fell behind on his obligation. Thus, he served 11 days in jail in October 2015 as a result. However, at the time of his psychological evaluation, he had resumed paying his child support obligation and was attempting to "catch up" on the arrearage.

In short, upon our de novo review of the record, we cannot find clear and convincing evidence of a long-term complete indifference toward the children. See *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005). See, also, *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004); *Gray v. Hartman*, 181 Neb. 590, 596, 150 N.W.2d 120, 123 (1967) ("forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time"); *Raymond v. Cotner*, 175 Neb. 158, 163, 120 N.W.2d 892, 895 (1963) (forfeiture established by parent's "complete indifference" to child's welfare and finding father had not forfeited right to custody despite not having visited child for 9 years), *overruled on other grounds, Bigley v. Tibbs*, 193 Neb. 4, 225 N.W.2d 27 (1975), *overruled on other grounds, Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980). While Mathew's own actions caused Kylee to seek a protection order, thereby preventing him from having contact with the boys for 1 year, and he certainly could have made a more significant effort upon expiration of the protection order, we cannot find that the evidence clearly and convincingly establishes circumstances which justify terminating Mathew's constitutionally protected right to care for his children; and absent such circumstances, he is presumptively regarded as the proper guardian for his children. See *In re Interest of Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651 (2017).

We understand the juvenile court's reluctance to uproot the children from their long-term foster home, especially given their recent behavioral concerns. However, the question is not whether the children's best interests would be served by placing their custody with Mathew. Mathew enjoys a constitutional right to custody of Jaydon and Ethan that may be disrupted only upon a finding that he is unfit or has forfeited his right to custody. Finding neither, we conclude that the juvenile court erred in denying the motion for custody.

[25] That is not to say, however, that the juvenile court is required to order that the children be turned over to Mathew

immediately. As stated above, the children were adjudicated in November 2013 based upon acts of Kylee. As adjudicated children, the juvenile court has jurisdiction over them pursuant to § 43-247(3). And although the parental preference doctrine applies to adjudicated children, the "foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the juvenile code must be construed to assure the rights of all juveniles to care and protection." *In re Interest of Veronica H.*, 272 Neb. 370, 375, 721 N.W.2d 651, 654 (2006). Given the length of separation between Mathew and the children and the length of time they have resided with their foster parents, it is in the best interests of the children to implement a transition plan before returning them to Mathew's physical custody. Accordingly, we reverse the order and remand the cause with directions to the juvenile court to grant the motion and order implementation of a transition plan to effectuate placement of the children with Mathew.

## CONCLUSION

We find that the order from which the appeal was taken was a final, appealable order and that thus, this court has jurisdiction over the appeal. Upon our de novo review of the record, we conclude that the State failed to adduce clear and convincing evidence that Mathew was either unfit or forfeited his right to custody of the children. We therefore reverse the order of the juvenile court and remand the cause with directions consistent with this opinion.

Reversed and remanded with directions.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# In re Interest of Kenneth B., Jr., et al., children under 18 years of age. State of Nebraska, appellee, v. Kenneth B., appellant.

909 N.W.2d 658

Filed February 27, 2018. No. A-17-459.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **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. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
6. **Juvenile Courts: Appeal and Error.** Juvenile court proceedings are special proceedings for purposes of appeal.
7. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **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.

9. **Juvenile Courts: Final Orders: Time: Appeal and Error.** In juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.
10. **Juvenile Courts: Parental Rights: Parent and Child: Final Orders: Appeal and Error.** An order that continues prior dispositional orders but changes the permanency objective from family reunification to another objective is not a final, appealable order unless the parent's ability to achieve rehabilitation and family reunification has been clearly eliminated.

Appeal from the Separate Juvenile Court of Douglas County: Elizabeth Crnkovich, Judge. Appeal dismissed.

Jane M. McNeil for appellant.

Donald W. Kleine, Douglas County Attorney, and Jennifer C. Clark for appellee.

Maureen K. Monahan, guardian ad litem.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Inbody, Judge.

## INTRODUCTION

Kenneth B., the biological father to Derrek B. and Kenneth B., Jr. (Kenneth Jr.), appeals the order of the Douglas County Separate Juvenile Court changing the permanency objective for the children from reunification to guardianship. Kenneth does not appeal the order as it relates to his third child, Kylie B. Because we conclude the order changing the permanency objective is not a final, appealable order, we dismiss the appeal for lack of jurisdiction.

## BACKGROUND

In September 2014, Kenneth was given leave to intervene in juvenile court proceedings involving four minor children and their mother, Kari S. Genetic testing confirmed that three of those four children were Kenneth's biological children, namely Derrek, Kenneth Jr., and Kylie. At that time, the children were in the temporary custody of the Department of Health and Human Services (DHHS) with placement to exclude the parental home. In January 2015, the State filed a supplemental petition alleging that Derrek, Kenneth Jr., and Kylie were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014) as a result of Kenneth's lack of parental care. The petition alleged that Kenneth was incarcerated; had failed to provide the children with safe, stable, and appropriate housing; and had failed to provide proper parental care, support, and supervision to the children. Following a hearing on the supplemental petition, the children were adjudicated as children within the meaning of § 43-247(3)(a). Kenneth subsequently appealed, and this court affirmed the juvenile court's determination in a memorandum opinion filed December 21, 2015, in case No. A-15-557.

In January 2016, the juvenile court entered an order setting the permanency objective as a concurrent plan of "reunification/adoption." The State moved to terminate Kenneth's parental rights in June 2016 but dismissed the petition without prejudice in September. Following another permanency planning hearing in October 2016, the permanency plan was reunification. In the October permanency planning order, Kenneth was ordered to participate in supervised visitation and to participate in family therapy, obtain safe housing, and follow the rules of his parole. The court further ordered that "a Family Group Conference be held to explore permanency through guardianship."

The juvenile court held its latest review and permanency planning hearing in March 2017, wherein Lindsey Witt of DHHS gave oral summaries on the condition and progress of

the children and parents. Witt provided DHHS' recommendation that Kenneth "continue to participate in services and show . . . ongoing consistency" but that the permanency objective be changed to "guardianship for Kylie, [Kenneth Jr.], and Derrek with their grandfather." In its submitted court report, DHHS recommended a course of action similar to that implemented from the October 2016 order:

> [Kenneth] shall:
>
> 1. Participate in supervised visitation with Kylie, Derrek, and [Kenneth Jr.], as recommended by the children's therapists.
>
> 2. Participate in family therapy, as recommended by the children's therapists.
>
> 3. Maintain safe and stable housing and a legal source of income.
>
> 4. Follow all rules and regulations of Parole.
>
> 5. This case [will] be reviewed in four months.

In its March 2017 permanency planning order, the juvenile court adopted DHHS' recommendation and changed the permanency objective for Kenneth's three children from reunification to guardianship, stating that "the permanency objective is a guardianship for [Derrek, Kenneth Jr., and Kylie]." In support of this determination, the order stated that "it would be contrary to the health, safety and welfare of the minor children . . . to be returned home at this time." The court found that reasonable efforts had been made to return the children to the home "and to finalize permanency to include[,] but not [be] limited to[,] evaluations, residential treatment, family therapy, individual therapy, bus tickets, placement and case management." During the March review and permanency planning hearing, the juvenile court explained:

> I am adopting the recommendation of [DHHS]. The singular permanency plan in this case at this time is one of guardianship.
>
> Now, [Kenneth], in terms of your relationship with the kids, you have this choice: You can agree to another

> family group conference with yourself and with the foster parents to see if, on your own, you can reach some agreement as to how shall we visit. . . . Or [I] can . . . decide how much contact you get.

The March 2017 order also scheduled a subsequent review and permanency planning hearing to be held 5 months later in August. Kenneth currently appeals from the March order.

## ASSIGNMENT OF ERROR

Kenneth assigns, rephrased and consolidated, that the juvenile court erred by modifying the permanency objective from reunification to guardianship.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings. *In re Interest of Carmelo G.*, 296 Neb. 805, 896 N.W.2d 902 (2017).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017).

## ANALYSIS

Kenneth appeals the March 2017 permanency planning order. Specifically, he challenges the juvenile court's changing the permanency goal from reunification to guardianship for Derrek and Kenneth Jr. Kenneth argues he was denied due process and a fundamentally fair procedure because he was not given notice that DHHS no longer supported its own written case plan and court report and because the State did not meet its burden to show that the written case plan and court report were not in the children's best interests. Kenneth further argues the change in the permanency objective was not supported by sufficient evidence.

[3,4] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an

appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Becka P. et al., supra*. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. *In re Interest of Darryn C.*, 295 Neb. 358, 888 N.W.2d 169 (2016).

[5,6] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). Juvenile court proceedings are special proceedings for purposes of appeal. *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016). Thus, we must decide whether the juvenile court's order changing the permanency plan to guardianship affected a substantial right.

[7-10] A substantial right is an essential legal right, not a mere technical right. *Id*. 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. *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015). This determination is fact specific and should be undertaken on a case-by-case basis. *Id*. Additionally, in juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). Thus, an order that continues prior dispositional orders but

changes the permanency objective from family reunification to another objective is not a final, appealable order unless the parent's ability to achieve rehabilitation and family reunification has been clearly eliminated. See *In re Interest of LeVanta S., supra*.

In *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009), this court determined that a review order which changed the permanency plan goal from reunification to adoption did not affect a substantial right, because the order implemented a rehabilitation plan that contained the same services as the previous order, did not change the mother's visitation status, and implicitly provided the mother an opportunity for reunification by complying with the terms of the rehabilitation plan. However, in *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013), we found the juvenile court's modification of a permanency goal from reunification to guardianship/adoption to be appealable, because the order also ceased all reasonable efforts affecting the mother's right to reunification. Similarly, the Nebraska Supreme Court in *In re Interest of Octavio B. et al., supra*, found that an order changing the permanency goal from reunification to adoption did affect a substantial right as the record indicated that the mother would not be given further opportunity for compliance with the case plan.

The present case presents a similar situation to that of *In re Interest of Tayla R., supra*. The juvenile court changed the children's permanency objective from reunification to guardianship in its March 2017 order by stating that "the permanency objective is a guardianship for [Derrek, Kenneth Jr., and Kylie]." In support of this determination, the order stated that "it would be contrary to the health, safety and welfare of the minor children . . . to be returned home *at this time*." (Emphasis supplied.) The March order was silent on the issue of services available to Kenneth. In the October 2016 order, however, Kenneth was ordered to participate in supervised

visitation and family therapy as recommended by the children's therapists, obtain safe and adequate housing, and follow the rules and regulations of his parole. The March 2017 order did not explicitly cease these services and obligations ordered pursuant to the October 2016 order.

During the March 2017 review and permanency planning hearing, Witt provided DHHS' recommendation that Kenneth "continue to participate in services and show . . . ongoing consistency" but that the permanency objective be changed to "guardianship for Kylie, [Kenneth Jr.], and Derrek with their grandfather." In its accompanying court report, DHHS recommended a course of action similar to that implemented from the October 2016 order:

> [Kenneth] shall:
>
> 1. Participate in supervised visitation with Kylie, Derrek, and [Kenneth Jr.], as recommended by the children's therapists.
>
> 2. Participate in family therapy, as recommended by the children's therapists.
>
> 3. Maintain safe and stable housing and a legal source of income.
>
> 4. Follow all rules and regulations of Parole.
>
> 5. This case [will] be reviewed in four months.

The juvenile court adopted the DHHS recommendation during the hearing, explaining:

> I am adopting the recommendation of [DHHS]. The singular permanency plan in this case *at this time* is one of guardianship.
>
> Now, [Kenneth], in terms of your relationship with the kids, you have this choice: You can agree to another family group conference with yourself and with the foster parents to see if, on your own, you can reach some agreement as to how shall we visit. . . . Or [I] can . . . decide how much contact you get.

(Emphasis supplied.)

Kenneth argues the juvenile court, in stating that the "singular permanency plan" is guardianship during the March 2017 hearing, changing the permanency goal in the March order to guardianship, and not providing any further written guidance on whether rehabilitation and reunification remain possible for him and Derrek and Kenneth Jr. effectively eliminated his ability to rehabilitate and reunify. However, the March order does not foreclose Kenneth's ability to seek rehabilitation and reunification with Derrek and Kenneth Jr. The October 2016 order directed Kenneth to participate in supervised visitation and family therapy, obtain safe and adequate housing, and follow the rules and regulations of his parole. The March 2017 order did not order such directions to cease. Instead, at the March hearing, the juvenile court stated it was adopting the DHHS recommendations, including that Kenneth continue to receive services and perform his obligations. It is evident that the services, visitation, and obligations the juvenile court previously ordered concerning Kenneth were to continue after the March order.

Moreover, the juvenile court included qualifying language during its oral pronouncement at the March 2017 hearing of the permanency objective, saying that "[t]he singular permanency plan in this case *at this time* is one of guardianship." (Emphasis supplied.) The juvenile court again qualified its finding that immediate reunification was inappropriate in its March order by writing that "it would be contrary to the health, safety and welfare of the minor children . . . to be returned home *at this time*." (Emphasis supplied.) The use of such qualifying language taken together with the juvenile court's ordering that a further review hearing be held 5 months after its March 2017 order implies rehabilitation and reunification remained a possibility. Therefore, because the March order merely changed the permanency objective from family reunification to guardianship and did not eliminate Kenneth's ability to achieve rehabilitation and family reunification, it is not a

final, appealable order. See *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009). Accordingly, we are without jurisdiction to review Kenneth's appeal of the March order and we dismiss the appeal.

## CONCLUSION

Although the March 2017 order changed the permanency objective from reunification to guardianship, DHHS was to continue to provide services to Kenneth as the order did not cease all reasonable efforts affecting his right to reunification. Therefore, the order is not a final, appealable order and we are without jurisdiction to review Kenneth's appeal.

Appeal dismissed.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# In re Interest of Ezra C., a child under 18 years of age. State of Nebraska, appellee, v. Stephanie K. and Kenneth K., appellees, and Nebraska Department of Health and Human Services, appellant.

910 N.W.2d 810

Filed March 6, 2018. No. A-17-699.

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.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), there are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
4. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
5. **Final Orders: Appeal and Error.** Numerous factors determine when an order affects a substantial right for purposes of appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue.
6. **Final Orders.** Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter.
7. **Juvenile Courts: Minors.** The State's right in juvenile proceedings is derived from its parens patriae interest, and it is pursuant to that interest that the State has enacted the Nebraska Juvenile Code.

8. ____: ____. The State's right is especially prominent in juvenile adjudications, because the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child.
9. ____: ____. Once a child is adjudicated, the State's interest in protecting the child becomes greater and more necessary.
10. **Juvenile Courts: Jurisdiction: Appeal and Error.** An appellate court is without jurisdiction on appeal when a juvenile court's order does not constitute an adjudicative or dispositive action in the proceedings as no substantial right has been affected.
11. **Juvenile Courts: Judgments: Appeal and Error.** An order in juvenile proceedings denying a motion for a psychosexual evaluation is not a final, appealable order, because it does not involve a substantial right of the State.
12. **Juvenile Courts: Child Custody: Appeal and Error.** Allowing an interlocutory appeal promotes significant delay in the juvenile proceedings and the ultimate resolution of custody.
13. **Juvenile Courts: Appeal and Error.** Generally, delaying juvenile proceedings to grant interlocutory appeals is antagonistic to the child's best interests.

Appeal from the County Court for Cheyenne County: Paul G. Wess, Judge. Appeal dismissed.

Neleigh N. Boyer, Special Assistant Attorney General, of Nebraska Department of Health and Human Services, for appellant.

No appearance for appellees.

Pirtle, Bishop, and Arterburn, Judges.

Arterburn, Judge.

## INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) appeals an order of the county court for Cheyenne County, sitting as a juvenile court, overruling DHHS' motion to require Kenneth K., the child's stepfather, to undergo a psychosexual evaluation. For the reasons set forth below, we dismiss this appeal due to a lack of jurisdiction.

## BACKGROUND

On April 22, 2016, a juvenile petition and supporting affidavit were filed with the county court for Cheyenne County alleging that Ezra C., born in 2014, was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) and also filed was a "Motion for Ex Parte Order of Temporary Custody." That same day, the county court entered a temporary order placing Ezra in the custody of DHHS for out-of-home placement.

On May 25, 2016, an amended petition was filed alleging that Ezra was a child within the meaning of § 43-247(3)(a) for the reason that he is in a situation injurious to his health or morals. Stephanie K., who is Ezra's mother, and Kenneth each entered no contest pleas to the amended petition on May 25. The county court found Ezra to be adjudicated within the meaning of § 43-247(3)(a) that same day.

On July 21, 2016, the guardian ad litem filed a motion for a sex offender risk assessment, requesting that the court order both Stephanie and Kenneth to participate in a sex offender risk assessment. The county court held a dispositional hearing, as well as a hearing on the motion for a sex offender risk assessment, on July 27. During the dispositional phase of the hearing, the court ordered that custody of Ezra was to continue with DHHS with physical placement in his foster home. The county court ordered that Kenneth complete a sex offender risk assessment. A review hearing was scheduled on September 14, but was continued because the sex offender risk assessment was not completed by Kenneth. The county court held a review hearing on September 22. The court entered an order after the review hearing which rescinded its previous order requiring Kenneth to complete a sex offender risk assessment.

It is apparent from the totality of the record, though we do not have the specific orders before us, that Ezra was reunified with Stephanie and Kenneth sometime between December 14, 2016, and January 19, 2017. There is no record of DHHS'

appealing the order of reunification. The record demonstrates that the State, through the deputy county attorney, filed on March 30 a motion to schedule a hearing to terminate the juvenile court's jurisdiction. That hearing was held on April 6. The county court denied the motion on the date of the hearing. DHHS filed a motion on April 17 requesting that Kenneth be required to complete a sex offender risk assessment. The county court denied the motion on April 26. An amended motion for an evaluation was filed by DHHS on May 16, requesting the county court to order Kenneth to participate in a psychosexual evaluation.

The county court held a hearing on the motion on May 24, 2017. Testimony from two psychologists, as well as a letter from a third, was received by the county court. Additionally, caseworkers from DHHS testified during the hearing. Generally, the testimony centered on past allegations regarding sexual misconduct by Kenneth. The testimony established that a safety plan was in place at the home. After argument, the county court iterated that even if the psychosexual evaluation were performed, the proceedings would be in a substantially similar circumstance as if the psychosexual evaluation had not been performed. The county court took the matter under advisement and entered a written order on June 5 denying DHHS' amended motion for an evaluation. DHHS appeals that order here.

## ASSIGNMENT OF ERROR

DHHS argues the county court erred in denying its motion for a psychosexual evaluation.

## STANDARD OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law. *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016). An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *Id.* 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. *Id.*

## ANALYSIS

DHHS argues that the county court erred in denying its motion for a psychosexual evaluation of Ezra's stepfather, Kenneth. DHHS argues that this order is a final, appealable order as it substantially affects their ability to litigate the case as guardian of the child. It asserts that based on the Nebraska Juvenile Code and the State's parens patriae interest in the proceedings, the county court abused its discretion in denying the motion.

The jurisprudence regarding this area of the law is not well-developed. However, based on the established case law, we are able to determine that the order denying a motion for a psychosexual evaluation is not a final, appealable order. The order does not involve a substantial right of the State. The order does not involve a dispositional issue in the proceedings. Finally, the order does not involve placement, permanent or otherwise, of the juvenile. Therefore, we determine that the appeal must be dismissed for a lack of jurisdiction.

[3,4] Our jurisdiction to review the county court's June 5, 2017, order denying the motion for psychosexual evaluation depends on whether it is a final order. Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), there are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017). The first and third categories of final orders are not implicated here. But a proceeding before a juvenile court is a special proceeding for appellate purposes, so we must determine whether the order dismissing the State's supplemental petition affected a substantial right. See *id.*

[5,6] Numerous factors determine when an order affects a substantial right for purposes of appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue. *Id.* It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial. *Id.* Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter. *Id.* See *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

The term "substantial right" has been defined in various ways. For example, the Nebraska Supreme Court has stated that a substantial right is an essential legal right, not a mere technical right. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken. *Id.* But the application of these definitions in juvenile cases, where the best interests of the child are the primary concern, has not always been clear. Most of the cases dealing with the finality of juvenile court orders involve the substantial right of a parent. See, e.g., *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). Here, it is the substantial right of the State, if any, which is at issue. For purposes of this analysis, DHHS and the State are one and the same because DHHS is a state agency.

[7,8] The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child. *In re Interest of Karlie D., supra*. See *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998). The State's right in juvenile proceedings is derived from its parens patriae interest, and it is pursuant to that interest that the State has enacted the Nebraska Juvenile Code. *In re Interest of Noah B. et al., supra*. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds,*

*O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). This right is especially prominent in juvenile adjudications, because the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. *In re Interest of Noah B. et al., supra*.

[9] In *In re Interest of Karlie D., supra*, the Supreme Court observed that the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. This same purpose forms the foundation for the State's parens patriae interest; thus, once the child is adjudicated, the State's interest in protecting the child becomes greater and more necessary. The court held that once a juvenile has been adjudicated under § 43-247(3), and the court has granted DHHS, and thus the State, custody of the child, the State has the right to recommend where the child should live. See *In re Interest of Karlie D., supra*. The child in *In re Interest of Karlie D.* had been adjudicated and placed in DHHS' custody. The order at issue denied DHHS' recommended placement and ended the dispositional phase of the proceeding. The court concluded that the order permanently moving the child to live with her grandmother affected an existing right of the State and was appealable. See *id.* See, also, *In re Interest of Joseph S.*, 21 Neb. App. 706, 842 N.W.2d 209 (2014) (finding appeal by State of order denying petition to terminate parental rights was final, appealable order), *reversed on other grounds* 288 Neb. 463, 849 N.W.2d 468 (2014); *In re Interest of Tanisha P. et al.*, 9 Neb. App. 344, 611 N.W.2d 418 (2000) (finding dispositional order changing child's placement was final order for purposes of appeal).

[10] In *In re Interest of Jassenia H.*, 291 Neb. 107, 864 N.W.2d 242 (2015), the Supreme Court found that a juvenile court's order determining that the federal and state Indian Child Welfare Acts were applicable to the juvenile proceedings was not a final, appealable order. In *In re Interest of Jassenia H.*, the guardian ad litem, on behalf of the juvenile, filed the appeal of the order claiming that this finding affected

a substantial right of the child. However, the Supreme Court found that the juvenile court's finding did not constitute an adjudicative or dispositive action in the proceedings. *Id.* As a result, the court determined that it was without jurisdiction on appeal as no substantial right had been affected. *Id.*

Here, Ezra had been adjudicated before the motion for a psychosexual evaluation. Therefore, Ezra was under DHHS' custody at the time of the order. However, Ezra had been reunified with Stephanie and Kenneth at least 5 months prior to DHHS' motion. DHHS did not appeal the placement order. DHHS drafted a safety plan, which was in place at the time of its motion. The fact that the county court denied its motion does not preclude DHHS from filing a similar motion in the future, especially if new evidence arises.

[11-13] Based on the precedent available to us, we find that an order in juvenile proceedings denying a motion for psychosexual evaluation is not a final, appealable order, because it does not involve a substantial right of the State. The outcome of the motion was not adjudicative or dispositional. The motion does not involve placement of the child. It is more akin to the procedural motions that the Supreme Court has determined were not final orders. It is also worth noting that allowing an interlocutory appeal promotes significant delay in the juvenile proceedings and the ultimate resolution of custody. *In re Interest of Marcella B. & Juan S.*, 18 Neb. App. 153, 775 N.W.2d 470 (2009). Generally, delaying juvenile proceedings to grant interlocutory appeals is antagonistic to the child's best interests. *Id.* Therefore, we find that we lack jurisdiction and must dismiss the appeal before us.

## CONCLUSION

We find that the county court's order denying DHHS' motion for psychosexual evaluation was not a final order and must dismiss the appeal due to a lack of jurisdiction.

Appeal dismissed.

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

# D.M., appellee, v. State of Nebraska et al., appellees, and Geoff Britton and Michael L. Kenney, appellants.

911 N.W.2d 621

Filed March 13, 2018. No. A-16-587.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Motions to Dismiss: Appeal and Error.** A district court's denial of a motion to dismiss is reviewed de novo.
3. ____: ____. An appellate court reviewing the denial of a motion to dismiss 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 conclusions.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Final Orders: Appeal and Error.** Generally, only final orders are appealable.
6. ____: ____. Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
7. **Motions to Dismiss: Final Orders.** Denial of a motion to dismiss is not a final order.
8. **Final Orders.** The collateral order doctrine is an exception to the final order rule.
9. **Final Orders: Immunity: Appeal and Error.** Under the collateral order doctrine, the denial of a claim of qualified immunity is appealable,

notwithstanding the absence of a final judgment, if the denial of immunity turns on a question of law.

10. **Civil Rights: Public Officers and Employees: Immunity.** Qualified immunity provides a shield from liability for public officials sued under 42 U.S.C. § 1983 (2012) in their individual capacities, so long as the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
11. **Trial: Immunity.** Where appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing.
12. **Final Orders: Appeal and Error.** In order to determine whether a case presents an order reviewable under the collateral order doctrine, an appellate court engages in a three-part inquiry: (1) whether the plaintiff has alleged the violation of a constitutional right, (2) whether that right was clearly established at the time of the alleged violation, and (3) whether the evidence shows that the particular conduct alleged was a violation of the right at stake.
13. **Immunity: Pretrial Procedure: Appeal and Error.** A district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact.
14. **Constitutional Law: Public Officers and Employees: Proof.** In order to succeed on a First Amendment retaliation claim, a plaintiff must show that (1) he or she engaged in a protected activity, (2) the government official took adverse action against him or her that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity.
15. **Constitutional Law: Due Process: Proof.** The 14th Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake. A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty," or it may arise from an expectation or interest created by state laws or policies.
16. **Due Process: Prisoners.** An allegation by an inmate that his or her due process rights were violated by virtue of his or her placement in administrative segregation, without more, does not implicate a liberty interest. In order to rise to the level of a due process violation, the segregation must result in deprivations which work such major disruptions in a prisoner's environment and life that they present dramatic departures from the basic conditions and ordinary incidents of prison sentences.

17. **Equal Protection.** The Equal Protection Clause of the 14th Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike.
18. **Equal Protection: Prisoners: Discrimination: Proof.** Absent assertion of membership in a protected class or violation of a fundamental right, an equal protection claim arising from placement in segregation requires showing that similarly situated classes of inmates were treated differently, that difference in treatment bore no rational relation to any legitimate penal interest, and that there was intentional or purposeful discrimination.
19. **Constitutional Law: Prisoners.** The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.
20. **Constitutional Law: Public Officers and Employees: Prisoners.** A prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, sufficiently serious. This means that a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities. The second requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.
21. **Constitutional Law: Public Officers and Employees: Prisoners: Liability.** To violate the Cruel and Unusual Punishment Clause, a prison official must have a sufficiently culpable state of mind. In prison-conditions cases, that state of mind is one of deliberate indifference to inmate health or safety, meaning that the prison official cannot be held liable under the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he or she must also draw the inference.
22. **Constitutional Law: Public Officers and Employees: Liability: Proof.** The standard by which a supervisor is held liable under 42 U.S.C. § 1983 (2012) in his or her individual capacity for the actions of a subordinate is extremely rigorous. The plaintiff must establish that the supervisor personally participated in the unconstitutional conduct or was otherwise the moving force of the violation by authorizing, approving, or knowingly acquiescing in the unconstitutional conduct.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Reversed in part, and in part dismissed.

Douglas J. Peterson, Attorney General, David A. Lopez, and Maddisen Ebert and Joshua Baumann, Senior Certified Law Students, for appellants.

Julie A. Jorgensen, of Morrow, Willnauer, Klosterman & Church, for appellee D.M.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

## I. INTRODUCTION

While incarcerated at the Omaha Correctional Center, D.M. was sexually assaulted by a guard. D.M. sued the State, the Nebraska Department of Correctional Services (DCS), and various individual defendants in their official and individual capacities. This appeal involves two of those defendants, Geoff Britton (an investigator for the DCS) and Michael L. Kenney (warden of the Omaha Correctional Center), and the remaining constitutional claims pending against them. Both filed motions to dismiss the remaining claims for failure to state a claim, and both alleged they were entitled to qualified immunity as a matter of law. The district court for Douglas County overruled the motions, and Britton and Kenney filed interlocutory appeals challenging the district court's order denying their entitlement to qualified immunity.

Because D.M.'s First Amendment claim necessitates resolving a fact-related dispute, we conclude this part of the appeal is not immediately reviewable under the collateral order doctrine and we dismiss the appeal in part as to the First Amendment issue for lack of jurisdiction. However, we conclude D.M. failed to establish a violation of his 8th and 14th Amendment rights as to Britton and Kenney; therefore, they are entitled to qualified immunity on those claims. We reverse the district court's order to the extent it denied

Britton and Kenney qualified immunity on the 8th and 14th Amendment claims.

## II. BACKGROUND

Due to the procedural posture of this case, the facts considered are those alleged in D.M.'s amended complaint. D.M. states that he was sexually assaulted by Anthony Hansen, a guard, in the commons area of the Omaha Correctional Center. D.M. reported the sexual assault to Jim Brown, his unit manager, immediately after it occurred. D.M. also completed a formal complaint and grievance form. Thereafter, D.M. was placed in segregation for more than 30 days while corrections/prison officials investigated the allegations made against Hansen.

While in segregation, D.M. was isolated from the general population and allowed no contact with other inmates. He had limited telephone privileges and was instructed not to speak to anyone about his allegations, including friends and family. Prison guards were instructed not to speak with D.M. Britton repeatedly interrogated D.M. about the incident, told D.M. that he would get jail time for lying about Hansen, encouraged D.M. to change his story, and told D.M. that he was "ruining the life" of Hansen and Hansen's wife, who also worked at the facility.

Hansen was allowed to work for some time during the investigation, but was eventually placed on paid leave, while D.M. remained in segregation. D.M. requested that he be transferred to another facility rather than remain in segregation, but was told that there was no room and that he would not be transferred. D.M. repeatedly requested counseling services, but none were initially provided.

After the investigation, Hansen pled guilty to sexual assault. D.M. was then transferred from his minimum security facility to a maximum security facility with a "reputation for violence." After transfer and numerous requests, D.M. was approved for counseling and received two sessions before his release.

D.M. filed a complaint against the State in December 2013. D.M. brought tort claims for negligent hiring/supervising, failure to protect, and respondeat superior against the State and the DCS; Robert P. Houston (director of the DCS), Britton (then known as John Doe #1), and Brown, in both their individual and official capacities; and Hansen, in both his individual and official capacities. Several persons and entities filed a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim and also on the ground of sovereign immunity. Filing the motion to dismiss were Houston, in both his individual and official capacities; the State; the DCS; and John Doe #1, Brown, and Hansen, in their official capacities only. See *D.M. v. State*, 23 Neb. App. 17, 867 N.W.2d 622 (2015), *overruled on other grounds, Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). The district court dismissed D.M.'s entire complaint with prejudice, concluding that all of his claims were barred by sovereign immunity. *Id*. On appeal, we affirmed in part, and in part reversed and remanded for further proceedings, because we found that sovereign immunity did not apply to all of D.M.'s claims and all of the defendants. *Id*.

D.M. filed an amended complaint in December 2015 against the State; the DCS; and Houston, Britton (formerly John Doe #1), Kenney, Brown, and Hansen in their individual and official capacities. D.M. alleged six causes of action: (1) First Amendment retaliation (against all defendants), (2) violation of equal protection and due process (against all defendants), (3) cruel and unusual punishment (against all defendants) under the Nebraska and federal Constitutions, (4) intentional infliction of emotional distress (against Hansen only), (5) intentional infliction of emotional distress (against all defendants), and (6) negligent infliction of emotional distress (against all defendants).

In December 2015, the State and the DCS, along with Houston, Britton, Brown, and Hansen (in their official capacities only), filed a motion to dismiss the entire amended

complaint. The district court subsequently granted the motion in part, dismissing D.M.'s fifth cause of action (intentional infliction of emotional distress) and sixth cause of action (negligent infliction of emotional distress) with prejudice. As to Britton and Kenney, this left only the three constitutional claims.

In March 2016, Britton and Kenney filed identical motions to dismiss D.M.'s amended complaint for failure to state a claim upon which relief can be granted and/or because they were entitled to qualified immunity as a matter of law. After a hearing, the district court denied these motions on May 20. Britton and Kenney filed an interlocutory appeal from that order.

## III. ASSIGNMENTS OF ERROR

Britton and Kenney assign that the district court erred in (1) overruling their motions to dismiss on the ground of qualified immunity and (2) denying their individual assertions of qualified immunity without issuing an "individualized analysis" of each claim.

## IV. STANDARD 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] A district court's denial of a motion to dismiss is reviewed de novo. See *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015). See, also, *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420.

[3] An appellate court reviewing the denial of a motion to dismiss 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 conclusions. See *Tryon v. City of North Platte*, 295 Neb. 706, 890 N.W.2d 784 (2017).

## V. ANALYSIS

[4-6] 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. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). Generally, only final orders are appealable. *Carney, supra*. Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *Carney, supra*.

[7-9] The present appeal is taken from the district court's order overruling Britton's and Kenney's motions to dismiss, both of which asserted D.M.'s amended complaint failed to state a claim upon which relief could be granted and/or claimed entitlement to qualified immunity as a matter of law. Denial of a motion to dismiss is not a final order. See *Hallie Mgmt. Co., supra*. However, the collateral order doctrine is an exception to the final order rule. *Carney, supra*. Britton and Kenney assert that our jurisdiction is proper under the collateral order doctrine. Under the collateral order doctrine, the denial of a claim of qualified immunity is appealable, notwithstanding the absence of a final judgment, if the denial of immunity turns on a question of law. *Carney, supra*.

### 1. Collateral Order Doctrine

We take a moment to address the status of the collateral order doctrine in Nebraska. Last year, the Nebraska Supreme Court decided *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017), wherein it overruled eight enumerated cases, originating with *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), that allowed interlocutory appeals through the collateral order doctrine for orders disqualifying counsel in a civil case. The Supreme Court engaged in a detailed discussion

of the right to appeal in Nebraska, reiterating that the right is "'purely statutory.'" *Heckman*, 296 Neb. at 461, 894 N.W.2d at 299. "In other words, unless a statute provides for an appeal, such right does not exist. The right to appeal does not exist at common law." *Id*.

*Heckman, supra*, refers to *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985), wherein the U.S. Supreme Court made clear that the collateral order doctrine is a narrow exception limited to trial court orders affecting rights that would be irretrievably lost in the absence of an immediate appeal. To fall within the federal collateral order doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from final judgment. See *id. Heckman* concluded that orders disqualifying counsel in civil cases did not satisfy the third requirement.

Although *Heckman, supra*, eliminated the use of the collateral order doctrine to file interlocutory appeals from orders disqualifying counsel, we do not read *Heckman* to eliminate the collateral order doctrine for appeals concerning qualified immunity. We reach this conclusion for several reasons. First, in *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014), our Supreme Court concluded it had jurisdiction under the collateral order doctrine over an appeal from an order denying a motion for summary judgment which involved a claim of qualified immunity. Ordinarily, an appeal from an order denying summary judgment is not a final, appealable order; however, under the collateral order doctrine, the denial of a claim of qualified immunity may be appealable if it presents only questions of law. See *id*. Second, the cases specifically enumerated and overruled in *Heckman, supra*, considered the collateral order doctrine as it related to interlocutory appeals from attorney disqualification orders, and it did not specifically overrule *Carney, supra*, and its application of the doctrine to qualified immunity appeals. Finally, the U.S. Supreme Court

and the Nebraska Supreme Court have emphasized the importance of resolving qualified immunity questions at the earliest possible stage in litigation. See *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). See, also, *Waldron v. Roark*, 298 Neb. 26, 902 N.W.2d 204 (2017) (noting that both U.S. Supreme Court and Eighth Circuit Court of Appeals have repeatedly stressed importance of resolving immunity questions at earliest possible stage in litigation; those entitled to qualified immunity hold more than mere defense to liability, they hold entitlement not to stand trial or face other burdens of litigation and if case is erroneously permitted to go to trial, then qualified immunity is effectively lost). Accordingly, having determined that *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017), did not abrogate the collateral order doctrine with respect to appeals involving qualified immunity which present purely questions of law, we turn to Britton's and Kenney's claims of qualified immunity raised in the present appeal.

### 2. Qualified Immunity

[10,11] Qualified immunity provides a shield from liability for public officials sued under 42 U.S.C. § 1983 (2012) in their individual capacities, so long as the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014). In some instances, it might be unclear, based upon the record before a court, whether a defendant is entitled to qualified immunity. *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007). In those instances, "'[a] hearing would likely clarify the matter. It may be that resolution of the qualified immunity defense . . . depends upon the resolution of disputed fact issues or on a credibility determination. . . .'" *Id.* at 986, 735 N.W.2d at 391 (quoting *Johnson v. Garraghty*, 57 F. Supp. 2d 321 (E.D. Va. 1999)). Thus, where appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing. *Carney, supra*.

[12] In order to determine whether a case presents an order reviewable under the collateral order doctrine, an appellate court engages in a three-part inquiry. *Carney, supra*. First, we determine whether the plaintiff has alleged the violation of a constitutional right. *Id.* Second, we determine whether that right was clearly established at the time of the alleged violation. *Id.* Finally, we determine whether the evidence shows that the particular conduct alleged was a violation of the right at stake. *Id.* The first two inquiries are questions of law; the last could require factual determinations to the extent that evidence is in conflict. *Id*.

Determining whether the plaintiff alleged a violation of a constitutional right and whether that right was clearly established are questions of law. *Id.* Evaluating whether the evidence shows that the particular conduct alleged violated the right at stake could require factual determinations to the extent that evidence is in conflict. See *id.* If this analysis requires factual determinations, it is not purely a question of law and we lack jurisdiction to review the denial of qualified immunity under the collateral order doctrine. See *id.*

We first consider the district court's order denying Britton's and Kenney's motions to dismiss based on assertions of qualified immunity.

(a) District Court's Order Regarding Immunity Claims

The State asserts that the district court erred in failing to issue a reasoned, thorough, and individualized analysis of Britton's and Kenney's qualified immunity claims. In both motions to dismiss, Britton and Kenney each asserted he was "entitled to qualified immunity as a matter of law." It has been held that officials are entitled to a thorough determination of their claims of qualified immunity if that immunity is to mean anything at all. *Saylor v. Nebraska*, 812 F.3d 637 (8th Cir. 2016). A thorough determination discusses all of the claims litigated. *Id.*

In this case, the district court's order stated:

> On the 14th day of April, 2016 the motions to dismiss of . . . Kenney and . . . Britton came on for hearing. The parties appeared by counsel. Arguments were made and the matters were taken under advisement.
>
> The Court finds that the motions of . . . Kenney and Britton should be overruled and denied.

The State argues that the district court's failure to make a reasoned, thorough, and individualized analysis of Britton's and Kenney's qualified immunity assertion warrants remanding the cause to the district court for such determinations in the event this court declines to consider the issues. We elect to consider the qualified immunity claims under the framework of *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014). Accordingly, we will consider whether (1) D.M. alleged the violation of a constitutional right, (2) whether that right was clearly established at the time of the alleged violation, and (3) whether the evidence shows that the particular conduct alleged was a violation of the right at stake. See *id.* We keep in mind that the first two inquiries present questions of law and that the last could require factual determinations to the extent the evidence is in conflict. See *id*.

As discussed further below, we conclude we have jurisdiction over the 8th and 14th Amendment claims and can address qualified immunity as to those allegations. However, we begin with D.M.'s First Amendment claim and conclude we do not have jurisdiction to immediately review Britton's and Kenney's claims of qualified immunity under the collateral order doctrine as to D.M.'s retaliation claim.

(b) First Amendment Retaliation

D.M. claims that he engaged in constitutionally protected speech when he reported the sexual assault. He further claims that in retaliation for his report, he was placed in segregation, guards were instructed not to speak to him or acknowledge him, and his privileges and his contact with others

were limited or excluded entirely, all in violation of his First Amendment rights.

The right to be free from retaliation for utilizing a prison grievance process is a right protected by the First Amendment. See *Santiago v. Blair*, 707 F.3d 984 (8th Cir. 2013). Therefore, D.M. has alleged a violation of a constitutionally protected right based on his allegation that his report of the sexual assault by Hansen subjected him to segregation and the other conditions described above. The first portion of the collateral order jurisdictional analysis set forth in *Carney, supra*, is satisfied. Next, we consider whether this right was clearly established at the time of the alleged violation.

For a right to be "'clearly established,'" the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The right to be free from retaliation when using a prison grievance system was clearly established at the time of the alleged violation. See, *Nelson v. Shuffman*, 603 F.3d 439 (8th Cir. 2010) (holding that plaintiff who allegedly was held in isolation in structurally unfinished and inadequate ward and deprived of access to legal counsel, mail, family, recreation, and telephone calls demonstrated sufficient deprivations to survive summary judgment on First Amendment retaliation claim); *Cooper v. Schriro*, 189 F.3d 781 (8th Cir. 1999) (allegation correctional officer shut off water for 5 days because prisoner used prison grievance system sufficient to state retaliation claim); *Burgess v. Moore*, 39 F.3d 216 (8th Cir. 1994) (threat made in retaliation for prisoner's use of prison grievance system sufficient to state First Amendment retaliation claim). D.M.'s amended complaint alleged a violation of a clearly established constitutional right, and therefore, the first two requirements of the collateral order jurisdictional analysis for D.M.'s First Amendment retaliation claim are satisfied.

[13] The third factor requires us to determine whether the evidence shows that the particular alleged conduct was a violation of the right at stake. A district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact. *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014). Although the district court did not provide any insight as to why it rejected Britton's and Kenney's motions to dismiss, we conclude that for purposes of a motion to dismiss, an analysis of D.M.'s First Amendment claim requires factual determinations and cannot be decided as a matter of law, as discussed next.

[14] In order to succeed on a First Amendment retaliation claim, D.M. must show that (1) he or she engaged in a protected activity, (2) the government official took adverse action against him or her that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity. See *Saylor v. Nebraska*, 812 F.3d 637 (8th Cir. 2016).

As discussed above, utilizing the prison grievance procedures to report the sexual assault was a protected activity, satisfying the first prong of the First Amendment retaliation analysis. However, determining whether Britton and Kenney engaged in adverse actions which would chill a person of ordinary firmness from using the prison grievance system and, if there were such adverse actions, determining whether such actions were motivated at least in part by D.M. filing his report present issues of fact. There is insufficient information at this stage of the proceedings to know whether any of the actions attributed to Britton and/or Kenney were designed to keep D.M. safe and preserve the integrity of the ongoing investigation or whether such actions were retaliatory in nature. These are issues of fact yet to be resolved. And as set forth in *Carney, supra*, an appellate court lacks jurisdiction over qualified immunity appeals under the collateral order

doctrine that turn on issues of fact. Therefore, we conclude this part of the appeal is not immediately reviewable under the collateral order doctrine and we dismiss the appeal for lack of jurisdiction as to the First Amendment issue.

(c) Equal Protection and Due Process

D.M.'s second cause of action is titled "Violation of Equal Protection and Due Process." Within this cause of action, D.M. alleged that he was "subjected to atypical and significant hardship that other prisoners did not suffer, specifically shunning and lack of verbal contact with any human within the prison, except for verbal contact in the form of repeated interrogations and threats of prosecution." He further alleged that he was treated differently than other inmates placed in segregation and that there was no rational basis for such treatment. This language indicates separate claims for due process and equal protection under the 14th Amendment. (We note that D.M. includes the Fifth Amendment when making allegations in his amended complaint related to Due Process and Equal Protection, but as noted by the State in its brief, the Fifth Amendment only restrains the federal government and neither Britton nor Kenney are federal employees. See *Livers v. Schenck*, 700 F.3d 340 (8th Cir. 2012).)

*(i) Due Process*

[15] The 14th Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake. *Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). D.M. did not allege deprivation of his life or property. He alleged violations of a protected liberty interest, e.g., he suffered "atypical and significant hardship." A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty," or it may arise from an expectation or interest created by state laws or policies. *Id.*

The Constitution does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement. *Id.* However, a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations. *Id.* But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

[16] Absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life as a prisoner, will never be a ground for a constitutional claim. *Pichardo v. Kinker*, 73 F.3d 612 (5th Cir. 1996). An allegation by an inmate that his due process rights were violated by virtue of his or her placement in administrative segregation, without more, does not implicate a liberty interest. *Christianson v. Clarke*, 932 F. Supp. 1178 (D. Neb. 1996). In order to rise to the level of a due process violation, the segregation must result in "deprivations which work such major disruptions in a prisoner's environment and life that they present dramatic departures from the basic conditions and ordinary incidents of prison sentences." *Moorman v. Thalacker*, 83 F.3d 970, 972 (8th Cir. 1996).

We conclude that we have jurisdiction over D.M.'s due process claim under the collateral order doctrine because it does not present an issue of fact. D.M.'s allegation that his placement into segregation, and the conditions associated with that, may have presented more difficult conditions than the general prison population. However, such allegations fail to establish a due process claim as a matter of law. As we noted above, the segregation must result in "deprivations which work such major disruptions in a prisoner's environment and life that they present dramatic departures from the basic conditions and ordinary incidents of prison sentences." *Moorman*,

83 F.3d at 972. D.M. failed to allege facts that rise to this legal threshold, and thus, Britton and Kenney are entitled to qualified immunity on D.M.'s due process claim.

*(ii) Equal Protection*

D.M. also alleged violations of his 14th Amendment right to equal protection. D.M.'s allegation of an equal protection violation consists of one sentence: "[D.M.] was also treated differently than other inmates placed in segregation and there was no rational basis for [his] treatment."

[17,18] The Equal Protection Clause of the 14th Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). However, prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Absent assertion of membership in a protected class or violation of a fundamental right, an equal protection claim arising from placement in segregation requires showing that similarly situated classes of inmates were treated differently, that difference in treatment bore no rational relation to any legitimate penal interest, and that there was intentional or purposeful discrimination. See *Phillips v. Norris*, 320 F.3d 844 (8th Cir. 2003).

We conclude we have jurisdiction over the equal protection claim under the collateral order doctrine because it does not present a factual issue, as D.M. did not allege a valid claim as a matter of law. D.M. did not allege that he is a member of a protected class and did not allege a violation of a fundamental right. Although D.M. did allege that he was treated differently than other inmates in segregation, he alleged no facts to

describe or support this allegation. We cannot conclude that his treatment had no rational relation to a legitimate penal interest or that his treatment constituted purposeful or intentional discrimination for purposes of his equal protection claims. D.M. failed to allege facts that rise to this legal threshold, and thus, Britton and Kenney are entitled to qualified immunity on the 14th Amendment equal protection claim.

(d) Cruel and Unusual Punishment

D.M. alleged that his time and treatment in segregation was cruel and unusual punishment because he was subjected to more than 30 days in total isolation with his only verbal contact coming in the form of interrogation and threats. He further alleged that the sexual assault by Hansen constituted cruel and unusual punishment.

[19] The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). The Eighth Amendment imposes duties on prison officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measure to guarantee the safety of inmates. *Farmer, supra*. Some conditions of confinement may establish an Eighth Amendment violation in combination when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets. *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991).

[20,21] A prison official violates the Eighth Amendment only when two requirements are met. *Farmer, supra*. First, the deprivation alleged must be, objectively, sufficiently serious.

*Id.* This means that a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities. *Id.* The second requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment. *Farmer, supra*. To violate the Cruel and Unusual Punishment Clause, a prison official must have a sufficiently culpable state of mind. *Farmer, supra*. In prison-conditions cases, that state of mind is one of "'deliberate indifference'" to inmate health or safety, meaning that the prison official cannot be held liable under the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety. *Farmer*, 511 U.S. at 834. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he or she must also draw the inference. *Farmer, supra*.

[22] D.M. failed to allege that he was deprived of a single basic, human need, let alone some combination of deprivation. His allegation that placement in isolation qualifies as a deprivation serious enough to implicate the Eighth Amendment does not pass muster. He failed to state a claim as a matter of law. In addition, D.M.'s allegation that his sexual assault by Hansen qualified as cruel and unusual punishment does not implicate either Britton or Kenney. The standard by which a supervisor is held liable under § 1983 in his or her individual capacity for the actions of a subordinate is extremely rigorous. *D.M. v. State*, 23 Neb. App. 17, 867 N.W.2d 622 (2015), *overruled on other grounds, Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). The plaintiff must establish that the supervisor personally participated in the unconstitutional conduct or was otherwise the moving force of the violation by authorizing, approving, or knowingly acquiescing in the unconstitutional conduct. *Id.* Kenney is not alleged to have participated in the sexual assault or to have otherwise authorized, approved, or knowingly acquiesced in the assault. Similarly, D.M. does not allege that Britton participated in,

directed, encouraged, knew about, or was in any way aware of the assault before it happened. D.M. failed to allege facts that rise to the legal threshold for an Eighth Amendment claim as to Britton and Kenney, and thus, they are entitled to qualified immunity on the Eighth Amendment cruel and unusual punishment claim.

## VI. CONCLUSION

For the reasons stated above, we conclude Britton and Kenney are entitled to qualified immunity as to the 8th and 14th Amendment claims, and we reverse in part the district court's order denying their motions to dismiss as to these claims. However, we find we lack jurisdiction to review the district court's denial of Britton's and Kenney's motions to dismiss D.M.'s First Amendment retaliation claim; and as to that part of the appeal, we dismiss for lack of jurisdiction.

Reversed in part, and in part dismissed.

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

# State of Nebraska, appellee, v. Kurt C. Krajicek, appellant.

910 N.W.2d 816

Filed March 13, 2018. No. A-17-322.

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. **Motions to Suppress: Pretrial Procedure: Trial: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
3. **Search and Seizure.** Application of the good faith exception to the exclusionary rule is a question of law.
4. **Constitutional Law: Search and Seizure: Search Warrants.** The Fourth Amendment to the U.S. Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and further provides that no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.
5. **Constitutional Law: Search Warrants: Probable Cause.** The execution of a search warrant without probable cause is unreasonable and violates constitutional guarantees.
6. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause.

7. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
8. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
9. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
10. **Search Warrants: Affidavits: Probable Cause.** The magistrate who is evaluating a probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
11. **Probable Cause.** Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found.
12. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts.
13. **Search Warrants: Affidavits: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit used to obtain a search warrant should not take the form of a de novo review.
14. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** Where the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to such deference, but, rather, must be reviewed de novo.
15. **Constitutional Law: Search and Seizure: Evidence.** The Fourth Amendment does not expressly preclude the use of evidence obtained in violation of its commands.

16. **Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence: Search and Seizure.** The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant.
17. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence.** Evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Stuart J. Dornan and Jason E. Troia, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Joe Meyer for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Bishop, Judge.

After his motion to suppress evidence was overruled and following a stipulated bench trial, Kurt C. Krajicek was convicted in the Douglas County District Court of possession of a controlled substance and was sentenced to 2 years' probation. On appeal, Krajicek challenges the court's denial of his motion to suppress evidence obtained as a result of five search warrants. We affirm.

## FACTUAL BACKGROUND

Krajicek filed a motion to suppress evidence obtained from the execution of five search warrants, all of which were

obtained in the county court for Douglas County. The first search warrant, which Krajicek claims was based on an insufficient probable cause affidavit, lead to the issuance of all of the other warrants. We discuss each in turn.

*First Affidavit and Search Warrant—*
*Krajicek's Residence.*

On August 13, 2015, Investigator Kevin Finn of the Nebraska State Patrol presented a county court judge with an "Affidavit and Application for Issuance of a Search Warrant" (Affidavit #1) for a single family dwelling located at a specified address on Pinkney Street in Omaha, Nebraska (residence).

In his affidavit and application for a search warrant, Finn set forth the grounds for issuance of the warrant as follows:

> On August 12, 2015 your affiant received information from Investigator Smoot #309 of the Nebraska State Patrol that Kurt Krajicek . . . is in possession of, using and distributing anabolic steroids from his residence. Your affiant was also informed Krajicek is renting the house and has a live in girlfriend . . . . Your affiant conducted a computer check of Krajicek and identified his primary address of . . . Pinkney St.
>
> Your affiant verified the refuse pickup date was August 13, 2015. Investigators with the commercial interdiction unit conducted surveillance on the residence and observed a refuse bin filled with multiple trash bags sitting next to the roadside curb. Your affiant contacted an employee with Deffenbaugh [I]ndustries who agreed to assist with collection of the trash. Inv. Lutter observed a pickup belonging to Deffenbaugh [I]ndustries collect the trash from the residence and followed the vehicle to a meeting location. The garbage was handed over to your affiant and Lutter. Investigators returned to the Nebraska State Patrol Omaha office and conducted a search of the contents. Located within the trash were five syringe needles, two empty vials with the labeling of "[s]omatropin

(rDNA origin) for injection", miscellaneous papers of venue and miscellaneous papers believed to be relating to 13th [S]treet Brickhouse liquor establishment.

Your affiant conducted research of somatropin and determined it to be on a Drug Enforcement Administration list as a human growth hormone and discovered through DEA sources; as part of the 1990 Anabolic Steroids Control Act, the distribution and possession, with the intent to distribute, of hGH "for any use other than the treatment of a disease or other recognized medical condition, pursuant to the order of a physician" is a violation of Nebraska state statute 28-416.

Furthermore your affiant examined the two bottles of [s]omatropin and observed no indication of a valid prescription for Krajicek or identifiable numbers. Your affiant observed the bottles to be written in an unknown language similar to that of Japanese or Chinese writing, along with the previously described [E]nglish labeling. Your affiant believes these containers to be illegally obtained from another country.

Based on training and experience your affiant is aware that subjects involved in the sale and distribution of controlled substance[s] will maintain product records and money associated with the distribution of a controlled substance at their residence. [Y]our affiant believes that there is probable cause to believe and does believe that evidence of the distribution of controlled substance[s] will be located at . . . Pinkney St[.], Omaha[,] Douglas County[,] Nebraska.

Finn stated that he had just and reasonable grounds to believe, and did believe, that being concealed or kept in, on, or about the residence (including all outbuildings and vehicles on the property) was the following:

> Anabolic steroids, marijuana, cocaine, heroin, methamphetamine, and/or other controlled substances, paraphernalia associated with the use, possession, manufacture,

> and/or distribution of anabolic steroids, marijuana, cocaine, heroin, methamphetamine, and any other controlled substances, records, ledgers, [U]nited [S]tates currency, money orders, address books, telephones, computers, electronic or digital storage devices used to store information and/or papers reflecting names, addresses, telephone numbers of customers, associates, and co-conspirators, plus receipts indicating a conspiracy to sell anabolic steroids, marijuana, cocaine, heroin, methamphetamine, and any other controlled substances.

He requested a warrant authorizing a daytime search.

The county court judge authorized the search warrant, as requested, on August 13, 2015.

Finn executed the search warrant on August 18, 2015, and recovered "40 grams of marijuana," "122 vials of various size and brands of unknown type drugs," "2 containers with unknown tary substance," "[m]iscellaneous items of drug paraphernalia," "[m]iscellaneous documents/papers of venue," "[t]wo keys to safety deposit box," "[s]ix cellular phones," and "United States Currency $10,000." Finn filed a "Return and Inventory" of the search warrant on August 20.

*Second Affidavit and Search Warrant—*
*Safety Deposit Box.*

On August 18, 2015, Finn presented a county court judge with an "Affidavit and Application for Issuance of a Search Warrant" (Affidavit #2) for a safety deposit box at a bank in Omaha. In his affidavit and application for a search warrant, Finn set forth the information from Affidavit #1. He further stated that during the search of the Pinkney Street residence on August 18, a set of keys belonging to a safety deposit box were located. Finn stated that "[b]ased on training and experience [he] is aware that subjects involved in the sale and distribution of controlled substance[s] will maintain product records and money associated with the distribution of a controlled substance in safety deposit boxes." The list of property

he believed was being concealed or kept in the safety deposit box was the same as described in Affidavit #1. Finn stated that "said property is under the control or custody" of Krajicek. He requested a warrant authorizing a daytime search.

The county court judge authorized the search warrant, as requested, on August 18, 2015.

Finn executed the search warrant on August 18, 2015, and recovered "United States currency . . . eight hundred twenty one, one hundred dollar bills" and "[p]ackaging material." Finn filed a "Return and Inventory" of the search warrant on August 20.

*Third Affidavit and Search Warrant—*
*Krajicek's Office.*

On August 19, 2015, Finn presented a county court judge with an "Affidavit and Application for Issuance of a Search Warrant" (Affidavit #3) for a basement office belonging to Krajicek "located on the west side of address . . . S. 13 St[.]" in Omaha. In his affidavit and application for a search warrant, Finn set forth the information from Affidavit #1 and Affidavit #2. He further stated the search of the Pinkney Street residence on August 18

> resulted in the arrest of Krajicek for possession of approximately 122 vials of various sizes and brands of an unknown liquid believed to be anabolic steroids, $10,000 United States currency believed to be related to the distribution of a controlled substance, approximately 30 grams of marijuana and various types of drug paraphernalia relating to the marijuana and vials.

And during the search of Krajicek's safety deposit box on August 18, investigators "located an additional $82,100 in United States Currency believed to be obtained through illegal distribution of controlled substances."

Finn stated that he discovered through further investigation that Krajicek is the owner of a specified business and has an office located at "S. 13 [S]treet." He provided details of how

he learned about Krajicek's office, which included a mention of "13th [S]treet [B]rickhouse" (which had previously been referenced in relation to items found in the "trash pull" of the residence).

Finn stated that "[b]ased on training and experience [he] is aware that subjects involved in the sale and distribution of controlled substance[s] will maintain product records and money associated with the distribution of a controlled substance in various locations." The list of property he believed was being concealed or kept in the office was the same as described in Affidavit #1. Finn stated that "said property is under the control or custody" of Krajicek and/or a named business. He requested a warrant authorizing a daytime search.

The county court judge authorized the search warrant, as requested, on August 19, 2015.

Finn executed the search warrant on August 19, 2015, and recovered "[m]iscellaneous documents and items of venue" and a "Dell laptop computer and bag." Finn filed a "Return and Inventory" of the search warrant on August 20.

*Fourth and Fifth Affidavits and Search Warrants—Electronic Devices.*

On September 25, 2015, Finn presented a county court judge with two "Affidavit[s] and Application[s] for Issuance of a Search Warrant" (Affidavits #4 and #5) for the electronic devices seized in previous searches of the Pinkney Street residence and Krajicek's office, and being held by the Nebraska State Patrol; any data on these items would be recovered by a computer forensic analyst. In his affidavits and applications for search warrants, Finn set forth the information from Affidavit #1, Affidavit #2, and Affidavit #3. He further described items found in each of the previous searches of the residence, safety deposit box, and office.

Finn said he knew that

> in prior cases, computers, computer equipment, cellular phones, and digital media were seized and found to

> contain evidence establishing ownership of the digital devices, involvement in criminal activity and ownership or use of any Internet service accounts, to include but not limited to, social media accounts, cloud storage accounts, email accounts, credit card accounts, telephone accounts, correspondence and other identification documents.

He included numerous pages detailing how he knew the above. He believed the "computers and/or digital devices/information/files" more fully described in the attachments would depict criminal activity involving the possession and/or possession with intent to deliver a controlled substance in violation of Nebraska law.

The county court judge authorized the fourth and fifth search warrants, as requested, on September 25, 2015. Finn executed the search warrants on September 26 and recovered a "White Dell laptop computer" with a specified serial number and a "Black Samsung Verizon Cell Phone"; any data on these items would be recovered by a computer forensic analyst. He filed a "Return and Inventory" of the search warrants on October 5.

## PROCEDURAL BACKGROUND

On September 18, 2015, Krajicek was charged with possession of a controlled substance, a Class IV felony, in the Douglas County District Court.

On December 18, 2015, Krajicek filed a motion to suppress all "physical evidence and all testimony in connection therewith" obtained as a result of the execution of the search warrants. Krajicek alleged the searches and seizures of evidence from his residence, safety deposit box, and office were unreasonable, unlawful, and violated one or more of his Fourth Amendment rights under the federal and Nebraska Constitutions. He alleged (1) "Any purported physical evidence or property taken from [him] or his residence was unreasonably, illegally and unconstitutionally seized by law enforcement officers without first obtaining a valid arrest

or search warrant, and was done without probable cause"; (2) the search warrants authorizing the search of his residence, safety deposit box, and office "were invalid because they were based on Affidavits so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; (3) the affidavits for the search warrants did not set forth "sufficient facts which could have supported the Affiant's conclusion that there was probable cause to believe that particular items of evidence, including safety deposit boxes, office or electronic devices, would be found at or within the above mentioned places at the time of the execution of the warrant"; (4) "[t]he scope of said searches exceeded the scope of the searches authorized within the search warrants, and therefore said searches were general and illegal as exploratory searches"; and (5) "[t]he search warrants lacked particularity with respect to the persons or things to be searched, items to be seized, and the manner and time for execution of the searches."

A suppression hearing was held on February 9, 2016. In lieu of in-court testimony, the challenge on the motion to suppress was confined to "the four corners of the documents." Five exhibits, containing the certified copies of the affidavits and search warrants issued and executed, along with the return and inventory for each, were received into evidence without objection. Krajicek argued that the initial affidavit, Affidavit #1, was lacking in probable cause because the information provided by an Investigator Smoot did not establish direct observation or information coming from a reliable informant and there was no evidence as to when the information was obtained. Krajicek further argued there was no evidence linking the trash that was at the curb to him or somebody at his residence. Krajicek argued that without probable cause on the first affidavit, the rest "basically fall from a domino effect."

In an order filed on June 3, 2016, the district court overruled Krajicek's motion to suppress after finding that four of the five search warrants were valid and supported by probable cause

and that the good faith exception applied to the searches under all five warrants.

The district court found search warrant Affidavit #1 provided sufficient information and details to establish probable cause to believe evidence of a crime would be found at Krajicek's residence because the materials found during the trash pull corroborated the information provided by Investigator Smoot and were otherwise "entirely independent and sufficient grounds for a finding of probable cause."

The court found search warrant Affidavit #2 did not provide sufficient information and details to establish probable cause to believe evidence of a crime would be found in the safety deposit box because the affidavit did not provide information as to where the set of keys were located during the search of the residence, how the keys were linked to Krajicek, if and how the officers determined the safety deposit box belonged to Krajicek, and how the affiant, Finn, believed Krajicek "is involved in the sale and distribution of controlled substance[s] where he would be maintaining product records and money associated with this distribution in a safety deposit box." Affidavit #2 did not include the various items located during the search of Krajicek's residence, such as the 40 grams of marijuana, 122 vials of various sizes and brands of unknown drugs, miscellaneous items of drug paraphernalia, 6 cellular phones, and $10,000 in cash which could be indicative of drug dealing behavior. "Affidavit #2 only includes that during the search of the residence, officers located a set of keys belonging to a safety deposit box." Thus, in reviewing the affidavit "only on the four corners," the court concluded probable cause to search the safety deposit box was not established. The court noted that the search warrant for the safety deposit box would have had sufficient probable cause if the affiant, Finn, had not left out the other items retrieved in the execution of the search warrant on Krajicek's residence.

The court found search warrant Affidavit #3 provided sufficient information and details to establish probable cause

to believe evidence of a crime would be found at Krajicek's office because, "[u]nlike in Affidavit #2, Affidavit #3 does include information from the affiant of the full results of the search of [Krajicek's] home . . . ." All previous information from Affidavit #1 and Affidavit #2 was also included in this affidavit, as well as how the affiant, Finn, linked Krajicek to his work address.

The court found search warrant Affidavits #4 and #5 provided sufficient information and details to establish probable cause to believe evidence of a crime would be found on the recovered electronics. Affidavits #4 and #5 included all information contained in the previous affidavits and noted what items were found during the execution of the first, second, and third search warrants. And the affidavits provided more than 10 pages of explanation for the link between electronic devices and criminal activity.

The court further found that the five search warrants did not exceed the scope of the probable cause in each warrant, that the warrants did not lack the particularity required by the Fourth Amendment, and that the good faith exception applied to the searches under all five warrants. The district court overruled Krajicek's motion to suppress "in all respects."

A stipulated bench trial was held on December 14, 2016, at which Krajicek preserved the issues concerning his motion to suppress. In an order filed on January 6, 2017, Krajicek was convicted of possession of a controlled substance and was later sentenced to 2 years' probation.

Krajicek appeals.

## ASSIGNMENT OF ERROR

Krajicek assigns the district court erred in denying his motion to suppress evidence.

## STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment,

an appellate court applies a two-part standard of review. *State v. Baker*, 298 Neb. 216, 903 N.W.2d 469 (2017). 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. *State v. Baker, supra*. When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress. *Id*.

[3] Application of the good faith exception to the exclusionary rule is a question of law. *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014).

## ANALYSIS

*Probable Cause for Search Warrants.*

Krajicek argues, "The first search warrant obtained demands all of the attention in this case. The other four stemmed from the first and would not have been granted without the results of the first search warrant having been served." Brief for appellant at 9. He claims, "The other four search warrants [were] fruits of the poisonous tree." *Id.* at 17.

Krajicek contends, "The first search warrant authorizing search of the residence . . . was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id*. at 9. More specifically, Krajicek argues as follows: There was no explanation as to how Smoot came into possession of the information relayed; the affidavit does not specifically mention that the trash was from Krajicek's address, although he says such can be inferred in the context of the document; and "'miscellaneous papers of venue'" were not further described to connect the trash to Krajicek or his girlfriend or to the address on Pinkney Street. *Id*. at 13.

> The information contained within the four corners of the affidavit was so lacking in indicia of probable cause

> because it was wholly void of the classification of the source, was wholly void of the basis for the information provided by the source, involved nothing more from the source other than a bare bones allegation, and the single trash pull . . . coupled with the affiant's research only yielded items that were entirely consistent with legal possession of a controlled substance.

*Id*. at 11. Krajicek asserts that "[a] suspicion to continue the investigation is not the equivalent of probable cause to justify intrusion into one's home." *Id*. at 9.

[4-9] The Nebraska Supreme Court has recently stated:

> The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . " and further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Nebraska Constitution provides similar protection.
>
> The execution of a search warrant without probable cause is unreasonable and violates these constitutional guarantees. Accordingly, a search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and

> circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.

*State v. Hidalgo*, 296 Neb. 912, 917, 896 N.W.2d 148, 153 (2017).

[10,11] The magistrate who is evaluating a probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Holguin*, 14 Neb. App. 417, 708 N.W.2d 295 (2006). Probable cause to search is determined by a standard of objective reasonableness; that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found. *Id*.

[12-14] A magistrate's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts. *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008). After-the-fact scrutiny by courts of the sufficiency of an affidavit used to obtain a search warrant should not take the form of a de novo review. *Id.* However, where the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to such deference, but, rather, must be reviewed de novo. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

We first consider whether Affidavit #1, for the search of the residence on Pinkney Street, contained probable cause to support the issuance of a warrant. In his probable cause affidavit, Finn said Smoot told him that Krajicek was in possession of, using, and distributing anabolic steroids from his residence. However, Finn's affidavit made no representation as to how

Smoot got this information, e.g. whether it was from his own observations, from investigation, or from an informant.

This is similar to *State v. Holguin, supra*, wherein as part of a probable cause affidavit to search, the affiant officer said that another officer, who was a drug investigator and a member of a drug task force, had intelligence that the defendant was traveling back and forth between Greeley, Colorado, and Scottsbluff, Nebraska, while transporting cocaine. The defendant appealed his conviction for aiding and abetting in the manufacture of a controlled substance other than marijuana, premising one of his assignments of error on the trial court's denial of his motion to suppress. On appeal, this court said:

> Although observations by a fellow officer engaged in a common investigation are a reliable basis for a search warrant, *State v. Bockman*, 11 Neb. App. 273, 648 N.W.2d 786 (2002), [the drug investigator's] "intelligence" regarding [the defendant's] transportation of cocaine was not explained in [the affiant officer's] statement in the affidavit as being [the drug investigator's] personal knowledge from firsthand observation, from investigation, or from informants. The affidavit simply does not explain how [the drug investigator] obtained this "intelligence"—for example, from an informant who had been shown to be reliable. See *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998) (discussing how reliability of various types of informant is established), *disapproved in part on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Thus, the affidavit reveals no "underlying circumstances" supporting the assertion that [the defendant] was transporting cocaine between Greeley and Scottsbluff. See *State v. Huggins*, 186 Neb. 704, 706, 185 N.W.2d 849, 851 (1971) (affidavit may be based on hearsay and need not reflect direct observations of affiant so long as magistrate is informed of some of underlying circumstances supporting affiant's conclusions). Although, in general, no special showing of reliability is necessary

> where the affidavit indicates the source of information to be a law enforcement officer, see *State v. Bockman, supra*, there must be some basis revealed in the affidavit beyond the fact that one officer informed another, who then made the affidavit. See *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998) (affidavit should include veracity and basis of knowledge of persons supplying hearsay information). Because [the affiant officer] asserted what [the drug investigator], another officer, knew, some basis for [the drug investigator's] "intelligence" about [the defendant] had to be in the affidavit. Without such basis, the magistrate could not properly evaluate the statement that [the drug investigator] had "intelligence" that [the defendant] was transporting cocaine.

*State v. Holguin*, 14 Neb. App. 417, 424-25, 708 N.W.2d 295, 303 (2006). Similarly, without knowing the basis for Smoot's information, neither the issuing magistrate, the suppression hearing judge, nor this court can consider his bare bones statement.

The suppression hearing judge in this case acknowledged that there was no information as to when or how Smoot obtained his information, but said the information was corroborated by Finn's independent investigation, i.e., the trash pull. We agree. Besides the statement from Smoot, the remaining pertinent information in the affidavit was that Finn conducted a "computer check of Krajicek" and identified his primary address as the address on Pinkney Street, which was for a single-family dwelling. Finn "verified the refuse pickup date was August 13, 2015. Investigators . . . observed a refuse bin filled with multiple trash bags sitting next to the roadside curb." A trash pull was done with the help of "Deffenbaugh [I]ndustries." Another investigator observed "Deffenbaugh [I]ndustries collect the trash from the residence" and followed the vehicle to a meeting place. The trash was handed over to that investigator and Finn. A search of the contents of the trash revealed five syringe needles, two empty vials with

the labeling of "[s]omatropin (rDNA origin) for injection," "miscellaneous papers of venue," and "miscellaneous papers believed to be relating to 13th [S]treet Brickhouse liquor establishment."

Krajicek claims that "[a]lthough the [trash pull] paragraph does not specifically mention that trash was pulled from the address of . . . Pinkney Street[,] arguably it can be inferred in the context of the document as a whole." Brief for appellant at 12. He further claims, "The 'miscellaneous papers of venue' were not further described to connect the trash to Krajicek or his girlfriend or to the address of . . . Pinkney Street." *Id.* at 13.

We find that as to both claims, practical commonsense inferences can be made that the trash pulled was sitting next to the curb in front of the address for which the search warrant was sought and that the "miscellaneous papers of venue" would have indicated that same address. And the affidavit reflects the address was for a single-family dwelling.

We acknowledge that Nebraska's case law on this issue is distinguishable. See *State v. Tompkins*, 14 Neb. App. 526, 710 N.W.2d 654 (2006), *reversed on other grounds* 272 Neb. 547, 723 N.W.2d 344, *modified on denial of rehearing* 272 Neb. 865, 727 N.W.2d 423 (2007) (trash set out for collection outside duplex with two units, one of which was occupied by defendant, that contained marijuana evidence but not venue items or other indicia of ownership or possession did not provide probable cause to issue warrant to search defendant and his unit for marijuana evidence; trash could not be affirmatively attributed to defendant). However, other jurisdictions have found that when a trash can is located in front of or behind a residence, inferences that the trash can and its contents originated from the residence can be made. See, *U.S. v. Gary*, 528 F.3d 324 (4th Cir. 2008) (officer's failure to state in affidavit for search warrant on defendant's residence that both trash cans marked and unmarked with house number were present directly behind defendant's residence and that

trash bags removed by officer were from two cans, rather than in trash can marked with subject house number, did not defeat probable cause and void search warrant on defendant's residence; while possible that trash in cans behind residence was not generated by defendant, most likely scenario was that trash cans placed directly behind home were used by those who lived there, regardless of whether there were two trash cans located behind home, rather than one; probable cause reinforced by fact that letter addressed to subject house number was found inside trash bags); *State v. Bordner*, 53 S.W.3d 179 (Mo. App. 2001) (although officers did not see who put trash bags in front of defendant's house, bags' being in front of house on day designated for trash pick up and previous reports that defendant had been making methamphetamine gave court reasonable basis for inferring that bags' contents had originated inside defendant's house). But, see, *State v. Malone*, 50 Kan. App. 2d 167, 323 P.3d 188 (2014) (there was not sufficient link between contraband and residence when trash recovered from curb in front of residence, but police found contraband in one trash bag and information concerning occupancy of residence in separate bag); *People v. Burmeister*, 313 Ill. App. 3d 152, 728 N.E.2d 1260, 245 Ill. Dec. 903 (2000) (affiant officer failed to describe indices of residency in trash; held police may not presume that evidence they discover in curbside trash originated from nearest residence; when police discover recently deposited curbside contraband, magistrate may issue warrant to search resident's home if officer's complaint describes eyewitness account of resident dumping trash for collection).

As the U.S. Supreme Court stated, "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Illinois v. Gates*, 462 U.S. 213, 231, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). As such, under a totality of the circumstances approach,

practical commonsense inferences can be made that the trash pulled was sitting next to the curb in front of the address on Pinkney Street for which the search warrant was sought and that the "miscellaneous papers of venue" would have indicated that same address.

As to the somatropin found in the trash pull, Krajicek does not contest that somatropin is a controlled substance; instead, he simply argues that it can be obtained legally and that there was no probable cause to believe the somatropin recovered in the trash pull was obtained illegally. Specifically, Krajicek argues Finn's research "only yielded items that were entirely consistent with legal possession of a controlled substance." Brief for appellant at 11. We disagree. Initially, we note that Finn's statement that he believed the somatropin was obtained illegally from another country, based on "an unknown language" appearing on the vials along with English, did not contain sufficient foundation for his belief. However, there was other evidence establishing probable cause to believe that the somatropin was obtained illegally. During the trash pull, Finn found five syringe needles and two empty vials with the labeling of "'[s]omatropin (rDNA origin) for injection.'" Finn's research of somatropin revealed the substance was on "the Drug Enforcement Administration list as a human growth hormone" and that as part of "the 1990 Anabolic Steroids Control Act, the distribution and possession, with the intent to distribute, of hGH 'for any use other than the treatment of a disease or other recognized medical condition, pursuant to the order of a physician' is a violation of Nebraska state statute 28-416." Finn examined the somatropin found in the trash and "observed no indication of a valid prescription for Krajicek or identifiable numbers." Based on the fact that there was no indication of a valid prescription for Krajicek or "identifiable numbers" on the somatropin, there was probable cause to believe that the drugs were obtained illegally and that evidence of criminal activity would be found in the residence.

For the reasons stated above, under the totality of the circumstances illustrated by the affidavit, we find the issuing magistrate had a substantial basis for finding that Affidavit #1 established probable cause for a search of the residence. Because we find there was probable cause to support the warrant for the residence, the remaining warrants were not fruit of the poisonous tree.

However, we, like the district court, note that the warrant for the safety deposit box was not supported by a sufficient probable cause affidavit. Affidavit #2 only contained the information from Affidavit #1, and then said that in the search of the residence, they found safety deposit box keys. Affidavit #2 did not include the other items located during the search of Krajicek's residence, such as the 40 grams of marijuana, 122 vials of various sizes and brands of unknown drugs, miscellaneous items of drug paraphernalia, 6 cellular phones, and $10,000 in cash which could be indicative of drug dealing behavior. Thus, in reviewing the affidavit "only on the four corners," we determine that probable cause to search the safety deposit box was not established. However, as discussed below, we find that the good faith exception applies to the search of the safety deposit box.

*Good Faith Exception.*

Initially, we note that Krajicek contends the State has the burden to show the good faith exception applies. Then he says that at the suppression hearing, the State offered no evidence beyond the affidavits, warrants, and inventory returns and made no argument as to good faith. However, Krajicek's claim that the State made no argument as to good faith is not supported by the record. At the conclusion of the suppression hearing, the parties were given time to submit legal briefs. And in its order on Krajicek's motion to suppress, the court said, "The State argues that as an alternative to its argument that the search warrants were supported by probable cause, the warrants are still valid because the 'Leon' good

faith exception applies." Clearly, the State made an argument regarding the good faith exception.

[15] Krajicek further argues the good faith exception does not save the search warrants. The Fourth Amendment does not expressly preclude the use of evidence obtained in violation of its commands. *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017). The exclusionary rule "'operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."'" *State v. Hoerle*, 297 Neb. at 847, 901 N.W.2d at 332. Thus, a Fourth Amendment violation does not necessarily mean that the exclusionary rule applies. *State v. Hoerle, supra*.

[16,17] Because the exclusionary rule should not be applied to objectively reasonable law enforcement activity, the U.S. Supreme Court created a good faith exception to the rule. *Id.*

> [T]he good faith exception to the exclusionary rule [was] first recognized in *United States v. Leon*[, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)]. The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant. Evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. In *Leon*, the Supreme Court noted that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of the exclusionary

> rule. The Court recently provided further guidance on this point, writing in *Herring v. United States*[, 555 U.S. 135, 144, 129 S. Ct. 695, 702, 172 L. Ed. 2d 496 (2009)]: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."

*State v. Nuss*, 279 Neb. 648, 656-57, 781 N.W.2d 60, 68 (2010).

Krajicek limits his good faith argument to the third situation noted above in *Nuss*, specifically that the warrant for the residence was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Although we previously found that the search of the residence was supported by a probable cause affidavit, we note that even if probable cause was lacking, the good faith exception would have applied. In particular, we note that the case law regarding the inference of a nexus between a trash can and a particular residence has been decided differently by different jurisdictions, and Finn and the issuing magistrate would have no way of knowing how Nebraska courts would rule. See *State v. Nuss, supra* (holding good faith exception applied because it was not clear under Nebraska law that labeling intercepted computer images as child pornography was insufficient, standing alone, to establish probable cause to search for evidence of visual depiction of sexually explicit conduct involving minors). Accordingly, under the totality of the circumstances in this case, Finn acted in objectively reasonable good faith in reliance upon the warrant. We find that the good faith exception applies and that the evidence recovered pursuant to the warrant for the residence should not be suppressed or excluded.

As to the search warrant for the safety deposit box, as noted by the district court, there would have been sufficient

probable cause if Finn had not left out the other items retrieved during the execution of the search warrant of the residence (i.e., 40 grams of marijuana, 122 vials of various sizes and brands of unknown drugs, miscellaneous items of drug paraphernalia, 6 cellular phones, and $10,000 in cash which could be indicative of drug dealing behavior); which information Finn did include in the subsequent affidavits. This was not the type of deliberate, reckless, or grossly negligent conduct which the exclusionary rule serves to deter. Under the totality of the circumstances in this case, Finn acted in objectively reasonable good faith in reliance upon the warrant. Accordingly, we, like the district court, find that the good faith exception applies and that the evidence recovered pursuant to the warrant for the safety deposit box should not be suppressed or excluded.

## CONCLUSION

For the reasons stated above, we find the district court did not err in denying the motion to suppress. The judgment of the district court is affirmed.

Affirmed.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# Karen Simms, biological grandmother and next friend of Megan Marie Friel et al., minor children, appellee, v. Jeffrey Allen Friel, appellant.

911 N.W.2d 636

Filed March 20, 2018. No. A-17-054.

1. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
3. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
6. **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.
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. **Moot Question: Jurisdiction: Appeal and Error.** Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, appellate courts review mootness determinations under the same standard of review as other jurisdictional questions.
9. **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 outcome of the litigation.
10. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
11. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
12. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
13. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or similar problem.
14. **Courts: Visitation.** A district court has inherent authority to issue a temporary order allowing visitation during the pendency of a proceeding for grandparent visitation.
15. ____: ____. A district court must make specific findings as set forth in Neb. Rev. Stat. § 43-1802(2) (Reissue 2016) before granting grandparent visitation.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, County Judge. Appeal dismissed.

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellant.

Aimee S. Melton, of Reagan, Melton & Delaney, L.L.P., for appellee.

Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

Moore, Chief Judge.

## I. INTRODUCTION

Jeffrey Allen Friel appeals from an order entered by the district court for Sarpy County which granted Karen Simms, a grandparent to the minor children at issue, temporary visitation. Because we find that Friel's appeal is now moot, we dismiss the appeal. However, under the public interest exception, we determine that a district court has inherent authority to grant temporary grandparent visitation during the pendency of the proceeding. We further determine that a district court must make specific findings as set forth in Neb. Rev. Stat. § 43-1802(2) (Reissue 2016) before granting grandparent visitation.

## II. BACKGROUND

In May 2016, Simms, the maternal grandmother of Friel's three minor children, filed a complaint for the establishment of grandparent visitation pursuant to § 43-1802. Simms alleged that her daughter, the mother of the children, had died from a "sudden cardiac arrest" in February 2016 and that Friel had since refused to allow Simms to see her grandchildren despite her previous frequent contact with them. Simms alleged that at the time of her daughter's death, Friel and her daughter were separated and there was a pending dissolution of marriage action. In his answer, Friel denied, among other things, that it would be in the best interests of the children to order grandparent visitation with Simms and he asked that the complaint be dismissed.

Simms thereafter filed a motion to appoint an expert witness and/or guardian ad litem to make recommendations as to the children's best interests. A hearing was initially held on August 22, 2016, and the order indicated that affidavits and arguments were offered by both parties; however, our record does not contain any affidavits. In an order entered on September 16, the court ordered Friel to produce reports from counselors, psychologists, or other therapists that have seen

the minor children since February 2016 and ordered the parties to attend mediation.

On October 24, 2016, another hearing was held on Simms' motion, at which time arguments were heard regarding the necessity of an expert witness. Simms also made an oral motion for "some temporary visitation" while the case was proceeding. The court allowed the parties 10 days to submit affidavits in regard to the oral motion. On November 10, the court entered an order appointing an expert witness. On November 15, the court entered an order on Simms' oral motion for temporary visitation. The court stated that it had considered the affidavits filed and the arguments by both parties, but, again, our record does not contain any affidavits. The court granted Simms visitation with the children 1 day each month, from 9 a.m. to 5 p.m., from November 2016 through May 2017.

On November 18, 2016, Friel filed a motion to alter or amend the judgment or, in the alternative, to vacate the November 10 and 15 orders. The court denied the motion in an order entered on December 23 in which it also denied Friel's oral motion for supersedeas bond. Friel appeals.

## III. ASSIGNMENTS OF ERROR

Friel assigns, as summarized, that the district court erred in ordering him to provide visitation to Simms because (1) the statutes establishing grandparent visitation do not allow for temporary orders and (2) the court did not make the required statutory findings before ordering grandparent visitation.

## IV. STANDARD OF REVIEW

[1,2] Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in

a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Id*.

[3] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016).

## V. ANALYSIS

### 1. Jurisdiction

The parties were previously ordered to address in their appellate briefs the jurisdictional question of whether the temporary order entered on November 15, 2016, was a final, appealable order. Simms thereafter filed a motion to dismiss the appeal, asserting that the order was not a final, appealable order; that Friel failed to timely appeal from the order; and that the appeal of the temporary visitation issue is now moot. We overruled the motion without prejudice to consideration of the jurisdiction issues raised in the motion following completion of briefing and submission of the appeal.

[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. *Al-Ameen v. Frakes, supra*.

#### (a) Final, Appealable Order

[5,6] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015). 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. *Id*. Therefore, we must consider whether the order of the district court which granted Simms temporary visitation affected a substantial right.

[7] There is no question that the parent-child relationship is a constitutionally protected right and is entitled to protection from intrusion into that relationship. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). 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. *In re Interest of Cassandra B. & Moira B., supra*. In *In re Interest of Cassandra B. & Moira B.*, an order affecting a parent's educational rights to a juvenile that lasted approximately 6 months was found to be appealable as affecting a substantial right.

*In re Interest of Zachary W. & Alyssa W.*, 3 Neb. App. 274, 526 N.W.2d 233 (1994), was an appeal involving an order by the juvenile court granting grandparent visitation for an indeterminate period of time until at least an upcoming adjudication hearing. This court found that the order being appealed was of "sufficient importance and may reasonably be expected to last a sufficiently long period of time that the order affects a substantial right of [the parent]." *Id.* at 278, 526 N.W.2d at 237.

We conclude that the November 15, 2016, order, granting Simms grandparent visitation, affected a substantial right of Friel and was a final, appealable order. And because this was a final, appealable order, Friel's motion to alter or amend the judgment or, in the alternative, to vacate the judgment tolled the time for filing the appeal. See, Neb. Rev. Stat. § 25-1239 (Reissue 2016); Neb. Rev. Stat. § 25-1912(3) (Reissue 2016). Friel's notice of appeal was timely filed from the December 23 order overruling his motion.

(b) Mootness

Friel argues that because the last date covered by the temporary order granting her grandparent visitation was May 25, 2017, the appeal has become moot. We agree that the order

granting temporary visitation expired by its terms in May 2017 and that thus, the issues presented by Friel in this appeal have become moot.

[8-11] Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, appellate courts review mootness determinations under the same standard of review as other jurisdictional questions. *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016). A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of the litigation. *Id*. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Id*. As a general rule, a moot case is subject to summary dismissal. *Id*.

[12,13] An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *Id*. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or similar problem. *Id*.

Friel asserts that the district court did not have authority to issue a temporary order for grandparent visitation as temporary orders are not specifically provided for in the grandparent visitation statutes. He also asserts that the district court failed to make the requisite statutory findings regarding best interests of the child.

Section 43-1802(2) provides as follows:

> In determining whether a grandparent shall be granted visitation, the court shall require evidence concerning the beneficial nature of the relationship of the grandparent to the child. The evidence may be presented by affidavit

> and shall demonstrate that a significant beneficial relationship exists, or has existed in the past, between the grandparent and the child and that it would be in the best interests of the child to allow such relationship to continue. Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

We have found no reported appellate cases that address the specific questions presented by this appeal: whether a district court has authority to issue a temporary order of grandparent visitation and whether the court is required to make specific findings regarding the beneficial relationship between the grandparent and child and the best interests of the child. We therefore choose to apply the public interest exception to the mootness doctrine to provide future guidance for the courts.

### 2. Temporary Grandparent Visitation

Friel argues that the district court did not have authority to issue a temporary order granting Simms grandparent visitation. Friel points to the grandparent visitation statutes, Neb. Rev. Stat. § 43-1801 et seq. (Reissue 2016), which do not contain a specific reference to temporary orders.

In support of her argument that the district court had authority to issue a temporary order for grandparent visitation, Simms argues that Neb. Rev. Stat. § 43-1227(3) (Reissue 2016) defines "[c]hild custody determination" as an order "providing for the legal custody, physical custody, *or visitation* with respect to a child," including a "permanent, *temporary*, initial, and modification order." (Emphasis supplied.) Section 43-1227 is part of the Uniform Child Custody Jurisdiction and Enforcement Act. The act defines "[c]hild custody proceeding"

in § 43-1227(4) as a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. Section 43-1227 goes on to set forth the various proceedings which are included in the definition, such as proceedings for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence. The definition does not include grandparent visitation proceedings.

Moreover, the inclusion of visitation proceedings within application of the Uniform Child Custody Jurisdiction and Enforcement Act (and its reference to temporary orders) does not lead to the conclusion that temporary orders are necessarily allowed in grandparent visitation proceedings. In the context of legal separation or divorce actions, the statutes specifically provide for temporary orders during the pendency of a proceeding. See Neb. Rev. Stat. § 42-357 (Reissue 2016). As noted above, there is no such specific provision in the grandparent visitation statutes.

Nevertheless, we note that several grandparent visitation cases have shown that a temporary order was issued during the pendency of the proceeding. See, *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006); *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999); *Rust v. Buckler*, 247 Neb. 852, 530 N.W.2d 630 (1995), *overruled on other grounds, Raney v. Blecha*, 258 Neb. 731, 605 N.W.2d 449 (2000). While the grandparent visitation statutes do not include a specific provision regarding temporary orders, a district court has inherent power to do all things necessary for the administration of justice within the scope of its jurisdiction. See, *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017); *Charleen J. v. Blake O.*, 289 Neb. 454, 855 N.W.2d 587 (2014). Appellate review of a district court's use of inherent power is for an abuse of discretion. *Putnam v. Scherbring, supra*.

[14] We conclude that a district court has inherent authority to issue a temporary order allowing visitation during the pendency of a proceeding for grandparent visitation.

### 3. Findings Required Under § 43-1802(2)

[15] For the sake of completeness, we address Friel's argument that the district court is required to make specific findings before granting grandparent visitation. We agree. As set forth above, § 43-1802(2) provides in part:

> Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

Clearly, a district court must make specific findings as set forth in § 43-1802(2) before granting grandparent visitation.

## VI. CONCLUSION

Although Friel's appeal of the order granting Simms temporary visitation with Friel's children is now moot, we determine, under the public interest exception, that a district court has inherent authority to enter temporary orders of visitation in grandparent visitation proceedings. We also determine that a district court is required to make specific findings as set forth in § 43-1802(2) before granting grandparent visitation.

Appeal dismissed.

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

# State of Nebraska, appellee, v. Kim M. Carrera, appellant.

911 N.W.2d 849

Filed March 27, 2018. No. A-17-098.

1. **Judgments: Speedy Trial: Appeal and Error.** Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Speedy Trial.** The statutory right to a speedy trial is set forth in Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2016).
4. ____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016).
5. ____. Under Neb. Rev. Stat. § 29-1208 (Reissue 2016), if a defendant is not brought to trial before the running of the time for trial as provided for in Neb. Rev. Stat. § 29-1207 (Reissue 2016), as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.
6. **Speedy Trial: Proof.** The burden of proof is upon the State to show that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016) are applicable when the defendant is not tried within 6 months.
7. ____: ____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
8. **Speedy Trial: Complaints: Indictments and Informations.** For cases commenced with a complaint in county court but thereafter bound over

to district court, the 6-month statutory speedy trial period does not commence until the filing of the information in district court.

9. **Speedy Trial: Pretrial Procedure.** The plain terms of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2016) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion. Final disposition under § 29-1207(4)(a) occurs on the date the motion is granted or denied.
10. **Speedy Trial: Pretrial Procedure: Presumptions.** Pursuant to Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2016), it is presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise.
11. **Speedy Trial: Indictments and Informations.** The time between dismissal of an information and refiling is not includable, or is tolled, for purposes of the statutory 6-month period. However, any nonexcludable time that passed under the original information is tacked onto any nonexcludable time under the refiled information, if the refiled information alleges the same offense charged in the previously dismissed information.
12. **Speedy Trial: Preliminary Hearings: Waiver: Complaints: Indictments and Informations.** If an information is filed initially in district court, referred to as a "direct information," such filing is treated in the nature of a complaint until a preliminary hearing is held or waived.
13. **Speedy Trial: Preliminary Hearings: Probable Cause: Waiver: Indictments and Informations.** In the case of a direct information, the day the information is filed for speedy trial act purposes is the day the district court finds probable cause or the day the defendant waives the preliminary hearing.
14. **Speedy Trial: Waiver: Appeal and Error.** A defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 2016) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.
15. **Constitutional Law: Judgments: Speedy Trial: Appeal and Error.** Although there is no right to interlocutory appeal solely concerning a constitutional right to speedy trial, the overruling of a motion alleging the denial of a speedy trial based upon constitutional grounds pendent

to a nonfrivolous statutory claim may be reviewed on appeal from that order.

16. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed.

Joseph Kuehl, of Lefler, Kuehl & Burns, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Bishop, Judge.

## I. INTRODUCTION

Kim M. Carrera appeals the Sarpy County District Court's order overruling her motion for absolute discharge, which alleged violations of her statutory and constitutional rights to a speedy trial. We affirm.

## II. BACKGROUND

This case is somewhat complicated because there are three criminal charges involved. Two of the charges were initially filed as separate cases (Sarpy County District Court cases Nos. CR15-586 and CR15-631), but were dismissed. The 6-month speedy trial clock would have started to run on those two charges when filed, would have stopped when dismissed, and then would have restarted when refiled in the current case, which also has one new charge (Sarpy County District Court case No. CR15-851).

1. Sarpy County District Court
Case No. CR15-586

The State initially filed a criminal complaint in the county court for Sarpy County on August 31, 2015, charging Carrera with one count of second degree sexual assault of a protected individual, a Class IV felony, under Neb. Rev. Stat. § 28-322.04(2) and (4) (Reissue 2008). The complaint alleged that the victim was C.W. and that the incident occurred on August 27. (We note that Carrera's alleged offense occurred prior to August 30, 2015, the effective date of 2015 Neb. Laws, L.B. 605, which changed the classification of certain crimes and made certain amendments to Nebraska's sentencing laws.) On September 4, Carrera filed a waiver of preliminary hearing, and the case was bound over to district court on September 8.

On September 16, 2015, the State filed an information in the Sarpy County District Court charging Carrera with one count of second degree sexual assault of a protected individual, a Class IV felony, under § 28-322.04(2) and (4). The information alleged that the victim was C.W. and that the incident occurred on August 27.

Also on September 16, 2015, Carrera filed separate motions to take depositions and for discovery; the motion to take depositions included various witnesses, one of which was the alleged victim, C.W. Carrera's written motion for discovery was denied after a hearing on September 21; however, oral motions for discovery and to depose C.W. were granted (it is not clear whether the written motion to take depositions—which included individuals other than C.W.—was ever ruled on).

On October 26, 2015, Carrera filed separate motions to compel and to release property. These motions do not appear to have been resolved prior to the dismissal below.

On November 3, 2015, the State filed a motion to dismiss the case without prejudice. The district court filed its order of dismissal, without prejudice, on November 9.

### 2. Sarpy County District Court Case No. CR15-631

On September 16, 2015, the State filed a "Direct Information" in the Sarpy County District Court charging Carrera with one count of child abuse, a Class IIIA felony, under Neb. Rev. Stat. § 28-707(1)(d) and (e) (Cum. Supp. 2014). The information alleged that the victim was C.W. and that the incident occurred on August 27. (Like Sarpy County District Court case No. CR15-586 summarized above, the date of this offense preceded the August 30, 2015, effective date of L.B. 605.)

On September 18, 2015, Carrera filed separate motions to take depositions and for discovery. These motions were not resolved prior to the dismissal below.

On September 21, 2015, upon motion by the State, the case was dismissed by the district court "due to it being a direct information"; the dismissal was without prejudice.

### 3. Sarpy County District Court Case No. CR15-851—Case on Appeal

After initially filing a criminal complaint and an amended criminal complaint in the county court for Sarpy County on October 27 and 28, 2015, the State filed a second amended criminal complaint on November 3, charging Carrera with the following: one count of tampering with physical evidence, a Class IV felony, under Neb. Rev. Stat. § 28-922 (Reissue 2016) (count I); one count of child abuse, a Class IIIA felony, under § 28-707(1)(d) and (e) (count II) (this is the same charge as was dismissed in Sarpy County District Court case No. CR15-631 above); and one count of second degree sexual abuse of a protected individual, a Class IV felony, under § 28-322.04(2) and (4) (count III) (this is the same charge as was dismissed in Sarpy County District Court case No. CR15-586 above). The State alleged that the victim was C.W. and that the incidents occurred between August 1 and 28 (all preceding the L.B. 605 effective date of August 30, 2015). On December 1, Carrera waived her right to a preliminary hearing and the case was bound over to district court.

On December 10, 2015, the State filed an information in the Sarpy County District Court charging Carrera with each count as described above. The information alleged that C.W. was the victim in counts II and III and, as amended on December 14, alleged that the incidents giving rise to all three counts occurred between August 1 and 28.

On December 10, 2015, Carrera filed a motion for depositions, which was granted by the court on December 14. Also on December 14, the court filed an order setting the case for a jury trial on March 15, 2016.

On December 18, 2015, Carrera filed a motion for a bill of particulars. The motion was to be heard on December 28, but the court, on its own motion, continued the hearing to December 30. In an order filed on December 31, the court denied Carrera's request for a bill of particulars.

On January 12, 13, and 15, 2016, Carrera filed motions for depositions. All three motions for depositions were granted on January 25.

While the above motions for depositions were pending, Carrera filed two motions to suppress on January 20, 2016. One motion sought to suppress evidence obtained as a result of two searches of her home and/or her arrest, as well as any statements she made at the time of the incident, her arrest, or during the two searches. The other motion sought to suppress evidence obtained as a result of the search of C.W.'s telephone and residence; the State later objected to this motion based on Carrera's "lack of standing." The court set an evidentiary hearing for February 4.

On February 4, 2016, Carrera filed a motion to continue the hearing on her motion to suppress scheduled for that day. Carrera alleged that on February 3, the Honorable Max J. Kelch (the district court judge in Carrera's case) was appointed as a Nebraska Supreme Court justice; the parties and Judge Kelch's bailiff had a telephone conference wherein the parties were informed that the hearing would not take place as scheduled and that the matter would be heard by a visiting

judge. During the telephone conference, "the [d]efense was asked to draw up" the motion to continue and defense counsel emphasized Carrera would not waive speedy trial and stood firm on her trial date set for March 15. On February 5, the district court (Judge Kelch) granted the motion to continue and ordered that the motions to suppress would be "set before Judge Zastera."

The trial docket case summary notes for February 9, 2016, state, "Case having been reassigned to the Honorable Wm. B. Zastera, Motion to Suppress now fixed for full hearing on April 28 . . . ." (Emphasis omitted.) But the summary notes for April 8 state that on the court's own motion, the "matter is now fixed for full hearing on the motion to suppress for April 22." And the summary notes for April 20 indicate that the "State's request for Continuance, over the vehement objection of [Carrera's] Counsel, is sustained. Matter now fixed for full hearing on Motion to Suppress on May 3 . . . . Hearing heretofore scheduled for April 22 . . . cancelled." (Emphasis omitted.)

On April 27, 2016, Carrera filed a stipulated motion to unseal search warrants, which motion was signed by her attorney and the State. On May 2, the court ordered the search warrants unsealed for the purpose of evaluating Carrera's motion to suppress, "set for hearing on May 3." However, on May 3, the court, on its own motion, continued the motion to suppress hearing to May 10.

On May 10, 2016, the matter came before the court on Carrera's motion to suppress. However, at the start of the hearing, the State asked for a continuance and offered into evidence the affidavit of Det. James Munsey of the Bellevue Police Department, which affidavit stated he was unavailable for the hearing that day because he was appearing as a witness in another trial. The court asked the defense if they objected. Carrera's counsel responded, "I guess I wouldn't object to the affidavit being received by you. But then as long as the objection is noted by defense in terms of a continuance, that

would be it from us." The court noted Carrera's objection, but found good cause for the continuance due to Detective Munsey appearing in another case. The matter was continued to June 17.

On June 17, 2016, the matter once again came before the court on the motion to suppress. However, Bellevue police officers Allison Evans and Roy Howell, two of the State's witnesses, were not available that day—Officer Evans was out of state on military leave until June 20 and Officer Howell was out of state on vacation until July 5. The State offered supporting affidavits regarding the officers' absences into evidence, and they were received without objection. The State intended to go forward without Officer Howell that day, but could not proceed without Officer Evans, who was the "primary contact officer." However, Carrera's counsel preferred to "have one day to do everything and not bifurcate it"; that was the court's preference as well. As a result, the matter was continued to August 2.

On July 28, 2016, Carrera filed an amended motion to suppress. The amended motion, regarding the search of her residence and her arrest, added an additional allegation in support of her motion.

After a hearing on August 2, 2016, the court filed its opinion and order on August 22 overruling Carrera's motion to suppress. The matter was set for a pretrial hearing on September 16.

At the pretrial hearing on September 16, 2016, the matter was set for a jury trial on November 10.

On November 3, 2016, Carrera filed a motion for dismissal and/or absolute discharge based on the alleged violations of both her statutory and constitutional rights to a speedy trial. The motion was set for hearing on November 7. The trial docket summary notes for November 7 state: "On Motion of [Carrera's] Counsel, matter continued to December 12 . . . . Trial heretofore scheduled for November 10 . . . cancelled pending ruling on Motion to Discharge." (Emphasis omitted.)

On December 12, 2016, the matter came before the court on Carrera's motion to dismiss and for absolute discharge. The court issued an opinion and order on January 3, 2017, overruling Carrera's motion to discharge. The court found varying days remained in which to bring Carrera to trial on each of the respective counts charged. The court found there was no violation of her statutory or constitutional right to a speedy trial.

Carrera appeals.

## III. ASSIGNMENTS OF ERROR

Carrera assigns, consolidated and restated, that the district court erred (1) in failing to grant her motion for dismissal and/or absolute discharge on the grounds that her statutory and constitutional speedy trial rights were violated and (2) in its calculation of the includable and excludable days for purposes of Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2016).

## IV. STANDARD OF REVIEW

[1] Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Gill*, 297 Neb. 852, 901 N.W.2d 679 (2017).

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *Id*.

## V. ANALYSIS

### 1. Statutory Speedy Trial Claim

[3-7] The statutory right to a speedy trial is set forth in §§ 29-1207 and 29-1208. *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014). Under § 29-1207(1), "Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back

up 1 day, and then add any time excluded under § 29-1207(4). *State v. Vela-Montes, supra.* Under § 29-1208, if a defendant is not brought to trial before the running of the time for trial as provided for in § 29-1207, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense. *State v. Vela-Montes, supra.* The burden of proof is upon the State to show that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence. *Id*.

[8] For cases commenced with a complaint in county court but thereafter bound over to district court, the 6-month statutory speedy trial period does not commence until the filing of the information in district court. *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).

This case commenced with the filing of a criminal complaint against Carrera in county court, but was thereafter bound over to the district court. The original information was filed in district court on December 10, 2015. Thus, in the absence of any excludable period, the 6-month period in which the State was required to bring Carrera to trial in Sarpy County District Court case No. CR15-851 would have ended on June 10, 2016. As will be discussed later, this is the speedy trial clock for count I (tampering with physical evidence). The speedy trial clock for counts II (child abuse) and III (second degree sexual abuse of protected individual) may be different because of the tacking and tolling of time from those charges being dismissed in earlier cases and refiled in this case.

[9,10] We must add any time excluded under § 29-1207(4) to the original speedy trial deadline to determine the last permissible day to bring Carrera to trial on each count. Under § 29-1207(4), as relevant in this case:

> The following periods shall be excluded in computing the time for trial:
>
> (a) The period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement, and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;
>
> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel. . . . A defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period;
>
> (c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:
>
> (i) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; [and]
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause.

The plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). Such motions include a defendant's motion to suppress evidence and a motion for discovery filed

by the defendant. *Id*. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion. *Id*. Final disposition under § 29-1207(4)(a) occurs on the date the motion is "'"'granted or denied.'"'" *State v. Williams*, 277 Neb. at 141, 761 N.W.2d at 522. "Pursuant to § 29-1207(4)(a), it is presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise." *State v. Williams*, 277 Neb. at 141, 761 N.W.2d at 522.

(a) Time on All Three Counts in District Court Case No. CR15-851

The district court found that "363 total days have run on the speedy trial clock in CR 15-851. Of those days, . . . 292 days were tolled" for various motions and continuances, but the court does not give the specific number of days tolled for each item mentioned. The only other specific reference to the number of days excluded in district court case No. CR15-851 follows an entry for August 22, 2016, which states, "[Carrera's] motion to suppress is denied. Speedy trial clock restarts (212 days excluded)." However, we cannot tell when that 212 days started. If the 212 days were continuous, it would mean the excludable period started on Saturday, January 23, a date that is not supported by this record. And if the time started when Carrera filed her motion to suppress on January 20, 212 days later would be Friday, August 19, which was before the motion was ruled on. In short, because the district court did not provide specific calculations, we are unable to explain where the district court's numbers come from. As stated in *State v. Williams*:

> Effective March 9, 2009, when ruling on a motion for absolute discharge pursuant to § 29-1208, the trial court shall make specific findings of each period of delay excludable under § 29-1207(4)(a) to (e), in addition to the findings under § 29-1207(4)(f) currently required by [*State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972)]. Such findings shall include the date and nature of the

> proceedings, circumstances, or rulings which initiated and concluded each excludable period; *the number of days composing each excludable period*; and the number of days remaining in which the defendant may be brought to trial after taking into consideration all excludable periods.

277 Neb. at 143-44, 761 N.W.2d at 524 (emphasis supplied).

We will conduct a speedy trial calculation based on our review of the record in order to determine whether the district court was clearly erroneous in overruling Carrera's motion for absolute discharge. As stated previously, the original information was filed in district court on December 10, 2015. Thus, in the absence of any excludable period, the 6-month period in which the State was required to bring Carrera to trial in Sarpy County District Court case No. CR15-851 would have ended on June 10, 2016. Obviously, no trial had taken place almost 5 months after that original deadline when Carrera filed her motion for absolute discharge on November 3. We now consider what excludable periods would have properly extended the original June 10 deadline.

On December 10, 2015, the same day the information was filed, Carrera filed a motion for depositions, which was disposed of on December 14. The period of time from the day after the defendant filed a motion for depositions until the trial court authorized the depositions should be excluded under § 29-1207(4)(a). See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). See, also, *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004) (first excludable day was day after defendant filed pretrial motions; cases suggesting different method of computation disapproved). Thus, 4 days are excluded. We note that in Carrera's brief, she failed to account for this excludable period.

On December 18, 2015, Carrera filed a motion for a bill of particulars, which was denied on December 31. Thus, 13 days are excluded. In Carrera's brief, she agrees that this time is excludable.

On January 12, 13, and 15, 2016, Carrera filed motions for depositions. Those motions were still pending on January 20, when Carrera filed her motions to suppress. The motions for depositions were resolved on January 25, but the motions to suppress were repeatedly continued and not resolved until August 22. The excludable times overlap, and if all of the time for the motions to suppress is excluded, then a total of 223 days is excluded (January 12 to August 22). The State argues this is the correct number of days excluded. If all 223 days are excluded (January 12 to August 22), then a total of 240 days (4 + 13 + 223) must be added to the original speedy trial deadline of June 10. Adding 240 days takes us to Sunday, February 5, 2017, making the last permissible day for trial Monday, February 6 (without taking into account any additional time considerations for counts II and III as discussed later in this opinion). If the last permissible day for trial was February 6, then the speedy trial clock had not yet expired when Carrera filed her motion for discharge on November 3, 2016.

However, Carrera argues that certain time periods after her motions to suppress were filed, but before they were ruled on, should not be attributable to her. Specifically, she argues the court erred in excluding the 76 days that fell between February 4 and April 20, 2016, because those days were attributable to the court. She further argues the court erred in excluding the days that passed since April 20 to August 22, because those delays were wholly attributable to the State. Those dates, and our determinations, are as follows.

*(i) February 4 to April 20, 2016*

On February 4, 2016, Carrera filed a motion to continue the hearing on her motions to suppress scheduled for that day, apparently at the direction of the court, due to Judge Kelch's appointment to the Nebraska Supreme Court. On February 5, Judge Kelch granted the motion to continue and ordered that the motions to suppress would be "set before Judge Zastera," who, on February 9, set the hearing for April 28. But, on

April 8, on the court's own motion, the hearing was set for April 22. Then, on April 20, over the defense's objection, the court sustained the State's request for a continuance, and the hearing was set for May 3.

Carrera relies on *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), to argue the 76 days outlined above should be attributable to the court and should not have been excluded in computing the time for trial. In *Wilcox*, the Nebraska Supreme Court held that a defendant was denied his right to a speedy trial where a motion to suppress filed by the defendant was not ruled on until 1 year 7 months 24 days after it was filed. The motion was first heard less than 2 weeks after filing, but was continued for further hearing (which was to be held slightly over 1 month after the motion to suppress was filed). However, the further hearing was not held at that time because the judge recused himself (there was a nearly 2-month delay from the time the judge notified counsel of his intent to recuse himself and the formal recusal, at which time a second judge contacted counsel). Thereafter, the record indicated no action in the case for 1 year 4 months 10 days. Then, a third judge received the transcript on the hearing conducted before the first judge and ruled on the motion 16 days later. The Nebraska Supreme Court concluded that the defendant's rights under § 29-1207 had been violated. The court said under § 29-1207(4)(a), generally, the time from filing to final disposition of the defendant's pretrial motions is excluded from computation. However, in addressing the time period after the substituted judge had been assigned to the case, the Nebraska Supreme Court said that for 16 days of the 1-year 4-month 26-day period from the formal recusal to resolution, the record showed the motion was actively under advisement; the rest of the time in question it lay dormant. "This delay cannot conceivably be described as a reasonable, ordinary consequence of filing one motion." *State v. Wilcox*, 224 Neb. at 142, 395 N.W.2d at 774. Referencing § 29-1207(4)(f), the court found that judicial delay, absent a showing of good cause, does not

suspend a defendant's right to a speedy trial. "[A] court cannot table a motion and thereby suspend the defendant's right where judicial delay [without a showing of good cause under § 29-1207(4)(f)] otherwise would warrant discharge." *State v. Wilcox*, 224 Neb. at 143, 395 N.W.2d at 775.

However, the Nebraska Supreme Court has "clarified *Wilcox* by pointing out that where the excludable period properly falls under § 29-1207(4)(a) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the delay." *State v. Turner*, 252 Neb. 620, 629, 564 N.W.2d 231, 237 (1997). See, also, *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). The Nebraska Supreme Court has said that

> unlike the requirement in § 29-1207(4)(f) that any delay be for "good cause," conspicuously absent from § 29-1207(4)(a) is any limitation, restriction, or qualification of the time which may be charged to the defendant as a result of the defendant's motions. Rather, the plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay.

*State v. Turner*, 252 Neb. at 629, 564 N.W.2d at 237. See, also, *State v. Lafler, supra*.

In *State v. Turner, supra*, an information was filed by the State against the defendant on July 15, 1994, charging him with numerous crimes. The defendant filed four discovery motions on September 26 that were set to be heard on October 5, but no hearing was held on that date. On January 5, 1995, the State moved for a continuance on the grounds that the Federal Bureau of Investigation had not completed its DNA analysis of certain evidence. The defendant opposed the motion, but the trial court granted the continuance, finding that under § 29-1207(4)(c)(i) there was a legitimate pursuit of evidence which had not yet been obtained through

no fault of the prosecution. Trial was set for the March jury panel. But on February 8, the defendant moved to dismiss based on violations of his statutory and constitutional rights to speedy trial. The defendant's motion was accompanied by a notice of hearing on February 14, but the motion was not heard that day. The defendant later filed additional motions. After a hearing on May 11, the defendant's motion to dismiss was overruled, with the trial court reiterating its finding that under § 29-1207(4)(c)(i), the continuance was for a legitimate pursuit of evidence. The defendant's motion to continue was granted, and a new trial date was set for July 17. But trial was continued on the defendant's motion. Trial eventually began on November 13, and the defendant was subsequently convicted of certain crimes.

On appeal, the defendant in *Turner* raised violations of his speedy trial rights, and the Nebraska Supreme Court considered what, if any, periods of time from July 15, 1994, to November 13, 1995, were properly excluded from the 6-month speedy trial computation. The court noted that neither the defendant's discovery motions nor his motion to suppress were held on their scheduled dates, but were instead all heard on May 11. The defendant argued that "only those periods during which the motions were reasonably pending, which he contend[ed] [was] that period between the initial filing and the first scheduled hearing, should be excluded." *State v. Turner*, 252 Neb. at 628, 564 N.W.2d at 237. After discussing *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), and *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), the Nebraska Supreme Court held, "In the case at bar, the evidence does not establish that the delay in hearing [the defendant's] motion was attributable to judicial neglect." *State v. Turner*, 252 Neb. at 630, 564 N.W.2d at 238. The court said that "[t]o the contrary, the hearing on May 11, 1995, indicates that the reason for the delay was [the defendant's] counsel's failure to adequately pursue the motions." *Id*. "[I]t will be presumed that a delay in hearing defense pretrial motions is attributable

to the defendant unless the record affirmatively indicates otherwise." *Id*.

This court has also distinguished *State v. Wilcox, supra*. In *State v. Johnson*, 22 Neb. App. 747, 860 N.W.2d 222 (2015), the defendant argued that the time it took the district court to rule on a motion to suppress constituted an inordinate and unreasonable delay and that sometime during that delay, he was denied a speedy trial. The defendant filed a motion to suppress on January 17, 2013. The motion was heard on March 20, and the district court took the motion under advisement. The court entered an order overruling the motion to suppress on December 2. On appeal, this court noted that the defendant relied heavily on the outcome in *State v. Wilcox, supra*, as support for his assertion that even though the period of time at issue in his case involved the period of time it took the court to rule on his pretrial motion to suppress, it was an unreasonable period of time for such a ruling and constituted judicial delay without a showing of good cause. However, this court said:

> Since its ruling in *State v. Wilcox, supra*, the Nebraska Supreme Court has clarified its ruling and consistently rejected the argument that [the defendant] makes in this case, by drawing a distinction between cases where the period of delay properly falls under § 29-1207(4)(a) and cases where the period of delay properly falls under the catchall provision of § 29-1207(4)(f). See, *State v. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004); *State v. Turner*[, 252 Neb. 620, 564 N.W.2d 231 (1997)]; *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). In *State v. Lafler, supra*, the court clarified that where the excludable period properly falls under § 29-1207(4)(a) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the delay.
>
> The court explained that the delay in *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), was *not* based on

> one of the specifically enumerated or described periods of delay under § 29-1207(4)(a). *State v. Lafler, supra*. Rather, the delay in *State v. Wilcox, supra*, in the court's actually assigning and hearing the defendant's motion was attributable to judicial neglect and fell under § 29-1207(4)(f), wherein other periods of delay not specifically enumerated are excludable, but only if the court finds that they are for good cause. *State v. Lafler, supra*.

*State v. Johnson*, 22 Neb. App. at 752-53, 860 N.W.2d at 227-28 (emphasis in original). This court said that the record demonstrated Johnson's motion was heard and taken under advisement and that "there [was] nothing to suggest any kind of judicial neglect comparable to that in *State v. Wilcox, supra*." *State v. Johnson*, 22 Neb. App. at 754, 860 N.W.2d at 228. Accordingly, we found that the district court correctly concluded the entire time attributed to the motion to suppress was properly excluded and that the court was not clearly erroneous in so holding.

We find the 76 days that fell between February 4 and April 20, 2016 (due to appointment of Judge Kelch to Nebraska Supreme Court, causing case to be reassigned), should be attributable to Carrera's motion to suppress as reasonable delay. Unlike in *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), there was no evidence of judicial neglect.

*(ii) April 20 to August 22, 2016*

On April 20, 2016, over the defense's objection, the court sustained the State's request for a continuance, and the hearing on the motions to suppress that had been set for April 22 was rescheduled for May 3. And on May 3, the court, on its own motion, continued the hearing on the motions to suppress to May 10. (We note there was an intervening motion filed on April 27, when Carrera filed a stipulated motion to unseal search warrants; on May 2, the court ordered the search warrants unsealed for the purpose of evaluating Carrera's motions to suppress.) There is no evidence as to why the State needed a continuance on April 20. Even though the State's motion to

continue occurred while Carrera's pretrial motions to suppress were still pending, we will give Carrera the benefit of assuming that the 20 days that fell between April 20 and May 10 should be attributable to the State (for its failure to make a showing under § 29-1207(c)) and thus should not be excludable from the speedy trial clock. See *State v. Williams*, 277 Neb. 133, 141, 761 N.W.2d 514, 522 (2009) ("[p]ursuant to § 29-1207(4)(a), it is presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise").

On May 10, 2016, the matter came before the court on Carrera's motions to suppress. However, at the start of the hearing, the State asked for a continuance, due to the unavailability of Detective Munsey, who was appearing as a witness in another trial that same day. The court noted Carrera's objection to the continuance, but found good cause, and the matter was continued to June 17. There was no evidence as to why Detective Munsey was material to the State's case. Again, even though the State's motion to continue occurred while Carrera's pretrial motions to suppress were still pending, we will give Carrera the benefit of assuming that the 38 days that fell between May 10 and June 17 should be attributable to the State (for its failure to make a showing under § 29-1207(c)) and thus should not be excludable from the speedy trial clock. See *State v. Williams, supra*.

On June 17, 2016, the matter once again came before the court on the motions to suppress. And once again, the State requested a continuance, this time because two of the State's witnesses were unavailable—Officer Evans was on military leave and Officer Howell was on vacation. The State intended to go forward without Officer Howell that day, but could not proceed without Officer Evans, who was the "primary contact officer." However, Carrera's counsel's "suggestion" and preference was to "have one day to do everything and not bifurcate it"; that was the court's preference as well. As a result, the matter was continued to August 2. The motions to suppress were

heard on August 2 and denied on August 22. There were 46 days that fell between June 17 and August 2. These days were excludable from the speedy trial clock under § 29-1207(4)(a) (due to Carrera's pretrial motions to suppress), and/or § 29-1207(4)(b) (continuance granted at request or with consent of defendant or his or her counsel). The 20 days (August 2 to 22) that the motions to suppress were under advisement are properly attributable to Carrera and are excluded from the speedy trial clock.

*(iii) Calculation of Time*

Before recalculating, we recall that the original speedy trial deadline was June 10, 2016. When adding the total possible excludable dates between December 10, 2015, and August 22, 2016, we reached a total of 240 days. That resulted in Monday, February 6, 2017, being the last possible day for trial. However, as stated in our discussion above, we will assume that 58 days during the pendency of Carrera's motions to suppress were attributable to the State. This reduces the 240 excludable days we calculated earlier to a total of 182 days excluded between December 10, 2015, and August 22, 2016 (240 − 58 = 182). Adding the 182 excludable days to the original speedy trial deadline of June 10 makes the last permissible day for trial Friday, December 9, 2016. Because Carrera's motion to discharge was filed on November 3, the speedy trial clock would not have run, at least as to count I (tampering with physical evidence), which was a charge that was initially filed in this case. Accordingly, as to count I, the court did not err in overruling Carrera's motion for discharge based upon her statutory right to a speedy trial.

[11] However, the speedy trial clock for counts II (child abuse) and III (second degree sexual abuse of protected individual) may be different because of the tacking and tolling of time from those charges being dismissed in earlier cases and refiled in this case. See *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014) (time between dismissal of information and refiling is not includable, or is tolled, for purposes of

statutory 6-month period; however, any nonexcludable time that passed under original information is tacked onto any nonexcludable time under refiled information, if refiled information alleges same offense charged in previously dismissed information). We now consider any additional time from the previously dismissed cases that must be tacked on to the current case.

(b) Additional Time for Count II (Child Abuse)

This is the same charge as was dismissed in district court case No. CR15-631. In that case, the State filed a "Direct Information" in the district court on September 16, 2015, charging Carrera with one count of child abuse, a Class IIIA felony, under § 28-707(1)(d) and (e). On September 18, Carrera filed separate motions to take depositions and for discovery. Those motions had not been resolved at the time the case was dismissed without prejudice on September 21. The time from September 16 to 21 was a total of 5 days.

The district court found in its opinion and order in the instant case that of the 5 days district court case No. CR15-631 was pending, 3 days were tolled (September 18 to 21, 2015) due to Carrera's motion for discovery. And thus, 2 days ran on the speedy trial clock and needed to be "tacked" to the speedy trial clock time for count II in the instant case.

The State agrees that 2 days from district court case No. CR15-631 had run on the speedy trial clock for count II in the instant case; however, the State attributes the 3 days tolled (September 18 to 21, 2015) to Carrera's motion to take depositions. In Carrera's brief, she does not exclude any days from district court case No. CR15-631 (September 16 to 21) in her speedy trial calculation.

However, after consideration of the record and reviewing *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999), a case that was not mentioned by either party or the district court, it appears the speedy trial clock never began running in district court case No. CR15-631, which was filed as a

"Direct Information." As stated in *Boslau*, ordinarily, when an individual is charged with the commission of a felony, a complaint is filed in county court. Thereafter, a preliminary hearing is held to determine if probable cause exists to charge the defendant with the commission of the crimes alleged in the complaint, and if probable cause is found, the defendant is bound over to district court where an information is filed. *Id.* "Under the foregoing scenario, pursuant to § 29-1207, the statutory 6-month speedy trial period begins to run upon the filing of the information in district court which is subsequent to the preliminary hearing." *State v. Boslau*, 258 Neb. at 43, 601 N.W.2d at 773. See, also, Neb. Rev. Stat. § 29-1607 (Reissue 2016).

[12,13] But, contrary to the foregoing practice, "in a case where a 'direct information' has been filed, the commencement of the 6-month period for speedy trial act purposes occurs upon either the finding of probable cause at a preliminary hearing or the date the defendant waives the preliminary hearing." *State v. Boslau*, 258 Neb. at 46, 601 N.W.2d at 774. The Nebraska Supreme Court clarified the proper procedure as follows:

> Under § 29-1607, it is clear that the 6-month speedy trial time period cannot begin to run until after the preliminary hearing finding probable cause is held or a preliminary hearing is waived by the defendant. Prior to the finding of probable cause or until a preliminary hearing is waived, the direct information is treated as a complaint. *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990). Once probable cause is found or a preliminary hearing is waived, however, the information is transformed into a true information. For purposes of calculating the 6-month speedy trial act time period in a direct information case, the direct information should be deemed filed the day the order is entered finding probable cause or the day the defendant waives the preliminary hearing, and the speedy trial act calculations should

> be measured from either of these events. Pursuant to our case law interpreting the speedy trial act, the statutory 6-month speedy trial time period begins to run the day following the filing of the information, and in the case of a direct information, the day the information is filed for speedy trial act purposes is the day the district court finds probable cause or the day the defendant waives the preliminary hearing.

*State v. Boslau*, 258 Neb. at 45, 601 N.W.2d at 774.

There is no evidence that a preliminary hearing was held in district court case No. CR15-631 or that Carrera waived the preliminary hearing. That being the case, there was not a "true information" filed in that case and the statutory 6-month speedy trial time period never began to run. Accordingly, no days from district court case No. CR15-631 will be "tacked" to count II in the instant case (district court case No. CR15-851). As a result, just like in count I above, Friday, December 9, 2016, was the last permissible day for trial for count II. Because Carrera's motion to discharge was filed on November 3, 2016, the speedy trial clock would not have run. Accordingly, as to count II, the court did not err in overruling Carrera's motion for discharge based upon her statutory right to a speedy trial.

(c) Additional Time for Count III
(Second Degree Sexual Assault
of Protected Individual)

This is the same charge as was dismissed in district court case No. CR15-586. In that case, the State initially filed a criminal complaint in the county court on August 31, 2015, charging Carrera with one count of second degree sexual assault of a protected individual, a Class IV felony, under § 28-322.04(2) and (4). On September 4, Carrera filed a waiver of preliminary hearing, and the case was bound over to district court on September 8.

The 6-month speedy trial period commenced on September 16, 2015, when the State filed an information in the district

court charging Carrera with one count of second degree sexual assault of a protected individual, a Class IV felony, under § 28-322.04(2) and (4). This case was ultimately dismissed without prejudice on November 9. Although the district court stated the time from September 16 to November 9 was a total of 53 days, we count a total of 54 days. We now consider how many of those 54 days were excludable.

On September 16, 2015, Carrera filed separate motions to take depositions and for discovery; the motion to take depositions included various witnesses, one of which was the alleged victim, C.W. These motions tolled the speedy trial clock. See § 29-1207(4)(a). On September 21, Carrera's written motion for discovery was denied after a hearing; however, oral motions for discovery and to depose C.W. were granted (it is not clear whether the written motion to take depositions—which included individuals other than C.W.—was ever ruled on). So, either 5 days (September 16 to 21) were excludable if all motions were ruled on or, if no ruling was made on the written motion to take depositions, then all time from September 16 to the November 9 dismissal was excludable.

On October 26, 2015, Carrera filed motions to release property and to compel, but those motions were not disposed of prior to the dismissal on November 9. Thus, 14 days were excludable (although the district court incorrectly said 13 days).

The district court found that of the 53 days district court case No. CR15-586 was pending, 5 days were excludable due to Carrera's motions for depositions and discovery (September 16 to 21, 2015) and 13 days were excludable due to Carrera's motions to compel and to release property (October 26 to November 9). Accordingly, the district court found that "53 total days had run on the speedy trial clock . . . . Of those days, 35 days were tacked and 18 days were tolled."

Both Carrera and the State agree with the district court that 5 days were excludable due to Carrera's motions for depositions and/or discovery, but say 14 days (rather than the court's

finding of 13 days) were excludable for the motions to compel and to release property which had not been resolved before the case was dismissed. The State then says there are "a total of 19 days excluded of the 53 that have run. This means that 35 days have run on this charge under the original information." Brief for appellee at 15. (However, we note that 19 days plus 35 days does not equal 53 days, it equals 54 days.) In Carrera's brief, she also states that 19 days (September 16 to 21 and October 26 to November 9, 2015) are excludable from district court case No. CR15-586 in her speedy trial calculation. Therefore, both Carrera and the State appear to agree that 19 days should be excluded.

We agree that assuming all deposition and discovery motions filed on September 16, 2015, were disposed of on September 21 (which as noted earlier, the record is not entirely clear on this issue), then a total of 19 days were excludable (5 + 14 discussed above). Therefore, out of the 54 days this case was pending, 35 days had already run on the speedy trial clock for count III in the current case, and the last permissible day for trial on count III was Friday, November 4, 2016 (35 days before the December 9 deadline for counts I and II). This date includes the benefit we have previously given to Carrera of assuming that 58 days were attributable to the State in district court case No. CR15-851, even though Carrera's pretrial motion to suppress was still pending in that case. Because Carrera's motion to discharge was filed on November 3, the speedy trial clock would not have expired. Accordingly, as to count III, the court did not err in overruling Carrera's motion for discharge based upon her statutory right to a speedy trial.

### (d) Waiver of Statutory Speedy Trial Right

[14] As stated in *State v. Mortensen*, 287 Neb. 158, 169-70, 841 N.W.2d 393, 402-03 (2014):

> [A] defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of

> that right under § 29-1207(4)(b) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.

Carrera waived her statutory right to a speedy trial under § 29-1207(4)(b) by filing an unsuccessful motion to discharge that necessitated continuing the trial beyond the statutory 6-month period. Because Carrera has waived her statutory right to a speedy trial under § 29-1207(4)(b), we are not required to calculate the days remaining to bring her to trial under § 29-1207. See *State v. Mortensen, supra*. Once the district court reacquires jurisdiction over the cause, it is directed to set the matter for trial.

### 2. Constitutional Speedy Trial Claim

[15] The State claims that Carrera did not argue her constitutional speedy trial claim in her brief. We find Carrera's argument on her constitutional claim to be minimal, with no in-depth analysis or reference to case law. However, for the sake of completeness, we briefly address her claim. See *State v. Johnson*, 22 Neb. App. 747, 860 N.W.2d 222 (2015) (although there is no right to interlocutory appeal solely concerning constitutional right to speedy trial, overruling of motion alleging denial of speedy trial based upon constitutional grounds pendent to nonfrivolous statutory claim may be reviewed on appeal from that order).

[16] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013). This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Id*. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. *Id*. Rather,

the factors are related and must be considered together with other circumstances as may be relevant. *Id*.

Carrera filed her motion to dismiss on November 3, 2016, less than 6 months after the original speedy trial deadline (regardless of the count charged). Although Carrera did assert her right to a speedy trial during the pendency of the case, the majority of the delay was due to her own pretrial motions. Additional delay was due to her agreement to a continuance or for good cause (i.e., when Judge Kelch was appointed to Nebraska Supreme Court and case had to be reassigned). Finally, she has not shown prejudice. See *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016) (in analyzing prejudice factor there are three aspects: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of defendant, and (3) limiting possibility that defense will be impaired by dimming memories and loss of exculpatory evidence). The district court noted that Carrera was not currently incarcerated while awaiting disposition of the counts charged; Carrera neither asserted nor showed the delay weighed particularly heavily on her; and nothing in the record illustrated Carrera's defense had been impaired by the delay.

We agree with the district court that when all four factors are balanced, it is clear that there had been no denial of Carrera's constitutional right to a speedy trial. Accordingly, the court did not err in overruling Carrera's motion for discharge based upon her constitutional right to a speedy trial.

## VI. CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.

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

# In re Interest of Jade H. et al., children under 18 years of age. State of Nebraska, appellee, v. Benjamin T., appellant.

911 N.W.2d 276

Filed March 27, 2018. No. A-17-513.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Proof.** In order to terminate parental rights, a court must find clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 2016) exists and that termination is in the child's best interests.
3. **Parental Rights.** Neb. Rev. Stat. § 43-292(9) (Reissue 2016) allows for terminating parental rights when the parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.
4. ____. Whether aggravated circumstances under Neb. Rev. Stat. § 43-292(9) (Reissue 2016) exist is determined on a case-by-case basis.
5. **Parental Rights: Words and Phrases.** Where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety, and welfare of the child, they are aggravated.
6. **Parental Rights: Minors: Words and Phrases.** The term "aggravated circumstances," as used in Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 2016), embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and would place the child in a position of an unreasonable risk to be reabused.

7. **Parental Rights.** The failure of a parent to seek medical treatment for a child when the child has suffered physical injuries meets the statutory requirement of Neb. Rev. Stat. § 43-292(9) (Reissue 2016).
8. **Parental Rights: Proof.** Only one statutory ground for termination need be proved in order for parental rights to be terminated.
9. **Parental Rights: Juvenile Courts.** Reasonable efforts to reunify a family are required under the juvenile code only when termination is sought under Neb. Rev. Stat. § 43-292(6) (Reissue 2016).
10. **Parental Rights: Proof.** In addition to proving a statutory ground, the State must show that termination is in the best interests of the child.
11. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.
12. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.
13. **Parental Rights: Statutes: Words and Phrases.** The term "unfitness" is not expressly used in Neb. Rev. Stat. § 43-292 (Reissue 2016), but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.
14. **Child Custody: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
15. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.

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

Darren J. Pekny and Courtney R. Ruwe, of Johnson & Pekny, L.L.C., for appellant.

Donald W. Kleine, Douglas County Attorney, Sarah Schaerrer, and Laura Elise Lemoine, Senior Certified Law Student, for appellee.

Pirtle, Riedmann, and Arterburn, Judges.

Pirtle, Judge.

## INTRODUCTION

Benjamin T. appeals the order of the separate juvenile court of Douglas County terminating his parental rights to his three children. He challenges the juvenile court's finding that the minor children came within the meaning of Neb. Rev. Stat. § 43-292(2), (8), (9), and (10)(d) (Reissue 2016); that no reasonable efforts were required under Neb. Rev. Stat. § 43-283.01 (Reissue 2016); and that termination was in the best interests of the children. Following our de novo review of the record, we affirm.

## BACKGROUND

Benjamin is the father of Jade H., Aly T., and Kazlynn T., born May 2015, January 2010, and June 2008, respectively. On the afternoon of October 24, 2016, the children were in Benjamin's vehicle, which he was driving, when a collision occurred. All the children were properly restrained in the back seat. Kazlynn was severely injured in the collision and placed on life support. Aly was unconscious after the accident and had serious injuries, but was doing well at the time of the termination hearing. Jade suffered only minor injuries. The children were placed in protective custody the next day.

Immediately after the accident, Randy Plugge, the driver of the other vehicle involved in the collision, got out of his vehicle and went over to Benjamin's vehicle to see if he was all right. Plugge talked to him briefly and said he was going to call the 911 emergency dispatch service. Plugge did not see the children in the back seat because airbags had deployed. When Plugge walked away from Benjamin's vehicle, Benjamin drove off. Benjamin drove to a park where an Omaha police officer found him disposing of alcohol that had been in his vehicle.

In November 2016, the State filed an "Amended Petition and Termination of Parental Rights" alleging that the children

came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016); that reasonable efforts under § 43-283.01 were not required because Benjamin had subjected the children to aggravating circumstances and had committed a felony assault which resulted in serious bodily injury to them; and that termination of Benjamin's parental rights was warranted under § 43-292(2), (8), (9), and (10), which termination was in the children's best interests.

The evidence at trial showed that for the 4 to 5 years before trial, Benjamin was the primary caregiver for Jade, Aly, and Kazlynn, and was the only person they knew as a parent. Jade was placed in foster care when she was 6 weeks old due to her mother's alcohol addiction, but Benjamin received placement and eventual custody of Jade when she was 9 months old.

After the accident, Aly and Jade were placed in the care of the woman who had been Jade's foster mother when she was removed from her mother's care at 6 weeks old. From the time they were placed with her until the termination trial, Benjamin maintained contact from jail with Aly and Jade through telephone calls. Telephone calls would occur once or twice per week, and the foster mother testified that all conversations were appropriate. She testified that Aly would tell Benjamin she loved him. Aly also prayed for him every night. The foster mother testified that she believed it was in Aly's best interests to continue to have contact with Benjamin.

Plugge, the other driver involved in the accident, testified that he was going straight at the intersection where the accident occurred and his light was green. He stated that he was driving "either 40 or 50" miles per hour and that he believed the speed limit was 45 miles per hour. Plugge denied stating to Benjamin that he was sorry and that he did not see him. He testified that he asked Benjamin why he had "run the red light." Plugge also denied that Benjamin told him his children were in the vehicle and he needed to get to a hospital. However, Omaha police officer Matthew Kelly testified that Plugge told

him that after the accident, Benjamin yelled from his vehicle that he was taking his children to the hospital.

Kelly also testified that Plugge told him he had a green light at the intersection, but there were no independent witnesses to the accident that could verify which direction of traffic had the green light at the time of the collision. Kelly testified that Benjamin's statement in regard to his location and the direction he was headed at the time of the collision was inconsistent with what he found at the scene. Kelly stated that in his opinion, Plugge had a green light and Benjamin had a red light at the time of the collision, and that his opinion was based on Plugge's statement that he had a green light and on Benjamin's inconsistent statements. Kelly testified that he could not tell who "ran the red light" based on the evidence at the scene of the accident.

Omaha police officer Jodi Sautter testified that after the accident, she was the officer that located Benjamin at the park, which was about 16 blocks from the scene of the accident. As she drove into the park, she saw Benjamin's vehicle and observed Benjamin running away from the vehicle. When she got closer, Benjamin appeared to throw something into a trash can and started walking back toward his vehicle. Sautter told Benjamin to get on the ground, and she restrained him. She testified that she could smell an odor of alcohol when she handcuffed him. At that time, Benjamin stated that his children were in the vehicle. She looked inside the vehicle and saw that the children were badly injured. Sautter called for medical assistance and began trying to help the children. Aly and Kazlynn were both unconscious. Kazlynn had a hematoma on the top of her head and was bleeding from her nose and mouth. Sautter testified that she could also smell alcohol inside the vehicle and that she observed an open can of beer spilled on the floorboard on the driver's side of the vehicle. Sgt. John Wells testified that there was also a beer can on the floorboard of the passenger side, as well as a bottle of whiskey in the vehicle. Wells also testified that the trash

can, which Sautter had observed Benjamin throwing something into, contained two unopened cans of beer and a bottle of whiskey.

Omaha police officer Nicholas Andrews testified that he did an investigation of Benjamin for driving under the influence of alcohol (DUI). He testified that he could smell an odor of alcohol when Benjamin was in the back seat of his police cruiser. He stated that Benjamin had bloodshot eyes, slurred speech, and a "disheveled look." Andrews had Benjamin perform field sobriety tests which indicated Benjamin was impaired. He subsequently had Benjamin do a preliminary breath test, which Benjamin failed. Andrews stated that based on the field sobriety tests and the preliminary breath test, Benjamin was under the influence of alcohol such that he could not safely operate a motor vehicle.

Omaha police officer Kevin O'Keefe interviewed Benjamin at the hospital after the accident. Benjamin told him he had consumed one beer and two wine coolers before the accident. He also stated that he was on two prescription medications and that he felt the effects of those more than the effect of the alcohol he had consumed. Benjamin told O'Keefe that after the collision, he saw Kazlynn bleeding from her mouth and left the scene to take the children to the hospital. O'Keefe testified that when he asked Benjamin about discarding alcohol in a trash can after the accident, Benjamin did not believe he did so. Benjamin admitted there was alcohol in his vehicle, but said it was not open. O'Keefe testified that Benjamin did not specifically say he had a green light at the time of the collision, but did state that the accident was Plugge's fault.

Following the accident, Benjamin was transported to the hospital where blood was drawn from him for testing. The nurse that drew Benjamin's blood testified that Benjamin told her he looked at the children in the back seat after the accident and got scared. The laboratory report with the results of Benjamin's blood test was entered into evidence, as well as testimony from the forensic chemist who tested the blood.

The results showed that Benjamin's blood alcohol content was ".115 plus or minus .003 grams of ethanol per 100 milliliters of blood." There was also evidence that Benjamin had been convicted of DUI four times prior to the accident. The convictions were in 2003, 2005, 2007, and 2009.

Dr. Andrew Macfadyen, an attending physician in the pediatric intensive care unit (ICU) at the hospital, testified regarding the medical condition of Aly and Kazlynn after the accident. Macfadyen testified that when Aly came into the ICU, she was not opening her eyes and would only respond to painful stimuli. Aly had a small hemorrhage in the part of her brain "known as the internal capsule," a concussion, and a bruise on her lung. She was in the ICU for 3 days with a severe traumatic brain injury. He testified that she improved during the course of those 3 days and was transferred from ICU to a regular hospital floor.

In regard to Kazlynn, Macfadyen testified that he first saw her the morning after the accident. She had a breathing tube and would only move her eyes a little bit in response to painful stimuli, but otherwise did not move. She had hemorrhaging in part of her "internal capsule," a skull fracture, a jaw fracture, severe swelling of her brain, and a laceration on her forehead and on her chin. Her pituitary gland, which is considered part of the brain, was also injured. Macfadyen testified that swelling of the brain is a very serious injury and often results in permanent injury to the brain. As a result of the swelling, a neurosurgeon had to remove parts of her skull on each side of her brain to allow her brain to keep swelling; otherwise, she would have died from the swelling. Macfadyen testified that a CT scan performed a few days later showed that her condition was getting worse. He also stated that a physical examination indicated she had a severe brain injury. In Macfadyen's opinion, all areas of her brain were affected and she will never completely recover.

Macfadyen testified that Kazlynn's long-term prognosis is "really, really bad" and that she is going to be "neurologically

devastated." He testified that someone is going to have to care for her for the rest of her life. Macfadyen testified that he does not expect her to ever walk, talk, or be aware of her environment. He stated that the best that could be hoped for was that "maybe she could hear somebody, maybe respond to a voice, maybe something might make her happy."

Macfadyen testified that an injury to the head or brain should be treated immediately. Any delay in treating a brain injury results in more damage to the brain and worsens the outcome. He stated, "In Kazlynn's case specifically, a delay in her care [following the accident] would have worsened her outcome."

Macfadyen testified that when Kazlynn left his care in the ICU, she was not breathing on her own. He testified that at the time of the termination trial, Kazlynn was breathing on her own but did not respond to voices or music. A CAT scan from February 2017 showed that there are areas of her brain that are "gone" and that there are "large holes" where those parts of her brain used to be. He testified that she has not and will not recover from her brain injury.

The foster mother testified that when Jade was placed in her care the first time, Benjamin had supervised visits with Jade, and that during those times, she observed his interactions with Jade, as well as with Aly and Kazlynn. The foster mother testified that it appeared to her that Benjamin had a bond with his children and that it was apparent they loved him and he loved them. She testified that he seemed to appropriately care for the children "for the most part." On cross-examination, the foster mother testified that the first time she met Benjamin at his home she believed he had been drinking. She testified that her belief was based on Benjamin's behavior and actions, as well as the fact that she saw alcohol in the home and could smell an odor of alcohol. She also testified that she was concerned about Benjamin's drinking at Jade's first birthday party. She testified that there "was a lot of drinking going on at the birthday party" and that it seemed like Benjamin "could

not stop drinking that day." The foster mother testified that throughout the time she has known Benjamin, "he seemed to drink a lot."

The case manager for Benjamin and the children testified that Benjamin has been at a correctional center since she was assigned to the case in October 2016. She testified that there had been three previous intakes in regard to Benjamin, one of which was in 2015 and alleged that Benjamin was "passed out and puking all the time, and that he was intoxicated and that the children were having to make their own meals." However, the case manager testified that nothing was ever filed on Benjamin. She also testified that based on Benjamin's prior DUI convictions and the prior intakes related to Benjamin's alcohol issues, she opined that it was in the children's best interests to terminate Benjamin's parental rights.

Following trial, the juvenile court adjudicated the children and terminated Benjamin's parental rights based on § 43-292(2), (8), (9), and (10) and found that termination was in their best interests. The court also found that reasonable efforts were not required under § 43-283.01.

## ASSIGNMENTS OF ERROR

Benjamin assigns that the juvenile court erred in (1) finding the children came within the meaning of § 43-292(2), (8), (9), and (10); (2) finding that reasonable efforts were not required under § 43-283.01; and (3) finding that termination of his parental rights was in the best interests of the children.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016). 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. *Id.*

## ANALYSIS

*Statutory Grounds.*

[2] In order to terminate parental rights, a court must find clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Austin G.*, 24 Neb. App. 773, 898 N.W.2d 385 (2017). In the present case, the juvenile court found that the State established by clear and convincing evidence that grounds for termination existed under § 43-292(2), (8), (9), and (10).

[3-5] Section 43-292(9) allows for terminating parental rights when the parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. *In re Interest of Elijah P. et al.*, 24 Neb. App. 521, 891 N.W.2d 330 (2017). Whether aggravated circumstances under § 43-292(9) exist is determined on a case-by-case basis. *In re Interest of Elijah P. et al., supra*. The Legislature has not defined "aggravated circumstances" in the juvenile code, but the Supreme Court has stated that "'where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety, and welfare of the child, they are "aggravated" . . . .'" *In re Interest of Jac'Quez N.*, 266 Neb. 782, 791, 669 N.W.2d 429, 436 (2003), quoting *New Jersey Div. v. A.R.G.*, 361 N.J. Super. 46, 824 A.2d 213 (2003).

[6] The term "aggravated circumstances," as used in § 43-283.01(4)(a), embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and would place the child in a position of an unreasonable risk to be reabused. *In re Interest of Jac'Quez N., supra*.

[7] Based on our de novo review of the record, we conclude that the State proved that the children came within the meaning of § 43-292(9) by clear and convincing evidence. The

Nebraska Supreme Court has found that the failure of a parent to seek medical treatment for a child when the child has suffered physical injuries meets the statutory requirement of § 43-292(9). See *In re Interest of Jac'Quez N., supra*. In the present case, Benjamin failed to get his injured children medical treatment after the accident.

In *In re Interest of Jac'Quez N., supra*, the Supreme Court concluded that aggravated circumstances existed where the parents delayed seeking medical attention for 2 days when the child suffered obvious, serious physical injuries. The juvenile court had terminated the father's parental rights under two subsections of § 43-292, including subsection (9), but determined the State had failed to meet its burden of proof as to the mother and did not terminate her rights. The State appealed, and the Supreme Court reversed the juvenile court's finding in regard to the mother. The Supreme Court concluded that although the evidence did not tend to establish the mother inflicted the initial injuries on the child, it clearly and convincingly established that she delayed seeking medical treatment for 48 hours after the child had received obvious and serious injuries, thus severely neglecting his medical needs. The mother did not seek medical treatment sooner, because she feared the child would be taken from her.

The present case is similar to *In re Interest of Jac'Quez N., supra*, in that Aly's and Kazlynn's injuries were obvious and serious after the accident. Police officers testified that Aly and Kazlynn were both unconscious in the back seat of the vehicle and that Kazlynn was bleeding profusely from a head wound and a cut to the neck area. There was evidence that at the scene of the crash, Benjamin told Plugge that he needed to get his children to the hospital. Further, in Benjamin's interview with the police following the accident, he stated that he looked at the children in the back seat and saw that Kazlynn was bleeding so he wanted to get the children to the hospital. Benjamin also told the nurse who drew his blood that he looked at the children in the back seat after the accident and

got scared. The evidence demonstrates that Benjamin was well aware that his children were injured and in immediate peril.

Despite knowing that the children were seriously injured, Benjamin did not get the children medical care. Rather, he fled the scene of the accident prior to the arrival of emergency medical personnel and drove about 16 blocks to a park where he disposed of incriminating alcohol in the vehicle. He delayed seeking medical treatment in an effort to protect himself from suspicion.

There was evidence from Macfadyen that an injury to the head or brain should be treated immediately and that any delay in treating a brain injury results in more damage to the brain and worsens the outcome than if it had been treated immediately. He stated, "In Kazlynn's case specifically, a delay in her care [following the accident] would have worsened her outcome."

As in *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003), the evidence in the instant case established that Benjamin failed to get his children medical treatment when they had obvious and serious physical injuries, thus severely neglecting their medical needs. His failure to immediately seek medical care for his children was a conscious, intentional decision made in an effort to protect himself despite knowing the children needed medical attention.

The evidence of Benjamin's failure to seek medical treatment for the children for his own personal gain is not the only evidence we have taken into account in concluding that Benjamin subjected his children to aggravated circumstances in accordance with § 43-292(9). There was evidence that Benjamin has had an alcohol problem for an extended period of time. At the time of the accident, Benjamin had four prior DUI convictions dating as far back as 2003, with the most recent conviction being in 2009. The foster mother testified that the first time she met Benjamin, she believed he had been drinking based in part on his behavior. At Jade's first birthday

party, the foster mother had concerns about Benjamin's drinking. She testified that throughout the time she has known him, "he seemed to drink a lot."

Further, Benjamin was intoxicated at the time of the accident on the afternoon of October 24, 2016. Andrews, the officer who had Benjamin perform field sobriety tests and a preliminary breath test, testified that based on those tests, Benjamin was under the influence of alcohol such that he could not safely operate a motor vehicle. The results of Benjamin's blood test showed that his blood alcohol content was ".115 plus or minus .003 grams of ethanol per 100 milliliters of blood." Despite being intoxicated, Benjamin put his children in the vehicle and transported them, putting their lives and his own at risk.

Based on Benjamin's failure to get his children medical care knowing they were physically injured, his chronic alcohol problem, and his willingness to place the children at risk, we conclude that termination of Benjamin's parental rights is warranted under § 43-292(9).

[8] Only one statutory ground for termination need be proved in order for parental rights to be terminated. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). Because we conclude that there is clear and convincing evidence to show that aggravated circumstances existed under § 43-292(9), we need not discuss the other statutory grounds which the court found to exist.

*Reasonable Efforts at Reunification.*

[9] Benjamin next assigns that the juvenile court erred in finding that reasonable efforts were not required under § 43-283.01. In *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002), the Nebraska Supreme Court clearly indicated that reasonable efforts to reunify a family are required under the juvenile code only when termination is sought under § 43-292(6). See, also, *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

Because we have determined that termination was proper pursuant to § 43-292(9), we need not determine whether the juvenile court erred in finding that reasonable efforts were not required under § 43-283.01.

*Best Interests and Parental Fitness.*

[10-15] Benjamin next asserts the juvenile court erred in finding that termination of his parental rights was in his children's best interests. In addition to proving a statutory ground, the State must show that termination is in the best interests of the child. *In re Interest of Kendra M. et al., supra*. A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *Id.* There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. *Id.* The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests. *In re Interest of Kendra M. et al., supra*. In discussing the constitutionally protected relationship between a parent and a child, the Nebraska Supreme Court has stated: "'"Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being."'" *Id.* at 1033-34, 814 N.W.2d at 761. The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other. *In re Interest of Kendra M. et al., supra*.

Prior to the accident, Benjamin had four DUI convictions dating back to 2003. The present juvenile matter began as a

result of Benjamin's choosing to drive under the influence of alcohol with his children in his vehicle, putting them at risk. He then had an accident, where two of the children suffered serious injuries. Benjamin made the conscious decision to leave the scene of the accident before emergency medical personnel arrived, knowing that his children were injured, so he could dispose of alcohol in his vehicle. Benjamin's actions demonstrate that he is not willing to put his children's needs above his own and will not protect them at any cost. The children would be at risk for further harm in Benjamin's care.

The case manager also testified that based on Benjamin's prior DUI convictions and the prior intakes related to Benjamin's alcohol issues, she opined that it was in the children's best interests to terminate Benjamin's parental rights.

Based upon our de novo review of the record, we find clear and convincing evidence that Benjamin's personal deficiencies have prevented him from performing his reasonable parental obligations to Jade, Aly, and Kazlynn in the past and would likely prevent him from doing so in the future. Accordingly, the presumption of fitness has been rebutted. We also find that it was shown by clear and convincing evidence that termination of Benjamin's parental rights would be in the children's best interests.

## CONCLUSION

Based on our de novo review, we conclude that the juvenile court did not err in terminating Benjamin's parental rights to Jade, Aly, and Kazlynn. Accordingly, the court's order is affirmed.

Affirmed.

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

# State of Nebraska, appellee, v. Seth Ehren Blimling, appellant.

911 N.W.2d 287

Filed March 27, 2018. No. A-17-1079.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **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.
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. **Courts: Juvenile Courts: Jurisdiction: Final Orders: Appeal and Error.** An order granting or denying transfer of a case from county or district court to juvenile court shall be considered a final order for the purposes of appeal.
5. **Courts: Juvenile Courts: Jurisdiction: Proof.** After considering all the evidence and reasons presented by both parties, the case shall be transferred to juvenile court unless a sound basis exists for retaining the case in county court or district court. The burden of proving a sound basis for retention lies with the State.
6. **Courts: Juvenile Courts: Jurisdiction: Evidence.** When a 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 the juvenile court.

Appeal from the District Court for Burt County: John E. Samson, Judge. Affirmed.

Timothy S. Noerrlinger for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Arterburn, Judge.

## INTRODUCTION

After giving a statement to police in which he admitted to intentionally hitting a classmate with his car, Seth Ehren Blimling was charged in the district court for Burt County with attempted first degree murder, assault in the second degree, and failing to render aid. Blimling was 15 years old at the time of the incident. The district court denied Blimling's motion to transfer his case to juvenile court. Blimling appeals from the district court's decision here. Upon our review, we do not find that the district court abused its discretion in denying Blimling's motion to transfer his case to juvenile court. Accordingly, we affirm.

## BACKGROUND

In February 2017, Blimling was 15 years old and a sophomore at Tekamah-Herman High School in Tekamah, Nebraska. On the morning of February 23, Blimling observed S.S., who was his "[e]x-best friend," and another classmate driving toward S.S.' house. Blimling followed them in his vehicle, and when they pulled into S.S.' driveway, Blimling parked in front of a nearby house. S.S. started to approach Blimling's vehicle, and Blimling "floored it as fast as it [could] go and . . . drove towards [S.S.]" Blimling hit S.S. with his car, causing S.S.' head to hit and crack the windshield of the vehicle and causing S.S. to fall to the ground. Blimling left the scene of the accident and drove to a church parking lot, where he called law enforcement and reported what he had done.

In his statement to law enforcement, Blimling stated that it had "felt good" to hit S.S. with his car. Blimling also stated that when he saw S.S. get up after being hit, he thought,

"'Darn' him." Blimling admitted that he had thought about hurting S.S. the night before this incident and stated that when he had seen S.S. driving home that morning, he thought, "'Hey there's [S.S.,] why not.'" He stated, "I also followed him for a bit too. I hated him." Blimling told law enforcement that he was upset with S.S. because S.S. had been harassing him using social media and had broken a golf club that belonged to Blimling's great-grandfather. In text messages to another classmate about this incident, Blimling stated that he "wanted him hurt bad" and that he "wanted him dead."

Another classmate of Blimling's observed the incident and provided a statement to law enforcement. He reported that Blimling "took off and hit [S.S.], he didn't stop or nothing[,] he kept on driving." Another student reported a somewhat similar incident involving Blimling. The student reported that one day as he was walking home, Blimling, who was driving a car, slowly followed the student for a distance. When the student crossed the street, Blimling drove very close to him and said, "'Better watch your back.'"

The State filed an information charging Blimling with count I: attempted first degree murder, in violation of Neb. Rev. Stat. §§ 28-201(1)(b) and 28-303(1) (Reissue 2016), a Class II felony; count II: assault in the second degree, in violation of Neb. Rev. Stat. § 28-309(1)(a) (Reissue 2016), a Class IIA felony; and count III: failure to render aid, in violation of Neb. Rev. Stat. § 60-697 (Reissue 2016), a Class IIIA felony. Shortly after the State filed the information, Blimling filed a motion requesting the district court to waive jurisdiction and transfer the case to juvenile court.

The district court conducted an evidentiary hearing on Blimling's motion. The evidence presented at the hearing reflects that Blimling was born in August 2001. Although Blimling was 15 years old at the time of the offenses in February 2017, he had turned 16 years old by the time of the evidentiary hearing, which was held on August 11, 2017. Both of Blimling's biological parents testified at the hearing.

In addition, a probation officer testified about various treatment alternatives.

Steve Ortmeier, a chief deputy probation officer, testified to the various treatment alternatives that would be available for Blimling should his case remain in the district court as opposed to the juvenile court. Ortmeier testified that with the exception of an in-home intensive family preservation program, the remaining probationary programs Blimling could be ordered to participate in would be available as part of both a juvenile or adult probation order. He further noted that an adult probation order could remain in effect for 5 years from the date of sentencing. A juvenile probation order would begin at disposition and end when Blimling turned 19 years old. Ortmeier testified to sanction alternatives in both adult and juvenile court.

Blimling's father, Patrick Blimling (Patrick), testified that in February 2017, Blimling had been residing with him for approximately 4 years. Patrick testified that in February 2017, Blimling was a sophomore in high school. However, he was behind on his credits due to some "behavioral issues" that had occurred during the school year. Patrick confirmed that Blimling had an individualized education plan due to his behavioral issues.

During the 4 years Blimling resided with Patrick, Blimling had spent some time in counseling to address his attention deficit hyperactivity disorder (ADHD). However, in the months leading up to February 2017, Blimling was not engaged in any type of counseling. In addition, Patrick testified that Blimling used to take medication for his ADHD condition when he was younger, but that he had stopped taking the medication during his eighth grade year because of the side effects. Patrick testified that he did not feel that Blimling's ADHD condition was "bad enough" to warrant the medication that had been prescribed.

Patrick testified that Blimling and S.S. were good friends prior to February 2017. In the weeks leading up to

February 23, 2017, however, a change in their relationship had occurred. Patrick described the relationship as having "deteriorated" and testified that Blimling's demeanor as a result of the problems in the relationship was "anger, a little bit of disappointment, upset." Patrick recounted an incident where S.S. had broken a golf club as a possible source of the relationship problems.

Blimling's mother, Bridgette Kult (Bridgette), also testified at the hearing. She testified that in February 2017, she had custody of Blimling pursuant to a court order, but she had been allowing him to live with Patrick since approximately June 2014. She agreed with Patrick's testimony that Blimling had an individualized education plan at school due to his behavioral issues. She explained that these issues were mostly due to Blimling's ADHD. He was easily distracted and fidgety during classes. Bridgette testified that she did not recall being consulted about Blimling's stopping his ADHD medication.

The bulk of Bridgette's testimony focused on events which occurred after February 23, 2017. Bridgette testified that Blimling lived with her for a period of time after February 23. Blimling lived with Bridgette, her husband, and Blimling's half sister after he was released from custody in April 2017. However, in mid-April, there was an incident between Blimling and Bridgette's husband that caused Blimling to leave their residence. Bridgette testified that Blimling and her husband had a confrontation after Blimling failed to listen to her repeated instructions. "[I]t was verbal shortly, then it elevated and became physical very briefly, [and] the boys went their separate ways." Blimling was unable to calm himself down after this incident, and as a result, he was hospitalized for 8 days at a mental health facility. Blimling told the medical professionals at the facility that he had ideations about killing his stepfather. When he was released from inpatient care, he "object[ed]" to coming back to Bridgette's home because he did not want to be around his stepfather. At the time of the

evidentiary hearing, Blimling was residing with his maternal grandmother.

Bridgette testified that by the time of the hearing, Blimling was being treated by multiple mental health care providers. In addition, he was taking medication to control his ADHD and to reduce stress and anxiety. Bridgette testified that Blimling's behaviors have improved since his inpatient treatment and that his current outpatient therapy is helping Blimling perform at school and at home. In fact, Bridgette testified that Blimling is enrolled in high school in Omaha, Nebraska; has caught up with all of his credits; and has not had any misconduct reports from the school. At the time of the hearing, Blimling was ready to begin his junior year of high school. Bridgette plans to continue with all of Blimling's current therapeutic services.

Bridgette testified that she considers Blimling to be an "immature" 16 year old. She testified that he does not drive, does not have a job, and does not have a way of supporting himself.

In addition to the testimony of both of Blimling's parents, multiple exhibits were admitted into evidence at the evidentiary hearing. These exhibits include police reports relating to the February 23, 2017, incident; Blimling's school records from prior to February 23; and his mental health records from after February 23, including from his inpatient treatment.

Information from the exhibits indicates that Blimling had little criminal history. Before February 23, 2017, he had one traffic citation for careless driving, which he received on February 15. Despite Blimling's lack of criminal history, his school records reflect that Blimling had a pattern of disobeying authority figures. These records indicate that Blimling regularly assaulted other students and verbally abused his teachers and the school staff. Examples of Blimling's behaviors at school included the following: urinating on the bathroom floor, drawing on the walls, throwing a chair when asked to comply with school rules, stabbing another student's textbook

with a pen, using crude language with teachers, and hitting other students.

Blimling's mental health records indicate that he has been diagnosed with "disruptive mood dysregulation disorder" and ADHD. When Blimling was admitted to the mental health facility in April 2017, he reported having suicidal thoughts and feeling homicidal toward his stepfather. Blimling also reported that when his stepfather had confronted him about not listening to Bridgette, it was Blimling who initiated the physical confrontation. He reported that "when he gets angry, nothing can bring him back down." Blimling reported that he was using marijuana during this time period. Additionally, Blimling reported that prior to February 23, 2017, he was using marijuana on a weekly basis.

When Blimling was released from inpatient treatment, mental health professionals believed his homicidal feelings and thoughts had dissolved. However, Blimling continued to struggle. As late as June 2017, Bridgette reported to Blimling's therapist that he was not showing much improvement and that he needed to learn "'to let things go.'" In July 2017, Bridgette reported that Blimling was being difficult.

Reports from Blimling's therapists indicate that Blimling has made some progress in therapy since April 2017. He has learned skills to help him address his anger. In addition, he expressed a desire to keep his anger controlled and expressed some regret about what he did to S.S. in February 2017. However, Blimling continues to refuse to see his stepfather. He has also told his therapists that he is not sure that he can apply his coping skills if "a huge conflict or cris[i]s arises." Blimling desires to return to live with Patrick because there are "no rules" at Patrick's house. Blimling indicated that Patrick had recently purchased him a dirt bike and was planning on purchasing a car for him in the near future.

In its written order denying Blimling's motion to transfer, the district court found, after examining all the relevant factors, that the severity of Blimling's offenses coupled with his

history of disruptive and assaultive behaviors at school and his recurring homicidal ideations several months after the current offenses would require rehabilitative and security measures beyond the period of his minority.

Blimling appeals.

## ASSIGNMENT OF ERROR

Blimling contends that the district court erred in denying his motion to transfer his case to juvenile court.

## STANDARD OF REVIEW

[1,2] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion. *State v. Bluett*, 295 Neb. 369, 889 N.W.2d 83 (2016). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* We note that in the recently decided case of *In re Interest of Steven S.*, 299 Neb. 447, 908 N.W.2d 391 (2018), the Nebraska Supreme Court reaffirmed this standard of review for cases originally filed in adult court.

## ANALYSIS

### Jurisdiction

[3] 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. *Id.* For an appellate court to acquire jurisdiction over an appeal, there must be either a final judgment or a final order entered by the court from which the appeal is taken. *Id.*

[4] The Nebraska Supreme Court recently held in *State v. Bluett, supra*, that a trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court was not a final, appealable order. That holding has since been statutorily overruled by 2017 Neb. Laws, L.B. 11, § 1, which amended Neb. Rev. Stat. § 29-1816 (Reissue 2016) to provide that an

"order granting or denying transfer of the case from county or district court to juvenile court shall be considered a final order for the purposes of appeal" and to further provide that, upon entry of such an order, "any party may appeal to the Court of Appeals within ten days." In the instant case, Blimling has properly perfected his appeal from the district court's denial of his motion to transfer his criminal proceeding to the juvenile court.

## Motion to Transfer to Juvenile Court

Neb. Rev. Stat. § 43-246.01(3) (Reissue 2016) grants concurrent jurisdiction to the juvenile court and the county or district courts over juvenile offenders who (1) are 11 years of age or older and commit a traffic offense that is not a felony or (2) are 14 years of age or older and commit a Class I, IA, IB, IC, ID, II, or IIA felony. Actions against these juveniles may be initiated either in the juvenile court or in the county or district court. In the present case, the charge of attempted first degree murder, a Class II felony, and the charge of assault in the second degree, a Class IIA felony, against Blimling put him within this category of juvenile offenders.

When an alleged offense is one over which both the juvenile court and the criminal court can exercise jurisdiction, a party can move to transfer the matter. For matters initiated in criminal court, a party can move to transfer it to juvenile court pursuant to § 29-1816(3).

In the instant case, when Blimling moved to transfer his case to juvenile court, the district court conducted a hearing pursuant to § 29-1816(3)(a), which subsection requires consideration of the following factors set forth in Neb. Rev. Stat. § 43-276(1) (Reissue 2016):

> (a) The type of treatment such juvenile would most likely be amenable to; (b) whether there is evidence that the alleged offense included violence; (c) the motivation for the commission of the offense; (d) the age of the

juvenile and the ages and circumstances of any others involved in the offense; (e) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court; (f) the best interests of the juvenile; (g) consideration of public safety; (h) consideration of the juvenile's ability to appreciate the nature and seriousness of his or her conduct; (i) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (j) whether the victim agrees to participate in mediation; (k) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07; (l) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm; (m) whether a juvenile court order has been issued for the juvenile pursuant to section 43-2,106.03; (n) whether the juvenile is a criminal street gang member; and (o) such other matters as the parties deem relevant to aid in the decision.

[5] The customary rules of evidence shall not be followed at such hearing, and "[a]fter considering all the evidence and reasons presented by both parties, the case shall be transferred to juvenile court unless a sound basis exists for retaining the case in county court or district court[.]" See § 29-1816(3)(a). As the Nebraska Supreme Court has explained, in conducting a hearing on a motion to transfer a pending criminal case to juvenile court, the court should employ "a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile." *State v. Stevens*, 290 Neb. 460, 465, 860 N.W.2d 717, 725 (2015). "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." *Id.* "The burden of proving a sound basis for retention lies with the State." *Id.*

In this case, the district court issued a detailed 10-page order explaining its consideration and weighing of the various factors set forth in § 43-276. In the order, the court found that Blimling's actions on February 23, 2017, were premeditated and clearly showed that Blimling "had homicidal thoughts before, during, and subsequent to his action of running over his ex-best friend with a motor vehicle." In fact, the court found that Blimling desired to seriously harm S.S. and was disappointed that S.S. only suffered minor injuries. The court also found that in the months since Blimling ran over S.S., he had exhibited homicidal thoughts toward his stepfather. The court stated, "The two incidents show a troubling violent pattern." The court also stated, "The evidence of premeditation and lack of remorse after both incidents is somewhat alarming."

In its order, the district court acknowledged that Blimling had been undergoing therapy with multiple mental health professionals for more than 3 months prior to the evidentiary hearing. However, the court found that the mental health notes submitted into evidence "did not reflect substantial improvement in [Blimling's] malevolent thought process." The court stated:

> The Court has a concern that a successful mental health regimen may very well require treatment beyond [Blimling's] nineteenth birthday — especially in light of homicidal ideation against not only the victim in this case but [Blimling's] stepfather as well as the actions taken to fulfill the homicidal ideation against the victim.

The court indicated that Blimling did not have a criminal history. However, he did have a pattern of behavioral issues and a lack of respect for others which was evidenced by his school records. This history of behavioral issues at school coupled with Blimling's homicidal ideations and lack

of remorse "indicates that the safety of the public could be in jeopardy until [Blimling] has successfully completed mental health therapy."

Ultimately, the court found that multiple factors set forth in § 43-276 weighed in favor of retaining jurisdiction of the case in district court, including the treatment options available to Blimling, Blimling's motivation for committing the current offenses, the violence associated with Blimling's offenses, Blimling's current age and the potential length of required treatment, Blimling's best interests, the consideration of public safety, and Blimling's ability to appreciate the nature and seriousness of his conduct. Based on its consideration of these factors, and all of the factors delineated in § 43-276, the district court refused Blimling's request to transfer the proceedings to the juvenile court.

In this appeal, Blimling challenges the weighing process employed by the court in reaching its decision. He argues that the court placed too much weight on the nature and circumstances of the offenses and too little weight on his "age, immaturity, lack of criminal history, and treatment efforts." Brief for appellant at 7. He also argues that the court erred in finding that he would require treatment beyond the age of 19.

In our review of the record, we find support for the district court's finding that Blimling will require treatment beyond his 19th birthday. Blimling was already 16 years old at the time of the evidentiary hearing. The evidence reveals that he suffers from serious mental health issues which are not yet adequately controlled through medication or through therapeutic intervention. Perhaps because of these mental health issues, Blimling has demonstrated a pattern of violent, aggressive, and offensive behavior at school, in the community, and at home. The evidence strongly suggests that Blimling will likely need treatment for more than the 2½ years he has left before he reaches the age of majority.

[6] In our review, we do not consider lightly Blimling's youth or his lack of any criminal history. However, much like

the district court, we cannot ignore the violent and disturbing nature of Blimling's crime, his lack of remorse, or his continuing anger and homicidal ideations. We further cannot ignore that the events for which Blimling has been charged are not isolated given the history of assaultive and disruptive behavior noted in his school records and the separate incident wherein Blimling, who was driving a car, followed another student and then made a threatening statement. When a 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 the juvenile court. See *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). Because there is ample evidence to support each of the findings which led the district court to deny Blimling's motion to transfer, we cannot and do not conclude that it abused its discretion.

## CONCLUSION

For the reasons discussed, we conclude that the district court did not abuse its discretion in denying Blimling's motion to transfer his case to juvenile court. As such, we affirm.

Affirmed.

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

# State of Nebraska, appellee, v. Gilberto Zuniga, appellant.

911 N.W.2d 869

Filed April 3, 2018. No. A-17-226.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Confessions: Miranda Rights: Motions to Suppress: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts meet constitutional standards is a question of law, which an appellate court reviews independently of the trial court's determination.
3. **Constitutional Law: Search and Seizure.** It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions.
4. **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.

5. **Constitutional Law: Search and Seizure: Duress.** To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice and not the result of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
6. **Search and Seizure: Duress.** In determining whether consent was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.
7. **Constitutional Law: Search and Seizure.** The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and voluntariness is a question of fact to be determined from the totality of the circumstances.
8. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
9. **Miranda Rights.** *Miranda* protections apply only when a person is both in custody and subject to interrogation.
10. **Miranda Rights: Arrests: Words and Phrases.** A person is in custody for purposes of *Miranda v. Arizona*, 484 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest.
11. **Miranda Rights.** Two inquiries are essential to the determination of whether an individual is in custody for *Miranda* purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether, given those circumstances, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

Thomas R. Lamb and Hannah E. Carroll-Altman, Senior Certified Law Student, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Arterburn, Judge.

## INTRODUCTION

After a bench trial in the district court for Lancaster County, Gilberto Zuniga was convicted of one count of delivery or possession with intent to deliver methamphetamine. On appeal, he challenges the district court's order overruling his motion to suppress evidence obtained during a warrantless search of his apartment and his motion to suppress statements he made to police at the time of the search. For the following reasons, we affirm.

## BACKGROUND

On August 1, 2016, the State filed an amended information charging Zuniga with delivery or possession with intent to deliver methamphetamine, a Class II felony. Prior to trial, Zuniga filed a motion to suppress the evidence obtained during a warrantless search of his apartment. He alleged that the search did not fall under any recognized exception to the warrant requirement because he did not validly consent to the search nor was there probable cause to justify the search. In his motion to suppress, Zuniga also asked that the statements he made to police at the time of the search be suppressed. He alleged that the statements resulted from custodial interrogation that occurred before he was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The district court held a suppression hearing. At the hearing, Zuniga argued to the district court that he did not validly consent to a search of his apartment. Zuniga argued that law enforcement officers induced his consent by leading him "to believe that if he led them inside of the apartment, [and gave] them the drugs that nothing would happen." The State called the three law enforcement officers who were present during the search of Zuniga's apartment to testify that Zuniga's consent to search was, in fact, valid.

Officer Robert Hallowell testified first. He was assigned as an investigator with a narcotics task force. On May 20, 2015, he and Officers Anthony Gratz and Christopher Monico were involved in an investigation at the apartment building where Zuniga lived. The officers had received information that Zuniga was selling narcotics out of the apartment building; however, they were unsure of the exact apartment Zuniga lived in.

At around 8:45 p.m. on May 20, 2015, the officers arrived at Zuniga's apartment building. All three were wearing plain clothes, but they each had a lanyard around their neck with their badge displayed. Officer Hallowell testified that after they arrived at Zuniga's apartment building, Officer Gratz placed a telephone call to Zuniga and told him that his vehicle had been involved in "a hit and run." Officer Gratz asked Zuniga to come outside and speak with police about his vehicle. Officer Hallowell admitted that the substance of the telephone call was a "ruse" in order to get Zuniga to come outside. Officer Hallowell also testified that the ruse was successful and that Zuniga came outside to check on his vehicle.

When Zuniga approached his vehicle, the officers explained why they were actually there. Specifically, Officer Hallowell testified that they informed Zuniga that they had information he was in possession of a large quantity of methamphetamine for the purpose of selling it. In fact, they told Zuniga that they knew where in his apartment the drugs were located. The officers indicated that they wanted Zuniga to turn the drugs over to them. Officer Hallowell testified that he did recall that Officer Gratz told Zuniga his goal was to make sure drugs were not going to be sold out of Zuniga's apartment anymore. Zuniga did not deny possessing the drugs.

Officer Hallowell testified that he did not participate much in the portion of the conversation with Zuniga that occurred next to Zuniga's vehicle. Instead, he stood "a little bit further away," so that Zuniga would not feel surrounded. However, Officer Hallowell testified that Zuniga did indicate to the

officers that he wanted to be honest with them. Zuniga also told them about a prior incident with police where he felt like he had been "set up." Officer Hallowell described a "back and forth" between the officers and Zuniga about whether they could enter his apartment. After about 30 minutes, Zuniga led officers into his apartment.

Once inside the apartment, Officer Hallowell joined Officer Gratz in continuing to speak with Zuniga about there being drugs in the apartment. The two officers asked Zuniga two or three times whether he would allow them to look inside a drawer located next to the sink in his kitchen. Officer Hallowell testified that Zuniga continued to talk about his prior experience with police and about his desire to be honest. After about 10 to 15 minutes of conversation inside the apartment, Zuniga agreed to allow officers to look in the kitchen drawer. Inside the drawer was a clear plastic baggie which contained a white crystalline substance resembling methamphetamine and a black digital scale. Subsequent to the search of the drawer, Zuniga was arrested. Officer Hallowell testified that up to the point in time when Zuniga was formally arrested, he was never told that he could not leave, nor did he ever ask to leave or try to leave.

At the jail, Officer Hallowell advised Zuniga of his *Miranda* rights and then proceeded to ask him about the drugs found in his apartment. During this interview, Zuniga revealed to Officer Hallowell where he had obtained the methamphetamine and revealed that he had been selling methamphetamine for approximately 4 months and had between 5 and 10 regular customers.

Officer Gratz also testified about the events which occurred on May 20, 2015. Officer Gratz testified that he placed a telephone call to Zuniga from outside his apartment building "in hopes that he would come out so we could have a conversation with him." During the telephone call, Officer Gratz told Zuniga that he was a police officer and that Zuniga's vehicle may have been involved in an accident. At first, Zuniga told

Officer Gratz that his vehicle was equipped with a loud alarm and that he would have heard the alarm if his vehicle had been struck by another vehicle. Eventually, though, Zuniga agreed to come outside.

After Zuniga came outside and approached his vehicle, the officers informed him that they were narcotics investigators and that they actually wanted to talk with him about his involvement with using and selling drugs from his apartment. Officer Gratz testified that once Zuniga knew why the officers were actually there, he became nervous and looked down and away from the officers. His breathing became rapid. Zuniga began talking about his previous involvement with law enforcement. He indicated his belief that he had been previously "set up" by an informant and law enforcement and was, as a result, arrested with a large quantity of narcotics. Officer Gratz testified that he asked Zuniga two or three times if they could continue their conversation inside his apartment because it was cold outside. Zuniga "eventually" said he was "okay with that" and led the officers into his apartment. Officer Gratz testified that the conversation with Zuniga outside of his apartment building lasted approximately 30 to 45 minutes.

Once inside the apartment, the officers and Zuniga "had [a] lengthy period of casual conversation about things other than drugs" which lasted approximately 5 or 10 minutes. Then, Zuniga sat down in a chair and Officer Gratz asked him if he was going to be honest. Officer Gratz testified that he told Zuniga that the officers wanted this to be "the last day that drugs were being used or sold" in the apartment. Zuniga agreed that "things needed to change." He then transitioned into talking about his prior arrest again. Zuniga told Officer Gratz that he did not want to go back to prison. Officer Gratz testified that he told Zuniga that it was not his goal to send Zuniga to prison. Instead, his goal was to stop the selling of drugs out of Zuniga's apartment. Officer Gratz testified that he never promised Zuniga he would not go to prison if he cooperated.

After 15 to 20 minutes of conversation inside the apartment, Officer Gratz asked Zuniga if he could look in two kitchen drawers where he believed the drugs were located. Officer Gratz testified that after a lengthy pause, Zuniga consented to officers' looking in the drawers. Upon searching one of the drawers, officers found a baggie containing what Officer Gratz believed to be methamphetamine and a digital scale. Subsequent to the search of the drawer, Zuniga was arrested. Officer Gratz testified that about 45 minutes passed between the officers' entering Zuniga's apartment and placing him under arrest.

Officer Monico testified similarly about the events of May 20, 2015. Officer Monico testified that when Zuniga came outside to inspect his vehicle, the officers contacted him and identified themselves as officers with the narcotics task force. They told Zuniga they wanted to talk to him about him selling methamphetamine from his apartment. Officer Monico testified that once officers revealed the actual reason they were contacting Zuniga, his "level of nervousness was visibly apparent and rose." Officer Monico stated, "I remember specifically he put a hand up on his car and leaned over on it and hung his head and began staring at the ground." Zuniga then told the officers about a prior situation in which he had been arrested on drug charges. Specifically, Zuniga felt he had been "wronged" on this previous occasion when he had let law enforcement into his home and they began searching everywhere. Zuniga told Officers Hallowell, Gratz, and Monico that he wanted to be honest with them, but he was afraid he would go to prison. Officer Monico testified that Zuniga indicated that he did have drugs in his apartment, but he was "hesitant to say exactly how much."

Officer Monico testified that he and the other officers asked Zuniga multiple times if they could go inside his apartment to continue their conversation because it was cold outside. Eventually, after "[a]t least a half hour," Zuniga agreed to let the officers inside. He escorted the officers to the apartment

door, opened the door, and allowed the officers to follow him inside.

Once inside the apartment, Officer Monico overheard Officer Gratz tell Zuniga that he believed the methamphetamine was in a particular drawer in the kitchen. Officer Monico also overheard Zuniga express concern and fear about going to prison. Officer Gratz responded that sending Zuniga to prison was not his goal. Sometime after this exchange, Zuniga gave officers permission to search the kitchen drawer. Inside the drawer was a baggie with what Officer Monico believed to be methamphetamine and a digital scale. Subsequent to the search of the drawer, Zuniga was placed under arrest. Officer Monico testified that officers spent a total of approximately 45 to 50 minutes inside Zuniga's apartment.

We note that Zuniga did not testify at the suppression hearing, nor did he present any other evidence.

In a written order, the district court denied Zuniga's motion to suppress evidence and motion to suppress statements. Regarding the motion to suppress evidence, the court stated, "Having considered the totality of the circumstances . . . the court concludes [Zuniga's] consent to search was given freely, intelligently, and voluntarily." In coming to this conclusion, the district court made the following factual findings:

> In this case, [Zuniga's] age is not readily apparent from the record, but he physically appears older than 30 years of age. There is no evidence [Zuniga] suffers from any mental impairment. There is no evidence he was under the influence of drugs or alcohol during his discussion with Investigators. [Zuniga] was not informed of his *Miranda* rights prior to his consent to search. [Zuniga] has had prior involvement with law enforcement and the criminal justice system. [Zuniga] was outside with investigators for 30-45 minutes after which he consented to Investigators entering his apartment. Investigators were then inside the apartment for 10-20 minutes before [Zuniga] gave consent to search. The request for consent

> was made 2-3 times before it was given. There were no threats, physical intimidation or punishment used to obtain consent. No promises were made by Investigators but statements were made that it was not the goal to arrest [Zuniga]. Consent was given inside [Zuniga's] apartment in "familiar surroundings". At no time during the discussions did [Zuniga] ask to leave nor did he ask Investigators to leave. [Zuniga] was not told he could not leave, and [he] did not ask for counsel.

Regarding the motion to suppress statements, the court found that Zuniga was not in custody at the time of the search of his apartment. As such, law enforcement was not required to inform him of his *Miranda* rights.

The matter proceeded to a stipulated bench trial. The State introduced an exhibit which contained police reports, property reports of the items seized during the search, and a laboratory report showing that the substance seized from the drawer in Zuniga's kitchen tested positive for methamphetamine. Zuniga objected to the exhibit based on the arguments raised in his motion to suppress, and the court overruled the objection. Zuniga then introduced into evidence various exhibits, including the deposition testimony of Officers Hallowell, Gratz, and Monico. The district court found Zuniga guilty of delivery or possession with intent to deliver methamphetamine. Subsequently, the court sentenced Zuniga to 8 to 12 years' imprisonment.

Zuniga appeals.

## ASSIGNMENTS OF ERROR

Zuniga asserts that the district court erred in overruling his motion to suppress the evidence obtained during the search of his apartment and his motion to suppress the statements he made to police at the time of the search.

## 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. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). Regarding historical facts, we review the trial court's findings for clear error. *Id.* But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *Id.*

[2] In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), we apply a two-part standard of review. *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). Regarding historical facts, we review the trial court's findings for clear error. *Id.* Whether those facts meet constitutional standards, however, is a question of law, which we review independently of the trial court's determination. *Id.*

## ANALYSIS

*Motion to Suppress Evidence.*

Zuniga maintains that it was error to overrule his motion to suppress evidence obtained during the warrantless search of his apartment. He argues that he did not freely and voluntarily consent to officers' looking inside his kitchen drawer. Rather, Zuniga contends that his "consent was the result of coercion, and based upon lies by police." Brief for appellant at 9. He asserts that the officers lied to him in order to get him to come outside of his apartment and lied to him again when they told him he would not go to prison if he cooperated and turned over the drugs.

[3,4] It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). 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. *Wells, supra.*

[5-7] To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice and not the result of a will overborne. *Tucker, supra.* Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *Id.* In determining whether consent was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. See *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). Mere submission to authority is insufficient to establish consent to search. *Tucker, supra.* The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and voluntariness is a question of fact to be determined from the totality of the circumstances. *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997). The burden is on the State to prove that consent to search was voluntarily given. *Prahin, supra.*

Based on the evidence presented at the suppression hearing, the district court's finding that Zuniga's consent to search the drawer was given freely, intelligently, and voluntarily was not clearly erroneous. As such, we affirm the denial of Zuniga's motion to suppress the evidence found in the drawer.

While we agree with Zuniga's general assertion that the police used deception in order to get him to come outside of his apartment, we do not find that such deception invalidated Zuniga's subsequent consent to search the kitchen drawer. The Nebraska Supreme Court has held that police deception which is not coercive in nature will not invalidate an individual's consent to search if the record otherwise shows the consent was voluntary. *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

Officer Hallowell admitted during his testimony that he and Officers Gratz and Monico used a ruse in order to get Zuniga to come outside of his apartment building so they could speak with him. However, once Zuniga was outside,

the officers immediately told him of the real reason they were there. They informed Zuniga that they had information he was using and selling drugs out of his apartment and that they wanted him to turn the drugs over to them. After the officers revealed their deception to Zuniga, he did not tell them to leave nor did he ever indicate he did not want to talk to them. In fact, he told the officers that he wanted to be honest with them about the drugs. And, after approximately 30 to 45 minutes of conversation with the officers outside of Zuniga's apartment building, he agreed to allow the officers inside of his apartment. Ultimately, the evidence presented at the suppression hearing reveals that the initial deception used by the officers was quickly corrected upon the officers' contacting Zuniga near his vehicle. Accordingly, we do not find that this deception was coercive in nature or that it invalidated either Zuniga's consent to enter his apartment or his ultimate consent to search his kitchen drawer.

We do not agree with Zuniga's assertion that the police deceived him again by telling him he would not be arrested if he cooperated and turned over the drugs in his apartment. In fact, in its order, the district court found that Officer Gratz had specifically testified that he did not promise Zuniga that he would not go to prison if he cooperated. The district court found this testimony to be credible, and we recognize that the district court was the finder of fact and take into consideration that it observed the witnesses. See *Ready, supra*. We do find, as did the district court, that Officer Gratz indicated to Zuniga that it was not his goal to arrest him, but that it was his goal to remove the drugs from the apartment. This statement comes close to being a misrepresentation or a promise not to arrest. However, in this case, in light of the other factors surrounding Zuniga's consent to search the drawer, we do not find that Officer Gratz' statement was enough to cause Zuniga's will to be overborne or to invalidate the consent.

Of particular importance in our analysis of the voluntariness of Zuniga's consent is his prior experience with law

enforcement. Zuniga repeatedly told the officers involved in this case that he had been previously arrested as a result of his possession of a large quantity of drugs. He informed the officers that he felt he had been treated unfairly at the time of this previous arrest, in part because he felt police had searched his home without his full consent. Given Zuniga's past experience, he clearly understood the effect of his giving consent to search the kitchen drawer. In addition, he understood the effect of his being in possession of drugs. Moreover, there was no evidence presented at the suppression hearing that Zuniga's interactions with the officers included threats, physical intimidation, or punishment. According to the officers' testimony, one officer typically stayed away from the immediate vicinity of the conversation, whether inside the apartment or outside in the parking lot, so as not to surround Zuniga. The evidence reveals that the officers had a calm and professional conversation with Zuniga about his use and selling of drugs from his apartment. During the interaction, which lasted approximately an hour or less, Zuniga never asked the officers to leave, never tried to leave himself, and never indicated that he no longer wanted to speak with the officers.

Given the totality of the circumstances present in this case, the district court's finding that Zuniga's consent to search the drawer was given freely, intelligently, and voluntarily was not clearly erroneous. However, we note that under a different set of facts, Officer Gratz' statement that it was not his goal to arrest or imprison someone could lead to a different result. We leave that determination for another case.

*Motion to Suppress Statements.*

Zuniga argues that the district court erred in overruling his motion to suppress the statements he made to police before and during the search of the drawer. He asserts that the statements he made were the result of a custodial interrogation and that he was not, at that time, advised of his rights pursuant to

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

[8-11] *Miranda, supra*, prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007). *Miranda* protections apply only when a person is both in custody and subject to interrogation. *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014). A person is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest. *State v. Landis*, 281 Neb. 139, 794 N.W.2d 151 (2011). Two inquiries are essential to this determination: (1) an assessment of the circumstances surrounding the interrogation and (2) whether, given those circumstances, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

The Nebraska Supreme Court, quoting *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002), has applied "'six common indicia of custody which tend either to mitigate or aggravate the atmosphere of custodial interrogation.'" *State v. Mata*, 266 Neb. 668, 682, 668 N.W.2d 448, 466 (2003), *abrogated on other grounds, Rogers, supra*. Those indicia are as follows: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong-arm tactics or deceptive stratagems were used during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the

suspect was placed under arrest at the termination of the proceeding. See *id*.

The Nebraska Supreme Court has also identified other circumstances relevant to the custody inquiry: (1) the location of the interrogation and whether it was a place where the defendant would normally feel free to leave; (2) whether the contact with the police was initiated by them or by the person interrogated, and, if by the police, whether the defendant voluntarily agreed to the interview; (3) whether the defendant was told he or she was free to terminate the interview and leave at any time; (4) whether there were restrictions on the defendant's freedom of movement during the interrogation; (5) whether neutral parties were present at any time during the interrogation; (6) the duration of the interrogation; (7) whether the police verbally dominated the questioning, were aggressive, were confrontational, were accusatory, threatened the defendant, or used other interrogation techniques to pressure the suspect; and (8) whether the police manifested to the defendant a belief that the defendant was culpable and that they had the evidence to prove it. *Rogers, supra*.

Upon our review, we conclude that the district court's finding that Zuniga was not in custody at the time he made the statements was not clearly erroneous. We recognize that some of the circumstances surrounding the making of the statements could tend to support a finding that Zuniga was in custody. For example, contact with Zuniga was initiated by the officers and Zuniga was never told he was free to terminate the interaction with the officers. In addition, the officers clearly informed Zuniga that they knew he was in possession of drugs and, in fact, knew where in his apartment he kept those drugs. Zuniga was arrested after the drugs were located by the officers.

However, the evidence which supports the district court's finding overcomes the foregoing factors. Zuniga was first located in the parking lot of his apartment building and then was in his own apartment. He was not at the police station or

in an unfamiliar environment. The officers did not physically restrain Zuniga or in any way impede his movement. There is no indication that Zuniga was not free to ask the officers to leave and terminate the interview. There was no evidence that the officers used threats, physical intimidation, or punishment to coerce Zuniga into speaking with them. As we stated above, the evidence demonstrated that the interaction between Zuniga and the officers was consensual and that Zuniga was cooperative. Zuniga spoke with officers freely and never denied his possession of drugs. There was no intensive or high pressure interrogation of Zuniga. In fact, Officer Gratz testified that once Zuniga and the officers entered Zuniga's apartment, they all engaged in a "casual conversation" about things other than drugs. According to the evidence, more than one such interlude occurred during the course of the interview. Finally, we must reiterate that the evidence was clear that Zuniga was not a novice in dealing with law enforcement and repeatedly expressed a level of distrust regarding their intentions. Nonetheless, he ultimately agreed to talk with them.

In light of all the surrounding circumstances, we conclude that the district court's finding that Zuniga was not in custody is not clearly erroneous.

## CONCLUSION

For the reasons stated above, we affirm the decision of the district court to overrule both Zuniga's motion to suppress evidence and motion to suppress statements. We, therefore, affirm Zuniga's conviction.

Affirmed.

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

# In re Estate of Brian L. Tiedeman, deceased. Dustin Lovorn, Special Administrator of the Estate of Brian L. Tiedeman, deceased, appellant and cross-appellee, v. Sue Ann Brethouwer, appellee and cross-appellant, and David L. Clark, Jr., and Sheila G. Casares, Copersonal Representatives of the Estate of Jody Clark, deceased, appellees and cross-appellants.

912 N.W.2d 816

Filed April 10, 2018. Nos. A-16-887, A-16-933.

1. **Decedents' Estates: Wills: Trusts: Judgments: Appeal and Error.** The interpretation of the words in a will or a trust presents a question of law. 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. **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.
3. **Wills: Intent: Words and Phrases.** Material provisions of a will are defined as those provisions which express donative and testamentary intent.
4. ____: ____: ____. Donative intent relates to words reflecting specific bequests to particular beneficiaries, and testamentary intent concerns whether the document was intended to be a will.
5. **Wills: Words and Phrases.** No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his or her property.
6. ____: ____. When construing the meaning of words in a document, the process requires determining the correct sense, real meaning, or

proper explanation of an ambiguous term, phrase, or provision in a written instrument.

7. ____. ____. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
8. **Parol Evidence: Wills: Intent.** Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain.
9. **Wills: Words and Phrases.** A patent ambiguity is an ambiguity appearing on the face of the instrument, whereas a latent ambiguity is one outside the will.
10. **Wills: Intent.** A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will.
11. **Wills.** Patent ambiguities are resolved from within the four corners of the will and without consideration of extrinsic evidence.
12. **Wills: Words and Phrases.** Where in a will there is such a patent ambiguity resulting from the use of the words and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning.
13. **Wills.** A latent ambiguity exists when the testator's words are susceptible of more than one meaning, and the uncertainty arises not upon the words of the will as looked at themselves, but upon those words when applied to the object or subject which they describe.
14. ____. A latent ambiguity arises when a beneficiary is erroneously described, where no such beneficiary has ever existed as the one so described, or when two or more persons or organizations answer the description imperfectly.
15. **Wills: Evidence.** Extrinsic evidence is admissible both to disclose and to remove the latent ambiguity of the will.
16. ____: ____. A patent ambiguity is a case where the same word in a will has two meanings discernible from the face of the will itself, whereas a latent ambiguity is a case where the word has two meanings, but only when extrinsic evidence is brought to bear.
17. **Wills.** The law will not suffer an heir to be disinherited upon conjecture.
18. **Wills: Intent.** Although a testator may disinherit an heir, the law will execute that intention only when it is put in a clear and unambiguous shape.

Appeals from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

James L. Haszard, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellant.

J.L. Spray and Ryan K. McIntosh, of Mattson Ricketts Law Firm, for appellee Sue Ann Brethouwer.

Dale D. Dahlin, P.C., L.L.O., for appellees David L. Clark, Jr., and Sheila G. Casares.

Moore, Chief Judge, and Bishop and Arterburn, Judges.

Bishop, Judge.

## INTRODUCTION

Following Brian L. Tiedeman's death, his nephew Dustin Lovorn filed a petition to have Tiedeman's purported holographic will admitted to probate in the county court for Lancaster County. Sue Ann Brethouwer and Jody Clark, two of Tiedeman's sisters, filed separate objections to Lovorn's petition, and the case was transferred to the district court for Lancaster County. The district court granted partial summary judgment in favor of Lovorn as to the document in question being written by Tiedeman, but granted summary judgment in favor of Brethouwer and Clark as to the document not being made with the requisite testamentary intent to be a valid holographic will. Lovorn appeals the district court's decision, and Brethouwer and Clark cross-appeal. We affirm.

## BACKGROUND

We initially note that while this appeal was pending, a suggestion of death was filed notifying the court that Clark died on December 27, 2017. On January 19, 2018, a stipulation and joint motion for revivor was filed by the parties pursuant to Neb. Rev. Stat. § 25-1401 et seq. (Reissue 2016), indicating that David L. Clark, Jr., and Sheila G. Casares (son and daughter of Clark) were appointed and qualified as copersonal representatives of Clark's estate. The parties agreed the action and interests of Clark should proceed in the names of her copersonal representatives. The stipulation and joint motion

for revivor was sustained by order of this court entered on February 1, 2018; however, this opinion will continue to refer to Clark by her name.

Tiedeman died on February 24, 2015. His estate is comprised primarily of a farm operation and has a gross value of approximately $4 million. Before his death, Tiedeman managed the farm operation with Lovorn. Tiedeman's only heirs at law were his three sisters: Brethouwer, Clark, and Lovorn's mother. Lovorn filed a petition in county court on March 4 to have the purported holographic will admitted into formal probate. We set forth the handwritten document below to reflect, as best possible, its use of spacing and capitalization, and its spelling:

> 5-22-14
> I Brian L Tiedeman want all my
> All Property to Dustin Lovorn
> I here by attend to change my will.
> [Signature]

The county court subsequently appointed Lovorn special administrator of Tiedeman's estate in order to manage the farming operation to prevent waste.

Brethouwer filed an objection to the petition for formal probate of the purported holographic will and transferred the action to the district court. Her objection alleged as follows: (1) The purported will does not express testamentary intent, (2) Tiedeman did not have testamentary capacity at the time of the purported will's execution, (3) Tiedeman lacked mental capacity to execute a will, (4) Tiedeman was under duress from Lovorn when the purported will was created, and (5) the purported will is the product of undue influence exercised by Lovorn over Tiedeman. Clark filed a separate objection, alleging the document in question (1) was not executed properly under Nebraska statutes governing the execution of a will, (2) is not a valid holographic will, (3) does not express testamentary intent, (4) is not in Tiedeman's handwriting, (5) was not made with testamentary intent at the time of its creation, (6) is

the product of undue influence by Lovorn over Tiedeman, (7) was created while Tiedeman was under duress from Lovorn, (8) was created at a time when Tiedeman did not have testamentary capacity, (9) resulted from fraud by Lovorn, and (10) was not intended to be a will and was the result of mistake by Tiedeman. Lovorn filed separate answers to both objections denying all of the allegations by both Brethouwer and Clark listed above.

Brethouwer then filed a motion for summary judgment, requesting judgment as a matter of law that the purported will "did not express sufficient testamentary intent as required by Neb. Rev. Stat. § 30-2328 (Reissue 2008)." Clark subsequently joined Brethouwer's motion for summary judgment. Lovorn filed a motion for partial summary judgment, requesting judgment as a matter of law that (1) the purported will was in Tiedeman's handwriting and (2) the purported will "expressed sufficient testamentary intent as required by Neb. Rev. Stat. §30-2328."

At the hearing on the motions for summary judgment, Lovorn offered the affidavit of attorney Patrick D. Timmer, in which Timmer explained the circumstances of the creation of the purported will. Counsel for Brethouwer and Clark made objections to the affidavit, including arguments related to extrinsic and parol evidence. The court took the offer of the affidavit under advisement. And although counsel for Clark challenged the accuracy of the affidavit based on alleged prior inconsistent reporting by Timmer as to whether the purported will was drafted by Tiedeman at home or at Timmer's office, this was only raised by argument and not through any evidence submitted at the hearing.

The district court issued an order on August 15, 2016. In that order, the court sustained objections to Timmer's affidavit as to paragraphs 10, 12, and 13, but received the remainder of the affidavit. The court observed that parol evidence was not admissible to determine the intent of a testator as expressed in his or her will unless there is a latent ambiguity therein which

makes his or her intention obscure or uncertain. The court further observed that with regard to the purported will in this case, "it is apparent that no latent ambiguity exists." Concluding it could not consider extrinsic evidence to determine Tiedeman's testamentary intent, the court sustained objections to the three paragraphs noted above.

The three excluded paragraphs of Timmer's affidavit averred: Tiedeman told Timmer that he wanted to change his will to give all of his property to Lovorn, but that Timmer did not have time to discuss a new will with him; Timmer handed Tiedeman a piece of paper and told him to write, "'I, Brian L. Tiedeman, want all my property to go to Dustin Lovorn and I hereby intend to change my will'"; and Timmer told Tiedeman "to write 'I hereby intend to change my will' to show his intention as to the purpose of the document."

In relevant part, the admitted portion of Timmer's affidavit averred: Timmer, an attorney, had worked with Tiedeman "on a number of occasions" with regard to the administration of Tiedeman's father's trust (Tiedeman was the trustee); Timmer was scheduled to meet with Tiedeman on May 22, 2014, for an allotted 45 minutes, and at that time, Tiedeman signed trust administration documents and powers of attorney appointing Lovorn as Tiedeman's attorney in fact; during this meeting, Timmer told Tiedeman to schedule another appointment to discuss a new will, but he explained to Tiedeman that in the meantime, he could "do what is called a holographic will" and told him he could create a document in his own handwriting that is signed and dated; Timmer personally witnessed Tiedeman writing on paper given to him and signing the document, and this is the document that has been offered for probate in Tiedeman's estate; Tiedeman did not leave the conference room during the course of the meeting and "the writing of the will"; Lovorn did not accompany Tiedeman to this meeting, nor did Lovorn speak to Timmer about "the will" until after Tiedeman's death; Tiedeman left "the holographic will" with Timmer, which he placed in Tiedeman's estate planning

file; Tiedeman told Timmer that Lovorn was already a joint owner on some of Tiedeman's accounts or that he was planning to add him to accounts; and Timmer stated that he was aware on May 22 that Tiedeman had an existing will prepared by another attorney, but that Timmer did not know the whereabouts of that will.

With that evidence, the district court first considered whether the purported holographic will was in Tiedeman's handwriting. The court stated that Timmer's affidavit "clearly shows that Timmer witnessed [Tiedeman] write and sign the document, he then left the document with Timmer, who placed it in [Tiedeman's] estate planning file." Since the court found there were no genuine issues of material fact regarding this issue, it granted partial summary judgment in favor of Lovorn, finding that the "purported holographic will is in the handwriting of [Tiedeman]."

The next issue considered by the district court was whether the purported holographic will expressed sufficient testamentary intent. Based on the evidence admitted, the court granted summary judgment in favor of Brethouwer and Clark, finding that "the writing fails to express sufficient testamentary and donative intent." It was the court's opinion that the words expressed Tiedeman's intent to create a new will at a future date. In sum, the court stated that "the purported holographic will . . . does not contain sufficient material provisions expressing testamentary and donative intent and cannot be legally recognized as a valid holographic will."

The district court ordered the matter transferred back to the county court "to carry the final decision to judgment and execution."

Lovorn filed a motion for the district court to set a supersedeas bond pursuant to Neb. Rev. Stat. § 30-1601 (Reissue 2016). The court entered an order stating "a supersedeas bond is required by . . . Lovorn to appeal this matter and the amount of said bond is $400,000.00." Lovorn then filed his appeal from the district court's order granting summary judgment

in favor of Brethouwer and Clark; it was docketed as case No. A-16-887.

Lovorn also filed a motion with the district court to reconsider the amount of the supersedeas bond and to extend time to file the bond. Lovorn's motion included an affidavit from the president of a bond company, which affidavit indicated the bond company was requiring $400,000 in collateral, plus a $6,000 fee per year, for a $400,000 bond. Lovorn claimed that he did not have sufficient assets to provide such collateral and that the primary asset in the estate is farm ground, which cannot be destroyed or removed, so a lesser bond would protect the beneficiaries. Lovorn's affidavit stated he owned vehicles and miscellaneous assets totaling $68,753, plus a one-half interest in the farm operation's machinery ($152,440) secured by a bank and for which ownership is "likely disputed."

The district court overruled Lovorn's motion for reconsideration and for an extension of time to file a bond. Lovorn then filed a motion with this court to review the district court's supersedeas bond amount and for leave to file his bond out of time in response to the court's decision to overrule his motion for reconsideration; it was filed as a separate appeal (case No. A-16-933). Brethouwer and Clark filed separate motions for summary disposition with this court, both arguing we lacked jurisdiction to hear Lovorn's appeal based on his failure to post the $400,000 supersedeas bond set by the district court. Those motions were overruled, and we entered an order setting the bond amount at $100,000, which Lovorn subsequently posted.

The appeals in cases Nos. A-16-887 and A-16-933 have been consolidated for briefing and disposition.

Although not relevant to this appeal, we note that following the district court's order regarding summary judgment, Clark filed a petition in the county court to have a purported lost will admitted to formal probate and nominated herself as personal representative. The petition included the purported

copy of a lost will which was unsigned by Tiedeman. Lovorn and his mother both filed objections to Clark's petition to have the lost will admitted to probate based on Lovorn's pending appeal. The county court scheduled a hearing date; however, our record does not show any further information.

## ASSIGNMENTS OF ERROR

Lovorn assigns nine errors, which we consolidate and restate as follows: The district court erred (1) in finding Brethouwer and Clark were entitled to judgment as a matter of law that the purported holographic will did not contain sufficient testamentary intent, (2) in failing to consider extrinsic evidence in determining the testamentary intent of the purported will, and (3) in setting the supersedeas bond in the amount of $400,000.

Brethouwer assigns on cross-appeal that the district court erred by receiving any part of Timmer's affidavit into evidence.

Clark assigns on cross-appeal that the district court erred (1) by receiving any part of Timmer's affidavit into evidence and (2) by finding the purported will was in Tiedeman's handwriting. She also assigns error to this court for reducing the amount of the supersedeas bond.

## STANDARD OF REVIEW

[1] The interpretation of the words in a will or a trust presents a question of law. When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below. *In re Estate of Etmund*, 297 Neb. 455, 900 N.W.2d 536 (2017).

[2] 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. *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015).

## ANALYSIS

*Not Valid Holographic Will on Its Face.*

The district court concluded that the document offered as Tiedeman's holographic will was in Tiedeman's handwriting, but that the words "I Brian L Tiedeman want all my All Property to Dustin Lovorn I here by attend to change my will" did not "express sufficient testamentary and donative intent" to qualify as a holographic will. Rather, the court concluded that the words expressed only "Tiedeman's intent to create a new will at a future date."

Like the district court, we begin our analysis by setting forth the statutory requirements for a holographic will. Pursuant to Neb. Rev. Stat. § 30-2328 (Reissue 2016):

> An instrument which purports to be testamentary in nature but does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator and, in the absence of such indication of date, if such instrument is the only such instrument or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument, from extrinsic circumstances, or from any other evidence.

[3,4] The district court found the purported holographic will did "not contain sufficient material provisions," which § 30-2328, set forth above, clearly requires. Material provisions of a will are defined as those provisions which express donative and testamentary intent. See *In re Estate of Foxley*, 254 Neb. 204, 575 N.W.2d 150 (1998). The district court cited to *Simonelli v. Chiarolanza*, 355 N.J. Super. 380, 810 A.2d 604 (2002), which also considered a purported holographic will, to explain that testamentary intent concerns whether the document was intended to be a will and donative intent relates to words reflecting specific bequests to particular beneficiaries. In *Simonelli*, the document at issue stated, "'In case of death-goes to Lisa Simonelli.'" 355 N.J. Super. at

384, 810 A.2d at 606. The New Jersey court stated that its governing statute for a holographic will required "'material provisions [to be] in the handwriting of the testator,'" *id.* at 385, 810 A.2d at 607, and concluded that the writing at issue was devoid of such material provisions and therefore failed to meet the statutory requirements of a holographic will. We also note the New Jersey court's reference to *In re Estate of Foxley, supra*, for its statement, "Such words constitute material provisions because they are the essence of any will." *Simonelli v. Chiarolanza*, 355 N.J. Super. at 388, 810 A.2d at 608. In summary, we agree that material provisions, meaning words which express donative and testamentary intent, are the essence of any will. Donative intent relates to words reflecting specific bequests to particular beneficiaries, and testamentary intent concerns whether the document was intended to be a will. See *Simonelli v. Chiarolanza, supra*. See, also, *In re Estate of Foxley, supra*.

The district court in the present matter, like the New Jersey court, concluded that the writing at issue failed to "contain sufficient material provisions expressing testamentary and donative intent and cannot be legally recognized as a valid holographic will." It found that the words "I Brian L Tiedeman want all my All property to Dustin Lovorn" failed to contain an operative verb to express a specific bequest and that the word "to" by itself does not have "present [or] future meaning." However, Lovorn asserts those particular words can only be understood as a specific bequest, because taken together, the words describe who the beneficiary is and what property is being devised. He concedes an "additional operative verb would have made the document more clear," but asserts "the document as a whole is sufficient to show Tiedeman's testamentary intent." Brief for appellant at 11. However, even if this court were to agree with Lovorn and find the writing was sufficient to establish donative intent, the writing still fails as a valid holographic will because of the lack of testamentary intent, which we discuss next.

The district court also considered the words "I here by attend to change my will" and stated that "even when read as 'intend' to change my will," the words do not "sufficiently evidence intent that the document is [Tiedeman's] final will, revoking all prior wills with the intention to dispose of his property upon his death." The court further stated, "[T]hese words express Tiedeman's intent to create a new will at a future date and not that this expression intended the creation of a final will."

[5,6] No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his or her property. *Gretchen Swanson Family Foundation, Inc. v. Johnson*, 193 Neb. 641, 228 N.W.2d 608 (1975). However, when construing the meaning of words in a document, the process requires determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument. See *In re Estate of Matthews*, 13 Neb. App. 812, 702 N.W.2d 821 (2005). We find no fault with the manner in which the district court examined and interpreted the words contained in the purported holographic will.

However, Lovorn argues the district court ignored the legal definition of the word "hereby" when determining whether there was present or future intent. He points to other jurisdictions' definitions, as well as the legal definition of "hereby" as either "[b]y this document" or "by these very words." Black's Law Dictionary 842 (10th ed. 2014). Lovorn argues that using one of these definitions would change Tiedeman's words in the document to "'I [by this very document] attend to change my will.'" Brief for appellant at 13. Lovorn asserts reading the words in this way requires the statement to be understood as a present intent to change his will.

Clark contends the use of the word "hereby" in the writing is inconclusive because it is not coupled with an operative verb, which prevents it from adding present intent. Brethouwer puts forth the same arguments, finding the lack of an operative

verb, even with the word "hereby," cannot be interpreted as present testamentary intent. Clark also contends the use of the verb "'want'" instead of "'devise,'" "'bequeath,'" or "'give'" indicates future intent and not a present intent to make a will. Brief for appellee Clark at 8.

As noted above, "hereby" means "[b]y this document," Black's Law Dictionary, *supra*, and "intend" means, in relevant part, "[t]o have in mind a fixed purpose to reach a desired objective; to have as one's purpose . . . [t]o signify or mean," *id.* at 930. The combination of the words "hereby intend" with the words "to change my will" does not clarify whether Tiedeman meant that with "this document," he was actually changing or revoking an existing will and creating a new will at that moment, or that with "this document," he was signifying his plan to change an existing will in the future. For example, the writing in question could have simply been a note written by Tiedeman to remind Timmer of his plans to later change his will, particularly since an admitted portion of Timmer's affidavit indicates Timmer told Tiedeman to schedule another appointment to discuss a new will. On the other hand, if the excluded portions of Timmer's affidavit could be considered, an argument can certainly be made that the writing was intended to evidence present testamentary intent. As set forth earlier, testamentary intent concerns whether the document was intended to be a will.

It is significant, therefore, whether the district court could have considered evidence outside the four corners of the purported will to determine testamentary intent under the circumstances present here. In construing the words within the four corners of the document, we can find no error with the district court's analysis and conclusion that the writing indicates only future intent and lacks present testamentary intent. Accordingly, we next consider whether extrinsic evidence may be considered to determine testamentary intent, because if so, a different outcome is possible.

*Extrinsic Evidence.*

[7,8] Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings. *In re Estate of Etmund*, 297 Neb. 455, 900 N.W.2d 536 (2017). In the present matter, the court construed the writing to indicate only Tiedeman's future intent to change his will, as discussed above. Lovorn argues the document should be construed to show present testamentary intent. Clearly, the words are ambiguous in this regard. And as noted above, Lovorn's argument is certainly more persuasive if the excluded portions of Timmer's affidavit can be considered. However, parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain. *In re Estate of Mousel*, 271 Neb. 628, 715 N.W.2d 490 (2006). The district court concluded that there was no latent ambiguity in the document at issue and that therefore, the extrinsic evidence contained in paragraphs 10, 12, and 13 of Timmer's affidavit could not be considered. We agree.

[9-12] A patent ambiguity is an ambiguity appearing on the face of the instrument, whereas a latent ambiguity is one outside the will. *In re Estate of Florey*, 212 Neb. 665, 325 N.W.2d 643 (1982). See, also, *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984) (patent ambiguity in will is one appearing on face of instrument as result of language contained therein). It is evident that the ambiguity at issue here is a patent ambiguity. The ambiguity arises from the writing itself, or from the face of the document. The words could indicate Tiedeman's intent to change an existing will with this particular document or his intent to change an existing will at some time in the future. A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will. *In re Estate of Mousel, supra*. Patent ambiguities are "resolved from within the four corners of the will and without consideration

of extrinsic evidence." *In re Estate of Matthews*, 13 Neb. App. 812, 816, 702 N.W.2d 821, 825 (2005) (court rejected argument that extrinsic evidence could be considered for purpose of considering circumstances under which holographic will was made; will at issue involved patent ambiguity, not latent ambiguity). Where in a will there is such a patent ambiguity resulting from the use of the words and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning. *In re Estate of Florey, supra*. Construction includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument. *In re Estate of Matthews, supra*. This is precisely what the district court did in this instance to reach its conclusion that the writing expressed "Tiedeman's intent to create a new will at a future date and not that this expression intended the creation of a final will."

[13-15] We now explain why the writing at issue does not involve a latent ambiguity, which would allow consideration of extrinsic evidence. A latent ambiguity exists when the testator's words are susceptible of more than one meaning, and the uncertainty arises not upon the words of the will as looked at themselves, but upon those words when applied to the object or subject which they describe. *In re Estate of Mousel, supra*. See *Krueger v. Krueger*, 169 Neb. 82, 98 N.W.2d 360 (1959). For example, when a will contained a devise of land to the "'Masonic Lodge for Crippled Children,'" on its face there would appear to be no ambiguity. See *In re Estate of Bernstrauch*, 210 Neb. 135, 136, 313 N.W.2d 264, 266 (1981). However, in *In re Estate of Bernstrauch*, it became evident that there was no such entity called the Masonic Lodge for Crippled Children. This resulted in two entities seeking to be designated as the proper devisee. Accordingly, the Nebraska Supreme Court concluded that a latent ambiguity existed, noting, "A latent ambiguity arises when a beneficiary is erroneously described or where no such beneficiary has ever existed

as the one so described" or "when two or more persons or organizations answer the description imperfectly." *Id*. at 139, 313 N.W.2d at 267. Further, "extrinsic evidence is admissible both to disclose and to remove the latent ambiguity of the will." *Id*. It is clear that a latent ambiguity is not the type of ambiguity at issue in the present appeal; the ambiguity in Tiedeman's purported will is within the face of the document itself and is therefore a patent ambiguity.

[16] In summary, a patent ambiguity is a case where the same word in a will has two meanings discernible from the face of the will itself, whereas a latent ambiguity is a case where the word has two meanings, but only when extrinsic evidence is brought to bear. *In re Estate of Smatlan*, 1 Neb. App. 295, 501 N.W.2d 718 (1992).

Clark correctly argues that any question regarding the testamentary intent of the purported holographic will is a patent ambiguity. She relies on *In re Estate of Matthews*, 13 Neb. App. 812, 702 N.W.2d 821 (2005), to assert extrinsic evidence cannot be used, and she argues the district court should have sustained her objection and kept the entirety of Timmer's affidavit out of evidence. As noted earlier, in *In re Estate of Matthews*, this court rejected an argument that extrinsic evidence could be considered for the purpose of considering the circumstances under which a holographic will was made, since the will at issue involved a patent ambiguity, not a latent ambiguity.

Both Brethouwer and Clark direct us to *In re Estate of Foxley*, 254 Neb. 204, 575 N.W.2d 150 (1998), where the court considered whether the decedent's handwriting on a photocopy of a previously executed will (and which was maintained in folder containing original will) was made with sufficient testamentary intent to constitute a proper holographic codicil. The decedent's personal representative submitted the original will and the purported holographic codicil for probate. A grandson objected to the admission of the purported codicil. Evidence was adduced that the decedent did not like

the grandson and that she told one of her attorneys she did not want the grandson to be an ongoing beneficiary or to participate in a previously established irrevocable trust. The trial court concluded the decedent had complied with the requirements of a holographic codicil and admitted the photocopy as a valid holograph, and this court affirmed on appeal. See *In re Estate of Foxley*, 6 Neb. App. 1, 568 N.W.2d 912 (1997). The Nebraska Supreme Court reversed, finding that the handwritten words at issue in that case, standing alone, did not evidence a clear testamentary intent. It stated:

> Although one might be sympathetic toward giving effect to the decedent's perceived testamentary intent, the Legislature has chosen to require that testamentary intent be expressed in certain ways before an instrument is entitled to be probated as a will. Unfortunately for the decedent, the instrument in this case fails. See *Matter of Estate of Muder*, 159 Ariz. 173, 765 P.2d 997 (1988). In this case, the testimony of [the decedent's] attorney and [one of] her daughter[s] . . . indicates that when [the decedent] changed the terms on the copy of her will, she was at least considering, if not actually intending, to write [her grandson] out of her will. We cannot conclude, however, that she had come to a final decision when writing on the copy of the will. We must remember that both the original and the copy of the will were found together in the den of [the decedent's] home, and an argument can be made that she was simply making notes on the copy of the will as to possible changes and had not, at the time of making those notes, made a final decision as to [her grandson]. If she was making a final decision, a plausible argument can be made that she would have made those changes on the original. If we make an exception in this case to the rule that holographic words, standing alone, have to demonstrate a clear testamentary intent, where do we stop? To weaken the rule would be to invite mischief or outright fraud by overreaching heirs, friends, or

> other potential beneficiaries taking advantage of testators in their most vulnerable moments, such as advanced age or right after an argument with one of the children or grandchildren. If one has made a final decision to write an heir out of his or her will, this must be done in such a way that the expression of this intention complies with the statute.

*In re Estate of Foxley*, 254 Neb. at 210-11, 575 N.W.2d at 154-55.

[17,18] *In re Estate of Foxley* certainly emphasizes the importance of being true to the statutory requirements by making sure that an instrument expresses testamentary intent in certain, clear ways before being entitled to be probated as a will; further, courts should not give effect to any "perceived" testamentary intent. *Id.* at 210, 575 N.W.2d at 154. Also significant in the quote above is the point made at the end regarding decisions to write an heir out of a will. Notably, the Nebraska Supreme Court has said that "'"the law will not suffer the heir to be disinherited upon conjecture."'" *Lowry v. Murren*, 195 Neb. 42, 45, 236 N.W.2d 627, 630 (1975). Although a testator may disinherit an heir, "'"the law will execute that intention only when it is put in a clear and unambiguous shape."'" *Id*. To the extent Tiedeman intended to disinherit his sisters, the writing at issue certainly does not provide for that in clear and unambiguous terms.

Lovorn's counsel also referred to *In re Estate of Foxley*, 254 Neb. 204, 575 N.W.2d 150 (1998), during oral argument as an example of a Nebraska case where extrinsic evidence was used to interpret the testamentary intent behind a document, because in its analysis, the Nebraska Supreme Court mentioned the location where the purported codicil and the original will were found. However, *In re Estate of Foxley* does not support Lovorn's position. The Nebraska Supreme Court was clear that the handwritten words on the photocopy of the will, standing alone, could not be understood to have testamentary intent without referring to the typewritten words

of the original will (extrinsic evidence) and that therefore, the purported holographic codicil was invalid. In that case, there may have been a different outcome that would have given effect to the decedent's perceived testamentary intent if the extrinsic evidence could have been considered. The same can be said here. However, the Nebraska Supreme Court was clear in *In re Estate of Foxley* that testamentary intent had to be discerned from the handwritten words alone. That is precisely what the district court did in this case.

Lovorn also asserts the district court should have admitted Timmer's entire affidavit based on *In re Estate of Dimmitt*, 141 Neb. 413, 3 N.W.2d 752 (1942). Lovorn reads *In re Estate of Dimmitt* to allow extrinsic evidence to be considered to "'show the facts and circumstances surrounding the situation under which Tiedeman created the will.'" Brief for appellant at 15, quoting *In re Estate of Dimmitt, supra*. However, Lovorn's reliance on *In re Estate of Dimmitt* is misplaced. The dispute in *In re Estate of Dimmitt* was over an attempt to admit both a will and a deed into probate together in order to convey a tract of the decedent's land. *In re Estate of Dimmitt* has been found to be distinguishable from cases where the will purports to be complete on its face and makes no reference to any extrinsic document. See *In re Estate of Matthews*, 13 Neb. App. 812, 702 N.W.2d 821 (2005). We likewise find *In re Estate of Dimmitt* inapplicable here, because there is no attempt in this case to incorporate an extrinsic document into the will like the deed in *In re Estate of Dimmitt*.

In summary, we agree with the district court's decision that the purported holographic will could not be legally recognized as a valid holographic will. The court correctly determined that the document did not contain sufficient material provisions expressing testamentary and donative intent within the document itself and that extrinsic evidence could not be considered to aid in that determination since there was no latent ambiguity.

*Supersedeas Bond.*

Lovorn assigned as error that the supersedeas bond amount of $400,000 set by the district court was both an excessive amount and in excess of 50 percent of his net worth, which he argues is contrary to Neb. Rev. Stat. § 25-1916 (Reissue 2016). However, after considering the motions for summary disposition on this issue, we reduced the supersedeas bond amount to $100,000, which Lovorn posted, making his assignment of error, and Clark's cross-appeal on this issue, moot before this court.

*Remaining Assigned Errors.*

On cross-appeal, Brethouwer and Clark both assign as error the district court's admission of Timmer's affidavit, other than paragraphs 10, 12, and 13. Clark also assigns as a separate error the district court's finding that the writing in question was in Tiedeman's handwriting. However, an appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Streck, Inc. v. Ryan Family*, 297 Neb. 773, 901 N.W.2d 284 (2017). Having already found the document in question is not a valid holographic will, we need not decide these remaining assigned errors.

## CONCLUSION

For the reasons set forth above, we affirm the district court's order.

Affirmed.

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

# Scott and Karie Hansmeier, appellants, v. Merva Hansmeier and Western Insurors-Platte Valley Agency, appellees.

912 N.W.2d 268

Filed April 10, 2018. No. A-17-115.

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. **Negligence: Proof.** To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages.
4. **Insurance: Agents.** An insurance agent has no duty to anticipate what coverage an insured should have.
5. ____: ____. When an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance.
6. **Insurance: Contracts: Breach of Contract: Negligence.** Absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages.
7. **Insurance: Agents.** It would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual

should have, absent the insured's requesting coverage in at least a general way.

8. **Insurance: Agents: Brokers.** If an insurance agent or broker undertakes to advise an insured, the agent or broker must use reasonable care to provide accurate information.
9. **Insurance: Agents: Brokers: Liability: Negligence.** An insurance agent or broker may be held liable for a negligent misrepresentation made to an insured.
10. **Insurance: Agents: Liability: Negligence: Proof.** In order for an insurance agent to be liable for negligent misrepresentation, the client must show that the insurance agent supplied the client with false information upon which the client reasonably relied and that the agent failed to exercise reasonable care or competence in communicating such information to the client.

Appeal from the District Court for Keith County: Richard A. Birch, Judge. Affirmed.

Brock D. Wurl, of Norman, Paloucek, Herman & Wurl, for appellants.

Sean A. Minahan and Patrick G. Vipond, of Lamson, Dugan & Murray, L.L.P., for appellees.

Pirtle, Bishop, and Arterburn, Judges.

Bishop, Judge.

Scott and Karie Hansmeier filed a negligence claim against Merva Hansmeier and her employer, Western Insurors-Platte Valley Agency (Western Insurors), claiming that Merva improperly advised them regarding the need to purchase workers' compensation insurance for their farm and ranch operation. The district court for Keith County granted Merva and Western Insurors' motion for summary judgment. Scott and Karie appeal, claiming that there are genuine issues of material fact that prevent summary judgment. We affirm.

## FACTUAL BACKGROUND

Scott and his wife, Karie, live in Ogallala, Nebraska. Scott and Karie own and operate a farm and ranch; they also

rent farmland and pastureland. Scott and his father are each sole proprietors of their own farming operations, but work together and are "basically 50/50 partners." Scott said he does "all [of] the work," some of the farmland is owned by his father, they each own their own machinery but use each other's as needed, and they crop share. In 2012, Scott had two full-time employees, including Mike Heble, and Scott's father had one full-time employee. Scott said he paid Heble, Scott's father paid his own employee, and they both paid the third employee; "[t]hat's how we get 50/50 out of the three guys."

Merva is Scott's aunt and was his insurance agent in 2012, and for several years prior. In 2012, Scott got all of his insurance through Merva, including his farm policy, homeowner's insurance, auto insurance, and health insurance. Scott did not provide any insurance for his employees.

On February 2, 2012, Heble injured his thumb in an auger while loading grain out of a bin and into a truck, and his thumb had to be "stitched . . . back on." When Scott tried to file a farm liability claim with his insurance company, he learned that Heble's injury was not covered.

In 2014, Heble filed a lawsuit against Scott, but that workers' compensation claim was eventually settled for an amount that included medical bills and a disability payment. Scott and his father split the costs of the settlement. The amount of the settlement was not put into evidence at the summary judgment hearing. The date of the settlement is not evident from our record; but it appears to have been after January 23, 2015, based on the allegations in Scott and Karie's complaint in the current case discussed below.

## PROCEDURAL BACKGROUND

On January 23, 2015, Scott and Karie filed a complaint against Merva and her employer, Western Insurors. Scott and Karie alleged that Merva and Western Insurors were negligent in advising them regarding the need to purchase workers' compensation insurance and that as a result, Scott and Karie

incurred costs defending a lawsuit brought by their employee, Heble, and they might also be liable for any judgment arising out of that lawsuit.

In their answer filed on March 24, 2015, Merva and Western Insurors denied the allegations made by Scott and Karie. Merva and Western Insurors asserted affirmative defenses, including contributory negligence, assumption of risk, estoppel, laches, waiver, and release.

On September 21, 2016, Merva and Western Insurors filed a motion for summary judgment, alleging that there were no genuine issues as to any material fact and that they were entitled to judgment as a matter of law.

The summary judgment hearing was held on November 18, 2016. The depositions of Scott and Merva were received into evidence at the hearing. Also received into evidence was a letter dated February 28, 2012, from Farmers Mutual of Nebraska to Scott and Karie regarding a claim under their insurance policy for Heble's accident. (In Scott's deposition, he refers to a "farm policy," and the letter from Farmers Mutual of Nebraska references a section of the policy related to "Farm and Personal Liability Protection," so references to this policy relate to liability coverage.)

In his deposition, Scott testified to the following: In 2012 and prior, Scott met with Merva on an "as needed basis" to discuss his insurance needs. They never talked about insurance for his employees. He initially said he never asked her about workers' compensation insurance, but then said he had. Scott knew prior to 2012 that he did not have to have workers' compensation insurance "on an agricultural person." He could not remember if he ever discussed with Merva that he did not have to have any workers' compensation insurance.

Scott testified that prior to February 2, 2012, Heble had previously been injured on the job two times. Scott paid Heble's medical expenses for the first injury because Heble did not have the money. But Scott did not pay the medical bills the second time. He said that Heble knew he did not have

workers' compensation insurance and that he was on his own for health insurance.

According to Scott, on February 2, 2012, Heble injured his thumb in an auger while loading grain out of a bin and into a truck, and his thumb had to be "stitched . . . back on." When Scott tried to file a farm liability claim with his insurance company, Merva told him Heble's injury was not covered. At some point after that, Scott learned for the first time that he was supposed to have provided his employees with notice that he was not providing workers' compensation insurance. Scott said that at some point Merva told him "this is a bad deal, not sure how it's all going to go out, but . . . if you end up getting sued, you're going to turn around and end up suing me on my errs [sic] and omissions."

Scott testified that Heble did file a workers' compensation lawsuit against him, but that the claim has since settled for an amount which included medical bills and a disability payment. Scott could not remember the amount of the settlement, but he and his father split the settlement costs.

Scott stated that prior to 2012, Merva had never told Scott that the "blanket" farm policy did not cover workers' compensation; and Scott acknowledged that he had never asked her if the liability portion of the policy covered injuries to his employees. Scott said that he had never read his policy "[f]rom front to back" and that he had not read the exclusion portions of his policy.

The letter dated February 28, 2012, from Farmers Mutual of Nebraska to Scott and Karie regarding the claim under their policy for Heble's accident, sets forth provisions of Neb. Rev. Stat. § 48-106 (Reissue 2010) regarding workers' compensation and includes the relevant provision from Scott and Karie's policy. The letter states that Scott and Karie had not been compliant with § 48-106(7), which provides that if an employer is exempt from the Nebraska Workers' Compensation Act by the subsection regarding services performed by an employee of an agricultural operation, then the employer must provide all

unrelated employees with written notice that the employer does not provide workers' compensation coverage, and the employee must sign the notice. Further, the letter notes that § 48-106(7) states that failure to provide the required notice subjects the employer to inclusion in the Nebraska Workers' Compensation Act, which requires an employer to carry a policy of workers' compensation. The letter then addresses the relevant provision from Scott and Karie's policy and the effect of their noncompliance with § 48-106(7). According to the letter:

> The policy states, under Section VI - Farm and Personal Liability Protection; Exclusions Applying to Section VI:
>
> ". . . **we** do not cover . . .
>
> "9. **Bodily injury** to a person if an **insured person** has or is required to have a policy providing workers' compensation, nonoccupational disease or occupational disease benefits covering the **bodily injury**."
>
> Because you did not comply with the Nebraska Workers' Compensation statute §48-106(7), this exclusion for coverage may apply to this accident.

(Emphasis in original.)

In her deposition, Merva testified to the following: In 2012, she knew about Scott's farming and ranching operation and that he had employees. Prior to 2012, she had multiple conversations with Scott about workers' compensation insurance. Merva told Scott they offered workers' compensation insurance and that she would be "happy" to get him a quote. When asked if she recommended Scott purchase the insurance, Merva said, "If the fact of telling him to protect his employees, that he probably should think about Work Comp., that's probably what I told him." And that "he, in my book, he should have it; but I can't tell somebody what they have to have." Merva said, "I did recommend that he had work — that he purchase it; but he told me it was too expensive. He told me that he doesn't have to have it by law. I told him that was true." When asked if, prior to 2012, she told Scott that if he was not going to carry workers' compensation insurance, that he needed to

have a waiver signed by his employees, Merva said, "No." When asked if she was aware that there was a waiver that Scott would need to have signed, Merva said, "No." She did not learn about the required waiver until after Heble's February 2012 accident.

Scott and Karie argued there were three claims: (1) They were instructed they were not required to purchase workers' compensation insurance, (2) they were never advised that workers' compensation insurance was available or necessary to cover their employees, and (3) Merva and Western Insurors failed to properly advise them as to their insurance needs. "It's basically an . . . errors and omissions against the agents claiming it [sic] didn't tell us we needed workers' compensation. Or if you did tell us, you didn't tell us anything about the notice requirement."

Merva and Western Insurors argued that Nebraska law is "pretty clear" that an independent insurance agent has no duty to advise an insured as to their insurance needs. They further argued that even if Merva tried to encourage workers' compensation insurance, Scott did not rely on that information.

In an order filed on January 10, 2017, the district court sustained Merva and Western Insurors' motion for summary judgment. The court found:

> To the extent Scott and Merva have a different recollection of their communications, that difference does not affect the result in this case and therefore is not material. There is no evidence from which it can be concluded that [Scott and Karie] requested workers[']compensation insurance and the policy they obtained unambiguously did not provide such coverage. The evidence is equally clear that [Scott and Karie] never asked [Merva and/or Western Insurors] for help or advice on how to exclude their employees from such coverage.

The court said the law is clear that an insurance agent has no duty to anticipate what coverage an insured should have. The court also noted the law requires that in order for an insurance

agent to be liable for negligent misrepresentation, a plaintiff must prove the agent provided him with false information upon which he reasonably relied and must prove the agent failed to exercise reasonable care or competence in communicating such information to the plaintiff. The court found that "the evidence is uncontradicted that what Merva told Scott about workers[']compensation coverage was accurate." The court stated that "[t]he law is also clear that she does not have a duty to provide him with unsolicited advice." Having found no material fact in dispute, the court granted Merva and Western Insurors' motion for summary judgment and dismissed Scott and Karie's complaint with prejudice.

Scott and Karie now appeal.

## ASSIGNMENTS OF ERROR

Scott and Karie assign that the district court erred in (1) sustaining Merva and Western Insurors' motion for summary judgment and dismissing Scott and Karie's case and (2) determining that this was a case involving anticipation of coverage, rather than a professional negligence case where an insurance agent provided incorrect and incomplete advice to her client.

## STANDARD OF REVIEW

[1,2] 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. *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017). 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. *Id.*

## ANALYSIS

In Scott and Karie's assignments of error and at oral argument, they claimed this is a professional negligence case.

However, as noted by Merva and Western Insurors' counsel at oral argument, Nebraska case law has never determined that an insurance agent is a "professional" for purposes of professional negligence actions under Neb. Rev. Stat. § 25-222 (Reissue 2016) (2-year statute of limitations for professional negligence actions). See *Motor Club Ins. Assn. v. Fillman*, 5 Neb. App. 931, 936, 568 N.W.2d 259, 263-64 (1997) (after setting forth description of "profession," court stated that "[i]t would seem that insurance agents do not fall within the statutory or case law definition of 'professionals' for purposes of § 25-222"; but finding it was not necessary to decide issue in that case). Furthermore, any professional negligence claim against Merva and Western Insurors would be barred by the 2-year statute of limitations set forth in § 25-222. Accordingly, Scott and Karie's claims against Merva and Western Insurors can only be for general negligence or negligent misrepresentation, and we address each below.

Scott and Karie primarily argue that there are material issues of fact in dispute which should prevent summary judgment. However, before considering the facts discernible from the record, we first consider the applicable law. Relevant to this case, § 48-106 provides:

> (2) The [Nebraska Workers' Compensation Act] shall not apply to:
>
> . . . .
>
> (d) Service performed by a worker when performed for an employer who is engaged in an agricultural operation and employs unrelated employees unless such service is performed for an employer who during any calendar year employs ten or more unrelated, full-time employees[.]
>
> . . . .
>
> (6) An employer who is exempt from the act under subsection (2) of this section may elect to bring the employees of such employer under the act. Such election is made by the employer obtaining a policy of workers' compensation insurance covering such employees. . . .

> (7) Every employer exempted under subdivision (2)(d) of this section who does not elect to provide workers' compensation insurance under subsection (6) of this section shall give all unrelated employees at the time of hiring or at any time more than thirty calendar days prior to the time of injury the following written notice which shall be signed by the unrelated employee and retained by the employer: "In this employment you will not be covered by the Nebraska Workers' Compensation Act and you will not be compensated under the act if you are injured on the job or suffer an occupational disease. You should plan accordingly." Failure to provide the notice required by this subsection subjects an employer to liability under and inclusion in the act for any unrelated employee to whom such notice was not given.

The evidence establishes that Scott knew he was not providing workers' compensation insurance to his employees. Scott testified that prior to February 2, 2012, Heble had previously been injured on the job two times. Scott paid Heble's medical expenses for the first injury, but he did not pay his medical bills the second time. Scott said that Heble knew he did not have workers' compensation insurance and that he was on his own for health insurance. Further, Scott initially said he never asked Merva about workers' compensation insurance, but he then said he had. Also, by his own testimony, Scott knew prior to 2012 that he did not have to have workers' compensation insurance "on an agricultural person." So the issue is not about whether he had to have workers' compensation insurance or should have been advised to have it; rather, this case turns on whether an insurance agent has an affirmative duty to tell an employer about the written notice and signature provisions contained in § 48-106. Merva and Western Insurors argue they had no duty to advise Scott and Karie as to the steps necessary to exclude their employees from the workers' compensation requirement. Based upon the facts viewed most favorably to Scott and Karie in this case, we agree.

[3] To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages. *Lewison v. Renner*, 298 Neb. 654, 905 N.W.2d 540 (2018). In their complaint and at the summary judgment hearing, Scott and Karie alleged, in part, that Merva and Western Insurors never advised them that workers' compensation was available or necessary to cover their employees.

[4,5] The Nebraska Supreme Court has stated that an insurance agent has no duty to anticipate what coverage an insured should have. *Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994). Rather, when an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance. *Id*.

[6,7] While it may be good business for an insurance agent to make such suggestions, absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages. *Polski v. Powers*, 221 Neb. 361, 377 N.W.2d 106 (1985) (although agent may have been aware that clients had built new building and were keeping hogs in building, he had no knowledge that they wished to change their insurance coverage or to obtain other or different coverage). "[I]t would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way." *Id*. at 364, 377 N.W.2d at 108. See, also, *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991) (no evidence that clients requested underinsured motorist coverage over and above someone else's liability insurance or that agent agreed to obtain such coverage; therefore, agent and his agency could not be held liable for failing to obtain such coverage).

As well-stated by the district court in this case:

> If it is an unreasonable burden to require insurance agents to anticipate what coverage an individual should have absent the insured's request, it would be an equally unreasonable burden to require an insurance agent to anticipate what steps the insured should take to not have the coverage he has already told the agent he does not want.

Because Merva had no duty to advise Scott and Karie that workers' compensation insurance was available or necessary, their negligence action fails as a matter of law. Further, as noted previously, Scott testified as to his own understanding that workers' compensation insurance was not required "on an agricultural person."

Scott and Karie also raise a negligent misrepresentation claim, alleging that they were instructed they were not required to purchase a workers' compensation policy and that they relied on that advice.

[8] A negligent misrepresentation cause of action does not require a request to obtain certain coverage. *Flamme, supra*. If an insurance agent or broker undertakes to advise an insured, the agent or broker must use reasonable care to provide accurate information. *Id*. The Supreme Court in *Flamme* cited to *Trotter v. State Farm*, 297 S.C. 465, 377 S.E.2d 343 (S.C. App. 1988), for the foregoing proposition of law.

In *Trotter*, the client was a business owner who contacted an insurance agent to obtain "'full protection'" on a work truck. 297 S.C. at 469, 377 S.E.2d at 346. The client filled out an application and explained about his business, his employees, and how many miles the truck would be driven. The agent wrote a commercial policy on the client's truck and a personal policy on his other vehicles. The commercial policy included a standard exclusion for any injury to an "'employee of the insured arising out of his or her employment.'" *Id.* The agent neither reviewed the policy with the client, told him about the exclusion, discussed other types of insurance, nor asked

whether the client needed workers' compensation insurance. The client, likewise, neither asked the agent to assess his insurance needs nor inquired about other types of insurance. The client did not communicate a desire for workers' compensation or any other insurance. Their conversation was confined to the procurement of insurance on his vehicles.

Later, one of the client's employees in *Trotter* was injured in an accident while riding in the work truck. The insurance company wrote the client a letter denying coverage for the employee's injuries due to the exclusion. Until the client received the letter, he was unaware of the exclusion, as he had not read his policy. The employee sued the client and was eventually awarded a judgment for his injuries.

The client in *Trotter* then brought suit against the agent and the insurance company, alleging, in part, that they negligently failed to advise him of an exclusion in his motor vehicle insurance policy. A jury verdict was entered for the client. The South Carolina Court of Appeals reversed, holding that the agent and insurance company were under no duty to advise the client of the employee exclusion in his policy or to advise him that he needed workers' compensation insurance. The court also held that the client failed to prove the agent undertook to advise the client either expressly or impliedly. As to an implied undertaking, there was no evidence that (1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on.

Here, as in *Trotter, supra*, there is no evidence that Merva received consideration beyond the payment of the premium. And there was no evidence that Scott and Karie made a clear request for advice. While there was a course of dealing over an extended period of time in this case, and Merva stated that she did recommend workers' compensation insurance to Scott, there is no evidence that Merva's advice was being relied

upon by Scott. In fact, Merva testified that Scott declined the workers' compensation insurance, because it was too expensive, and told her that, by law, he did not have to have workers' compensation insurance. And Scott testified that he knew prior to 2012 that he "didn't have to have workers' compensation on an agricultural person."

[9,10] An insurance agent or broker may be held liable for a negligent misrepresentation made to an insured. *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991). In order for an insurance agent to be liable for negligent misrepresentation, the client must show that the insurance agent supplied the client with false information upon which the client reasonably relied and that the agent failed to exercise reasonable care or competence in communicating such information to the client. See *Hobbs v. Midwest Ins., Inc.*, 253 Neb. 278, 570 N.W.2d 525 (1997).

In order to be liable for negligent misrepresentation, Merva must have given Scott and Karie false information, and there is no indication that she did so. Scott told Merva that, by law, he did not have to have workers' compensation insurance, and she told him that that was true. Her agreement that Scott's assessment of the law was true did not constitute an instruction that he should not purchase a workers' compensation policy. There is no evidence that Merva provided Scott with false information; and for that reason alone, any negligent misrepresentation claim fails. Additionally, because Scott knew prior to 2012 that he did not have to have workers' compensation insurance "on an agricultural person," he did not reasonably rely on any information supplied by Merva; this is another reason why any negligent misrepresentation claim fails.

Based on the record before us, even when considering the facts most favorable to Scott and Karie, it appears the parties discussed workers' compensation insurance and Scott opted to not purchase it because it was too expensive. The record shows Scott knew he did not need to carry workers' compensation insurance; he just did not know about the notice

and signature requirements contained in § 48-106(7). When Merva agreed with Scott that he was not required to carry workers' compensation insurance, it was not her responsibility to further inform Scott that a workers' compensation statute set forth specific steps to be taken when an exempt employer chooses not to offer workers' compensation insurance. As aptly noted by Merva and Western Insurors' counsel at oral argument, the Nebraska Workers' Compensation Act governs employers, not insurance agents. The district court was correct in stating that to the extent Scott and Merva have a different recollection of their communications, that difference does not affect the result in this case and is therefore not material. Any claim of negligence or negligent misrepresentation fails as a matter of law.

## CONCLUSION

For the reasons stated above, we affirm the decision of the district court granting Merva and Western Insurors' motion for summary judgment.

Affirmed.

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

# David Lynn Metzler, appellant, v. Mary Grace Metzler, appellee.

913 N.W.2d 733

Filed April 10, 2018. No. A-17-242.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue that does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
3. **Jurisdiction: Divorce.** Under the doctrine of divisible divorce, divorce proceedings contain two principal components: (1) the dissolution of the marital status and (2) the adjudication of the incidences of the marriage.
4. **Jurisdiction: Divorce: Child Support: Alimony.** The divisibility doctrine holds that while a state court may have jurisdiction over the marriage to dissolve it, that same court may lack personal jurisdiction to adjudicate personal matters such as support or alimony.
5. **Jurisdiction: Divorce.** The dissolution of the marital status is generally considered an in rem proceeding where the marriage is the res adjudicated.
6. **Jurisdiction: States.** In rem proceedings require minimum contacts between a person's interest in the res adjudicated and the forum state.
7. **Jurisdiction: States: Domicile.** Because states have a strong interest in the marital status of their residents, a marriage has sufficient contacts with a state to justify that state's exercise of jurisdiction over it when one spouse has established a domicile therein.
8. ____: ____: ____. A nonresident spouse's absence does not diminish a state's interest in, or contacts with, the resident spouse's marriage, even

if the nonresident spouse has never traveled to the resident spouse's new state.

9. **Due Process: Jurisdiction: States: Domicile: Service of Process.** If the resident spouse has established a bona fide domicile in a state and his or her service on the nonresident spouse satisfied procedural due process, the state has jurisdiction to adjudicate the resident spouse's marital status.
10. **Divorce: Actions: Domicile: Words and Phrases.** The language of Neb. Rev. Stat. § 42-349 (Reissue 2016) requiring an "actual residence in this state" means that one party is required to have a bona fide domicile in Nebraska for 1 year before commencement of a dissolution action.
11. **Domicile: Intent: Words and Phrases.** Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home.
12. **Domicile: Intent.** The absence of either presence or intention thwarts the establishment of domicile.
13. **Domicile.** Once established, domicile continues until a new domicile is perfected.
14. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
15. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
16. ____: ____: ____. When a state construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the Due Process Clause, the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process.
17. ____: ____: ____. Due process for personal jurisdiction over a nonresident defendant requires that the plaintiff allege specific acts by the defendant which establish that the defendant had the necessary minimum contacts before a Nebraska court can exercise jurisdiction over a person.
18. **Jurisdiction: States.** When considering the issue of personal jurisdiction, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

19. **Due Process: Jurisdiction: States.** The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
20. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction deals with a court's ability to hear a case; it is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
21. **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.
22. **Actions: Pleadings.** Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.
23. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Appeal from the District Court for Sarpy County: George A. Thompson, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Stephanie Weber Milone, of Milone Law Office, for appellant.

Todd O. Engleman, of Nebraska Legal Group, for appellee.

Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

Moore, Chief Judge.

## I. INTRODUCTION

David Lynn Metzler appeals from an order of the district court for Sarpy County that dismissed his complaint for dissolution of marriage. We conclude that the court erred in dismissing David's complaint with respect to his request for the court to dissolve his marriage. However, we find that the district court was correct in dismissing David's complaint

with respect to issues relating to child custody, parenting time, child support, and division of property and debts. Therefore, we affirm in part, and in part reverse and remand for further proceedings.

## II. BACKGROUND

On October 17, 2016, David filed a pro se complaint for dissolution of marriage in the district court for Sarpy County. David used a preprinted complaint for dissolution of marriage (with children) form for self-represented litigants, which form is available on the Nebraska Judicial Branch website. In his complaint, David set forth his address in Sarpy County and alleged that he has lived in Nebraska for more than 1 year with the intention of making this state a permanent home. David alleged that his spouse, Mary Grace Metzler, lives at a particular address in Pennsylvania. The complaint stated that David and Mary were married on October 27, 2000, in British Columbia, Canada, and that the marriage is irretrievably broken. The complaint contains the names and years of birth of the parties' four children. The complaint set forth the children's addresses and the persons with whom the children have lived for the last 5 years. The complaint referenced another proceeding in a British Columbia court concerning the custody of or parenting time with the children, including a notation of "December 08, 2015, determination of guardians." The form complaint includes a paragraph that states, "[c]hild custody, parenting time, or other access, and child support are not contested." The form complaint also includes paragraphs that state property and debts have been accumulated and should be fairly divided. However, a handwritten notation appears below these paragraphs, which reads "[n]one to be divided" followed by the initials "DM." David requested that the court dissolve his marriage. After the paragraph requesting that the court fairly divide the property and debts between him and Mary, a handwritten note again states "[n]one to be divided" followed by the initials "DM." As a further request, David checked the

box next to "[a]ward my spouse and me joint legal and joint physical custody of the child(ren)." The form complaint also contained paragraphs requesting that the court order a parenting plan and award child support according to the Nebraska Child Support Guidelines.

On February 9, 2017, Mary filed a verified motion to dismiss, claiming that Nebraska courts lack personal jurisdiction of her and subject matter jurisdiction over David's complaint. Additionally, she claimed David's complaint failed to state a claim upon which relief can be granted. On February 27, the district court held a hearing on Mary's motion to dismiss. The district court filed an order dated February 28, 2017, granting Mary's motion to dismiss. The court noted that it was "without jurisdiction to make determination" on child custody and support because the children have never resided in Nebraska and a British Columbia court issued a prior order on these issues. Despite David's request that the court retain jurisdiction to litigate the dissolution, the court reasoned that "the issues of child custody and support are so integrated in the subject matter of the case that Nebraska is not the most convenient forum, nor the appropriate forum." David timely filed this appeal.

## III. ASSIGNMENT OF ERROR

David assigns the district court erred in dismissing his complaint for dissolution of marriage.

## IV. STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 297 Neb. 999, 902 N.W.2d 159 (2017).

[2] Determination of a jurisdictional issue that does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

## V. ANALYSIS

### 1. Personal Jurisdiction

David argues that because Mary was personally served with a summons and a copy of his complaint, the district court acquired personal jurisdiction over her. Mary counters that because she has never been to Nebraska, she has not maintained "'minimum contacts'" with the state to be subject to its court's jurisdiction. Brief for appellee at 5. Based on the authority that follows, we conclude that there is a distinction between personal jurisdiction over the marriage of a resident spouse and personal jurisdiction over a nonresident spouse. We find that because David has established the requisite domicile in Nebraska, his marriage with Mary has sufficient contact with the state to justify the district court's exercise of jurisdiction over the marriage and David's request to dissolve it.

[3,4] Under the doctrine of divisible divorce, divorce proceedings contain two principal components: (1) the dissolution of the marital status and (2) the adjudication of the incidences of the marriage. See, *Tiedeman v. Tiedeman*, 195 Neb. 15, 236 N.W.2d 807 (1975); *Harvey v. Harvey*, 6 Neb. App. 524, 575 N.W.2d 167 (1998). The divisibility doctrine holds that while a state court may have jurisdiction over the marriage to dissolve it, that same court may lack personal jurisdiction to adjudicate personal matters such as support or alimony. *Tiedeman v. Tiedeman, supra*; *Harvey v. Harvey, supra*. As discussed below, Nebraska courts have jurisdiction to dissolve David's marriage with Mary, but they lack the necessary personal jurisdiction over Mary and her children to adjudicate the more personal matters, such as child custody, parenting time, child support, or division of assets and debts.

#### (a) Dissolution of Marital Status

[5-7] The dissolution of the marital status is generally considered an in rem proceeding. *Stucky v. Stucky*, 186 Neb. 636, 643, 185 N.W.2d 656, 660 (1971) (Newton, J., dissenting) ("an action for divorce is universally considered to be an action in rem"). The marriage is the res adjudicated. 27A C.J.S.

*Divorce* § 10 (2016). In rem proceedings require minimum contacts between a person's interest in the res adjudicated and the forum state. *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). Because states have a strong interest in the marital status of their residents, a marriage has sufficient contacts with a state to justify that state's exercise of jurisdiction over it when one spouse has established a domicile therein:

> Domicil [sic] creates a relationship to the state which is adequate for numerous exercises of state power. [Citations omitted.] Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service [citation omitted] meet the requirements of due process.

*Williams v. North Carolina*, 317 U.S. 287, 298-99, 63 S. Ct. 207, 67 L. Ed. 279 (1942).

[8,9] A nonresident spouse's absence does not diminish a state's interest in, or contacts with, the resident spouse's marriage, even if the nonresident spouse has never traveled to the resident spouse's new state. See *id*. If the resident spouse has established a bona fide domicile in a state and his or her service on the nonresident spouse satisfied procedural due process, the state has jurisdiction to adjudicate the resident spouse's marital status. See, *Estin v. Estin*, 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948); *Williams v. North Carolina, supra*; *Vanvelzor v. Vanvelzor*, 219 P.3d 184 (Alaska 2009); *Collins v. Collins*,

165 Ohio App. 3d 71, 844 N.E.2d 910 (2006); *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001); *Taylor v. Jarrett*, 191 Ariz. 550, 959 P.2d 807 (Ariz. App. 1998); *Smith v. Smith*, 459 N.W.2d 785 (N.D. 1990); *In re Marriage of Rinderknecht*, 174 Ind. App. 382, 367 N.E.2d 1128 (1977); *Stottlemyer v. Stottlemyer*, 458 Pa. 503, 329 A.2d 892 (1974). See, also, Restatement (Second) Conflict of Laws § 71 (1971).

[10-13] David satisfied Nebraska's residency requirement to obtain a divorce. In relevant part, Neb. Rev. Stat. § 42-349 (Reissue 2016) provides as follows:

> No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his or her permanent home for at least one year prior to the filing of the complaint . . . .

The Nebraska Supreme Court has interpreted the language of § 42-349 requiring an "actual residence in this state" to mean that one party is required to have a bona fide domicile in Nebraska for 1 year before commencement of a dissolution action. *Catlett v. Catlett*, 23 Neb. App. 136, 869 N.W.2d 368 (2015). Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home. *Id.* The absence of either presence or intention thwarts the establishment of domicile. *Id.* Once established, domicile continues until a new domicile is perfected. *Id.*

In David's complaint for dissolution of marriage, he alleged that he has lived in Nebraska for more than 1 year with the intent of making this state a permanent home, which Mary does not dispute. Accepting the allegations in the complaint as true, we conclude David is a resident of Nebraska under § 42-349 who can properly petition a Nebraska court to dissolve his marriage.

In addition, David satisfied procedural due process by complying with the process service requirements for dissolution proceedings. Neb. Rev. Stat. § 42-352 (Reissue 2016) states

that "[s]ummons [for a proceeding under Neb. Rev. Stat. §§ 42-347 to 42-381 (Reissue 2016)] shall be served upon the other party to the marriage by personal service or in the manner provided in section 25-517.02." Mary was personally served by a county sheriff in Pennsylvania, and therefore, David complied with the service requirement of § 42-352. As a result, the district court had jurisdiction to dissolve David and Mary's marriage.

Mary cites the Nebraska Supreme Court's decisions in *Stucky v. Stucky*, 186 Neb. 636, 185 N.W.2d 656 (1971), and *York v. York*, 219 Neb. 883, 367 N.W.2d 133 (1985), to support her argument that the district court lacks jurisdiction to dissolve her marriage because it lacks personal jurisdiction of her. We find these cases to be factually distinguishable. The principles stated in each are consistent with our analysis.

In *Stucky v. Stucky, supra*, the parties resided together in Nebraska, but upon separation, the husband left the state. The husband returned to Nebraska only twice after the parties' separation. However, he continued to deposit money in a joint bank account in Nebraska, he maintained credit accounts and utilities on the family home in Nebraska in his name, and the parties made joint mortgage payments. Based upon the husband's contacts with Nebraska, the Nebraska Supreme Court determined that the district court had in personam jurisdiction over the husband to enter a personal judgment for support, alimony, and costs. The decree also awarded the husband certain property.

In *York v. York, supra*, the parties were married in Nebraska, lived in the state together for approximately 17 years, and had five children born here. The parties also owned a home together in Nebraska. The husband moved out of state and was personally served with summons upon the filing of the wife's action for dissolution. The Nebraska Supreme Court determined that Nebraska had in personam jurisdiction over the presently nonresident husband, since Nebraska was the last place of marital domicile and his wife and children still resided in Nebraska.

While the above cases support the proposition that a court cannot make determinations about the incidences of marriage without personal jurisdiction, they do not deny a court's ability to grant a resident spouse's request for dissolution of a marriage. Because a court does not need personal jurisdiction of the nonresident spouse to adjudicate the marital status of the resident spouse, the principles outlined in *Stucky* and *York* do not apply here.

Nebraska courts have jurisdiction to dissolve a marriage so long as the petitioner meets the residency requirements and procedural due process is satisfied. After our de novo review of the record, we conclude the district court erred when it dismissed David's petition requesting a dissolution of his marriage.

(b) Incidences of Marriage

[14,15] On the other hand, Nebraska courts lack personal jurisdiction over Mary to adjudicate personal matters that are incidences of the marriage, such as child custody, parenting time, child support, and division of property and debts. Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014). Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Id.*

[16] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), provides that a court may exercise personal jurisdiction over a person "[w]ho has any . . . contact with or maintains any . . . relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." When a state construes its long-arm statute to confer jurisdiction to the fullest extent

permitted by the Due Process Clause, the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process. *RFD-TV v. WildOpenWest Finance, supra*.

[17-19] Due process for personal jurisdiction over a nonresident defendant requires that the plaintiff allege specific acts by the defendant which establish that the defendant had the necessary minimum contacts before a Nebraska court can exercise jurisdiction over a person. *Id.* When considering the issue of personal jurisdiction, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Id.*

Here, there is no dispute that Mary and their children have never had any contact with Nebraska whatsoever. Mary and David were married, had four children, and separated in Canada. Mary and their children have never traveled to Nebraska. While David alleged there was no marital property or debts for the court to divide, the form complaint requested a fair division of property and debts. Further, although the complaint acknowledges a prior proceeding concerning custody of the children in a British Columbia court, the form complaint included a paragraph requesting that the court grant David joint legal and physical custody of the children. The form complaint also requested that the court determine a parenting plan and set child support. To the extent that David's complaint included requests for relief that are personal in nature, i.e., child custody, parenting time, child support, and division of property and debts, we find the district court did not err in dismissing these requests in the complaint due to lack of personal jurisdiction over Mary.

### 2. Subject Matter Jurisdiction

David argues the district court also had subject matter jurisdiction to adjudicate his complaint for divorce. Mary disagrees, arguing the Nebraska courts lack subject matter jurisdiction of David's divorce petition because there are no marital assets in Nebraska.

[20] Subject matter jurisdiction deals with a court's ability to hear a case; it is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *House v. House*, 24 Neb. App. 595, 894 N.W.2d 362 (2017). Neb. Rev. Stat. § 42-351 (Reissue 2016) provides in relevant part as follows:

> (1) In proceedings under sections 42-347 to 42-381, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning *the status of the marriage*, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorney's fees.

(Emphasis supplied.) As discussed above, David's complaint requests the dissolution of his marriage, which is clearly within the district court's jurisdiction. Based upon our de novo review of the record, we conclude that the district court had subject matter jurisdiction to adjudicate David's divorce under §§ 42-349 and 42-351. We find the district court erred in granting Mary's motion to dismiss David's complaint for lack of subject matter jurisdiction.

### 3. Failure to State Claim

Last, David argues that his complaint contains all the allegations required by § 42-349 and Neb. Rev. Stat. § 42-353 (Reissue 2016). Therefore, it states a claim upon which relief may be granted, and the district court should not have dismissed it based upon Neb. Ct. R. Pldg. § 6-1112(b)(6). We agree.

[21-23] 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. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). Nebraska is a notice pleading jurisdiction. *Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, 899 N.W.2d 227 (2017). Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim, showing that the pleader is entitled to relief. *Id.* Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

Section 42-353 details the allegations a dissolution of marriage complaint must contain:

> The complaint shall include the following:
>
> (1) The name and address of the plaintiff and his or her attorney, except that a plaintiff who is living in an undisclosed location because of safety concerns is only required to disclose the county and state of his or her residence and, in such case, shall provide an alternative address for the mailing of notice;
>
> (2) The name and address, if known, of the defendant;
>
> (3) The date and place of marriage;
>
> (4) The name and year of birth of each child whose custody or welfare may be affected by the proceedings and whether (a) a parenting plan as provided in the Parenting Act has been developed and (b) child custody, parenting time, visitation, or other access or child support is a contested issue;
>
> (5) If the plaintiff is a party to any other pending action for divorce, separation, or dissolution of marriage, a statement as to where such action is pending;
>
> (6) Reference to any existing restraining orders, protection orders, or criminal no-contact orders regarding any party to the proceedings;

(7) A statement of the relief sought by the plaintiff, including adjustment of custody, property, and support rights; and

(8) An allegation that the marriage is irretrievably broken if the complaint is for dissolution of marriage or an allegation that the two persons who have been legally married shall thereafter live separate and apart if the complaint is for a legal separation.

David's complaint contained each of the allegations required above. Therefore, we conclude that David stated a claim upon which the district court could grant relief and that the district court erred in granting Mary's motion to dismiss for failure to state a claim.

## VI. CONCLUSION

The district court had personal and subject matter jurisdiction to adjudicate David's request for a dissolution of his marriage, and David's complaint stated a cause of action for such dissolution. However, the district court lacked personal jurisdiction of Mary to adjudicate issues relating to child custody, parenting time, child support, and division of property and debts. Therefore, we affirm the dismissal of any claims contained in the complaint for child custody, parenting time, child support, and division of property and debts. We reverse the dismissal of the request for a dissolution of marriage contained in the complaint and remand the cause for further proceedings.

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

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# In re Estate of Harley Newman, deceased. Linda Martens, Personal Representative of the Estate of Harley Newman, deceased, appellee, v. Stewart Newman, appellant.

913 N.W.2d 744

Filed April 17, 2018. No. A-16-1049.

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. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous.
4. **Trial: Judges: Words and Phrases.** An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.
5. **Trial: Witnesses: Parties.** Neb. Rev. Stat. § 24-734(4) (Reissue 2016) only pertains to allowing a witness to be examined telephonically with the consent of the parties. It does not address permitting a party to appear and participate at trial telephonically.
6. **Due Process: Trial: Witnesses: Evidence.** When a person has a right to be heard, procedural due process includes a reasonable opportunity to refute or defend against a charge or accusation and a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation.
7. **Constitutional Law: Prisoners.** A prisoner has no absolute constitutional right to be released from prison so that the prisoner can be present at a hearing in a civil action.
8. **Due Process: Prisoners: Right to Counsel.** Although due process does not require the appointment of counsel to represent a prisoner in a private civil matter, due process does require that the prisoner receive

meaningful access to the courts to defend against suits brought against him or her.

9. **Prisoners: Courts: Claims: Damages: Proof.** To establish a violation of the right of meaningful access to the courts, a prisoner must establish the State has not provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury.
10. **Constitutional Law: Prisoners: Courts.** The constitutional right to access the courts does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences directly or collaterally and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental and perfectly constitutional consequences of conviction and incarceration.
11. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
12. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
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 County Court for Douglas County: Craig Q. McDermott, Judge. Reversed and remanded for a new trial.

Stewart Newman, pro se.

Nick Halbur, of Elder Law of Omaha, P.C., L.L.O., for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Pirtle, Judge.

## INTRODUCTION

Stewart Newman appeals from an "Order for Probate of Will" entered in the county court for Douglas County wherein the court found that the last will and testament of Harley

Newman, executed February 15, 2016, was a valid will and should be probated by the personal representative, Linda Martens. Stewart challenges multiple pretrial matters, as well as the court's determination that the will was valid, and the court's failure to allow his claim for the return of personal property. Based on the reasons that follow, we reverse, and remand for a new trial.

## BACKGROUND

This case involves the formal probate of Harley's last will and testament. Harley, the father of Stewart and Martens, passed away on February 22, 2016. On March 28, Martens filed an "Application for Informal Probate of Will and Informal Appointment of Personal Representative," along with Harley's last will and testament executed on February 15. On March 29, the "Registrar" issued a "Certificate to Probate Will" and appointed Martens the personal representative. Stewart filed a "Petition of Claim and Request of Formal Testacy" on April 15, requesting a formal probate of Harley's will and requesting an order to return Stewart's personal property that was left in Harley's custodial care. The court set a pretrial conference hearing for May 31. Stewart filed additional motions before the May 31 hearing.

Stewart was not present at the pretrial conference hearing on May 31, 2016, because he was incarcerated. Several matters were addressed. However, the hearing was ultimately set aside for a new pretrial conference on August 12 to afford Stewart the opportunity to be heard. At the August 12 hearing, Stewart participated in the hearing by telephone and the court informed the parties that all issues addressed at the May 31 hearing would be reconsidered.

At the August 12, 2016, hearing, Stewart was granted in forma pauperis status. The court denied his motion for appointment of counsel. The court also considered Stewart's "Motion for Subpoena," in which he asked the court for "an Order to Subpoena the phone records of the Nebraska Department of Corrections Services," specifically those records of calls

between him and Harley. Martens objected to the form of the filing, which the court sustained. Stewart also filed a motion which included a request that Martens produce an address for Diana Kappel, his ex-wife. At the hearing, Martens' counsel stated that Martens did not have Kappel's address and the court ruled that Martens could not be compelled to produce evidence she did not have or to investigate for Stewart.

Stewart had also filed a motion to appear telephonically. Martens objected to allowing Stewart to appear or to testify telephonically for trial, citing Neb. Rev. Stat. § 24-734(4) (Reissue 2016). The court granted Stewart's motion to the extent of nonevidentiary hearings. It ruled that trial would not be held telephonically because there was no stipulation or consent by all the parties to conduct an evidentiary hearing by such means.

Another nonevidentiary hearing was held on September 22, 2016, to address additional motions and filings by Stewart. Stewart participated by telephone. Stewart's request for Kappel's address was again discussed, and Martens' attorney again stated neither he nor Martens had the address. Stewart's "Motion to Issue a Transport Order," allowing him to be physically present for trial, was denied. Before the conclusion of the hearing, the court told Stewart that he could submit his arguments for trial in a brief and indicated that it would not make a decision until it had received his brief.

Trial was held on September 27, 2016. The court took judicial notice of Harley's last will and testament already in the court record and heard testimony from three witnesses. The evidence showed that Harley executed his last will and testament on February 15 in his wife's room at a health care facility where she resided. Harley's wife and two daughters were present, and he was able to identify those individuals correctly.

Melinda Streetman, a paralegal and notary public, testified that she reviewed the key provisions of the will with Harley and that he verified their accuracy. Streetman specifically

went over a provision in the will that excluded Stewart from receiving any portion of Harley's estate, and Harley affirmed his intent to exclude Stewart. Only Streetman, Harley, and his wife were present during the discussion of the provisions in the will.

Streetman identified Harley's last will and testament and her own signature on the will accompanied by her notary seal. She also testified that she witnessed Harley sign the document and that she observed the two witnesses, who both worked at the facility, sign the will.

The first witness, a social worker, testified that she signed the will on February 15, 2016. She identified her signature and Harley's signature on the will. She testified that she knew Harley because his wife was her patient at the facility where she worked, Harley had been her patient at one time, and Harley visited his wife every day. The social worker testified that on the day the will was executed, Harley was not acting out of the ordinary, there was nothing unusual about his behavior, and she had no concerns about his cognition.

The other witness to the will, a nurse, testified that she knew Harley and his wife because she provided care to Harley's wife. She testified that she was present when Harley signed the will, she had no concerns about his cognition, and there was nothing unusual about his behavior. She identified her signature and Harley's signature on the will.

Following trial, the court entered an order on September 29, 2016, finding that Harley's last will and testament was a valid will. It granted the application for probate of the will and ordered that the will be probated by Martens.

## ASSIGNMENTS OF ERROR

Stewart assigns that the trial court erred in (1) having ex parte communication with Martens' attorney, as well as failing to allow Stewart to be heard and present at trial; (2) making a decision on the will before the court received his brief; (3) not allowing him his right to the discovery of evidence to

support his claims; (4) finding that the document at issue was a self-proven will and that Harley was competent to sign it; (5) failing to find that Stewart is a "rightful heir in accordance to Article Four of the instrument"; and (6) failing to allow his claim of unlawful taking of his personal property.

## STANDARD OF REVIEW

[1-3] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Balvin*, 295 Neb. 346, 888 N.W.2d 499 (2016). When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below. *Id.* The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous. *Id.*

## ANALYSIS

Stewart makes two separate arguments under his first assignment of error. He argues that the court erred in having ex parte communication with Martens' attorney at the May 31, 2016, hearing and that the court erred in failing to allow him to be heard and present at the September 27 trial.

We first address Stewart's ex parte communication argument. Stewart argues that the trial judge used the hearing on May 31, 2016, to engage in an ex parte communication with Martens' attorney where the two of them discussed how they were going to proceed to ensure Stewart could not bring any evidence or appear, while keeping him from having any grounds for an appeal.

[4] The May 31, 2016, hearing was held without Stewart's participation. However, no ex parte communication took place. An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). Stewart had notice of the hearing. The court entered an order on April 18 for a

pretrial conference, notifying the parties that a pretrial conference would be held on May 31. Stewart even responded to the notice by filing a motion for continuance asking that the May 31 hearing be rescheduled. Stewart was unable to attend the hearing because he was incarcerated and was not represented by counsel, so the hearing proceeded without him.

Further, there was no prejudice to Stewart from the May 31, 2016, hearing, because at the hearing, the court concluded that Stewart should be allowed to participate in the proceedings by telephone. A subsequent pretrial conference hearing was held on August 12, where Stewart participated by telephone. At that hearing, the court informed the parties that all issues addressed at the May 31 hearing would be reconsidered. The court then gave Stewart the opportunity to address his filings and motions.

Stewart also suggests that an ex parte communication occurred at a June 10, 2016, hearing and that the court reporter had not filed a complete bill of exceptions because the June 10 hearing was not in the record. However, the record before us reflects that a hearing was never held on June 10.

We conclude that Stewart's argument under his first assignment of error—the court's ex parte communication with Martens' attorney—is without merit.

As previously stated, Stewart also argues under his first assignment of error that the court erred in denying him the right to appear either in person or telephonically at the trial on September 27, 2016. At the August 12 pretrial conference hearing, Martens objected to allowing Stewart to appear or to testify at trial by telephone, citing § 24-734(4). Although the court had granted Stewart's motion to participate by telephone for nonevidentiary hearings, it ruled that trial would not be held telephonically because there was no stipulation or consent by all the parties to conduct the evidentiary hearing by such means. Stewart had also filed a motion to issue a transport order, allowing him to be physically present at trial, which the trial court denied.

[5] We first address Marten's reliance upon § 24-734(4) in support of her objection to allowing Stewart to appear or testify by telephone. Subsection (4) of § 24-734 provides: "A judge, in any case *with the consent of the parties*, may permit *any witness who is to be examined by oral examination* to appear by telephonic, videoconferencing, or similar methods, with any costs thereof to be taxed as costs." (Emphasis supplied.) This subsection only pertains to allowing a witness to be examined telephonically with the consent of the parties. It does not address permitting a party to appear and participate at trial telephonically. We conclude that the statute is irrelevant to the issue of whether the court erred in denying Stewart the right to appear either in person or telephonically at the trial.

[6-8] Stewart argues that the court's refusal to allow him to appear in person or by telephone at trial deprived him of procedural due process. He relies on *Conn v. Conn*, 13 Neb. App. 472, 695 N.W.2d 674 (2005), where this court determined that an inmate's due process rights were violated when the trial court denied his request to participate by telephone in a dissolution proceeding brought against him by his wife. We held that "'[w]hen a person has a right to be heard, procedural due process includes . . . a reasonable opportunity to refute or defend against a charge or accusation [and] a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation . . . .'" *Id.* at 475, 695 N.W.2d at 677, quoting *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). We further stated in *Conn*:

> "Although it is clear that a prisoner has no absolute constitutional right to be released from prison so that the prisoner can be present at a hearing in a civil action . . . and that due process does not require the appointment of counsel to represent the prisoner in a private civil matter . . . due process does require that the prisoner receive meaningful access to the courts to defend [against] suits brought against him or her."

13 Neb. App. at 475, 695 N.W.2d at 677, quoting *Board of Regents v. Thompson*, 6 Neb. App. 734, 577 N.W.2d 749 (1998) (citations omitted).

The *Conn* case can be distinguished from the present case in that *Conn* involved a civil matter brought against an inmate, whereas Stewart could be designated as an "objector" or a "contestant" in the instant probate matter which he did not initiate. See Neb. Rev. Stat. §§ 30-2429.01 and 30-2431 (Reissue 2016). Stewart is not defending against a charge or accusation brought against him. However, he is not in the position of a plaintiff either. Stewart did not file this action. Rather, he is in the position of trying to protect what he views as his property interest in the estate of Harley.

[9,10] In *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. 735, 884 N.W.2d 687 (2016), the Nebraska Supreme Court held that to establish a violation of the right of meaningful access to the courts, a prisoner must establish the State has not provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury, that is, the hindrance of a nonfrivolous and arguably meritorious underlying legal claim. The court further noted that the constitutional right to access the courts does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. *Id.*

> The tools it requires to be provided are those that the inmates need in order to attack their sentences directly or collaterally and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental and perfectly constitutional consequences of conviction and incarceration.

*Id.* at 745, 884 N.W.2d at 695, citing *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

Stewart is not challenging his sentence or the conditions of his confinement. However, he is challenging the validity of

the will of Harley, his father. The will, on the one hand, is in no way related to his imprisonment, but, on the other hand, is an attempt to simply protect a property right that he has in Harley's estate. In that sense, Stewart stands similarly situated to the husband in *Conn v. Conn*, 13 Neb. App. 472, 695 N.W.2d 674 (2005), who was the defendant in a divorce action. The trial court's refusal to allow Stewart to even participate by telephone at trial is more than "one of the incidental and perfectly constitutional consequences of conviction and incarceration." See *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. at 745, 884 N.W.2d at 695, citing *Lewis v. Casey, supra*.

We conclude the court's failure to allow Stewart to participate in the trial by telephone was a deprivation of his fundamental due process rights pursuant to U.S. Const. amends. V and XIV and Neb. Const. art. I, § 3.

Stewart next assigns that the court erred in making a decision on the validity of the will before it received his trial brief. At the September 22, 2016, hearing, the court told Stewart he could submit a brief to the court within 14 days after trial, where he could argue his position because he would not be present in person or telephonically. The court indicated that it would refrain from making a decision on the matter until after it received his brief. Stewart's brief was filed on October 3. The court announced its decision at trial on September 27 and entered an order on September 29.

Although the court was not technically required to wait to make its decision until after it received Stewart's brief, it should have done so. Given our finding above that Stewart's due process rights were violated when he was not allowed to participate by telephone at trial, we find this error by the court compounded the situation. Given the violation of Stewart's due process rights discussed previously, we must reverse, and remand for a new trial.

Stewart's third assignment of error is that the trial court erred in not allowing him his right to the discovery of evidence to support his claims. Stewart argues that he was denied

two specific discovery requests: the address of Kappel and recordings of telephone conversations between him and Harley from the Department of Correctional Services. He argues that Kappel would have provided evidence in regard to Stewart's personal property left in Harley's care, a 2009 will by Harley, and the relationship between Stewart's children and his parents prior to Harley's death. He alleges the recorded telephone conversations would show the continued relationship between him and Harley, discussions of Stewart's personal property, Harley's desire to leave Stewart his home, and Harley's lack of coherence due to heavy medication on or about February 15, 2016.

[11,12] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Moreno v. City of Gering*, 293 Neb. 320, 878 N.W.2d 529 (2016). The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id.*

In regard to the first discovery issue, Stewart filed various motions requesting Kappel's address from Martens. The court denied his motions related to Kappel's address at the hearings on August 12 and September 22, 2016. At both hearings, Martens' counsel stated that neither he nor Martens had Kappel's current address. The court ruled that Martens could not be compelled to produce evidence she did not have or to investigate for Stewart. Martens did not have Kappel's address, and it was Stewart's burden to locate a witness he believed could support his case. Martens was not responsible for finding information for Stewart that she did not have. The court did not err in denying his motions related to Kappel's address.

The second discovery ruling Stewart challenges is the denial of his efforts to obtain recorded telephone conversations from the Department of Correctional Services. Stewart filed a "Motion for Subpoena" related to telephone records and recorded conversations kept by the Department of Correctional

Services. Martens objected to the motion based on the improper form of the filing, which the trial court granted. Stewart subsequently filed a "Motion for Order to Release Discovery Information," seeking telephone records and recorded conversations. Martens again objected as to form, stating that a motion for the release of telephone records is not proper discovery. Martens' counsel further stated that the Department of Correctional Services could be compelled under the proper form for a subpoena, but Stewart's filing was not a subpoena, it was a motion. The trial court denied Stewart's "Motion for Order to Release Discovery Information."

On appeal, Stewart does not argue that either of his requests for the telephone records and recorded conversations were in the proper form. Rather, he asserts that the court's failure to grant his requests for telephone records and recorded conversations prevented him from obtaining evidence to support his claims. Stewart has failed to meet his burden to show that the discovery ruling was an abuse of discretion. See *Moreno v. City of Gering, supra*. We conclude the trial court did not err in the discovery rulings challenged by Stewart.

Stewart's next assignment of error is that the court erred in not allowing his claim for unlawful taking of his property. In his "Petition of Claim and Request of Formal Testacy," his initial filing, Stewart requested an order to return personal property belonging to him or the value thereof that was left in Harley's custodial care. Stewart states that he left personal property in Harley's care when he was incarcerated in 2011, that Martens had knowledge of the personal property, and that she sold or disposed of his property without his permission.

Stewart attempted to combine the contest of the will with a creditor's claim against the estate. The claim against the estate was discussed at the September 22, 2016, hearing. Martens' counsel stated that she had disallowed Stewart's property claim in the "Objections" she filed in response to Stewart's "Petition of Claim and Request of Formal Testacy." The "Objections" stated that she was disallowing all claims beyond his demand

for formal probate of the will. Martens further stated that Stewart had not filed a petition for allowance and that the time allowed to do so had elapsed.

Neb. Rev. Stat. § 30-2488(a) (Reissue 2016) provides in relevant part:

> Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.

In the present case, Martens disallowed Stewart's claim for the return of personal property in the "Objections" filed May 24, 2016. Pursuant to § 30-2488, the disallowance shifted the burden to Stewart to file a petition for allowance no later than 60 days after the notice of disallowance. He did not file a petition for allowance within the time allowed. Accordingly, Stewart's claim for the return of his personal property was not before the court. This assignment of error is without merit.

[13] Finally, because we have determined that Stewart's due process rights were violated requiring us to reverse, and remand for a new trial, we need not address his 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. *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017).

## CONCLUSION

We conclude that the trial court violated Stewart's due process rights when it did not allow him to participate in the trial by telephone. Accordingly, we reverse, and remand for a new trial.

Reversed and remanded for a new trial.

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

# American Express Centurion Bank, appellee, v. R.D. Scheer, also known as Ronald D. Scheer, appellant.

913 N.W.2d 489

Filed April 17, 2018. No. A-17-219.

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. **Summary Judgment: Proof.** A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
3. ____: ____. Once the party moving for summary judgment makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
4. **Debtors and Creditors: Words and Phrases.** An account stated is an agreement between persons who have had previous dealings determining the amount due by reason of such transactions.
5. **Actions: Debtors and Creditors.** An account stated creates a new cause of action in which pleading and proof of the original items of indebtedness are unnecessary.
6. **Debtors and Creditors.** The creditor in a valid account stated may recover thereon without pleading and proving the original items of the indebtedness.
7. **Debtors and Creditors: Proof.** The failure to object to an account stated is admissible in evidence as tending to prove an acknowledgment of its correctness; proof of an express promise to pay is not required.
8. **Debtors and Creditors.** An account stated is not subject to the usual defenses attacking the original items of indebtedness, but is subject to the defenses of usury, fraud, and mistake.

9. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

Hugh I. Abrahamson, of Abrahamson Law Office, for appellant.

Sara E. Bauer and Shawn D. Flint, of Gurstel Law Firm, P.C., for appellee.

Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

Riedmann, Judge.

## INTRODUCTION

R.D. Scheer, also known as Ronald D. Scheer, appeals from an order of the district court for Douglas County granting summary judgment in favor of American Express Centurion Bank (American Express) and ordering Scheer to pay American Express the sum of $72,197.11. Because no genuine issue of material fact exists as to an account stated, we affirm.

## BACKGROUND

American Express filed a complaint against Scheer alleging that it had issued three credit card accounts to Scheer and extended credit to him. According to the complaint, Scheer used the credit cards to make purchases but failed to pay the amounts owed, leaving balances due totaling $72,197.11. Each of the first three counts sought recovery for breach of the credit card contracts, and the fourth count sought recovery on an account stated. Scheer filed an answer and asserted 17 affirmative defenses, the majority of which were directed to the breach of contract claim. As to the account stated, Scheer asserted that he was charged a usurious interest rate, the balances were inaccurate, American Express failed to attach an itemization of the accounts from their start date, and American Express defrauded him.

American Express then filed a motion for summary judgment. At the hearing on the motion, American Express offered into evidence three affidavits establishing the history and the outstanding balance for each credit card account. Each affidavit stated that American Express mailed monthly billing statements to Scheer and that he never asserted "a valid unresolved objection" to the balance shown as due and owing. The final billing statement for each account was attached to the affidavits. The affidavits and attachments were received into evidence without objection from Scheer. Scheer did not offer any evidence at the hearing.

In a subsequent written order, the district court determined that American Express made a prima facie case for summary judgment and that Scheer produced no contrary evidence showing the existence of a material issue of fact. Therefore, the court granted American Express' motion for summary judgment and entered judgment against Scheer in the amount of $72,197.11. Scheer subsequently filed a motion for reconsideration, which was denied. Scheer now appeals to this court.

## ASSIGNMENTS OF ERROR

Scheer assigns that the district court erred in granting American Express' motion for summary judgment and in denying his motion for reconsideration.

## 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. *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

## ANALYSIS

Scheer argues that the district court erred in granting American Express' motion for summary judgment because

"there are two very cogent fact issues" that should have precluded summary judgment. Brief for appellant at 5. It appears both issues relate to the amount American Express claims is due. Scheer contends that questions regarding the underlying purchases, amounts paid by him, and the amount of interest charged need to be resolved before awarding judgment to American Express. He also asserts the amount American Express is seeking is not its actual damages because it may have taken a "tax write off" and therefore should be prevented from recovering more than its actual damages. *Id.* at 8. For the reasons set forth below, we conclude that the pleadings and the evidence presented at the summary judgment hearing show that no genuine issue of material fact exists as to American Express' entitlement to judgment on its account stated claim.

Neb. Rev. Stat. § 25-1332 (Reissue 2016) provides in part that a motion for summary judgment shall be granted "if the pleadings and the evidence admitted at the hearing show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[2,3] A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Sulu v. Magana, supra*. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id*.

In its claim for an account stated, American Express alleged that it rendered to Scheer accurate invoices and/or statements of the transactions between the parties, that the invoices and/or statements were received by Scheer, and that Scheer failed to object to any item on the statements within a reasonable period of time. At the hearing on the motion for summary judgment, American Express offered into evidence

three affidavits from its assistant custodian of records. In each affidavit, the affiant stated that based upon his personal knowledge and the company's business records, "American Express sends or otherwise makes available monthly billing statements to cardmembers who carry a balance or are otherwise required to receive a monthly statement." The affiant further stated that American Express "transmitted monthly billing statements" to Scheer and that "[t]here is no record of [him] ever asserting a valid unresolved objection to the balance shown as due and owing on the monthly statements provided . . . ." Finally, the affiant asserted that due to nonpayment, the accounts were closed, and that after giving credit for all payments made, the attached invoices reflected the ending balance owed on each account. The attached invoices were in the amounts of $16,088.84, $18,002.08, and $38,106.19 for a total of $72,197.11. Scheer presented no evidence to rebut these facts.

[4-7] An "account stated" is an agreement between persons who have had previous dealings determining the amount due by reason of such transactions. *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). An account stated creates a new cause of action in which pleading and proof of the original items of indebtedness are unnecessary. The creditor in a valid account stated may recover thereon without pleading and proving the original items of the indebtedness. *In re Estate of Black*, 125 Neb. 75, 249 N.W. 84 (1933). The failure to object to an account stated is admissible in evidence as tending to prove an acknowledgment of its correctness. Proof of an express promise to pay is not required. *John Deere Co. of Moline v. Ramacciotti Equip. Co.*, 181 Neb. 273, 147 N.W.2d 765 (1967).

Although Scheer alleged in his answer that the amount claimed was in error, the evidence offered and received at the hearing was that monthly statements had been sent to Scheer and that he had not asserted a valid unresolved objection. We note that the three invoices received at the hearing were

dated between April and June 2013. The complaint was filed in July 2016. The only indication of an objection to the amount contained in our record is in Scheer's answer filed in August 2016. The failure to object to an account stated is admissible in evidence as tending to prove an acknowledgment of its correctness. *John Deere Co. of Moline v. Ramacciotti Equip. Co., supra*. Given the absence of any objection by Scheer for 3 years, the evidence was sufficient to establish an account stated and that the amount claimed was correct. See, also, *McKinster v. Hitchcock*, 19 Neb. 100, 104-05, 26 N.W. 705, 706 (1886) (stating "perhaps the better rule is, that if such an account be retained for an unreasonable time without objection it will be treated as an account stated and *prima facie* correct").

[8] Because an account stated creates a new cause of action in which pleading and proof of the original items of indebtedness are unnecessary, American Express was not required to prove the underlying transactions. And because an account stated sets the amount agreed upon, Scheer's argument that it does not reflect American Express' actual damages is irrelevant. An account stated is not subject to the usual defenses attacking the original items of indebtedness, but is subject to the defenses of usury, fraud, and mistake. See, *In re Estate of Black, supra*; *Jorgensen v. Kingsley*, 60 Neb. 44, 82 N.W. 104 (1900). Therefore, once American Express presented a prima facie case of an account stated, the burden of proof shifted to Scheer to prove that no agreement as to the amount owed existed. Absent evidence to dispute the existence of an account stated, Scheer was left to his affirmative defenses of usury, fraud, and mistake.

Although Scheer asserted the defenses of usury, fraud, and mistake in his answer, his allegations are conclusory and he has not directed us to any disputed material fact in evidence as to these defenses. We note that he also does not make any argument on appeal specific to these defenses. We therefore do not address them.

Scheer relies upon *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000), to argue that before American Express was entitled to summary judgment, it was not only required to present evidence supporting its claims, but it was also required to disprove the affirmative defenses pled in his answer. In *City State Bank v. Holstine, supra*, the plaintiff commenced an action against the defendant for defaulting on a promissory note which the defendant had cosigned. The defendant raised various affirmative defenses in his answer, including that the plaintiff made fraudulent representations to induce him to cosign the note. In support of this defense, the defendant pled six specific fraudulent misrepresentations allegedly made by the plaintiff. The plaintiff moved for summary judgment and presented evidence in support of its claims. The trial court granted the motion, and the defendant appealed.

On appeal, the Nebraska Supreme Court observed that the evidence presented by the plaintiff at the summary judgment hearing generally established its claims, but the plaintiff presented no evidence regarding most of the affirmative defenses pled in the answer. The Supreme Court recognized that the petition sought judgment on a promissory note, and the operative answer raised numerous purported affirmative defenses, which were denied by the plaintiff; thus, the issues were framed by those pleadings. The court then stated that in order for the plaintiff to succeed on its motion for summary judgment, it was required to produce evidence of the promissory note on which the defendant was the cosigner and a default thereon. The court additionally determined that given the posture of the case, the plaintiff was also required to produce evidence which demonstrated that there were no genuine issues of material fact regarding the defendant's cognizable affirmative defenses and that it was entitled to judgment as a matter of law. Because the plaintiff produced no evidence regarding the material factual allegations set forth in certain of the defendant's purported affirmative defenses,

the Supreme Court concluded that the plaintiff failed to meet its initial burden as the party moving for summary judgment to produce evidence which, if uncontroverted, would entitle it to judgment as a matter of law. Accordingly, the court held that the trial court erred in granting summary judgment in the plaintiff's favor.

[9] In the present case, however, Scheer did not plead material factual allegations in his answer when asserting his affirmative defenses as did the defendant in *City State Bank v. Holstine, supra*; rather, Scheer alleged general legal conclusions. His generalized defenses of fraud and usury are not material factual allegations, and although we recognize that Scheer was not required to plead specific facts because Nebraska is no longer a code-pleading jurisdiction as it was at the time *City State Bank v. Holstine, supra*, was decided, it remained Scheer's burden to produce material facts in dispute to overcome American Express' motion. By electing not to offer any evidence at the hearing on the motion for summary judgment, Scheer failed to prove the existence of a genuine issue of material fact and the district court properly granted judgment in favor of American Express. Scheer's assigned error also asserts that the district court erred in denying his motion for reconsideration; however, Scheer does not argue this assignment. Errors that are assigned but not argued will not be addressed by an appellate court. *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014).

## CONCLUSION

We conclude that Scheer failed to establish the existence of a genuine issue of material fact once American Express presented a prima facie case. We therefore affirm the decision of the district court granting summary judgment in favor of American Express.

Affirmed.

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

# State of Nebraska, appellee, v. Brittney Pryce, appellant.

913 N.W.2d 755

Filed April 17, 2018. No. A-17-310.

1. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
2. ____: ____. A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury.
3. **Presumptions: Jurors: Due Process.** Adverse pretrial publicity can create a presumption of prejudice in a community such that the jurors' claims that they can be impartial should not be believed. But juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he is charged does not alone presumptively deprive the defendant of due process.
4. **Presumptions: Jurors.** Juror partiality may be presumed only in situations where the general atmosphere in the community or courtroom is sufficiently inflammatory.
5. **Venue: Juror Qualifications: Presumptions.** A court will normally not presume unconstitutional juror partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage.
6. **Venue: Due Process.** Even the community's extensive knowledge about a crime or a defendant through pretrial publicity is insufficient in itself to render a trial constitutionally unfair when the media coverage consists of merely factual accounts that do not reflect animus or hostility toward the defendant.
7. **Venue.** Press coverage which is factual in nature cannot serve as the basis for a change of venue.

8. **Venue: Juror Qualifications.** Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.
9. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if a juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court.
10. **Venue: Juries: Proof.** A court must evaluate several factors in determining whether the defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. These factors include (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which the venire was drawn.

Appeal from the District Court for Custer County: Karin L. Noakes, Judge. Affirmed.

P. Stephen Potter for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

Riedmann, Judge.

## INTRODUCTION

Brittney Pryce was convicted in the Custer County District Court of intentional child abuse resulting in death and sentenced to 30 to 40 years' imprisonment. She appeals, arguing that the court erred in denying her motion to change venue. We find no abuse of discretion in the denial of the motion and therefore affirm.

## BACKGROUND

In July 2014, Pryce was charged by information with intentional child abuse resulting in the death of a 21-month-old child. On August 9, 2016, Pryce filed a motion to change venue, alleging that due to extensive pretrial publicity, she would be unable to get a fair trial in Custer County. At the hearing on her motion, Pryce offered into evidence five articles in support of her motion. The first article was published on "SandhillsExpress.com" on August 4 and reported that Pryce had appeared in court that morning and rejected a plea offer from the State. The article noted that a jury trial was scheduled to begin on August 22. The second article was also from the same website and published on June 23. It explained that a group advocating for child abuse victims appeared at a hearing in Pryce's case and that at the hearing, the court heard numerous pretrial motions. The article also noted that Pryce was accused of causing the death of a 21-month-old child who had been in her care and listed the dates for a final pretrial hearing and trial.

The third article Pryce offered into evidence was published on August 8, 2016, on the website of the Custer County Chief newspaper. This article stated that after the State and Pryce had offered and rejected plea agreements, the case would proceed to jury trial starting August 22. The article also reported that Pryce had been charged with second degree murder and child abuse leading to death of a child. However, although Pryce originally faced both charges, she had been bound over to district court on the child abuse charge only. Thus, at the time the article was published, only that charge remained.

The final two articles were published in the Custer County Chief but are not dated. It is clear from the contents of the articles, however, that they were published sometime in early 2014. They report details surrounding the child's death and the fact that Pryce and her mother had been arrested.

After the hearing, the district court entered an order denying the motion to change venue at that time. The court noted

that although Pryce had offered into evidence a sample of the nature of the pretrial publicity, there was no evidence regarding the degree to which the publicity had circulated through the community or in areas to which venue could be changed, though the court acknowledged that that type of evidence was difficult to obtain prior to jury selection. Thus, the court found that Pryce failed to meet her burden that a venue change was warranted.

Jury selection began in this case on August 22, 2016, and lasted for 2 days. After the process was complete, Pryce renewed her motion to change venue. The district court opined that an impartial jury had been selected and denied the motion.

At the conclusion of trial, the jury found Pryce guilty. She was sentenced to 30 to 40 years' imprisonment. This timely appeal follows.

## ASSIGNMENT OF ERROR

Pryce assigns that the district court erred in denying her motion to change venue.

## STANDARD OF REVIEW

[1] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

## ANALYSIS

Pryce argues that the denial of her motion to change venue was erroneous for two reasons. First, she claims that under *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), we should presume prejudice in the community due to pretrial publicity. In the alternative, she asserts that even if juror bias is not presumed, her motion to change venue should have been granted when considering the applicable factors.

[2] Generally, all criminal cases shall be tried in the county where the offense was committed unless it shall appear to the

court by affidavits that a fair and impartial trial cannot be had there. See Neb. Rev. Stat. § 29-1301 (Reissue 2016). A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury. *Id*.

[3,4] In *Irvin v. Dowd, supra*, the U.S. Supreme Court held that the overwhelming negative publicity against the defendant should have mandated a change of venue not just to a county adjoining the county in which the murders had occurred, but to a county geographically far enough removed to be untainted by the publicity. The Nebraska Supreme Court has stated that under *Irvin v. Dowd, supra*, adverse pretrial publicity can create a presumption of prejudice in a community such that the jurors' claims that they can be impartial should not be believed. *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009). But juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he is charged does not alone presumptively deprive the defendant of due process. *Id*. Juror partiality may be presumed only in situations where the general atmosphere in the community or courtroom is sufficiently inflammatory. *Id*.

[5] A court will normally not presume unconstitutional juror partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage. *Id*. The Nebraska Supreme Court has held that five newspaper articles containing information regarding the case failed to demonstrate that the publicity was so widespread to have corrupted the mind of all potential jurors—particularly when there was no evidence of the extent to which that publicity reached the community in question. See *State v. Schroeder*, 279 Neb.

199, 777 N.W.2d 793 (2010). See, also, *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990) (no abuse of discretion in denying motion to change venue for pretrial publicity where only five newspaper articles appeared within 4 months of jury selection).

[6,7] But the quantum of news coverage is not dispositive. *State v. Galindo, supra*. Even the community's extensive knowledge about a crime or a defendant through pretrial publicity is insufficient in itself to render a trial constitutionally unfair when the media coverage consists of merely factual accounts that do not reflect animus or hostility toward the defendant. *Id*. Although the Supreme Court has frequently stated that the defendant must show pervasive, misleading pretrial publicity, the more important consideration is whether the media coverage was factual, as distinguished from invidious or inflammatory. *Id*. Press coverage which is factual in nature cannot serve as the basis for a change of venue. *Id*.

In the present case, at the hearing on Pryce's initial motion to change venue, she offered into evidence five news articles containing information about the case. It is clear that three of the five articles were published shortly before trial began in August 2016. The other two articles appear to have been published around the time Pryce was arrested in 2014. But each article contains only factual information, which is insufficient to support a finding that the general atmosphere in the community or courtroom is sufficiently inflammatory. We note that one article published on August 8, 2016, erroneously stated that Pryce was still facing charges of second degree murder and child abuse resulting in death, when in fact, only the child abuse charge remained pending. However, this error alone is not enough to establish that the entire jury pool would be biased against Pryce.

We conclude that the five news articles containing factual, as opposed to inflammatory, information regarding the case were insufficient to support a finding that the publicity was so widespread to have tainted the entire pool of potential jurors.

Thus, the district court did not err in denying the motion to change venue at that time.

[8] Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue. *State v. Schroeder, supra*. Indeed, the U.S. Supreme Court based its decision in *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), partially on the information gleaned during voir dire. There, six murders were committed in Indiana. There was extensive news coverage in the county where the crimes occurred and in an adjoining county during the 6 or 7 months preceding trial. The stories described the defendant's criminal history, his confession to the murders and other crimes, his police lineup identification, the fact that he had taken a lie detector test, and his plea offer, as well as references to him as the "'confessed slayer of six,' a parole violator and a fraudulent-check artist," and characterizing him as remorseless and without conscience. *Id*., 366 U.S. at 726. One newspaper account referred to "'a pattern of deep and bitter prejudice against [him]'" among the members of the community. *Id*., 366 U.S. at 727.

During voir dire examination, which lasted 4 weeks, news articles reported that "'impartial jurors are hard to find.'" *Id*. Of the 430-person panel, almost 90 percent entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty—and a number admitted that if they were in the accused's place and he in theirs on the jury with their opinions, they would not want him on a jury. Of the 12 jurors who were selected, 8 thought he was guilty. Thus, the U.S. Supreme Court ultimately determined that based on the barrage of pretrial publicity and the pattern of deep and bitter prejudice shown to be present throughout the community, jury prejudice should be presumed and a change in venue was warranted.

In the present case, there was no evidence that the pretrial publicity surrounding Pryce and this case was nearly as inflammatory or pervasive as that in *Irvin v. Dowd, supra*. The

articles received into evidence here refer to Pryce by name and explain the circumstances surrounding the charges she faced, but none of the articles contain additional information about Pryce personally, express opinions as to her guilt or innocence, or speak derogatorily of her.

[9] The fact that a number of potential jurors indicated having heard of the case prior to trial is not sufficient to support a change of venue. It is not required that the jurors be totally ignorant of the facts and issues involved. *Irvin v. Dowd, supra*. In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. *Id*. This is particularly true in criminal cases. *Id*. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *Id*. It is sufficient if the juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court. *Id*.

Thus, in the instant case, although potential jurors may have heard factual information about the case prior to trial, the majority of them indicated that they could remain impartial, decide Pryce's guilt based solely on the evidence presented at trial, and understood that Pryce was presumed innocent until proven guilty. Of the jurors who were ultimately selected for the jury, only four indicated having generally seen media reports of the case, but they all stated that they had not formed an opinion as to Pryce's guilt and could remain impartial. Thus, there is no evidence of the pattern of deep and bitter prejudice shown to be present throughout the community as in *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). We therefore conclude that the district court did not abuse its discretion in denying the motion to change venue.

Pryce also argues that a change of venue was warranted when considering the factors to be weighed in determining whether publicity has made it impossible to secure a fair and impartial jury. We disagree.

[10] Even if the evidence is insufficient to support a presumption of partiality under *Irvin v. Dowd, supra*, a change of venue may still be warranted where the defendant shows the existence of pervasive misleading pretrial publicity. See *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). A court must evaluate several factors in determining whether the defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. These factors include (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which the venire was drawn. *Id.*

We have already addressed the first four factors. The pretrial publicity consisted of five articles—only three of which were published shortly before trial commenced—which contained only factual information about the case, and the publicity was not inflammatory or pervasive. And there was no evidence establishing the degree to which the articles circulated throughout Custer County. These factors do not support a change in venue.

Of the remaining four factors, a review of the jury selection process shows that there was no difficulty in selecting a jury. Great care was taken during the process. At the outset, we note that the sheer time which voir dire took to complete, approximately 2 days, does not in and of itself warrant a change of venue. See *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976). At least 80 potential jurors were summoned, 42

were initially called, and as a panel, they were questioned about their exposure to pretrial publicity. The parties agreed that any potential juror who indicated having heard or read media reports of the case would be questioned separately. Ultimately, 25 potential jurors were personally interviewed. The parties also challenged a number of jurors during voir dire and 16 were stricken for cause. However, of the potential jurors who were challenged and excused, not all of them were dismissed due to exposure to pretrial publicity. Rather, they were excused for reasons such as health issues; financial hardship; or knowing or being related to Pryce, her husband, or a witness.

Four of the jurors ultimately selected for the jury indicated that despite having heard of the case via the media, they had not formed an opinion as to Pryce's guilt and could be fair and impartial. We reiterate that the law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impression or opinions and render a verdict based upon the evidence. See *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011). For the sake of completeness with respect to the final two factors, we note that intentional child abuse resulting in death is a Class IB felony and agree with the parties that it is a significant charge. See Neb. Rev. Stat. § 28-707 (Reissue 2016). In addition, we observe that there is no evidence in the record establishing the size of Custer County—the area from which the venire was drawn. When considering the foregoing factors, we cannot conclude that the district court abused its discretion in denying Pryce's motion to change venue.

## CONCLUSION

Finding no abuse of discretion in the denial of Pryce's motion to change venue, we affirm.

Affirmed.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# Benjamin J. Schmeidler, appellant, v. Jessica F. Schmeidler, appellee.

912 N.W.2d 278

Filed April 17, 2018. No. A-17-361.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, and alimony.
2. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
3. **Child Custody.** When both parents are found to be fit, the inquiry for the court is the best interests of the children.
4. ____. In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Reissue 2016), courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and the parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; and many other factors relevant to the general health, welfare, and well-being of the child.
5. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
6. **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.

7. **Child Custody.** Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.
8. ____. Courts typically do not award joint legal custody when the parties are unable to communicate effectively.
9. ____. Where the parties are unable to communicate and trust one another, joint decisionmaking by the parents is not in the child's best interests.
10. **Visitation.** The trial court has discretion to set a reasonable parenting time schedule.
11. ____. The determination of the reasonableness of a parenting plan is to be made on a case-by-case basis.
12. ____. Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent.
13. ____. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights.
14. ____. Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children.
15. **Visitation: Courts: Stipulations.** It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties themselves or by third parties.
16. **Parent and Child.** The best interests of a child require a parenting arrangement which provides for a child's safety, emotional growth, health, stability, and physical care.
17. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
18. ____: ____. Property which one party brings into the marriage is generally excluded from the marital estate.
19. **Divorce: Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding.

20. **Property Division.** Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties.

Appeal from the District Court for Clay County: Vicky L. Johnson, Judge. Affirmed as modified.

Scott D. Grafton, of Grafton Law Office, P.C., L.L.O., for appellant.

Benjamin H. Murray, of Germer, Murray & Johnson, for appellee.

Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired.

Riedmann, Judge.

## INTRODUCTION

Benjamin J. Schmeidler appeals the order of the district court for Clay County which dissolved his marriage to Jessica F. Schmeidler, awarded custody and parenting time of the parties' minor child, and divided the marital estate. We affirm as modified as explained below.

## BACKGROUND

Benjamin and Jessica were married in September 2011. Their daughter was born in 2014. On May 19, 2016, Benjamin filed a complaint for dissolution of the marriage.

Trial on the issues of property division, custody, parenting time, and child support was held on February 23, 2017. At the time of trial, Benjamin was 28 years old and worked as a general farmhand. His parents, friends, and boss generally testified that he was a good, involved father to his daughter and acted as a "father figure" to Jessica's older son from a previous relationship. They testified that they had seen Jessica belittle Benjamin and yell at him in public. They admitted seeing both Benjamin and Jessica drink alcohol during the marriage but denied that Benjamin had a drinking problem.

To the contrary, Jessica testified that Benjamin drank alcohol every day when she first met him and that his drinking

escalated during the marriage. She claimed that he became angry and violent when he was drinking. Jessica's mother testified that Benjamin drank frequently and excessively and that there were occasions where she was scared for the safety of Jessica's older child while he was under Benjamin's care.

On March 15, 2017, the district court entered an order dissolving Benjamin and Jessica's marriage. The court found that the parties have "a long history of conflict," rendering joint decisionmaking and custody impossible. Thus, the court determined that the best interests of the child would be served by placing her legal and physical custody with Jessica, subject to Benjamin's parenting time. The court adopted the parenting plan proposed by Jessica, which granted Benjamin parenting time with the child every other weekend and every Wednesday evening. Benjamin was required to provide transportation to and from his parenting time, and the parenting plan prohibited the child from having contact with certain family members of Jessica's during Benjamin's parenting time. In addition, the parenting plan contained a provision that prohibited Benjamin from consuming alcohol while the child was in his possession, or for 24 hours prior. Benjamin was also ordered to pay $568 per month in child support.

The court added a "safety plan" to the parenting plan, which provides that if at any time during Benjamin's parenting time Jessica learns Benjamin has been drinking alcohol, it is understood and agreed that Benjamin's parenting time should end, and that Jessica, or a responsible adult, is allowed to pick up the child and Benjamin's parenting time concludes. In addition, under the safety plan, if Jessica suspects that Benjamin has been consuming alcohol during his parenting time, she is allowed to request that Benjamin perform a breath test. If Benjamin tests positive at the beginning of parenting time, he will forfeit that parenting time, and if he tests positive at the end of a parenting time period, he forfeits his next parenting time period. The safety plan further requires that Benjamin "self-report" to Jessica any time he has consumed alcohol

and that if the child was present while he was drinking, he forfeits his next parenting time. Finally, under the safety plan, if Benjamin has an alcohol-related criminal offense, his parenting time is to be suspended, unless supervised by his parents, until Benjamin and Jessica are able to reach further agreement for the reinstatement of parenting time or further order of the court.

The court valued and divided the marital assets and debts and ordered that Benjamin make an equalization payment to Jessica in the amount of $5,000. Benjamin timely appeals to this court.

## ASSIGNMENTS OF ERROR

Benjamin assigns, summarized, that the district court erred in (1) failing to adopt his proposed parenting plan, (2) adopting Jessica's proposed parenting plan despite several errors, (3) impermissibly delegating to Jessica the authority to unilaterally suspend his parenting time, and (4) classifying and valuing certain assets and debts of the parties and ordering him to pay an equalization payment of $5,000.

## STANDARD OF REVIEW

[1] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Burcham v. Burcham*, 24 Neb. App. 323, 886 N.W.2d 536 (2016). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, and alimony. *Id.*

## ANALYSIS

### *Failing to Adopt Benjamin's Proposed Parenting Plan.*

Benjamin argues that the district court should have adopted the parenting plan he proposed as opposed to adopting Jessica's proposed parenting plan. We find no abuse of discretion in the adoption of Jessica's proposed plan.

In his parenting plan, Benjamin sought joint legal and physical custody of the child. Thus, on appeal, Benjamin argues that the court erred in failing to award joint legal and physical custody, because imposing joint custody and allowing him additional parenting time is in the best interests of the child.

[2,3] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007). When both parents are found to be fit, the inquiry for the court is the best interests of the children. *Id*. The district court made no explicit finding, in the present case, that either Benjamin or Jessica was unfit, and thus, its task was to determine whether a joint physical custody arrangement was in the child's best interests.

[4] In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Reissue 2016), courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and the parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; and many other factors relevant to the general health, welfare, and well-being of the child. *Maska v. Maska, supra*.

Benjamin claims that upon an examination of these factors, the best interests of the minor child require joint legal and physical custody with the parties. We disagree.

[5,6] In this case, both Benjamin and Jessica presented evidence concerning their own parenting strengths and the weaknesses of the other. The trial court determined that Jessica was a more credible witness. Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and

may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Barth v. Barth*, 22 Neb. App. 241, 851 N.W.2d 104 (2014). In fact, 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. *Id*.

The court additionally concluded that Jessica had been the primary parent of the child, Benjamin had a history of domestic violence and abuses alcohol in a way that poses a danger to the child, and placing the child's custody with Jessica will allow the child to have a stronger relationship with Jessica's older child.

[7-9] More importantly with respect to the issue of joint custody, the court found that the parties have a long history of conflict, rendering joint decisionmaking and custody impossible, and that therefore, joint custody was not in the child's best interests. The Nebraska Supreme Court has repeatedly held that joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars. See, e.g., *Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017); *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). And this court has acknowledged that courts typically do not award joint legal custody when the parties are unable to communicate effectively. See *State on behalf of Maddox S. v. Matthew E.*, 23 Neb. App. 500, 873 N.W.2d 208 (2016). Where the parties are unable to communicate and trust one another, joint decisionmaking by the parents is not in the child's best interests. See *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009).

Given the evidence presented at trial, our standard of review, and deference to the trial court's observation of the witnesses, we cannot find that the district court abused its discretion in declining to award joint custody and instead awarding custody of the child to Jessica.

*Jessica's Proposed Parenting Plan.*

Benjamin challenges the parenting plan as ordered in several respects. He claims that the court erred in ordering that the minor child have no contact with certain family members of Jessica, ordering that Benjamin provide all transportation to and from his parenting time, and only granting him 2 weeks of summer parenting time, rather than the 6 weeks he requested.

[10-14] The trial court has discretion to set a reasonable parenting time schedule. *Thompson v. Thompson*, 24 Neb. App. 349, 887 N.W.2d 52 (2016). The determination of the reasonableness of a parenting plan is to be made on a case-by-case basis. *Id*. Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent. *Id*. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. *Id*. Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children. *Aguilar v. Schulte*, 22 Neb. App. 80, 848 N.W.2d 644 (2014).

In the instant case, the district court found Jessica's testimony credible. Jessica testified that certain of her family members have threatened her and drive by her house on almost a daily basis. Based on this evidence, we cannot find that the district court abused its discretion by placing a limitation on Benjamin's parenting time and not allowing contact between the child and these family members.

With respect to transportation and summer parenting time, the district court has the authority to impose a reasonable parenting plan according to the best interests of the child. The

record is unclear as to the distance between Benjamin's and Jessica's current residences; however, it appears they live some distance apart. Prior to imposition of the temporary order in September 2016, the parties would share transportation and "meet halfway" in Clay Center, Nebraska, in order to exchange the child. The parenting plan attached to the decree requires that Benjamin pick up the child from Jessica at the beginning of his parenting time and return the child to Jessica at the conclusion of his parenting time. We conclude that requiring Benjamin to provide all transportation constitutes an abuse of discretion given his limited parenting time, particularly on Wednesday evenings. We therefore modify the parenting plan to require that the parties meet in Clay Center in order to exchange the child for Benjamin's Wednesday evening parenting time.

Further, although the district court is not required to grant equal parenting time to the parents, Nebraska's Parenting Act recognizes the importance of both parents remaining active and involved in parenting in order to serve the best interests of the child. See, Neb. Rev. Stat. § 43-2923(3) (Reissue 2016); *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009). Indeed, the parenting plan adopted by the district court in this case acknowledges that the best interests of the child will be maintained through the ongoing involvement of both Jessica and Benjamin. And parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent. *Thompson v. Thompson, supra*. Thus, we conclude that the district court abused its discretion in awarding Benjamin only 2 weeks of summer parenting time absent evidence that it would be in the child's best interests.

As such, we modify the parenting plan to allow Benjamin 6 continuous weeks of parenting time during the child's school summer vacation. As currently required in the parenting plan, Benjamin must notify Jessica, in writing, not later than May 1 of each calendar year of the dates he will exercise his summer parenting time. All other provisions contained in the current

parenting plan with respect to summer parenting time remain the same.

Benjamin additionally argues that there is confusion with respect to the Christmas holiday as provided for in the parenting plan, and we agree. The plan defines the Christmas holiday as beginning at 5 p.m. on the day the child is released from school for the Christmas holiday and concluding at 12 p.m. on the day before the child returns to school. The plan then divides the Christmas vacation into two visitation periods: the first period runs from 5 p.m. on the day the child is released from school and ends at 9 a.m. on December 25, and the second period runs from 9 a.m. on December 25 and ends at 9 a.m. on January 1. The ending dates of the defined Christmas holiday and the second visitation period are inconsistent. We therefore modify the second visitation period to end at 12 p.m. on the day before the child returns to school. We otherwise affirm the parenting plan.

*Safety Plan.*

Benjamin argues that the district court erred in including the safety plan in the parenting plan, because it impermissibly grants Jessica unilateral authority to suspend Benjamin's parenting time upon her belief that he has been drinking. The Nebraska Supreme Court has previously upheld a provision in a parenting plan that restricted a parent's ability to consume alcohol during parenting time, or for a reasonable time prior thereto. See *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990). A similar provision appears in the present parenting plan, and Benjamin does not argue error with its inclusion. Rather, it is the inclusion of the safety plan that Benjamin contests because of the authority it grants Jessica. We find merit in his argument and conclude that the district court's order giving Jessica the discretion to suspend Benjamin's parenting time is an unlawful delegation of the trial court's duty.

[15] It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties themselves or by third parties. *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). In *Deacon v. Deacon, supra*, the Supreme Court reversed an order which granted a psychologist the authority to effectively determine visitation and to control the extent and time of such visitation, concluding that such an order was an unlawful delegation of the trial court's duty that could result in the denial of proper visitation rights of the noncustodial parent. As authority for its conclusion, the *Deacon* court cited *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978). In *Lautenschlager*, the court observed:

> The rule that custody and visitation of minor children shall be determined on the basis of their best interests, long established in case law and now specified by statute, clearly envisions an independent inquiry by the court. The duty to exercise this responsibility cannot be superseded or forestalled by any agreements or stipulations by the parties.

201 Neb. at 743-44, 272 N.W.2d at 42.

The Supreme Court in *Deacon* specifically took note that the reasoning of *Lautenschlager* was being extended to third parties. The reasoning of *Deacon* has also been applied in other contexts. See, *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992) (finding plain error in juvenile court's requirement that parent participate in support group and follow all directions of counselor); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988) (disapproving of district court order authorizing child custody officer to control custody and visitation rights of minor child); *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995) (holding that juvenile court order granting psychologist authority to determine time,

manner, and extent of parental visitation was improper delegation of judicial authority).

In *Barth v. Barth*, 22 Neb. App. 241, 851 N.W.2d 104 (2014), this court disapproved of the district court's order granting the child's father, the custodial parent, the discretion to withhold overnight visitation with the child's mother, the noncustodial parent, if she cohabits with someone of the opposite sex. We concluded that the rationale of the aforementioned cases applies with equal force when it is the custodial parent who is granted the authority to determine the visitation privileges of the noncustodial parent, because setting the time, manner, and extent of visitation is solely the duty of the court. The same holds true in the present case.

Jessica argues that the authority to determine whether Benjamin is permitted parenting time with the child is not delegated to her, but, rather, to Benjamin himself. She claims that the choice to drink belongs to Benjamin, knowing that if he does so, he is not entitled to visitation with the child. The same could be said for the parties in *Barth v. Barth, supra*, however. There, the choice to cohabit with someone of the opposite sex belonged to the mother, and she knew that if she did so, she would not be entitled to overnight visitation with the child.

Although we agree with Jessica that drinking is a conscious decision of Benjamin's, it is the sole responsibility of the district court to determine questions of visitation regarding the child according to her best interests, including the time, manner, and extent of visitation. This independent responsibility cannot be delegated to Jessica. More problematic is the fact that the safety plan allows Jessica to retrieve the child during Benjamin's parenting time if she "learns that [Benjamin] has been drinking alcoholic beverages." There is no requirement that such information be confirmed, which essentially permits Jessica to unilaterally terminate Benjamin's parenting time based on an unconfirmed belief that he has been drinking. This authority has the potential to become problematic, particularly

given the parties' history of conflict, and could result in the denial of proper visitation rights of the noncustodial parent. See *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[16] In addition, we note that the safety plan requires Benjamin to report to Jessica if "he has slipped from his plan not to consume alcohol." There is no requirement that such consumption occur in the presence of the child or pose any danger to the child; he is required to report all alcohol consumption. The best interests of a child require a parenting arrangement which provides for a child's safety, emotional growth, health, stability, and physical care. See § 43-2923. Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children. *Aguilar v. Schulte*, 22 Neb. App. 80, 848 N.W.2d 644 (2014). Because the requirement to "self-report" is not confined to alcohol consumption during the time period in which he has or will have the child, it is an inappropriate provision to be included in the parenting plan. We therefore conclude that the district court abused its discretion in including the safety plan, which allows Jessica to determine whether Benjamin is entitled to visitation and prohibits Benjamin from consuming alcohol even outside the presence of the child. We therefore modify the parenting plan to remove the safety plan.

*Valuation and Division of Property.*

Benjamin challenges the district court's valuation and division of the parties' property in several respects. We modify the decree as explained below.

[17] Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide

the net marital estate between the parties in accordance with the principles contained in § 42-365. *Burcham v. Burcham*, 24 Neb. App. 323, 886 N.W.2d 536 (2016).

[18,19] Benjamin first challenges the classification of fencing supplies, a Shop-Vac, and some hay as marital assets. He claims these assets were his nonmarital property and should not have been included in the marital estate. Property which one party brings into the marriage is generally excluded from the marital estate. *Id.* The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding. *Id*.

Benjamin testified that he owned the fencing supplies prior to the marriage, and therefore, they are not marital property. In addition, Benjamin and both of his parents testified that the Shop-Vac was a Christmas gift to Benjamin from his parents, and his mother testified that the gift was given prior to the marriage. Jessica did not testify as to the fencing supplies or the Shop-Vac. Because the undisputed evidence establishes that these items are Benjamin's nonmarital property, the district court erred in classifying them as marital property. The court valued the Shop-Vac at $100 and the fencing supplies at $3,000. We therefore decrease Benjamin's portion of the marital assets by $3,100.

The evidence with respect to the hay is less clear. Benjamin testified that the parties did not own any hay at the time of the divorce. He later explained that the hay was food for the horses owned jointly by the parties. Jessica first testified that Benjamin has an unlimited supply of hay, but she later stated that they both had an unlimited supply of hay at the time they were married. She said the hay was a "bonus" from Benjamin's job. Because the record is unclear as to whether the hay was in existence as a separate asset or was Benjamin's separate property, he has not met his burden to show the property is nonmarital. We therefore affirm the inclusion of the hay in the marital estate.

Finally, Benjamin asserts that the district court erred in valuing a Farm Service Agency (FSA) loan. The court accepted Jessica's value of $20,000 for the loan, but Benjamin claims it should be valued at $32,000.

As of March 2016, the FSA loan had an available balance of $32,000 total. Benjamin testified that initially, he used $22,000 of the available balance to purchase 11 cows at a cost of $2,000 each. He explained that he attempted to breed the cows to have calves in the spring of 2017, but sold the cows that did not become pregnant. He was advanced an additional $7,900 from the FSA loan to buy cows to replace those he had sold. This apparently occurred after he filed the complaint for dissolution of the marriage in May 2016.

[20] Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). Thus, any increase in the debt amount that occurred after the parties separated was not for the joint benefit of the parties and should not be considered a marital debt. Thus, the additional $7,900 that Benjamin received after he filed for dissolution of the marriage does not constitute a marital debt.

Jessica valued the FSA loan at $20,000, but she did not provide evidence as to how she arrived at that value. Thus, accepting such value without supporting evidence constitutes an abuse of discretion. The undisputed evidence presented at trial supports assigning a value of $22,000 to the loan, and we therefore modify Benjamin's portion of the marital liabilities accordingly.

Based on the foregoing modifications, the total marital assets equal $60,577.41 and the marital debts equal $24,414.44. Due to our modifications, Benjamin's portion of the marital assets has decreased by $3,100 and his portion of the marital debts has increased by $2,000. Thus, the value of Benjamin's portion of the net marital estate now equals $20,612.97 and Jessica's portion equals $15,550. As a result,

we modify the equalization payment due from Benjamin to Jessica to a total of $2,531.

## CONCLUSION

We find no abuse of discretion in the district court's decision to decline to impose joint custody of the parties' minor child and award custody to Jessica. We modify the parenting plan, the valuation and distribution of the marital estate, and the equalization payment as explained above. The district court's order is otherwise affirmed.

Affirmed as modified.

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

# Robert Thomas, appellant, v. Kiewit Building Group Inc., et al., appellees.

914 N.W.2d 456

Filed April 24, 2018. No. A-16-968.

1. **Directed Verdict: Evidence: Appeal and Error.** A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. In reviewing that determination, an appellate court gives the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.
2. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pleaded.
3. ____. A pleading serves to eliminate from consideration those contentions which have no legal significance and to guide the parties and the court in the conduct of cases.
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. **Negligence: Contractors and Subcontractors.** A general contractor in possession and control of the premises has a duty to keep the premises

in such condition that they afford a reasonably safe place to work for persons working on or otherwise rightfully on the premises.

6. **Negligence: Liability: Contractors and Subcontractors.** A general contractor in possession and control of the premises is only liable when the subcontractor's employee is injured because the workplace premises were not safe. It is not liable when an employee is injured due to specific actions or inactions involved in the construction process.
7. ____: ____: ____. A possessor of property is not liable for injury to an independent contractor's employee caused by a dangerous condition that arose out of the contractor's work, as distinguished from a condition of the property or a structure on the property.
8. **Trial: Evidence: Appeal and Error.** The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.
9. **Trial: Evidence: Testimony: Proof.** Demonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.
10. ____: ____: ____: ____. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.
11. **Trial: Juries: Evidence.** Demonstrative exhibits are defined by the purpose for which they are offered at trial—to aid or assist the jury in understanding the evidence or issues in a case.
12. **Trial: Evidence: Testimony.** Demonstrative exhibits are relevant only because of the assistance they give to the trier of fact in understanding other real, testimonial, and documentary evidence.
13. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Reversed and remanded for further proceedings.

James E. Harris and Britany S. Shotkoski, of Harris & Associates, P.C., L.L.O., for appellant.

Dan H. Ketcham, of Engles, Ketcham, Olson & Keith, P.C., for appellee Kiewit Building Group Inc.

Inbody, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

## INTRODUCTION

Robert Thomas brought a negligence action against Kiewit Building Group Inc. (Kiewit); Architectural Wall Systems Co. (AWS); and Zurich American Insurance Co., AWS' workers' compensation insurance carrier. The action arises out of an injury Thomas sustained while working for AWS on the construction of a building for TD Ameritrade in Omaha, Nebraska. Kiewit was the general contractor for the project. At the close of Thomas' case, the district court for Douglas County sustained Kiewit's motion for directed verdict. Based on the reasons that follow, we reverse, and remand for further proceedings.

## BACKGROUND

Thomas brought this negligence action against Kiewit, AWS, and Zurich American Insurance Co. based on injuries he sustained on February 20, 2012, when he slipped and fell at the TD Ameritrade jobsite. Thomas has been paid workers' compensation benefits and therefore, as provided under Neb. Rev. Stat. § 48-118 (Reissue 2010), AWS and Zurich American Insurance Co. were named as defendants for workers' compensation subrogation purposes only.

On February 20, 2012, Thomas was working in the course and scope of his employment as an ironworker with AWS on the 12th floor, which was the top floor, of the TD Ameritrade building. The 12th floor was not yet enclosed, and the floor was exposed to the elements, including ice, snow, and frost. Additionally, snow and ice would melt on the roof above, drip down and puddle on the 12th floor, and refreeze. This occurred even on days when there was no precipitation. The concrete floor would become slick as a result of the snow and ice, making the floor dangerous. Sand was spread on the icy areas to make the floor safer. Thomas was injured when he slipped and fell on sand that remained on the floor after it was dry.

Thomas alleges that Kiewit was negligent in failing to remove the sand after the floor was dry, creating a slippery and dangerous surface.

At the time Thomas fell, he and Perry Schafer, another AWS employee, were carrying a metal sheet of siding that was 26 to 28 feet long and 3 feet wide. Before the accident happened, Thomas and Schafer had made 7 to 10 trips carrying metal sheets and had taken the same path each time. Thomas testified that he did not think there was a risk of falling, because he had walked the route safely numerous times. They also had been carrying the same sheets of siding on the job for a couple days before the accident, carrying about 20 sheets each day. Due to the size of the sheets, they had to be carried one at a time by two workers. AWS was going to install the metal sheets on the exterior of the building, so Thomas and Schafer were carrying the sheets to the outside walkway of the building.

On the day of the accident, there were several "trades" working on the 12th floor with AWS, including electricians, heating and air conditioning installers, and plumbers, all of whom had materials stacked on the floor. Because of the materials stacked up in various places and due to the length of the sheets they were carrying, Thomas and Schafer had to "zig-zag through everything." Thomas testified that he and Schafer preplanned the route they would take to carry the sheets before starting the day. Schafer and Thomas chose the route they used, and nobody else instructed them on the path to take.

When Thomas fell, Schafer was the lead person carrying the metal sheet. Their route required them to step up onto a raised concrete area designed for an air-handling unit. This required them to each step up onto this pad and then step back down as they carried the metal sheet. Schafer testified that he and Thomas had done this several times that day without any problems. Thomas stated that when they would carry the metal sheets, he felt like he was somewhat pulled by Schafer, who was the lead person. However, Thomas testified that he was

confident about carrying the sheets, because he had done it numerous times and did not think there was any risk.

When Thomas fell, Schafer had gone about 10 or 15 steps past the raised pad and Thomas was stepping off the raised pad. When he stepped off, "[his] feet just went out from under [him]." Schafer testified that there was sand on the concrete where Thomas fell and that it was placed there on a different day due to icy conditions. Schafer testified that there was not very much sand and that it was spread out. He testified he did not feel it was necessary to give Thomas a warning about the sand because it was visible. Schafer testified that he and Thomas continued to work without removing the sand. Schafer testified that if they thought the sand on the floor was an issue, they could have done something about it. Thomas stated that he resumed working shortly after he fell, walking the same route with the sand still present.

John Dahir was Kiewit's safety supervisor. His job was to manage Kiewit's safety programs and ensure they complied with Occupational Safety and Health Administration (OSHA) regulations, state law, and Kiewit's safety rules. He additionally would make sure that subcontractors followed their own safety rules. He testified that Kiewit had responsibility overall for safety on the TD Ameritrade jobsite, but that the subcontractors per contract were responsible for their own safety as well. Dahir testified that Kiewit did walk-throughs of different areas throughout each day and took photographs to document inspections and to show the subcontractors any deficiencies that were found so they could be corrected. He testified about one occasion where he identified slick floors from ice and snow as a safety issue on the job and took photographs of this condition. On one of the photographs, he noted, "Slick conditions were addressed with the group that we [Kiewit] are sanding the main walk paths and that . . . they are responsible to prep their [work areas] with sand if they are not in the main walk paths that have not been sanded." He explained that Kiewit took care of the main walking paths and

that the subcontractors were "responsible to prep their own work areas to make it work ready," which included putting down sand if necessary. Dahir testified that the area where the accident occurred was in AWS' work area. He testified that it is the responsibility of the contractor who spreads the sand to clean it up after it is no longer needed. Dahir also stated that everyone on the site was responsible for unsafe conditions and had the authority to correct an unsafe act or condition. Dahir further testified that the conditions on the 12th floor "varied from day-to-day, and hour-by-hour" because of the ice and snow.

Dahir testified that in his opinion, the sand on the dry floor was not a hazard. He based his opinion on the fact that the sand was put down as a safety measure to prevent someone from slipping based on the icy conditions they were dealing with on the 12th floor. He testified that he has also walked where there was sand on dry concrete and that he did not consider the floor to be a slip hazard. Dahir testified that there was no OSHA violation with respect to Thomas' fall and that OSHA has never recognized sand used to prevent slip and falls in outside conditions to be a hazardous condition.

Keith Vidal, a consulting safety engineer, also testified that snow and ice are recognized hazards and that putting sand down is a reasonable safety measure to reduce the risk of falling on snow and ice. Vidal testified that sand in and of itself is a recognized hazard, but not a hazard recognized by OSHA.

Schafer testified that when ice was on the concrete floor, it was a dangerous condition, and that sand was put down to make the floor condition less dangerous. He testified that when he saw ice on the floor, he would report it to his foreman. Schafer testified that when sand remained on dry concrete, it made the floor slick, but that he did not recall ever reporting sand on the floor to his foreman as a dangerous condition. He stated that he knew to be careful when walking on sand on dry concrete and that he and Thomas specifically

talked about being careful when carrying the sheets because of the sand on the floor.

Reagan Wheatly, Thomas' foreman, testified that all AWS employees are responsible for safety in their own jobs and that they are trained in how to protect themselves from slips and falls. Specifically, AWS employees are told to wear proper boots, preplan their walking path, and look for hazards. Wheatly testified that the AWS employees were to be aware of anything on the ground in their path and that they were expected to do something about anything they considered a danger. They were responsible "to keep [their] path clear."

Wheatly testified that the floors were never slick or dangerous due to sand. He did not consider sand on the ground to be a hazard. He stated that it was only the ice that concerned him and was a problem. He testified that the sand reduced the dangers of the ice and improved worker safety. Wheatly stated that there was sand available for AWS workers to put down if there was ice on the floor and that it was up to each subcontractor to decide whether to put sand down in their work areas. Wheatly also testified that the conditions on the floor were always changing due to the various subcontractors who worked on the floor, as well as the fact that the floor was exposed to outdoor conditions.

Wheatly testified that he never experienced any problems walking on the route that Thomas and Schafer used and that he never thought there was a hazard because of sand on the ground. He also testified that neither Thomas nor Schafer ever reported that the sand was a hazard. Wheatly testified that he had never been trained that sand is considered debris or a safety hazard. After Thomas fell, Wheatly did not think it was necessary to remove the sand where Thomas fell to make it safer to walk. He also testified that Kiewit did not do anything to cause Thomas' accident.

Thomas testified that Kiewit laborers made it safe for the workers by keeping walkways clear. Thomas had seen Kiewit laborers putting sand down in the main walkways 2 weeks

before the incident. Thomas testified that he did not fall in a main walkway and that he does not know who put sand down in the area where he fell. He did remember a meeting where AWS employees were told that they were responsible for spreading sand in their work area.

Thomas testified that he knew sand was present where he fell and that he could see it. Thomas never reported the sand on the floor as an unsafe condition, because in his opinion, the sand was not unsafe. He testified that he has encountered sand on other construction jobs. Thomas admitted that Kiewit would not be on notice of the sand creating a hazard if he and other AWS employees did not report a problem. Thomas testified that sand on a dry floor made it slick, but that it did not stop him and his coworkers from working—they just had "to pay some special attention" when walking. He also testified that he was responsible for his own safety. Thomas admitted that he was trained to report unsafe conditions and that he knew he was not required to work if he felt unsafe.

At the close of Thomas' case, Kiewit made a motion for a directed verdict, which the trial court sustained. The trial court entered an order dismissing Thomas' action, as well as all pending cross-claims and subrogation interests.

## ASSIGNMENTS OF ERROR

Thomas assigns that the trial court erred in (1) granting Kiewit's motion for directed verdict; (2) finding that Kiewit did not owe him, as an employee of independent contractor AWS, a duty to provide a safe place to work; (3) applying the general rule that one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the independent contractor; (4) finding that Kiewit as general contractor did not have possession and control of the premises; (5) failing to recognize and apply the rule that a general contractor in possession and control of premises has a duty to provide a safe place to work; (6) failing to permit him to frame the issues as he chose; (7) refusing to admit

exhibits 41 and 48 into evidence as demonstrative exhibits; and (8) failing to take judicial notice of an OSHA regulation, specifically 29 U.S.C. § 654(a)(1) (2012).

## STANDARD OF REVIEW

[1] A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence. *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 900 N.W.2d 732 (2017), *opinion modified on denial of rehearing* 297 Neb. 568, 902 N.W.2d 98.

## ANALYSIS

Thomas first assigns that the trial court erred in granting Kiewit's motion for directed verdict. His next five assignments of error all relate to the court's findings in regard to the directed verdict. Accordingly, we address the first six assignments of error together.

Thomas pled this case as a premises liability case. Specifically, in his amended complaint, he alleged that Kiewit, as the general contractor in possession and control of the construction site, had a duty to provide a safe place to work and to keep the premises reasonably safe for workers on the construction site, and a further duty to protect and/or warn workers against dangerous conditions on the construction premises. Thomas further alleged that Kiewit created and knew of the dangerous condition resulting from slippery, sandy floors and that Kiewit knew or should have known that the dangerous condition involved an unreasonable risk of harm to workers who either would not discover or realize the danger or would fail to protect themselves against such danger. The amended complaint alleges that Kiewit was negligent in one or more of the following ways: (1) failing to provide a safe place to work

by not following "good housekeeping measures" as required under the Kiewit safety plan, OSHA safety regulations, and industry safety customs and rules; (2) failing to timely clean up the sand, thereby creating a dangerous condition on the premises; (3) failing to use reasonable care to protect Thomas against dangerous conditions on the premises; (4) failing to warn Thomas of the existence of a dangerous condition on the premises; and (5) failing to use reasonable care in maintaining the subject premises in a safe condition for the protection of workers.

Although Thomas pled and proceeded with this case based on a theory of premises liability, the trial court viewed it otherwise. When considering Kiewit's motion for a directed verdict, the court was swayed by Kiewit's argument that premises liability did not apply to a claim for injuries sustained by a subcontractor's employee against the general contractor of a construction project.

Kiewit made its motion for directed verdict at the close of Thomas' case in chief. It argued that a directed verdict should be granted in its favor because Kiewit, as a general contractor, was not liable for physical harm to a subcontractor's employee and because Thomas had failed to prove that any of the exceptions to the rule were applicable, specifically that Kiewit had control over AWS' work or control over the area where Thomas was injured. Thomas argued he presented evidence to show that Kiewit had possession and control over the premises and that therefore, Kiewit had a duty to provide a safe place to work for an independent contractor's employees. After both parties argued their respective positions, the trial court stated this was not a premises liability case, notwithstanding how it had been pled by Thomas. Rather, it analyzed the case under the general rule of imposing vicarious liability upon a general contractor for injuries arising out of the negligence of its subcontractor. Under that theory, the court determined that Kiewit did not have possession and control of the area in which Thomas was injured nor did it have actual

constructive knowledge of the danger and therefore was not liable for Thomas' injuries. As a result, the court found that Kiewit did not owe a duty of care to Thomas under the particular facts of this case as a matter of law, thereby granting Kiewit's motion and dismissing all cross-claims and subrogation interests.

[2,3] Thomas contends that the trial court essentially amended his pleadings when it rejected his premises liability theory of the case. The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pleaded. *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003). A pleading serves to eliminate from consideration those contentions which have no legal significance and to guide the parties and the court in the conduct of cases. *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998).

We conclude that the trial court erred in failing to decide the motion for directed verdict on the theory upon which the case was pled. Thomas pled the case based on premises liability, and the court should have decided the case on that theory, rather than adopting a different theory. See *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012) (applying premises liability theory to injured subcontractor's employee and holding that independent contractor is business invitee to whom possessor of land owes duty to protect against certain dangers). We further conclude, as discussed below, that Thomas' evidence was sufficient to create a question for the jury as to Kiewit's liability and that thus, the motion for directed verdict should have been denied.

[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. *Edwards v. Hy-Vee*, 294 Neb. 237, 883 N.W.2d 40 (2016).

[5] The Nebraska Supreme Court has recognized that a general contractor in possession and control of the premises has a duty to keep the premises in such condition that they afford a reasonably safe place to work for persons working on or otherwise rightfully on the premises. See *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981). See, also, *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014) (one in possession and control of premises has duty to provide safe place to work for independent contractor's employees).

Thomas presented evidence from which the trier of fact could have determined that Kiewit, as the general contractor, maintained possession and control of the premises and therefore had a duty to provide a safe place to work for Thomas, an employee of independent contractor AWS. Dahir testified that Kiewit had responsibility overall for safety on the TD Ameritrade jobsite. He testified that Kiewit was responsible for initiating, maintaining, and supervising all safety precautions. Dahir testified that Kiewit did walk-throughs of different areas throughout the jobsite each day and took photographs to document inspections and to show the subcontractors any deficiencies that were found so they could be corrected.

Wheatly also testified that Kiewit, as the general contractor, had to provide a safe place to work free of recognized hazards, which includes safe walking surfaces free of those hazards. Thomas testified that Kiewit laborers kept walkways clear and picked up debris left behind. Another employee for

AWS testified that he believed it was Kiewit's responsibility to keep the jobsite clean and to make sure it was safe "[d]ay in and day out."

There was evidence that Kiewit took care of the main walking paths and that the subcontractors were responsible for their own work areas, which included putting sand down on ice when necessary. Dahir testified that it was the responsibility of the contractor who spread the sand to clean it up after it was no longer needed. The evidence was conflicting as to who put the sand down where Thomas fell. There was also evidence that Kiewit cleaned up the sand after Thomas fell.

Wheatley testified that sand was available to AWS workers to use in their work areas. However, he testified that he never put sand down and never instructed the AWS workers to do so either. He also testified that he would expect Kiewit to sweep up sand on the floor that is no longer necessary.

Schafer testified that Kiewit would have put the sand down in the place where Thomas fell. He did not see anyone from Kiewit put it in the exact place where Thomas fell, but he saw them spreading it in other areas. He testified that the sand was not put down on the day Thomas fell, but, rather, it had been put down on a different day due to icy conditions. He testified that Kiewit laborers were the only ones who spread sand. Schafer also testified that he had seen Kiewit laborers pumping puddles of water off the floor. He testified that AWS workers did not put down sand because it was outside their scope of work. He testified that he personally did not put down sand because he was a union ironworker. Schafer also testified that Kiewit laborers cleaned up the sand where Thomas fell. Thomas testified that he saw Kiewit laborers putting down sand in the main walkways 2 weeks before his accident. He did not know who put the sand down in the area where he fell.

[6,7] In addition to the evidence that Kiewit had possession and control of the premises, and therefore a duty to provide a safe place to work, Thomas presented evidence

from which the trier of fact could conclude that such duty was breached because the sand on the dry concrete made the workplace unsafe. The Nebraska Supreme Court has held that a general contractor in possession and control of the premises is only liable when the subcontractor's employee is injured because the workplace premises were not safe. See *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014). It is not liable when an employee is injured due to specific actions or inactions involved in the construction process. *Id.* Similarly, a possessor of property is not liable for injury to an independent contractor's employee caused by a dangerous condition that arose out of the contractor's work, as distinguished from a condition of the property or a structure on the property. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012).

Thomas alleged that there was something unsafe about the workplace premises, i.e., the sand on the dry concrete. The evidence shows that the concrete on the 12th floor would often have ice and snow on it, which made it slick. Sand was often put on the ice to make it less slick. Dahir testified that sand was put down to improve safety and prevent workers from slipping on icy conditions. Dahir testified that the sand on the dry floor was not a hazard. Schafer agreed that when sand was put on the ice, it made the floor less dangerous. However, Schafer also testified that sand on the dry concrete floor created a slick surface, making it dangerous to walk on. Schafer testified that he had slid on an area where there was sand on dry concrete. He stated that he knew to be careful when walking on sand on dry concrete and that he and Thomas specifically talked about being careful when carrying the sheets of siding because of the sand on the floor. Thomas also testified that sand on dry concrete made the floor slick and made it necessary to pay special attention when walking over it.

Giving Thomas, as the nonmoving party, the benefit of every controverted fact and all reasonable inferences from the evidence, we conclude that Thomas presented sufficient

evidence to create a question of fact as to Kiewit's liability. Thus, the trial court erred in granting Kiewit's motion for directed verdict.

[8-12] Thomas also assigns that the trial court erred in refusing to admit exhibits 41 and 48 into evidence as demonstrative exhibits. The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion. *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011). "'[D]emonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.'" *State v. Pangborn*, 286 Neb. 363, 369-70, 836 N.W.2d 790, 797 (2013), quoting *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). Conversely, "'[d]emonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant, or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.'" *Id.* at 370, 836 N.W.2d at 797. Demonstrative exhibits are defined by the purpose for which they are offered at trial—to aid or assist the jury in understanding the evidence or issues in a case. *State v. Pangborn, supra.* They are relevant only because of the assistance they give to the trier of fact in understanding other real, testimonial, and documentary evidence. *Id.*

Exhibit 41 is a computer-generated depiction of Thomas' accident, showing him stepping off the raised pad onto the floor and falling. It was presented to Dr. John Hain during his deposition testimony to assist him in explaining the "mechanism of injury" in this case. No objection was made in regard to exhibit 41 during Hain's deposition.

At trial, the exhibit was offered into evidence before Hain's video deposition was played for the jury. Kiewit objected to the admission of the exhibit based on foundation. The parties

discussed the fact that Hain's deposition had not yet been played for the jury, and there was discussion about whether the court should wait to rule on the admissibility of exhibit 41 until after Hain's testimony. The court decided to rule at that point, and it sustained Kiewit's foundation objection. Hain's video deposition was subsequently played for the jury.

We conclude that the court properly sustained Kiewit's foundation objection at the time exhibit 41 was offered into evidence. Hain was asked about the exhibit during his deposition testimony, yet the exhibit was offered before Hain's deposition was played for the jury. Thomas did not reoffer the exhibit into evidence after Hain's deposition was played for the jury or at any time later in the trial. Accordingly, we conclude that the court did not abuse its discretion in failing to admit exhibit 41 into evidence.

[13] Exhibit 48 is a chart which showed the results of testing performed by Vidal, the consulting safety engineer, in which he used a tribometer to measure the slip resistance on various surfaces with and without sand. Although the chart was not identified as exhibit 48 during Vidal's testimony, he used it during his testimony without objection, explaining his findings while the exhibit was being shown to the jury. When Thomas offered the exhibit at a later point in trial, Kiewit objected based on foundation and hearsay, as well as on the ground that it was more prejudicial than probative. After some discussion between the court and the parties regarding demonstrative evidence, the court reserved ruling on exhibit 48. The record does not show that the court ever subsequently ruled on the admissibility of exhibit 48. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017). Because the trial court did not rule on the admissibility of exhibit 48, we do not consider Thomas' argument on appeal.

Finally, Thomas assigns that the court erred in failing to take judicial notice of an OSHA regulation, specifically 29

U.S.C. § 654(a)(1), the general duty clause. Kiewit objected, arguing that it was irrelevant because there was no indication in the evidence of an OSHA charge or violation. The court sustained Kiewit's objection, stating that the regulation was not relevant and would confuse the jury. Based on our review of the record, we agree. Thomas' final assignment of error is without merit.

## CONCLUSION

Based on the reasons stated above, we conclude that the district court erred in sustaining Kiewit's motion for directed verdict. Accordingly, the order of the district court is reversed and the matter is remanded for further proceedings.

Reversed and remanded for
further proceedings.

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

# Walter A. Barrios, appellee, v. Commissioner of Labor of the Nebraska Department of Labor, appellant, and Custom Rental Services, Inc., appellee.

914 N.W.2d 468

Filed April 24, 2018. No. A-17-635.

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. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
6. **Final Orders: Appeal and Error.** If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.
7. **Administrative Law: Appeal and Error.** Under the Administrative Procedure Act, the district court sits as an intermediate appellate court.

8. **Courts: Final Orders: Appeal and Error.** When a district court, sitting as an intermediate appellate court, enters an order that affects a substantial right, that order is final for purposes of appeal if its judgment can be executed without any further action by the district court.
9. ____: ____: ____. Where the district court, sitting as an intermediate appellate court, reverses a judgment in favor of a party, and remands the matter for further proceedings, that party's substantial right has been affected.
10. **Estoppel: Words and Phrases.** Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations.
11. **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 or her detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
12. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.
13. ____. The elements of equitable estoppel are, as to the party claiming estoppel: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
14. **Administrative Law: Courts: Appeal and Error.** Under the Administrative Procedure Act, the district court has the discretion to remand a matter for resolution of issues that were not raised before the agency if the court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency.
15. **Rules of the Supreme Court: Administrative Law: Corporations: Attorneys at Law.** Under the Nebraska Supreme Court rules, a corporate officer who is not a lawyer is not prohibited from representing the corporation at an agency hearing under certain conditions.

Appeal from the District Court for Hall County: Mark J. Young, Judge. Affirmed in part as modified, and in part reversed.

Katie S. Thurber, Thomas A. Ukinski, and Dale M. Shotkoski for appellant.

Thomas A. Wagoner for appellee Walter A. Barrios.

Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

Riedmann, Judge.

## INTRODUCTION

The Commissioner of Labor of the Nebraska Department of Labor (the Department) appeals the order of the district court for Hall County which remanded the matter to the Nebraska Appeal Tribunal for consideration of issues not previously raised. As explained below, we affirm in part as modified and in part reverse.

## BACKGROUND

Walter A. Barrios was employed with Rogue Manufacturing Company (Rogue Manufacturing) for several years before he was laid off on October 8, 2015. He began working for Custom Rental Services, Inc. (Custom Rental), on October 12, but resigned on October 13. Barrios then applied for unemployment benefits through the Department.

Barrios' application was initially granted, and he received benefits. After the Department completed its investigation, however, an adjudicator for the Department concluded in a notice of determination dated May 27, 2016, that because Barrios had voluntarily left his employment with Custom Rental without good cause, he was disqualified from receiving benefits under Neb. Rev. Stat. § 48-628 (Reissue 2010) for the week his employment ended and the 13 weeks immediately following. This disqualification resulted in an overpayment to Barrios of $3,552, which he was liable to repay.

Barrios appealed the decision to the appeal tribunal. The appeal tribunal held a hearing, at which the sole issue was whether Barrios voluntarily left his employment with Custom Rental without good cause under § 48-628. Barrios testified that during his job interview with Custom Rental, he was told that he would be delivering tables and chairs to different locations. However, the only work he was asked to perform on October 12 and 13, 2015, was washing the outside of a building. He explained that he decided to quit because "the job I got was not the one that I was told I would do." After Barrios left his employment with Custom Rental, he called the unemployment office. He testified that after he reported he "only had worked for [Custom Rental] for three days," an employee stated, "'Oh, no problem. I congratulate you.'"

The president of Custom Rental testified that during the days that Barrios worked, there were no deliveries that needed to be made. The president said that when that happens, the employees typically work on maintaining equipment or work on the facilities.

In a written order, the appeal tribunal concluded that Barrios failed to prove that he terminated his employment with Custom Rental for good cause. Therefore, he was subject to the 13-week disqualification period, and any benefits he received to which he was not entitled must be repaid. The Department's determination was therefore affirmed. Barrios moved for reconsideration of the appeal tribunal's decision, but the request was denied.

Barrios appealed the decision of the appeal tribunal to the district court for Hall County. In his amended petition, he alleged that the appeal tribunal erred in ordering that the benefits he received be repaid because he was eligible for benefits as a result of his employment at Rogue Manufacturing. In addition, Barrios claimed that the Department should be estopped from recouping the benefits paid to him because he detrimentally relied upon the representation of the Department's employee that he was eligible for unemployment benefits.

After holding a hearing and reviewing the evidence, the district court reversed the decision and remanded the matter to the appeal tribunal "in the interests of justice to resolve issues not raised before the agency." Specifically, the court concluded that the matter should be remanded for consideration of whether the Department is estopped from seeking reimbursement of the benefits paid to Barrios when its employees initially awarded the benefits after knowing a voluntary withdrawal had occurred. The district court further remanded the matter for a determination of whether Barrios was entitled to unemployment benefits as a result of his employment with Rogue Manufacturing. Finally, the court found that plain error had occurred when the president of Custom Rental was allowed to participate in the hearing before the appeal tribunal and cross-examine witnesses. The district court concluded that unless the president was an attorney, he was prohibited from representing the corporation at the hearing. The Department timely appeals to this court.

## ASSIGNMENTS OF ERROR

The Department assigns, summarized, that the district court erred in (1) remanding the matter for a determination of whether the Department is equitably estopped from seeking reimbursement of benefits paid to Barrios, (2) remanding the matter for a determination of whether Barrios is entitled to unemployment benefits from Rogue Manufacturing, and (3) finding plain error in the representation of Custom Rental by its president.

## STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Underwood v. Nebraska State Patrol*, 287 Neb. 204, 842 N.W.2d 57 (2014). When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether

the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id*.

## ANALYSIS

*Jurisdiction.*

[4-6] 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. *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004). If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court. *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018).

Barrios claims we do not have jurisdiction, because the district court's order is not final insomuch as it remanded the matter for further proceedings. Neb. Rev. Stat. § 84-917(5)(b)(ii) (Reissue 2014) sets forth the procedure under the APA in situations in which the district court remands the matter to the agency for further proceedings. It states:

> The agency shall affirm, modify, or reverse its findings and decision in the case by reason of the additional proceedings and shall file the decision following remand with the reviewing court. The agency shall serve a copy of the decision following remand upon all parties to the district court proceedings. The agency decision following remand shall become final unless a petition for further

> review is filed with the reviewing court within thirty days after the decision following remand being filed with the district court. The party filing the petition for further review shall serve a copy of the petition for further review upon all parties to the district court proceeding in accordance with the rules of pleading in civil actions promulgated by the Supreme Court pursuant to section 25-801.01 within thirty days after the petition for further review is filed. Within thirty days after service of the petition for further review or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified copy of the official record of the additional proceedings had before the agency following remand.

§ 84-917(5)(b)(ii). The above procedure was added to the APA in 2006 when the Legislature passed 2006 Neb. Laws, L.B. 1115. As passed, L.B. 1115 incorporated 2006 Neb. Laws, L.B. 1136, the purpose of which was to eliminate the need for a new action being filed in the district court if a party sought review of an agency decision following additional proceedings on remand. See Judiciary Committee Hearing, L.B. 1136, 99th Leg., 2d Sess. 18 (Feb. 2, 2006). See, also, *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997) (dismissing appeal under APA for lack of jurisdiction for failure to serve summons within 30 days of filing petition for review following decision on remand).

[7-9] Under the APA, the district court sits as an intermediate appellate court. § 84-917(2) and Neb. Rev. Stat. § 84-918(1) (Reissue 2014). The Nebraska Supreme Court has held that when a district court, sitting as an intermediate appellate court, enters an order that affects a substantial right, that order is final for purposes of appeal if its judgment can be executed without any further action by the district court. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994). Where the district court reverses a judgment in

favor of a party, and remands the matter for further proceedings, that party's substantial right has been affected. *Id*.

In *Rohde v. Farmers Alliance Mut. Ins. Co., supra*, the county court directed a verdict in favor of the defendant. The plaintiffs appealed to the district court, which reversed the judgment and remanded the case to the county court for trial on the merits. *Id*. The defendant appealed to the Court of Appeals, which dismissed for lack of jurisdiction. *Id*. On a petition for further review, the Nebraska Supreme Court overruled prior precedent to the extent that it held an order of a district court reversing a final order of the trial court and remanding the case for a trial on the merits is never a final order. See *id*. The court explained that the determining factor was whether the district court retained the cause for further action; if it did not, the district court's order remanding the case for further proceedings was a final order. See *id.*

In the present case, the district court reversed a decision that had been entered in favor of the Department, thereby affecting a substantial right of the Department. Pursuant to § 84-917(5)(b)(i), the district court remanded the matter for further proceedings to address an issue that had not been raised in the agency proceeding. Section 84-917(5)(b)(ii) requires the agency to file its new decision with the district court, but unless a party files a petition for further review with the district court, the agency's decision becomes final without any further action of the district court. Prior to the amendment of § 84-917(5) in 2006, the Nebraska Supreme Court had held that remanding a case to an agency for further proceedings did not empower the district court to retain jurisdiction over the action. *Concordia Teachers College v. Neb. Dept. of Labor, supra*.

The Nebraska Supreme Court has not squarely addressed this issue since the enactment of § 84-917(5)(b)(ii), and an argument can be made that the additional provisions preclude a final judgment until such time as the new decision is filed with the district court. However, we are mindful that in *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb.

653, 657, 844 N.W.2d 276, 280 (2014), a case in the same procedural posture as the case before us, the Nebraska Supreme Court addressed the merits, recognizing that the appellant "timely appeals." Accordingly, we address the Department's assigned errors.

*Equitable Estoppel.*

The Department first argues that the district court erred in remanding the matter for a determination of whether the Department is estopped from seeking repayment of the benefits paid to Barrios to which he was not entitled. We conclude that because the elements of equitable estoppel are not present in the instant case, the district court erred in remanding the matter on that basis.

[10,11] Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations. *Omaha Police Union Local 101 v. City of Omaha*, 292 Neb. 381, 872 N.W.2d 765 (2015). The doctrine applies where, as a result of conduct of a party upon which another person has in good faith relied to his or her detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed. *Id*.

[12,13] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. *Id*. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the

party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Id*.

In the present case, Barrios argues that the doctrine of detrimental reliance applies because the Department paid unemployment benefits without a disqualification period when he had reported to its representative that he "only had worked for [Custom Rental] for three days." But Barrios does not explain how he relied upon such action. He had already terminated his employment with Custom Rental when he called the Department, so he is not claiming that the statement of the Department's representative induced him to quit his job. Barrios alleges in his amended petition that he was advised by the Department's representative he would be eligible for benefits and that based upon the representation, he applied for, and received, benefits. But at the hearing before the tribunal, he testified that the representative said, "'Oh, no problem. I congratulate you.'" We do not view that as a false representation upon which a person would reasonably rely to mean unemployment benefits were available without a disqualification period. Even Barrios' statement in his motion to reconsider that he was "advised that [he] qualified for Unemployment Benefits" cannot be construed as a representation that he would not have a disqualification period.

Even assuming Barrios relied upon the representative's statement as an inducement to apply for benefits, he suffered no harm in doing so. If he applied and the Department applied the 13-week disqualification period, he would receive nothing during those 13 weeks. If the Department did not apply the disqualification period, he would receive immediate unemployment benefits. He ultimately received immediate benefits to which the Department later determined he was not entitled. But because Barrios should never have received those benefits in the first place, allowing the Department to recoup the erroneously paid funds will cause no detriment to Barrios. He will

end up in the same position he would have been had benefits been properly delayed at the outset. And if he was entitled to benefits after the 13-week period (a question we are unable to determine based upon the record before us), and he had never applied for benefits, he would have ended up in a worse position. Thus, the doctrine of equitable estoppel is not applicable here. As a result, the district court erred in remanding the matter for a determination of whether the Department should be estopped from seeking repayment of the erroneously paid funds from Barrios.

*Benefits From Rogue Manufacturing.*

The Department also claims that the district court erred in remanding the matter for a determination of whether Barrios is eligible for benefits from Rogue Manufacturing. Specifically, it argues that the district court failed to properly construe Neb. Rev. Stat. § 48-626 (Reissue 2010) and § 48-628, leading to the erroneous conclusion that "an adjudication of the separation of Barrios from Rogue [Manufacturing] was required before a determination could be made whether he separated from employment with Custom Rental with good cause." Brief for appellant at 29. We disagree with the Department's interpretation of the district court's order.

[14] The sole issue addressed by the Department and the appeal tribunal was whether Barrios terminated his employment with Custom Rental for good cause. In his amended petition to the district court, Barrios alleged that the appeal tribunal's application of the disqualification period was erroneous in part because he was eligible for the benefits he received due to his employment with Rogue Manufacturing. Although this argument was raised for the first time on appeal to the district court, under the APA, the district court has the discretion to remand a case for resolution of issues that were not raised before the agency. See § 84-917. If the court determines that the interest of justice would be served by the resolution

of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings. § 84-917(5)(b)(i).

The district court's order observes that the transcript and bill of exceptions before it do not indicate whether the Department assessed if Barrios was eligible for benefits from Rogue Manufacturing. It is undisputed that the Department is seeking reimbursement of benefits it claims were erroneously paid to Barrios based on its determination that he was subject to the 13-week disqualification period due to his voluntary termination from Custom Rental. However, if his eligibility for benefits was based upon his employment with Rogue Manufacturing, and his separation from that employer did not warrant disqualification, then any benefit received by Barrios should not have to be repaid. See *Gilbert v. Hanlon*, 214 Neb. 676, 335 N.W.2d 548 (1983) (benefits attributable to separate employer are disqualified separately). Contrary to the Department's interpretation, the district court's remand for consideration of Rogue Manufacturing's liability was not for the purpose of determining whether Barrios separated from employment with Custom Rental with good cause, but, rather, for the purpose of determining whether Barrios was required to repay the benefits he received.

The underlying, unresolved issue is whether the Department is entitled to a return of the benefits paid. We cannot find that the district court abused its discretion in remanding the matter for a determination of whether Barrios was entitled to the benefits he received as a result of his employment with Rogue Manufacturing.

We note that although the court's order indicates that it was remanding the matter to the appeal tribunal for this determination, the matter must be remanded to the Department. It is the Department's duty to assess whether a claimant is entitled to receive unemployment benefits for which he or she has applied, and under § 84-917(5)(b), the court may remand the case to *the agency* for further proceedings. Thus, we

modify the district court's order to remand the matter to the Department, rather than the appeal tribunal.

*Representation by Custom Rental's President.*

Finally, the Department asserts that the district court erred in finding plain error in the appeal tribunal allowing the representation of Custom Rental by its president. The district court concluded that unless the president of Custom Rental was an attorney, he may not represent the corporation during the proceedings before the appeal tribunal. We conclude that the court erred in this determination.

[15] Pursuant to the Nebraska Supreme Court rules:

> Whether or not they constitute the practice of law, the following are not prohibited:
>
> . . . .
>
> (C) Nonlawyers appearing in a representative capacity before an administrative tribunal or agency, subject to the following:
>
> . . . .
>
> (2) A nonlawyer who is an employee, member, or officer of an entity or organization may represent such entity or organization before an administrative tribunal or agency of the State of Nebraska, or a political subdivision of the State of Nebraska, if all of the following conditions are met:
>
> (a) The tribunal, agency, or political subdivision permits representation of parties by nonlawyers;
>
> (b) The nonlawyer employee, member, or officer is specifically authorized by the entity or organization to appear before the tribunal, agency, or political subdivision on its behalf;
>
> (c) Such representation is not the primary duty of the nonlawyer employee, member, or officer to the entity or organization, but is secondary to other duties relating to the management or operation of the entity or organization;

> (d) The nonlawyer employee, member, or officer does not receive separate or additional compensation (other than reimbursement for costs) for such representation;
>
> (e) The representation does not involve a claim that the tribunal, agency, or political subdivision's action or the action of another person is illegal as a matter of law or unconstitutional; and
>
> (f) The Nebraska Evidence Rules as applicable in the district courts do not apply to the administrative proceeding.

Neb. Ct. R. § 3-1004. Thus, under the Nebraska Supreme Court rules, a corporate officer who is not a lawyer is not prohibited from representing the corporation at an agency hearing under certain conditions. The record before us lacks evidence as to several of the conditions set forth in § 3-1004(C)(2), however. Thus, this court and the district court are unable to determine whether the representation of Custom Rental by its president constituted the unauthorized practice of law. Accordingly, the district court erred in finding that allowing Custom Rental's president to represent the corporation at the agency hearing was plain error.

## CONCLUSION

We conclude that the district court erred in remanding the matter for a determination of whether the doctrine of equitable estoppel applies to the Department's request for reimbursement of unemployment benefits paid to Barrios. In addition, the court's finding of plain error with respect to allowing Custom Rental's president to represent the corporation before the appeal tribunal was erroneous. The district court's order is therefore reversed as to those issues. We affirm the court's decision to remand the matter for a determination of whether Barrios is eligible to receive unemployment benefits from Rogue Manufacturing, but modify the order to remand the matter to the Department, rather than the appeal tribunal.

Affirmed in part as modified,
and in part reversed.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# Crossman & Hosford, appellee, v. Micaela Harbison, Personal Representative of the Estate of Jeanne K. Moderow, deceased, appellant.

915 N.W.2d 101

Filed May 1, 2018. No. A-16-1115.

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. **Debtors and Creditors: Words and Phrases.** An "account stated" is an agreement between persons who have had previous dealings determining the amount due by reason of such transactions.
4. **Debtors and Creditors.** When parties have accounts against each other, and a statement of the account is made out by one party and presented to the other, and the latter expressly assents to its correctness, the law will regard it as a stated or settled account, and it will be binding on both parties.
5. **Debtors and Creditors: Proof.** The failure to object to an account rendered is admissible in evidence as tending to prove an acknowledgment of its correctness. Proof of an express promise to pay is not required.
6. **Debtors and Creditors: Time.** A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent. What constitutes an unreasonably long time is a question of fact to be answered in the light of all the circumstances.

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 Douglas County, Shelly R. Stratman, Judge, on appeal thereto from the County Court for Douglas County, Darryl R. Lowe, Judge. Judgment of District Court reversed and remanded for further proceedings.

Benjamin M. Belmont and Wm. Oliver Jenkins, of Brodkey, Peebles, Belmont & Line, L.L.P., for appellant.

Donald C. Hosford, Jr., of Crossman & Hosford, for appellee.

Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

Riedmann, Judge.

Crossman & Hosford sought recovery for legal services performed under an account stated theory. The county court for Douglas County granted summary judgment in its favor, and the judgment was affirmed by the district court. Finding a genuine issue of material fact, we reverse the judgment and remand the cause for further proceedings.

## FACTUAL BACKGROUND

Donald C. Hosford, Jr., is an attorney in Omaha, Nebraska, practicing law under the name "Crossman & Hosford." Hosford alleged that he performed legal services for Jeanne K. Moderow for some indeterminate time prior to March 8, 2012. On March 8, he sent Moderow two billing statements: one in the amount of $1,900 for services performed for "JMJM Properties, LLC" and one in the amount of $16,675 for work performed for "American Marking Company." The statements set out a narrative listing of the services rendered, but did not include an itemization of when the work was performed, what it specifically included, or the amount charged for each task.

Hosford sent followup invoices reflecting the amounts due in April, June, and July.

On July 31, 2012, Moderow first responded to Hosford's invoices, via email. She apologized for her delayed response, stated she was "taken aback" at the amount of the bill, and stated that because it would be difficult to pay "all at once," she would send a check for $500 "in the next couple of weeks." She concluded by thanking him for his patience. As promised, Moderow made her first $500 payment on August 14 and her second $500 payment on December 13. Subsequent billings reflected these payments as deductions from the total amount due.

Hosford continued to bill Moderow monthly without further response until April 2013. On April 17, Moderow sent Hosford a letter in an effort to "avoid a 'trainwreck.'" In that letter, she stated, "I have concerns regarding the years it took to bill me and the amount of the bill. In fact, if I had known your fees, I might have made other arrangements." Hosford responded, via letter, noting her two payments and stating that prior to her April 17 letter, she had never informed him of any issue with regard to her account. He concluded, stating, "With all due respect, such complaint comes at me too late, and after all the effort and communication I have put forth with regard to getting this resolved."

Moderow responded later that month, claiming that she had been paying on the first bill for the "JMJM LLC set up." She claimed that the statement concerning "AMC" had her "puzzled." She explained that the "bill was late (over 5 years) in being sent. There are no itemizations or dates and the amount is questionable." She requested "a significant adjustment." Hosford denied her request and continued sending monthly statements. Moderow made no additional payments.

## PROCEDURAL BACKGROUND

In October 2013, Hosford filed a complaint in the county court for Douglas County. He alleged that he had sent a

statement of account for legal services and costs to Moderow and that the account was stated and agreed to between the two of them. He further alleged payment of $1,000 by Moderow and sought judgment for the remaining $17,575 plus prejudgment interest. Moderow filed a general denial and affirmatively alleged that Hosford's claim was barred by the statute of limitations or the equitable doctrine of laches and waiver.

Hosford subsequently filed a motion for summary judgment, which was ultimately granted. Moderow's appeal to the district court was unsuccessful, and she timely appealed to this court. During the pendency of the appeal, Moderow passed away and the appeal was revived in the name of Micaela Harbison, personal representative of Moderow's estate, pursuant to Neb. Rev. Stat. § 25-1406 (Reissue 2016).

## ASSIGNMENTS OF ERROR

Moderow assigns that the district court erred in finding no genuine issues of material fact in the claim of an account stated. Specifically, she asserts that genuine issues of material fact were present with regard to whether Moderow was a proper party and whether Moderow had an understanding of that to which she was agreeing. Moderow also assigns that the district court erred in finding no genuine issue of material fact as to the reasonableness of the attorney fees charged and as to whether the claim was barred by the statute of limitations.

## STANDARD OF REVIEW

[1,2] 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. *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017). 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. *Id.*

## ANALYSIS

[3,4] Hosford filed this action as an account stated. An "account stated" is an agreement between persons who have had previous dealings determining the amount due by reason of such transactions. *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). The general rule is that when parties have accounts against each other, and a statement of the account is made out by one party and presented to the other, and the latter expressly assents to its correctness, the law will regard it as a stated or settled account, and it will be binding on both parties. *Loy v. Storz Electric Refrigeration Co.*, 122 Neb. 357, 240 N.W. 423 (1932).

[5] The initial question, therefore, is whether the billing statements of March 8, 2012, and Moderow's subsequent conduct are sufficient to establish an account stated as a matter of law. As the party moving for summary judgment, Hosford had the burden to prove a prima facie case of an account stated. It is uncontroverted that Moderow did not expressly agree to personally pay the amounts contained in the billing statements; however, the failure to object to an account rendered is admissible in evidence as tending to prove an acknowledgment of its correctness. Proof of an express promise to pay is not required. *John Deere Co. of Moline v. Ramacciotti Equip. Co.*, 181 Neb. 273, 147 N.W.2d 765 (1967).

[6] Here, Moderow initially expressed surprise at the amount of the bill, but rather than contesting it, she explained that she would be unable to pay it "all at once." Thirteen months after having received the billing statements, she first expressed "concerns" regarding the amount of the bill. As stated in the Restatement (Second) of Contracts § 282 at 386 (1981), "A party's retention without objection for an unreasonably long time of a statement of account rendered by the

other party is a manifestation of assent." But what constitutes an unreasonably long time is a question of fact to be answered in the light of all the circumstances. *Id.*, comment *b*.

In the present action, Hosford sent two billing statements to Moderow. One was identified as work for "JMJM Properties, LLC" in the amount of $1,900, and the other identified work for "American Marking Company" in the amount of $16,675. Neither statement indicates when the work was performed, but based upon the evidence, the work for "American Marking Company" took place more than 4 years prior to the billing statement being sent. No fee agreement appears in the record, and according to Moderow, one never existed. Moreover, the parties never had any discussions as to hourly fees or the extent of services to be rendered. It took Moderow 4 months to respond to the initial billing statement, and although she did not object to the amount of the bill, she did express her surprise at both the amount and the length of time it spanned.

Given the circumstances of the case, we cannot say as a matter of law that Moderow's delayed objection should be construed as implied assent to the amount claimed by Hosford. Although failure to object to an account rendered is admissible in evidence as tending to prove an acknowledgment of its correctness, it does not undisputedly prove correctness. And the weight or sufficiency of such proof is a question of fact to be determined by the fact finder. See *Hendrix v. Kirkpatrick*, 48 Neb. 670, 67 N.W. 759 (1896). Recognizing that Hosford waited more than 4 years to bill Moderow, the reasonableness of Moderow's 13-month delay in expressly questioning the amount of the bill is a question of fact.

[7] Having determined that a fact question exists as to whether Moderow agreed to the amount billed, we need not address Moderow's arguments that genuine issues of material fact exist as to whether she was a proper party, the reasonableness of the attorney fees, or whether Hosford's claim is barred by the statute of limitations. An appellate court

is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

## CONCLUSION

Because a genuine issue of material fact exists as to whether Moderow agreed to the amount Hosford claimed was due, summary judgment was inappropriate. We reverse the judgment and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

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

# Paul A. Rosberg, appellant, v. Kelly R. Rosberg, appellee.

916 N.W.2d 62

Filed May 1, 2018. No. A-17-341.

1. **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.
2. **Records: Pleadings: Appeal and Error.** In the absence of a bill of exceptions, an appellate court examines and considers only the pleadings in conjunction with the judgment reviewed. When a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review.
3. **Records: Pleadings: Presumptions: Appeal and Error.** Where there is no bill of exceptions, an appellate court is limited on review to an examination of the pleadings. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment.
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. **Judgments.** When a trial court determines an ex parte temporary harassment protection order is not warranted, an evidentiary hearing is not mandated under the harassment protection order statute.
7. **Judgments: Pleadings: Affidavits.** In harassment protection order proceedings, a trial court has the discretion to direct a respondent to show cause why an order should not be entered or, alternatively, the court

can dismiss the petition if insufficient grounds have been stated in the petition and affidavit.

Appeal from the District Court for Knox County: James G. Kube, Judge. Affirmed.

Paul A. Rosberg, pro se.

No appearance for appellee.

Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

Bishop, Judge.

Paul A. Rosberg (Rosberg) sought a harassment protection order against his wife, Kelly R. Rosberg (Kelly), in the district court for Knox County. Rosberg appeals, pro se, from the district court's order dismissing his petition; he claims that the district court erred by not affording him an opportunity to be heard and that a harassment protection order should have been entered. We affirm.

## BACKGROUND

On November 4, 2016, Rosberg filed a "Petition and Affidavit to Obtain Harassment Protection Order" against Kelly pursuant to Neb. Rev. Stat. § 28-311.09 (Reissue 2016). He sought a protection order for himself and his five children. His allegations of harassment are summarized as follows: From August 2012 to November 4, 2016, Kelly "lied to [Rosberg's] probation officer 3 times and [Rosberg] had to go to jail for 16 days and pay an attorney $10,000 and all the fict[it]ious charges they had were drop[p]ed by the federal Judge"; Kelly allows the children to be around a "life time" registered sex offender; Kelly leaves the children for extended periods of time and lets the children "do most anything," and the children are engaging in problematic behavior; Kelly committed perjury by making up a lie that Rosberg earned $250,000 per year, which lie resulted in a sentence of jail time for Rosberg; Kelly lied to a Platte County judge so

Rosberg "could not see [the] children for one year"; Kelly "harassed all of us by preventing us from having visitation since July 12, 2015"; Kelly makes the children believe her lies by "continually disparaging" Rosberg; Kelly refused to allow the children to attend family weddings; Rosberg is "sure [Kelly] is mentally sick"; Rosberg believes it is unsafe for the children to be around Kelly or her boyfriend, a sex offender, and believes she should only have supervised visitation; and Rosberg is "afraid [Kelly] may have someone or herself plant guns on [him] like she did before when she tried to get [him] railroaded into federal prison for 11 years."

On November 14, 2016, the district court entered an "Order Dismissing Petition Without Hearing," which stated, in relevant part:

> Upon consideration of the petition and affidavit, the Court finds that the requested relief should be denied and the petition should be dismissed (specific findings, if any, set forth below).
>
> Insufficient allegations to support the entry of a protection order. Also, this [is] a matter which if addressed at all, should be addressed in the pending domestic litigation between the parties.
>
> IT IS THEREFORE ORDERED that the petition for issuance of a protection order is denied and petition is dismissed without prejudice.

On November 17, 2016, Rosberg filed a "Motion requesting Hearing." He requested a hearing to "prove his allegations that [Kelly] ser[i]ously th[r]eatens, endangers, and intim[i]dates [Rosberg and the children]." He added that the children are in danger when Kelly allows them to be around a "registered lifetime sex offender" and that Kelly should not be on his premises "where she or her coh[o]rts can plant guns in fu[r]ther attemp[t]s to railroad [him] into jail like she had done in the past."

On December 13, 2016, Rosberg filed a "precape" for subpoenas to compel two of his children to appear and testify in

district court on December 20. Also on December 13, Rosberg filed a "Notice of Threat and additional facts." On December 23, Rosberg filed a "Motion to Reconsider."

According to a "Journal Entry" filed January 3, 2017, both parties had appeared before the court without counsel on December 20, 2016. The journal entry addressed Rosberg's "motion for hearing," noting arguments were made by the parties. The court denied Rosberg's motion. The court also addressed Kelly's "motion to dismiss" and stated that "there are insufficient facts regarding the basis for the motion to dismiss and the Court deemed the motion to dismiss moot."

A "Journal Entry" filed January 31, 2017, indicates the case was before the court that day for hearing; Rosberg was present without counsel, and Kelly was not present (she filed a waiver of appearance that same day). The journal entry notes that Rosberg offered "Exhibit 1, Motion to Reconsider, specifically pages 35 through 173, which has been received by the Court." Rosberg provided argument, and the court took the matter under advisement.

On February 22, 2017, Rosberg filed a "Notice of Additional Information Unavailable at Time of Hearing." Rosberg alleged that an order was made in his divorce case denying his request for a protection order. Rosberg claimed that since the judge handling his divorce would not issue a protection order, then "it is most certainly up to [the judge in this case] to hear all the evidence and make a decision regarding [Rosberg's] request for an exparte protection order against Kelly." (Emphasis omitted.)

The district court entered an order on February 28, 2017, which stated:

> This matter came on to be heard on January 31, 2017, upon [Rosberg's] "Motion Requesting Hearing" which the Court interprets as a motion to reconsider its Order of November 14, 2016, denying the plaintiffs their request for a protection order and dismissing the same without prejudice. [Rosberg] appeared personally. No other

> plaintiffs appeared nor were they represented by counsel. [Kelly] did not appear, nor was she represented by counsel.
>
> Upon consideration of the arguments presented as well as the information contained in Exhibit 1 the Court denies said request to reconsider. The Court will stand on its Order of November 14, 2016, dismissing this matter without hearing.

Rosberg appeals from this order.

## ASSIGNMENTS OF ERROR

Rosberg's brief does not properly contain an assignments of error section; however, the brief lists six questions under the heading "Issues to be Addressed." He asks, restated: (1) Did the district court err by not having a hearing on the requested protection order?; (2) Did the district court err by finding there were insufficient allegations to support entry of a protection order?; (3) Does the Nebraska constitution apply to him?; (4) Did the district court evade its responsibilities by not allowing Rosberg to present evidence?; (5) Did the district court "violate 33 C.J. 1135, sec. 84 when [it] made judgment without any kind of trial?"; and (6) Did the district court "use proper discretion after being made aware that [Rosberg] was not a member of the Bar Club Association and understanding case law Haines vs. Kerner 1972, 404 U.S. 519?"

The "Argument" section of Rosberg's brief consists of four paragraphs which address only the first two "questions" noted above. Accordingly, our review will be limited to addressing those two questions as alleged errors. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

## STANDARD OF REVIEW

[1] A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is

reviewed de novo on the record. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

## ANALYSIS

As set forth above, we address only the two errors alleged and argued by Rosberg, which are (1) whether the district court erred in not providing a hearing on his protection order request and (2) whether there was sufficient evidence to support entry of a protection order. Rosberg argues, "Basically, [the court] closed the door, preventing [Rosberg] from having the issues addressed in court." Brief for appellant at 7. He claims the court made a decision without allowing him to present the facts. At the same time, he also claims "the evidence presented in the petition and the exhibits presented in the courtroom were sufficient allegations to call for a protection order hearing and most likely an immediate exparte [sic] protection order." *Id*.

[2,3] We first note that no bill of exceptions has been filed in this appeal. In the absence of a bill of exceptions, we examine and consider only the pleadings in conjunction with the judgment reviewed. See *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991). When a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review. *Id*. Where there is no bill of exceptions, an appellate court is limited on review to an examination of the pleadings. *Id*. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment. *Id*. We conclude the transcript is sufficient for this court's disposition of Rosberg's alleged errors.

### *Harassment Protection Orders.*

We begin our analysis with a review of the statutes applicable to harassment protection orders. Section 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.

(Emphasis supplied.)

The purpose of § 28-311.09, and the definition of certain terms, are contained in Neb. Rev. Stat. § 28-311.02 (Reissue 2016), which 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 of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person.

[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*."

*Richards v. McClure*, 290 Neb. 124, 132, 858 N.W.2d 841, 847 (2015) (quoting *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013)).

With this law in mind, we now address the errors claimed by Rosberg.

*Right to Hearing.*

Rosberg claims he was denied an opportunity for a hearing on his petition for a harassment protection order. However, the record does not support that assertion. It is true that on November 14, 2016, the district court entered an order dismissing Rosberg's petition without a hearing. On November 17, Rosberg filed a "Motion requesting Hearing" to "prove his allegations." The January 31, 2017, journal entry informs us that a hearing did take place on January 31. And the February 28 order explains that the January 31 hearing was "upon [Rosberg's] 'Motion Requesting Hearing,'" which the court interpreted as a motion to reconsider its November 14, 2016, order denying Rosberg's request for a protection order.

At the January 31, 2017, hearing, Rosberg was present without counsel and Kelly was not present (she filed a waiver of appearance). Importantly, the journal entry states that Rosberg offered "Exhibit 1, Motion to Reconsider, specifically pages 35 through 173, which has been received by the Court." Rosberg also "provided argument" and the court "took the matter under advisement." Therefore, contrary to Rosberg's assertion, he did in fact have an opportunity to offer evidence (exhibit 1) in support of his petition, and it was received by

the court. Rosberg also had an opportunity to make an argument before the court.

The district court subsequently entered an order on February 28, 2017, which stated it considered the arguments presented on January 31, as well as the information contained in exhibit 1, and chose to "stand on its Order of November 14, 2016, dismissing this matter without a hearing." Although the November 14 order did in fact dismiss Rosberg's petition "without a hearing," Rosberg has, since that time, succeeded in having a hearing on January 31, 2017, at which time his exhibit 1 was offered and received, and arguments were made. Accordingly, we conclude this alleged error is without merit.

For the sake of completeness, to the extent Rosberg is arguing that the mere filing of a petition and affidavit for a harassment protection order requires a trial court to schedule a hearing before dismissing the petition, we conclude otherwise. There may be some confusion as to the mandatory nature of a protection order hearing, because the statutory language detailing procedures for domestic abuse protection orders and harassment protection orders are not identical, and where one statutory scheme requires a hearing before the dismissal of a petition, the other does not. Specifically, when a party seeks a protection order under the Protection from Domestic Abuse Act, if the trial court reviewing a petition determines a domestic abuse ex parte temporary protection order need not be issued, the court "shall immediately schedule an evidentiary hearing" on the petition to be held within 14 days, with notice given to the petitioner and the respondent. See Neb. Rev. Stat. § 42-925(2) (Supp. 2017). See, also, *Sarah K. v. Jonathan K.*, 23 Neb. App. 471, 873 N.W.2d 428 (2015) (if grounds do not exist for issuance of domestic abuse ex parte temporary protection order, court must schedule evidentiary hearing within 14 days).

However, for harassment protection orders sought under § 28-311.09, as in this case, the statutory scheme does not contain the same mandatory hearing language found in the

domestic abuse protection order statute set forth above. Rather, as noted previously, upon the filing of a petition and affidavit for a harassment protection order, "the court *may* issue a harassment protection order." § 28-311.09(1) (emphasis supplied). The statute does not mandate the issuance of such an order, nor does the statute require a hearing upon the court concluding the petition fails to state sufficient grounds for entry of an order. Additionally, the harassment protection order statute provides:

> If the specific facts included in the affidavit (a) do not show that the petitioner will suffer irreparable harm, loss, or damage or (b) show that, for any other compelling reason, an ex parte order should not be issued, the court *may* forthwith cause notice of the application to be given to the respondent stating that he or she may show cause, not more than fourteen days after service, why such order should not be entered.

§ 28-311.09(7) (emphasis supplied).

Section 28-311.09(7) grants the trial court the discretion to take further action when it determines an ex parte temporary protection order should not be issued; it does not mandate further action. The trial court may direct the respondent to show cause why an order should not be entered, but the court is not required to do so. If the face of the petition and affidavit fail to set forth a sufficient basis to warrant the issuance of a harassment protection order, the trial court may, in its discretion, dismiss the petition without burdening the court with holding an evidentiary hearing where the sole purpose is to prove up on the petition. Notably, a contested factual hearing in a protection order proceeding is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Such proceedings are summary in nature, and a court is justified in excluding evidence if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence; however, for a court to issue a protection order, some evidence must be presented. See *id*.

The Legislature has providently granted the trial courts the discretion to filter between those petitions and affidavits which properly allege facts qualifying for harassment protection under the statute from those alleging facts, even if presumed true, which fail to qualify for protection under the statute. This is certainly consistent with the notion that a trial court can summarily dismiss a petition on its own motion when "not a fact stated" entitles the party to the relief sought. *Van Etten v. Test*, 64 Neb. 407, 408, 89 N.W. 1052, 1053 (1902) (litigant's attempt to circumvent prior judgment against her by filing new action should have been summarily dismissed by trial court because such attempts "should not be permitted to burden courts or clog the wheels of justice").

[6,7] Accordingly, when a trial court determines an ex parte temporary harassment protection order is not warranted, an evidentiary hearing is not mandated under the harassment protection order statute like it is under the domestic abuse protection order statute. In harassment protection order proceedings, a trial court has the discretion to direct a respondent to show cause why an order should not be entered or, alternatively, the court can dismiss the petition if insufficient grounds have been stated in the petition and affidavit. Although the district court in this instance decided to grant Rosberg a hearing so he could offer evidence and make arguments to the court after the court's initial dismissal of Rosberg's petition, the harassment protection order statute did not require the court to hold such a hearing.

*Sufficiency of Allegations.*

Rosberg argues that "the evidence presented in the petition and the exhibits presented in the courtroom were sufficient allegations to call for a protection order hearing and most likely an immediate exparte [sic] protection order." Brief for appellant at 7.

As explained earlier, where there is no bill of exceptions, an appellate court is limited on review to an examination of the pleadings. See *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991). If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment. *Id*. We conclude that the pleadings are sufficient to support the district court's order, and therefore, we presume the evidence (exhibit 1) considered by the district court supported its decision to dismiss Rosberg's petition seeking a harassment protection order against Kelly.

We agree with the district court that the issues complained about by Rosberg do not rise to the type of conduct contemplated by the harassment protection order statute. As set forth previously, the inquiry is whether a reasonable victim would be seriously terrified, threatened, or intimidated by the perpetrator's conduct. *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015). Rosberg's allegations about Kelly consist of her lying, allowing the children to be around a registered sex offender, letting the children do anything they want, preventing certain parenting time from taking place, denying the children's attendance at family weddings, disparaging Rosberg, and possibly "plant[ing] guns" on Rosberg to get him in trouble. Additionally, Rosberg claims that Kelly is "mentally sick" and should only have supervised parenting time. While Rosberg may very well have valid reasons to be concerned, upset, angry, or frustrated by the circumstances evolving in the course of his marriage dissolution, as noted by the district court, these are matters to be addressed in that separate action and not through a harassment protection order.

## CONCLUSION

The district court's February 28, 2017, order is affirmed.

Affirmed.

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

Samuel E. Fales, appellee, v.
Sandy L. Fales, appellant.
914 N.W.2d 478

Filed May 1, 2018. No. A-17-645.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **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.
3. **Words and Phrases.** The acts of abuse defined in the Protection from Domestic Abuse Act are those committed against household members and include attempting to cause or intentionally and knowingly causing bodily injury and placing, by means of credible threat, another person in fear of bodily injury.
4. ____. Threatening to cause or actually causing bodily injury to a spouse or former spouse qualifies as domestic intimate partner abuse.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Loup County: Mark D. Kozisek, Judge. Judgment vacated, and cause remanded for further proceedings.

Sara K. Houston for appellant.

Nathan T. Bruner and Loralea L. Frank, of Bruner Frank, L.L.C., for appellee.

Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

Riedmann, Judge.

Sandy L. Fales appeals from the order of the district court for Loup County which dissolved her marriage to Samuel E. Fales and granted custody of their minor child to Samuel. Sandy argues on appeal that the court abused its discretion in awarding Samuel custody. Because the district court failed to make special written findings as required by Neb. Rev. Stat. § 43-2932(3) (Reissue 2016), we vacate the district court's order and remand the cause for further proceedings.

## FACTUAL BACKGROUND

Sandy and Samuel were married in 2010, and their child, Samuel Ellis Wayne Fales (Ellis), was born in May 2012. The parties separated in the spring of 2015, and Samuel filed for dissolution of the marriage in June 2015. Each party requested custody of Ellis. In a temporary order, the district court awarded custody of Ellis to Sandy and granted Samuel parenting time of every other weekend, as well as 1 week per month.

At the March 2017 trial, evidence was presented as to the strengths and weaknesses of the parties relating to their fitness for custody of Ellis. Samuel operates the family cattle ranch with his father and brother. He has lived in the same family home since he was 8 years old, and his father lives nearby. He described a caring, involved extended family. Samuel testified that he provides a stable environment for Ellis and that he plays with Ellis while ensuring that Ellis naps, reads, attends church, and helps with household chores.

Sandy stated that she first moved to the ranch shortly after the parties married in 2010 and that she has been the primary caregiver for Ellis and her 12-year-old daughter from a previous relationship. Sandy obtained an associate of arts degree in 2010 and has pursued a career as a photographer, although her earnings have been nominal. Sandy initially testified that Samuel permitted her to have few friends and would not allow her to work outside the home. However, she later acknowledged that the ranch itself was rural and secluded but that Samuel allowed her to go places, purchasing a car for her to

drive, and that she did, in fact, participate in activities. Sandy said she ultimately decided to leave the marriage in June 2015 after concluding that the marriage was no longer working and that she and Samuel were constantly fighting. She described the feeling of "walking on eggshells," stating that Samuel continually yelled at her and called her names.

Sandy does not have a close relationship with her extended family. When she first left the family home, she had a number of short-term living arrangements, including a safe house and a home owned by the man with whom she was involved at the time. She and Ellis stayed with her mother for about 30 days before her mother asked her to leave, after which she stayed for several weeks at yet another safe house. Sandy testified that she now resides in Colorado Springs, Colorado, with Ellis and her daughter. Sandy is working toward earning a bachelor's degree at a local university.

Sandy explained that she had left the family home intermittently beginning in April 2015, returning on some weekends for photography engagements and to see Ellis. At some point, Samuel learned that Sandy had become involved with a man in Colorado and planned a permanent move there. There is no dispute that a serious domestic incident occurred during Sandy's last visit to the family home in June. Becoming enraged at Sandy's refusal to allow him to read texts on her cell phone, Samuel smashed the cell phone; handcuffed Sandy, who had emerged wet and naked from the shower; and restrained her on a bed. Ellis witnessed some of this disturbing scene, and after Samuel led Ellis out of the room, he returned to the bedroom where he reached for a loaded shotgun and held it under his chin while threatening suicide. The incident resulted in Samuel's misdemeanor convictions for third degree assault and "[a]ttempt of a class 3A or 4 felony," as well as a 1-year protection order against him as to Sandy. Samuel is still serving a 48-month term of probation.

Samuel subsequently sought treatment from a clinical therapist, who was a licensed independent mental health practitioner. She treated him with cognitive therapy. The therapist

testified that the disintegration of the marriage triggered in Samuel post-traumatic stress disorder from earlier childhood trauma, as well as a depressive episode. However, she testified that Samuel had made excellent progress. She described Samuel as a "respected rancher" in the community. She stated that he was now "extremely stable" and that she was very confident he could deal with life changes. The therapist opined that Samuel is "an excellent parent [and] deserves the right to parent his child."

Samuel asserted that Ellis' health regularly deteriorated while in Sandy's care and that he often took Ellis to doctor appointments following Ellis' time with Sandy. Samuel testified that Ellis lost weight after Sandy first took him from the family home and that he regained some of the weight while in Samuel's care. Ellis had a recurrent rash on his upper lip from excess moisture on his lip for extended periods. Ellis' family physician diagnosed him with impetigo and regularly treated him for a number of common ailments, such as rashes, cough, elevated temperature, colds, and fever. Nonetheless, the physician stated that he could not attribute poor parenting as the cause of Ellis' several visits with the physician.

The district court found that both parents were fit and that both had developed a strong bond with Ellis. However, the court noted that Ellis required medical intervention about one-half of the times that Samuel exercised his parenting time, which was after Ellis spent time with Sandy. While acknowledging that these medical problems did not necessarily imply failure on Sandy's part, the court found that Samuel was more attentive to Ellis' personal hygiene and physical needs. The court pointed to Ellis' weight loss while with Sandy, his recurring impetigo, and an incident with head lice, as well as a picture of Ellis' exhibiting long, dirty fingernails and toenails, which the court deemed a reflection on the lack of attention to Ellis on Sandy's part.

Turning to the evidence of domestic abuse, the court noted that the June 2015 incident, while not the sole incident between the parties, "was by far the worst." The court

summarized other instances in which Samuel had thrown, broken, or burned things and otherwise acted inappropriately. The court found that there was credible evidence of abuse inflicted by Samuel on Sandy, but no credible evidence of child abuse or neglect.

The court stated that both parents are capable of parenting Ellis and had the emotional maturity and financial ability to raise Ellis and tend to his physical, emotional, and educational needs. However, the court found that Samuel provided the more stable environment. The court noted that Samuel and his family provide a loving, nurturing environment for Ellis, while Sandy has no close family ties and any friends she has in Colorado are new with no known ties to Ellis. The court considered Ellis' relationship with Sandy's daughter and concluded that, given the difference in age and sex, separating the half siblings would not have a detrimental effect on Ellis.

The court rejected Sandy's contention that she initially left Ellis with Samuel because he would not permit her to take Ellis. The court found that Sandy left Ellis with Samuel as "a matter of convenience rather than a product of threats." The court further noted that Sandy's move over 400 miles away has impacted Samuel's ability to visit with Ellis and that, in so doing, Sandy had "placed her own agenda ahead of Ellis" with little regard for the move's effects on the strong relationship between Samuel and Ellis.

In awarding custody of Ellis to Samuel, the court considered the fact that Samuel had committed domestic intimate partner abuse. However, the court noted that Samuel had continued counseling to deal with the issues, which may have led to the incident of abuse, and that now "[h]e deals with the breakdown of the parties' marriage in a more mature and reasonable manner." The court also considered the lack of credible evidence of child abuse or neglect by either party and pointed to Sandy's own parenting plan that suggested the parties meet for visitation exchanges in person, which the court felt indicated that she was not greatly concerned about contact with Samuel. Because those exchanges would be in a public

place, the court concluded that the parenting plan contained reasonable limits calculated to protect Sandy from harm. The parenting plan limited communication between the parties to email or text unless otherwise agreed, and it prohibited them from speaking negatively about the other parent or inquiring about the other's personal affairs through Ellis.

Sandy has timely appealed from this order.

## ASSIGNMENT OF ERROR

Sandy asserts that the district court erred in awarding Samuel sole legal and physical custody of Ellis.

## STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* A judicial abuse of discretion exists if 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. *Id.*

[2] 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. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

## ANALYSIS

[3,4] Sandy argues that awarding custody to Samuel constituted an abuse of discretion because Samuel had committed domestic intimate partner abuse against her. She asserts that the district court failed to make the special written findings required under § 43-2932(3) before custody is awarded to a parent who has threatened an intimate partner with imminent

bodily injury. Domestic intimate partner abuse includes "an act of abuse as defined in section 42-903." See Neb. Rev. Stat. § 43-2922(8) (Reissue 2016). 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) (Reissue 2016). 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.

Through Sandy's testimony and exhibits showing Samuel's misdemeanor convictions for third degree assault and "[a]ttempt of a Class 3A or 4 felony," she was able to show that Samuel had committed domestic intimate partner abuse. That evidence was not disputed by Samuel.

Section 43-2932(1)(b) provides in part: "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." Section 43-2932(3) provides:

> 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.

When a parent has committed domestic intimate partner abuse, as happened in this case, the obligations of § 43-2932 are mandatory. See *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

In the instant case, the district court found that "there is credible evidence of abuse inflicted by Samuel on Sandy as that term is defined at §42-903." In contrast, the court found "no evidence that Samuel ever acted inappropriately with Ellis. His anger was directed at Sandy and never toward Ellis." In awarding custody to Samuel, the court stated that it had considered Samuel's domestic intimate partner abuse. The court noted:

> [Samuel] has counseled and continues counseling dealing with issues that may have lead [sic] to the circumstances of the domestic abuse. He now deals with the breakdown of the parties' marriage in a more mature and reasonable manner. The court further considers that there has been no credible evidence of child abuse or neglect of Ellis by either party. [Sandy's] own Parenting Plan suggests that the parties meet in Sterling, Colorado for visitation exchanges, implying no great concern on her part of further domestic abuse or the need for an intermediary. Meeting in a public place will most likely prevent [Sandy] from being subject to any further abuse. Limitations on the purpose and method of communication will decrease the potential for conflict. The court finds that the limits in the Parenting Plan are reasonably calculated [to] protect [Sandy] from harm.

The court explicitly found that (1) Samuel had neither abused nor neglected Ellis and, in fact, was consistently a stable and loving parent to him, and (2) adequate protections were made for Sandy's protection. Sandy argues, however, that the absence of special written findings that Ellis can be adequately protected from harm constitutes an abuse of discretion. We agree.

As set forth above, the order explicitly addresses the protection of only Sandy; it does not include any special written findings that Ellis can be adequately protected from harm. Section 43-2932(3) requires the court to make special written findings as to the child *and* other parent. The Nebraska Supreme Court has stated that this obligation is a mandatory

directive. See *Flores v. Flores-Guerrero, supra*. Failure to make such findings precludes the court from awarding legal or physical custody to Samuel. *See id*.

Because the district court failed to comply with the statutory requirement, its award of custody to Samuel constitutes an abuse of discretion. See *id*. Therefore, we vacate its custody determination and remand the cause for further proceedings on the complaint. If Samuel is awarded any type of custody, the district court's order must include special written findings that Ellis and Sandy can be adequately protected by any limitations on custody, parenting time, and visitation that the court finds necessary. See § 43-2932(3).

[5] In addition to her concerns about statutory compliance, Sandy argues more generally that the district court wrongly concluded that Ellis' best interests were served in awarding custody to Samuel. However, our decision to reverse the district court's order because it was not in compliance with § 43-2932(3) obviates the need to consider this argument. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

## CONCLUSION

Because of the district court's failure to make special written findings in compliance with § 43-2932(3), we vacate the district court's order awarding custody to Samuel and remand the cause for further proceedings consistent with this opinion.

Judgment vacated, and cause remanded for further proceedings.

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

# Willie Moss, also known as Lamont Kirkland, appellee, v. C&A Industries, doing business as Aurstaff Temporary Agency, employer, appellant.

915 N.W.2d 615

Filed May 8, 2018. No. A-17-465.

1. **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.
2. **Judicial Notice: Records.** Papers requested to be judicially noticed must be marked, identified, and made a part of the record.
3. **Judicial Notice: Appeal and Error.** The trial court's ruling should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review of its decision is impossible.
4. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
5. ____: ____. Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
6. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.

7. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
8. **Workers' Compensation: Proof.** To obtain a modification of an award, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident.
9. ____: ____. To obtain a modification of a prior award, the applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had been previously made.
10. **Workers' Compensation.** Whether an applicant's incapacity has increased under the terms of Neb. Rev. Stat. § 48-141 (Reissue 2010) is a finding of fact.
11. **Workers' Compensation: Expert Witnesses.** Although a claimant's medical expert does not have to couch his or her opinion in the magic words "reasonable medical certainty" or "reasonable probability," the opinion must be sufficient to establish the crucial causal link between the claimant's injuries and the accident occurring in the course and scope of the claimant's employment.
12. **Expert Witnesses: Physicians and Surgeons: Appeal and Error.** An appellate court examines the sufficiency of a medical expert's statements from the expert's entire opinion and the record as a whole.
13. **Workers' Compensation: Expert Witnesses: Physicians and Surgeons.** The Workers' Compensation Court is the sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony.
14. ____: ____: ____. Resolving conflicts within a health care provider's opinion rests with the Workers' Compensation Court, as the trier of fact.
15. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
16. **Workers' Compensation: Proof.** To establish a change in incapacity under Neb. Rev. Stat. § 48-141 (Reissue 2010), an applicant must show a change in impairment and a change in disability.
17. **Workers' Compensation: Words and Phrases.** In a workers' compensation context, impairment refers to a medical assessment, whereas disability relates to employability.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Reversed and remanded for further proceedings.

Jill Hamer Conway, of Prentiss Grant, L.L.C., for appellant.

Terrence J. Salerno and Danny C. Leavitt for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Moore, Chief Judge.

## INTRODUCTION

C&A Industries, doing business as Aurstaff Temporary Agency (the Appellant), appeals from the order of the Nebraska Workers' Compensation Court which entered a further award of benefits to Willie Moss, also known as Lamont Kirkland (Kirkland). For the reasons set forth herein, we reverse, and remand for further proceedings.

## BACKGROUND

Kirkland was 60 years old at the time of the second modification trial in February 2017. In July 2008, he was working for the Appellant, a temporary agency, and was employed as a laborer. On July 23, while engaged in the duties of his employment, he suffered multiple cuts and abrasions to his legs and arms, trauma to his head, a broken tooth, cervical and lumbar strain, trochanteric bursitis, and a medial meniscus tear and strain of the left knee as a result of an accident when a load of "angle iron" fell from an overhead crane onto him. He has not returned to work in any capacity since July 2008. Kirkland underwent conservative treatment which alleviated some symptoms, but when surgery was recommended for his left knee injury, the Appellant refused to authorize further medical treatment.

Kirkland sought workers' compensation benefits, filing a petition in the compensation court on January 28, 2009. He alleged that on July 23, 2008, he sustained injuries in an

accident arising out of and in the course and scope of his employment with the Appellant. Specifically, he alleged that he was performing his regular job duties when a "Truss Angle" shifted and fell on him, causing him to sustain injuries to his "head, neck, back, arms, shoulders, knees, chest, legs and feet."

On December 10, 2009, the compensation court entered an award, finding Kirkland was injured as described above. At the time of the award, Kirkland remained temporarily totally disabled due to his left knee injury. The court noted medical evidence from Dr. Nicholas Steier (Kirkland's family physician) and Dr. Mark Pitner (an orthopedic surgeon Kirkland was referred to by Steier), suggesting that "the failure to address the left knee injury ha[d] caused a gait disturbance which aggravated [Kirkland's] low back and hip which ha[d] become symptomatic." The court awarded temporary total disability, as well as future indemnity benefits, and it ordered the Appellant to pay certain medical expenses and future medical expenses reasonably necessary for evaluation and treatment of Kirkland's multiple injuries, including but not limited to the recommended left knee arthroscopic surgery.

Following the first trial, Kirkland received the arthroscopic procedure on his left knee, but as a postoperative complication, he developed deep vein thrombosis and a pulmonary embolism, which necessitated further hospitalization.

On October 20, 2010, the Appellant filed a petition to modify in the compensation court, alleging that Kirkland had sustained a material and substantial change in his condition since the entry of the previous award that warranted a change to or reduction in benefits owed by the Appellant. Kirkland answered, denying the assertion of a change in his physical condition, and filed a counterclaim, alleging that the Appellant had failed to comply with the award and refused to pay many of his medical bills as they were incurred.

The compensation court entered a further award on June 17, 2011. The court noted that it had reviewed the medical

evidence as a whole and Kirkland's testimony, which it found credible. The court found that the scheduled member injury to Kirkland's left knee adversely affected him such that loss of permanent earning power could not be fairly assessed without considering the impact of the member injury upon his employability. The court determined that Kirkland's scheduled member injury and whole body injuries combined to render him permanently totally disabled. The court awarded permanent indemnity benefits, including future indemnity benefits; ordered the Appellant to pay certain specified medical expenses; and also ordered the Appellant to pay future medical expenses reasonably necessary for evaluation and treatment of Kirkland's July 2008 injuries.

On October 12, 2016, Kirkland filed the petition to modify at issue in this appeal. He alleged that since entry of the award and further award, his "treating physicians have evaluated and treated [his] right knee and determined he requires a total knee arthroplasty." He alleged a material and substantial increase in incapacity due solely to his compensable injuries, entitling him to modification of the previous awards. He sought an order requiring the Appellant to pay for "the treatment and medication necessary to address [his] work related condition" and awarding him such workers' compensation benefits to which he was entitled, including an award of penalties and attorney fees.

The Appellant answered, denying that treatment of Kirkland's right knee was compensable. The Appellant asserted that the previous awards did not find Kirkland sustained a work-related right knee injury and did not award future medical care for a right knee injury. The Appellant also alleged that Kirkland's claims with regard to his right knee were barred by res judicata.

Trial was held before the compensation court on February 28, 2017. The court heard testimony from Kirkland and received various medical records and other documentary exhibits offered by the parties.

[1-3] We note that the Appellant references a September 2009 deposition of Steier in its brief on appeal. This deposition was not an exhibit offered directly as evidence at the current modification trial and was presumably offered at a prior trial. At the current trial, the Appellant asked the compensation court to take judicial notice of all exhibits offered and received at both prior trials and also asked the court to take judicial notice of specific pages from certain, specific, and previously offered exhibits. The court took judicial notice as requested by the Appellant, but the only judicially noticed exhibits included in the record on appeal were those exhibits from which Appellant requested the court to take judicial notice of specific pages. Steier's 2009 deposition was not one of those exhibits. 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. *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017). Papers requested to be judicially noticed must be marked, identified, and made a part of the record. *Id.* The trial court's ruling should state and describe what it is the court is judicially noticing. *Id.* Otherwise, a meaningful review of its decision is impossible. *Id.* Because Steier's 2009 deposition was not included in the record, we are unable to review the Appellant's assertions with respect to it.

At the February 2017 modification trial, Kirkland testified about his injuries and the history of his treatment. Kirkland testified that the level of pain in his right knee at the time of his accident and injury in July 2008 "started off as aching" and then his right knee condition "developed until the point where [he] would have popping as well as almost the same type of procedure [sic] as [his] left knee." Kirkland testified that although one of his treating doctors in 2008 noted he might have some damage to his right knee, no doctor told him prior to 2016 that he needed surgery on his right knee. He also noted that at some point, Pitner told him, "'Your knee is starting to wear down from the constant use of it.'" Pitner further

told Kirkland, "'Because you're putting more strain on it by using it as your only support . . . it's wearing down.'"

Kirkland underwent left knee replacement surgery in April 2016. Kirkland indicated that since his left knee replacement surgery, he has been relying primarily upon his right leg when he walks. He testified further that as he went through rehabilitation following his left knee replacement surgery, he favored his right knee "to hold [him] up" and that "it got to the point" where Pitner recommended surgery on the right knee. Kirkland testified that he wanted to undergo that surgery and that he was asking the court to order payment for that surgery.

Kirkland was on pain and antidepressant medication at the time of trial. Despite having formerly been "a world class fighter" and "involved in that kind of activity," he had never been on pain medication or antidepressants prior to his July 2008 work accident and had only been to the hospital once "to get an examination to fight against [sic] foreign countries." Kirkland testified that he had not suffered any new injuries since 2008.

Kirkland's trial testimony is consistent with his answers to interrogatories, served on the Appellant in March 2009, and his testimony in a January 2017 deposition that were received into evidence at trial. In Kirkland's interrogatory answers, he stated that he sustained injuries to "his head, neck, back, arms, shoulders, *knees*, chest, legs and feet" in the July 2008 accident. (Emphasis supplied.) In his deposition, Kirkland testified he had right knee pain on the day of the accident. He testified further that he showed both of his knees to his work supervisor on the Monday following the accident and that his right knee was swollen. Kirkland testified that he continued to have pain in his right knee but that it was "overshadowed" by the pain in his left knee.

Kirkland's trial testimony is also supported by the medical evidence received at trial, and although we have not noted every such complaint in our analysis, the medical evidence

reflects continuing complaints of right knee pain and/or popping since the time of the July 2008 accident. For example, in 2008, Kirkland complained of bilateral knee popping during aquatic physical therapy on August 22. He complained of right knee pain during a defense medical examination by a doctor on December 9, but the doctor found the examination of Kirkland's knee otherwise "not remarkable" with "no specific physical findings."

The medical records show further complaints about Kirkland's right knee in 2009 and 2010. In January 2009, Pitner recorded that Kirkland complained of right knee pain. During a visit to the "Rejuvenation Center" in March, Kirkland noted that his right knee "pops." In October 2010, when he visited another medical clinic, Kirkland marked both his left and right knee on a pain diagram.

Kirkland's complaints of right knee pain continued in 2011 and 2012. He complained of bilateral knee pain to Pitner in July 2011 and was diagnosed with "[b]ilateral degenerative arthritis of the knees." In his notes from that visit, Pitner stated, "The right knee really was not included in [Kirkland's] previous work comp injury and was not a part of discussion today. [Kirkland] does know, however, that it is fairly worn as well." Pitner discussed "knee replacement" with Kirkland at that time, but it is unclear from Pitner's notes whether they discussed replacement of both knees or just the left knee. Pitner's notes do show, however, that Kirkland's left knee bothered him more at that time. Pitner administered cortisone injections into both of Kirkland's knees in September 2012 due to his complaints of bilateral knee pain.

Kirkland continued to treat with Pitner from late 2012 through April 2016 when Pitner performed replacement surgery on Kirkland's left knee. During that time, Kirkland complained of bilateral knee pain. In September 2013, Pitner again administered cortisone injections into both of Kirkland's knees. Pitner also injected both knees on various occasions between April 2014 and January 2016.

On April 11, 2016, Pitner performed a "left total knee arthroplasty" on Kirkland. During a followup visit 2 weeks after the left knee surgery, Kirkland stated he wanted to "begin working on getting prior authorization through workmen's compensation for the right total knee arthroplasty." Pitner administered a cortisone injection to Kirkland's right knee at that visit.

Causation opinions from three doctors concerning Kirkland's right knee were received into evidence at trial. The first causation opinion is from Dr. Erik Otterberg, who conducted an independent medical examination regarding Kirkland's right knee on September 2, 2016. In his report, Otterberg responded to certain questions. As to whether Kirkland's right knee injury was a preexisting condition, related to the July 2008 accident, or caused by a subsequent condition or accident, Otterberg responded that he did not have any documentation of any preexisting right knee problems. He found no mention of the right knee problem initially after the accident, but noted the medical examination of Kirkland in December 2008, in which a doctor evaluated Kirkland's right knee and noticed some right knee pain. With regard to causation, Otterberg stated, "With [Kirkland's] denying right knee problems beforehand and no documentation of pre-existing right knee conditions, I would conclude that this could be related to the July 23, 2008 event with some probability." In response to the question of whether Kirkland's right knee condition represented a material and substantial increase in incapacity "since June 17, 2011 due solely to the injury of July 23, 2008," Otterberg stated, "The progression of the right knee pain and arthritis would progress from the time of the initial event to current." And, as to whether any right knee replacement surgery would be reasonably medically necessary as a result of the July 2008 accident or due to a preexisting condition, regardless of the July 2008 accident, he stated, "Again, with [Kirkland's] denying having any knee problems prior to this and with no documentation of treatment for right knee

problems before this, I think that it is somewhat reasonable to equate his need for a [right] knee replacement with the event on July 23, 2008."

The next causation opinions are from Steier, who also treated Kirkland during the period when Pitner was treating Kirkland. On September 21, 2016, Steier wrote in a letter addressed "To Whom It May Concern":

> Kirkland is a patient under my care who suffered a work comp injury on July 23, 2008. Since that time he has had neck pain, back pain, shoulder pain and bilateral hip and knee pain. He underwent left total knee arthroplasty. He continues with treatment for his neck, back, shoulder and hip pain. He was scheduled for right total knee arthroplasty, but apparently work comp is questioning whether this right knee pain is work related. I reviewed his medical records. I see documentation in the medical records that he started developing right knee pain as far back as August 9, 2010. It is reasonable to assume and one could argue that the right knee pain developed as a direct result of his work comp injuries as his gait and weightbearing changed which may have stressed his right knee.

Then on January 26, 2017, Steier issued a checkbox type of report in which he opined "with a reasonable degree of medical probability" that Kirkland's injuries to his neck, back, head, right knee, and left knee and his hip pain were the result of the work-related accident of 2008; that the medical care and treatment he rendered to Kirkland as a result of these injuries was reasonable and necessary; that Kirkland was at maximum medical improvement for all injuries except his right knee for which surgery was still pending; and that Kirkland would need future medical care and treatment as a result of all of these injuries.

The final relevant causation opinion is found in a February 2, 2017, letter Pitner wrote to Kirkland's counsel:

> This response is . . . to your letter faxed, dated 01/26/17, requesting a narrative report with regard to causality

> and a potential Worker's Compensation case for the left [sic] knee. [Kirkland] has been seen in the office and treated for an injury to the right knee, which was determined to be related to an injury at work. I have also treated him for progressive degenerative disease of the left knee and made the recommendation with proceeding with joint replacement.

On March 29, 2017, the compensation court entered a further award of benefits to Kirkland. The court first addressed the Appellant's assertion that Kirkland's claim was barred by res judicata. The court noted Kirkland's claims of right knee injury in the 2008 accident and evidence about Kirkland's right knee injury. The court also noted that the original award did not find that Kirkland suffered a right knee injury in the 2008 accident. Because Kirkland claimed to have injured his right knee in the 2008 accident and because an injury to Kirkland's right knee was not included in the 2009 award, the court determined that Kirkland was barred from relitigating that issue pursuant to the doctrine of res judicata or issue preclusion.

The compensation court determined, however, that Kirkland was not precluded from seeking modification of the original award. The court stated that Kirkland could recover benefits for a right knee injury "if he can prove his right knee injury/condition stems from his compensable left leg injury, low back injury, neck injury or hip injury" and if he proves the requirements for a modification under Neb. Rev. Stat. § 48-141 (Reissue 2010). The court outlined Kirkland's testimony and the medical evidence about Kirkland's right knee issues, and it noted and analyzed the causation opinions of Pitner, Otterberg, and Steier.

Given the detail of the compensation court's analysis of the causation opinions, we reproduce it here as follows:

> The opinions [of Pitner, Otterberg, and Steier] are the extent of the "causation" opinions offered at trial. Not one doctor opined [Kirkland's] right knee condition was

unrelated to the accident on July 23, 2008, although there are problems with each of the aforementioned opinions. The Court will address each opinion individually.

Initially, . . . Pitner's opinion appears to causally relate [Kirkland's] right knee injury to the accident on July 23, 2008 based upon the theory that his right knee was actually hurt in the accident. If that is the case, that opinion is legally irrelevant as this Court has concluded that [Kirkland] is barred from relitigating that issue. In complete candor, however, it is unclear how . . . Pitner relates [Kirkland's] right knee problem to the accident on July 23, 2008. That lack of clarity does not aid [Kirkland] given it is [Kirkland's] burden to prove his right knee injury was solely caused by the injuries suffered to either his hip, low back, neck or left knee. This Court concludes that . . . Pitner's opinion does not carry [Kirkland's] burden of proof given the lack of clarity and certainty about what exactly his opinion is.

The same criticism can be lodged towards . . . Otterberg's opinion. He does not identify how [Kirkland's] right knee injury is causally related to the accident on July 23, 2008, but he too seems to opine the right knee was initially injured in the accident on July 23, 2008. That opinion would also be legally irrelevant given the Court's ruling on res judicata. Furthermore . . . Otterberg employs the word "could" when providing his opinion, and it is well recognized that expert medical testimony based upon "could," "may," or "possibly" lacks the definiteness required to support an award from the Workers' Compensation Court. . . . Consequently, the Court finds that . . . Otterberg's opinion is insufficient to carry [Kirkland's] burden.

. . . Steier's opinion has some of the same problems as those of . . . Otterberg. . . . Steier also uses the words "could" and "may" when stating his opinion. On the other hand, he at least identifies that [Kirkland's]

> right knee problem[] was caused by [Kirkland's] altered weight bearing and gait. Moreover, . . . Steier cleaned up the deficiencies created by using the words "could" and "may" by issuing his follow-up check box report in which he stated [Kirkland's] right knee injury was the result of the accident on July 23, 2008. Ultimately, the Court finds . . . Steier's opinion to be legally sufficient to carry [Kirkland's] burden of proof and persuasion particularly when considering the Nebraska Supreme Court's decision in [*Hohnstein v. W.C. Frank*], 237 Neb. 974, 468 N.W.2d 597 (1991). In [*Hohnstein*], the Nebraska Supreme Court affirmed the trial court's modification of an award where the only expert opinion to support the claimant's case was one in which [the doctor] testified that the claimant had problems after the fall "and one would assume they were causally related." [*Id.*] at 983, 468 N.W.2d at 604.
>
> The Court finds [Kirkland] suffered a material and substantial change in his physical condition for the worse due solely to the injuries suffered by him in the accident on July 23, 2008. The Court finds [Kirkland's] right knee injury was caused by his altered gait and weight bearing caused by the original injuries suffered in the accident on July 23, 2008. The Court relies upon the opinion of . . . Steier to so find.

The compensation court ordered the Appellant to pay for the right knee total replacement recommended by Pitner and for all followup care necessitated by the surgery. The court also ordered the Appellant to pay certain medical bills and denied Kirkland's request for attorney fees. The Appellant subsequently perfected this appeal.

## ASSIGNMENTS OF ERROR

The Appellant asserts that the compensation court erred in (1) finding Kirkland experienced a material and substantial change for the worse in his right knee condition distinct

and different since the prior trials and awards due solely to his July 2008 accident and (2) adopting medical opinions in support of its ruling that did not meet the required burden of proof.

## STANDARD OF REVIEW

[4-7] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Hintz v. Farmers Co-op Assn.*, 297 Neb. 903, 902 N.W.2d 131 (2017). Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Id.* When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Kohout v. Bennett Constr.*, 296 Neb. 608, 894 N.W.2d 821 (2017).

## ANALYSIS

The Appellant asserts that the compensation court erred in finding Kirkland experienced a material and substantial change for the worse in his right knee condition distinct and different since the prior trials and awards due solely to his July 2008 accident and adopting medical opinions in support of its ruling that did not meet the required burden of proof.

Under § 48-141, an award of the compensation court may be modified:

> (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . .

[8-10] To obtain a modification of an award, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013). To obtain a modification of a prior award, the applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had been previously made. *Id.* Whether an applicant's incapacity has increased under the terms of § 48-141 is a finding of fact. *Rader v. Speer Auto, supra*.

The Appellant argues that because the record shows Kirkland has had ongoing right knee pain, right knee popping, and an altered gait since the time of the July 2008 accident, he failed to prove that his right knee condition at the time of the 2017 trial was distinct and different from and materially worse than his condition at the time of the prior trials. The Appellant also argues that Steier's causation opinion, which the court relied on, was insufficient.

[11-14] Although a claimant's medical expert does not have to couch his or her opinion in the magic words "reasonable medical certainty" or "reasonable probability," the opinion must be sufficient to establish the crucial causal link between the claimant's injuries and the accident occurring in the course and scope of the claimant's employment. *Damme v. Pike Enters.*, 289 Neb. 620, 856 N.W.2d 422 (2014). An appellate court examines the sufficiency of a medical expert's statements from the expert's entire opinion and the record as a whole.

*Id.* The Workers' Compensation Court is the sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony. *Id.* Resolving conflicts within a health care provider's opinion rests with the Workers' Compensation Court, as the trier of fact. *Id.*

The record shows that Kirkland has complained of right knee pain and popping since the July 2008 accident, but that his left knee symptoms were initially worse. The record also shows that after Kirkland's left knee replacement surgery, he relied primarily on his right knee to support him, stressing it to the point that Pitner recommended right knee replacement surgery in 2016. The record shows that prior to Pitner's recommendation, no doctor had recommended replacement surgery for Kirkland's right knee.

The compensation court relied on Steier's causation opinions to find Kirkland suffered a material and substantial change in his physical condition for the worse due solely to the injuries suffered by him in the 2008 accident. The court specifically found that "[Kirkland's] right knee injury was caused by his altered gait and weight bearing caused by the original injuries."

[15] If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015). Considering the evidence in the light most favorable to Kirkland and examining Steier's statements from his collective opinions and the record as a whole, we find the record supports the compensation court's determination that Kirkland suffered a material and substantial change in his physical condition for the worse due solely to the injuries he suffered in the July 2008 accident. The injury to Kirkland's right knee, at the time of the instant modification, was distinct and different from the injuries compensated in the prior awards. The fact

that Kirkland complained of some right knee issues before the prior awards does not preclude this finding as the condition of the right knee at the time of the instant modification had progressed to require a total replacement.

[16,17] However, our analysis under § 48-141 does not end there. To establish a change in incapacity under § 48-141, an applicant must show a change in impairment and a change in disability. *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013); *Jurgens v. Irwin Indus. Tool Co.*, 20 Neb. App. 488, 825 N.W.2d 820 (2013); *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). A change in impairment refers to the employee's physical condition or health status. See, *Rader v. Speer Auto, supra*; *Bronzynski v. Model Electric, supra*. Disability, on the other hand, is defined in terms of employability and earning capacity rather than loss of bodily function. See, *Rader v. Speer Auto, supra*; *Wolfe v. American Community Stores*, 205 Neb. 763, 290 N.W.2d 195 (1980); *Bronzynski v. Model Electric, supra*. In a workers' compensation context, impairment refers to a medical assessment, whereas disability relates to employability. *Rader v. Speer Auto, supra*; *Jurgens v. Irwin Indus. Tool Co., supra*.

In *Rader v. Speer Auto, supra*, the employee submitted evidence showing that he had experienced a slight increase in his loss of earning power since an earlier award. The trial court found that although the employee experienced an additional loss of earning power, this loss of earning power alone did not serve to establish a material and substantial change for the worse in her condition as required by § 48-141(2). On appeal, the Nebraska Supreme Court affirmed the denial of modification under § 48-141. The Supreme Court first noted that although there were competing loss of earning power opinions, the trial judge was entitled to accept the opinion of one expert over another. The Supreme Court then noted, however, that with respect to impairment, there was expert evidence to show that the employee did not experience a material or substantial change in her condition. The Supreme Court

concluded that although the finding of a modest increase in the employee's loss of earning capacity supported a worsening of disability, the record as a whole failed to establish a worsening of impairment, and that thus, the trial court's finding that the employee did not prove an increase in incapacity under § 48-141 was not clearly wrong.

In this appeal, we are presented with the opposite scenario than that existing in *Rader v. Speer Auto, supra*. Here, the trial court found a substantial change in Kirkland's physical condition; in other words, a worsening of his impairment. However, the trial court did not address the second prong of § 48-141—a change in disability. Presumably, this prong was not addressed below because Kirkland was already found to be permanently totally disabled in the 2011 further award. Nevertheless, we cannot ignore the requirement that an employee show both a change in impairment and a change in disability before being entitled to a modification under § 48-141. Nor are we aware of any exceptions under § 48-141 to the requirement of proving an increase in disability in cases where a worker is already at permanent total disability. Obviously, there was no evidence adduced in this case regarding an increase in disability because Kirkland was already found to be totally disabled. Because Kirkland failed to establish a worsening of disability, it was clear error for the trial court to find that he suffered an increase in incapacity under § 48-141.

Although the trial court erred in finding an increase in incapacity to support modification under § 48-141, this does not necessarily end our inquiry. In his petition to modify, Kirkland alleged a material and substantial change in his condition to support modification under § 48-141, but he also alleged that the 2011 further award provided for future medical care and treatment, that he now required a total knee arthroplasty, and that this change was due to his compensable injuries. The relief sought in the petition was an order requiring the Appellant to comply with the 2011 further award by paying

for the treatment necessary to address his work-related condition—the right knee total arthroplasty. This is the relief that the trial court granted, albeit under a § 48-141 finding, which we have determined to be in error.

An award of future medical treatment may include treatment which becomes reasonably necessary only after entry of the award. See, *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012); *Pearson v. Archer-Daniels-Midland Milling Co*., 282 Neb. 400, 803 N.W.2d 489 (2011). The question becomes whether the requested treatment is necessary to treat the employee's work-related injuries. See *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). If the necessity of the treatment has been established, it may be compensable notwithstanding the fact that it was not specifically included in the award of future medical benefits. See *Sellers v. Reefer Systems, supra*.

The foregoing cases regarding future medical treatment are generally premised upon Neb. Rev. Stat. § 48-120 (Cum. Supp. 2016) (award of medical expenses) rather than § 48-141. An employee may file a motion to compel payment of medical expenses following an award of future medical expenses. See *Zitterkopf v. Aulick Indus.*, 16 Neb. App. 829, 753 N.W.2d 370 (2008) (employee previously awarded permanent total disability and future medical expenses obtained order compelling employer to pay for medication necessary to address reaction to pain medication).

Here, although the compensation court found that Kirkland was precluded under the doctrine of res judicata from claiming he sustained an injury to his right knee in the 2008 accident, a finding that Kirkland does not challenge on appeal, the court further found that Kirkland was not precluded from proving that his right knee injury stems from the injuries found to be suffered in the 2008 accident. This finding is consistent with *Sellers v. Reefer Systems, supra*; *Pearson v. Archer-Daniels-Midland Milling Co., supra*; and *Rodriguez v. Hirschbach Motor Lines, supra*.

Because we conclude that the trial court erroneously premised its award of medical bills for the right knee treatment upon § 48-141, we must reverse its decision. However, because the court did not specifically address Kirkland's request to compel payment of these expenses under the further award, we remand the cause for further proceedings consistent with this opinion.

## CONCLUSION

The compensation court was clearly wrong in finding that Kirkland suffered an increase in incapacity under § 48-141. We reverse the March 29, 2017, further award and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

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

# Carolyn Gatzemeyer and Robert Gatzemeyer, appellees, v. Jennifer L. Knihal, appellant.

915 N.W.2d 630

Filed May 8, 2018. No. A-17-549.

1. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Visitation: Parental Rights: Proof.** A court can order grandparent visitation only if the petitioning grandparent proves by clear and convincing evidence that (1) there is, or has been, a significant beneficial relationship between the grandparent and the child; (2) it is in the best interests of the child that such relationship continue; and (3) such visitation will not adversely interfere with the parent-child relationship.
4. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
5. **Trial: Evidence: Appeal and Error.** An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility.
6. **Visitation: Parental Rights.** Although the Nebraska grandparent visitation statutes recognize the interests of the child in the continuation of the grandparent relationship, under Nebraska's grandparent visitation statutes as a whole, the best interests of the child consideration does

not deprive the parent of sufficient protection because visitation will not be awarded where such visitation would adversely interfere with the parent-child relationship.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Benjamin M. Belmont and Wm. Oliver Jenkins, of Brodkey, Cuddigan, Peebles, Belmont & Line, L.L.P., for appellant.

Michael B. Lustgarten and Britt H. Dudzinski, of Lustgarten & Roberts, P.C., L.L.O., for appellees.

Moore, Chief Judge, and Pirtle and Arterburn, Judges.

Pirtle, Judge.

## INTRODUCTION

Jennifer L. Knihal appeals from an order of the district court for Douglas County granting Carolyn Gatzemeyer and Robert Gatzemeyer grandparent visitation with Knihal's two children. Based on the reasons that follow, we affirm.

## BACKGROUND

On July 22, 2016, the Gatzemeyers filed a complaint for grandparent visitation seeking court-ordered visitation rights with their grandchildren, Michael Gatzemeyer and Maya Gatzemeyer. Knihal filed an answer opposing the complaint. During the pendency of the proceedings, the trial court awarded the Gatzemeyers temporary visitation with Michael and Maya, which visitation consisted of one overnight visit every other weekend.

The children's parents are Knihal and Kevin Gatzemeyer, the Gatzemeyers' son, who is now deceased. Knihal and Kevin were married in November 2004. Michael was born in 2004, and Maya was born in 2006. Knihal and Kevin separated in November 2008 and divorced in July 2010. Based on the parenting plan, Knihal and Kevin had joint physical custody

of the children on a "week-on, week-off basis." Kevin died in March 2014.

The Gatzemeyers' complaint for visitation came on for trial on April 12, 2017. Carolyn testified that starting from the time of each child's birth until 2010, when Knihal and Kevin divorced, she and Robert would see the children at least weekly, if not more. Carolyn would babysit the children whenever Knihal and Kevin needed her to, usually once or twice per month, and sometimes the children would stay overnight. Carolyn testified that the children stayed with the Gatzemeyers on one or two occasions when Knihal and Kevin went out of town. She would also see the children during holidays and family events.

Carolyn testified that after Knihal and Kevin divorced in 2010 until the time of Kevin's death in 2014, she and Robert would see the children at least twice during the weeks Kevin had custody. Michael and Maya would stay overnight about every other week. Carolyn also testified that she took the children to daycare during Kevin's weeks of custody and would sometimes pick them up. She stated that she and Robert were very active in the children's lives.

The Gatzemeyers also hosted family dinners every other Sunday that were attended by Kevin, Michael, Maya, and Kevin's brother and his family. Carolyn testified that Michael and Maya also attended an annual summer family trip to Minnesota with Kevin, which included the Gatzemeyers and other extended family members.

Carolyn testified about the specific activities that she and Robert would do with the children. She and Robert would take the children to various places, including trips to a museum, a botanical garden, and a zoo. They would also watch movies and play cards together, which Carolyn said the children loved to do. Carolyn also testified that Michael loved hockey and that Kevin's brother was a hockey coach whose sons played hockey. The Gatzemeyers would take Michael to watch hockey games being coached by Kevin's brother and/or games that

their cousins were playing. She testified about one occasion when Robert and Michael went to a hockey game together and she and Maya spent that time sewing at home.

Carolyn testified that one weekend she and Robert took the children to a state park, where they went swimming and hiking. Carolyn also testified that during the Minnesota trips, Michael and Maya loved swimming, boating, and playing outside. Carolyn further testified that she and Robert would attend the children's extracurricular activities, such as Michael's "ball games" and football games, as often as they could.

Carolyn testified that after Kevin died in March 2014, she and Robert continued to have regular contact with the children until March 2016. They would see the children "at least a couple times" per month, and the children would stay overnight with them once or twice per month. The time spent with the children was usually a result of Knihal's needing someone to watch the children. Sometimes, the children would call and ask if they could come over. Knihal allowed Michael and Maya to continue going to the Sunday dinners after Kevin passed away, and they also went on the family trip to Minnesota with the Gatzemeyers in 2014 and 2015.

Carolyn testified that on March 9, 2016, Knihal called her and said the Gatzemeyers "were horrible grandparents," and that she did not want them to have any future contact with the children. Carolyn testified that prior to March 9, her contact with Michael and Maya had been "regular and consistent since they were born" and that the children always enjoyed spending time with the Gatzemeyers.

Robert testified and concurred with Carolyn that they have had regular contact with the children since they were born. He also testified that he was involved in all the events and activities with Michael and Maya that Carolyn testified about.

The Gatzemeyers' daughter-in-law, who was married to Kevin's brother, testified that she has had the opportunity to observe the Gatzemeyers around Michael and Maya on numerous occasions. She testified that Carolyn loves to interact

with the children, play with them, and take them places. She testified that Carolyn is "all about being a grandma" and that Robert "is a great grandpa." She also testified that the grandsons, including Michael, like to help Robert build and paint items in his woodshop and that Maya "adores" Robert. She testified that the contact between the Gatzemeyers and the children has been regular and consistent and that the relationship is a loving one.

Gabriel Butler, Knihal's boyfriend of 8 years and with whom she has lived for 6 years, also testified. He testified that before March 2016, the Gatzemeyers saw the children about once per month, sometimes for the day and sometimes overnight. He testified that after Kevin died, Michael and Maya would behave differently for a couple days after they came home from a visit with the Gatzemeyers. He testified they would yell and scream, would not listen to him or Knihal, and seemed to be upset with Knihal, even saying that she "killed" Kevin. Butler testified that the children's behavior after visits interfered with Knihal's ability to parent the children. He testified that since the temporary order has been in place, he had observed the same type of behavior when the children came home after visits. Butler testified that the visits under the temporary order have put a strain on Knihal's relationship with her children.

Butler acknowledged that Knihal had allowed regular contact between the Gatzemeyers and the children from the time of Kevin's death in March 2014 until March 2016, despite the children's behavior following the visits. He testified that the children love their grandparents and enjoy spending time with them. Butler testified that despite the behavior of the children after visits, he believed the children should still have contact with the Gatzemeyers and they should be involved in each other's lives.

Knihal testified that before she and Kevin separated in 2008, the children had regular contact with the Gatzemeyers. She said she did not know how much contact the children had

after she and Kevin separated until he died. Knihal agreed with Carolyn's testimony that after Kevin died, the children would spend time with the Gatzemeyers about once a month and would sometimes stay overnight.

Knihal testified that prior to March 2016, when she told the Gatzemeyers they could no longer see the children, the children would behave differently when they came home from visits. She stated they would be defiant, disrespectful, and would make hurtful statements, such as saying it was her fault that Kevin is dead. Knihal testified that she believed the Gatzemeyers disparaged her when the children were visiting them. She testified that in March 2016, she "had had enough." Knihal testified that she called Carolyn and told her the children are upset and angry at Knihal when they return from visits and that Carolyn responded that what Knihal was saying was "not true and that [she was] over-exaggerating." Knihal told Carolyn that she did not want the Gatzemeyers to see the children again "until [she] was ready."

Knihal testified that since the temporary order has been in effect, the children have been exhibiting the same type of behavior after visits that they did before she ended visits in March 2016. She believed the time the children were spending with the Gatzemeyers was interfering with her parenting because the children would be mean and hurtful toward her and would not listen to her after visits. She also testified that in the month or two before trial, Maya has not wanted to attend the court-ordered visits.

Knihal testified that she believes it is in Michael's and Maya's best interests to have contact with the Gatzemeyers, but that she should be the one deciding when it should occur. She is opposed to court-ordered visitation because "it undermines [her] decision as their mother on whether or not they can see people when they want to."

Carolyn testified that neither she nor Robert have ever said anything negative about Knihal in front of the children and have never indicated that she was somehow responsible for

Kevin's death. She further testified that she has never told anyone that she blames Knihal for Kevin's death.

Carolyn also denied that Knihal had ever told her that the children had behavior issues at home after visits. She stated that she had never heard that the children were acting out at home until it was mentioned in this lawsuit. Robert also testified that Knihal never told him that she was having trouble with the children after visits.

Following trial, the court entered an order finding that the Gatzemeyers had a significant beneficial relationship with the children, that it was in the best interests of the children that the Gatzemeyers be granted visitation, and that the Gatzemeyers' exercising visitation with the children would not adversely impact the parent-child relationship between the children and Knihal. The court granted the Gatzemeyers visitation with the children during the second weekend of each month from Saturday at 10 a.m. until Sunday at 7 p.m. The court also ordered visitation on Christmas Eve, the weekend before Easter, and each summer for the annual family trip to Minnesota.

## ASSIGNMENTS OF ERROR

Knihal has assigned four errors, which we consolidate for discussion into two. Knihal assigns that the trial court erred in (1) granting the Gatzemeyers' request for grandparent visitation and (2) failing to give special weight to her determination of her children's best interests.

## STANDARD OF REVIEW

[1,2] Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Vrtatko v. Gibson*, 19 Neb. App. 83, 800 N.W.2d 676 (2011). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power,

elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

## ANALYSIS

[3,4] Knihal first assigns that the trial court erred in granting the Gatzemeyers' request for grandparent visitation. The grandparent visitation statutes, Neb. Rev. Stat. §§ 43-1801 to 43-1803 (Reissue 2016), permit a grandparent to seek visitation with his or her minor grandchild in limited circumstances, including, as pertinent here, when the child's parent or parents are deceased. See § 43-1802(1)(a). A court can order grandparent visitation only if the petitioning grandparent proves by clear and convincing evidence that (1) there is, or has been, a significant beneficial relationship between the grandparent and the child; (2) it is in the best interests of the child that such relationship continue; and (3) such visitation will not adversely interfere with the parent-child relationship. See, § 43-1802(2); *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (2004).

Knihal argues that the Gatzemeyers did not prove the three elements required under § 43-1802(2) by clear and convincing evidence. She first contends that there was not sufficient evidence that there is, or has been, a significant beneficial relationship between the Gatzemeyers and the children. The evidence showed that the Gatzemeyers have had a regular and consistent relationship with Michael and Maya from the time they were born, in 2004 and 2006 respectively, until March 2016, when Knihal stopped allowing the children to spend time with them. During Knihal and Kevin's marriage, the Gatzemeyers spent time with the children on a regular

basis, sometimes having them overnight. After the divorce, the Gatzemeyers continued to see the children during the weeks Kevin had custody and helped Kevin get the children to and from daycare. The children would stay overnight sometimes as well. After Kevin died in March 2014, the Gatzemeyers continued to have regular contact with the children for the next 2 years. The children also continued to attend Sunday family dinners and went on the family trip to Minnesota in 2014 and 2015, as they had when Kevin was alive.

In addition to the amount of time the Gatzemeyers spent with the children, there was also evidence in regard to how the time was spent together and the quality of the relationship. The Gatzemeyers would take the children various places, such as the museum, the zoo, or hockey games, or they would spend time together at home watching movies or playing card games. Carolyn also testified that she and Robert would attend the children's extracurricular activities when they could.

The children's aunt testified that Carolyn loves to interact with the children, play with them, and take them places. The children's aunt further testified that the Gatzemeyers are good grandparents and have a loving relationship with the children. Butler testified that the children love their grandparents and enjoy spending time with them.

We conclude that the trial court did not abuse its discretion in finding that the Gatzemeyers presented clear and convincing evidence of a significant beneficial relationship with Michael and Maya.

Knihal also argues that the Gatzemeyers did not prove by clear and convincing evidence that it was in the children's best interests that the relationship continue, nor did they prove that visitation would not adversely interfere with Knihal's relationship with her children. Knihal contends that these two elements were not met based on the evidence of the children's behavior after visits with the Gatzemeyers.

Knihal testified that she ended Michael's and Maya's contact with the Gatzemeyers in March 2016 because of the

children's defiant and disrespectful behavior after visits. She believed the Gatzemeyers disparaged her when the children were visiting. Knihal testified that she told Carolyn about the children's behavior in March 2016, but that Carolyn did not believe her. She further testified that since the temporary visitation order has been in place, the children are behaving the same way that they had in the past after visits. Butler agreed that the children behave differently after visits with the Gatzemeyers. Both Knihal and Butler testified that they believed that the visits were interfering with Knihal's ability to parent her children.

Despite Knihal's contention that the children had behavior issues when they returned from visits with the Gatzemeyers after Kevin's death, she allowed the children to continue to spend time with the Gatzemeyers for 2 years. She also testified that she believed it was in Michael's and Maya's best interests to continue to have contact with the Gatzemeyers. Butler also testified that he believed the children should have contact with the Gatzemeyers and they should be involved in each other's lives.

Carolyn testified that neither she nor Robert have ever said anything negative about Knihal in front of the children and have never indicated to them or anyone else that Knihal was somehow responsible for Kevin's death. Carolyn also denied that Knihal had ever told her that the children had behavior issues at home after visiting the Gatzemeyers, and Carolyn said that she heard the allegations for the first time during the present litigation. Robert also testified that Knihal never told him that the children were behaving differently after visits.

[5] An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). After hearing the witnesses, the court apparently did not find Knihal's or Butler's testimony credible

in regard to the children's behavior following visits. We defer to the trial court's findings on credibility.

As previously discussed, the Gatzemeyers have always been involved in the children's lives and they have spent time together, with and without other family members, on a regular, consistent basis. The evidence shows that the Gatzemeyers and the children have an established, loving relationship that is beneficial to the children. The relationship also allows Michael and Maya to stay connected with other paternal family members, which may not happen without visits with the Gatzemeyers. As previously stated, Knihal believed it was in Michael's and Maya's best interests to continue to have contact with the Gatzemeyers, she just did not want it to be court-ordered visitation.

We conclude that the trial court did not abuse its discretion in finding there was clear and convincing evidence that it was in the children's best interests that the relationship with the Gatzemeyers continue and that visitation between the children and the Gatzemeyers would not adversely interfere with the parent-child relationship.

[6] Knihal also assigns that the trial court erred in failing to give special weight to her determination that visitation was not in her children's best interests. Knihal relies on principles established in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), which provide that a fit parent is presumed to act in the best interests of his or her child, and although special weight is to be accorded a fit parent's decision regarding visitation, the presumption in favor of a parent's decision is rebuttable. In *Hamit v. Hamit, supra*, the Nebraska Supreme Court determined that the requirements in § 43-1802(2) satisfy the principles established in *Troxel v. Granville, supra.* The Nebraska Supreme Court held that although the Nebraska grandparent visitation statutes recognize the interests of the child in the continuation of the grandparent relationship, under Nebraska's grandparent visitation statutes as a whole, the best interests of the child consideration

does not deprive the parent of sufficient protection because visitation will not be awarded where such visitation would adversely interfere with the parent-child relationship. *Hamit v. Hamit, supra.*

In the present case, the court specifically found that visitation between the Gatzemeyers and the children would not adversely impact the parent-child relationship between Knihal and the children. The court gave Knihal's decision regarding visitation the weight it was entitled to based on § 43-1802(2) and *Hamit v. Hamit, supra*. Knihal's final assignment of error is without merit.

## CONCLUSION

We conclude that the trial court did not err in granting grandparent visitation to the Gatzemeyers. Accordingly, the court's order is affirmed.

Affirmed.

**Nebraska Court of Appeals**

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

-- Nebraska Reporter of Decisions

# In re Interest of Kirsten H., a child under 18 years of age. State of Nebraska, appellee, v. Victoria F., appellant.

915 N.W.2d 815

Filed May 22, 2018. No. A-17-981.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. ____: ____. Subject matter jurisdiction is a court's power 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 involved in the action or proceeding before the court and the particular question which it assumes to determine.
4. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
5. **Child Custody: Jurisdiction.** Jurisdiction over child custody proceedings is governed by the Uniform Child Custody Jurisdiction and Enforcement Act.
6. ____: ____. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a court which makes an initial child custody determination will have exclusive, continuing jurisdiction over child custody until certain determinations are made pursuant to Neb. Rev. Stat. § 43-1239 (Reissue 2016).
7. ____: ____. A court with exclusive and continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act may decline to exercise its jurisdiction on the basis that it is an inconvenient forum.
8. **Judgments: Jurisdiction.** A court action taken without subject matter jurisdiction is void.

9. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** A void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on a court.
10. **Judgments: Jurisdiction: Appeal and Error.** An appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.
11. **Jurisdiction: Appeal and Error.** When a lower court does not have jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim.

Appeal from the County Court for Box Butte County: Paul G. Wess, Judge. Orders vacated, appeal dismissed, and cause remanded with directions.

Katy A. Reichert, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellant.

Travis R. Rodak, Box Butte County Attorney, for appellee.

Jean Rhodes, guardian ad litem.

Riedmann and Bishop, Judges, and Inbody, Judge, Retired.

Bishop, Judge.

## INTRODUCTION

Kirsten H.'s parents divorced in North Dakota in approximately 2009. In 2012, Kirsten and her mother, Victoria F., moved to Nebraska, where Victoria later remarried. While visiting her grandparents in North Dakota in the summer of 2016, Kirsten made allegations that she had been sexually abused by John F., her stepfather. Juvenile proceedings were initiated in North Dakota, and the juvenile court there ultimately determined that Kirsten was to be returned to Victoria in Nebraska by July 1, 2017.

Before July 1, 2017, juvenile proceedings were initiated in Nebraska. After a hearing on August 10, the county court for Box Butte County, sitting as a juvenile court, granted

temporary custody of Kirsten to the Nebraska Department of Health and Human Services (DHHS) and said that placement with her grandparents in North Dakota should continue. And after a hearing on August 31, the juvenile court overruled Victoria's motion to dismiss, which claimed the juvenile court lacked subject matter jurisdiction because of the proceedings in North Dakota. Victoria appeals the orders from both August 10 and 31. For the reasons that follow, we find that the juvenile court of Box Butte County did not have subject matter jurisdiction at the time of both the August 10 and August 31 orders and that therefore, those orders are void. We vacate those orders, dismiss the appeal, and remand the cause with directions.

## BACKGROUND

Victoria is the biological mother of Kirsten, born in December 2007. Garvin H. is Kirsten's biological father. Garvin was stationed in Germany with the Army at the time of the juvenile court proceedings in both North Dakota and Nebraska in 2016 and 2017; the record does not establish Garvin's domicile. Victoria's father and stepmother are Kirsten's grandparents, and they live in North Dakota.

Victoria and Garvin were divorced in North Dakota, the proceedings of which "started" in 2009. In 2012, Victoria and Kirsten moved to Nebraska. Victoria subsequently married John. Victoria, John, and Kirsten continued to live in Nebraska.

In the summer of 2016, Kirsten went to North Dakota to spend a week with her grandparents. While in North Dakota, Kirsten disclosed that she had been sexually abused by John. After receiving the report of possible abuse, and having Kirsten interviewed (during which she also apparently disclosed physical abuse by John and Victoria), the State of North Dakota initially filed for emergency custody, and later, a "deprivation" petition was filed. Kirsten has remained with her grandparents ever since.

North Dakota Proceedings

Although we do not have any of the initial court pleadings or orders from North Dakota, testimony from an April 2017 North Dakota hearing was received into evidence in the current Nebraska case. We briefly summarize that testimony. North Dakota entered an emergency custody order in August 2016. The "venue [got] changed" to Nebraska in October. Nebraska apparently filed juvenile proceedings, but the proceedings were dismissed by the State in February 2017 before it went to "trial." Victoria then went to North Dakota to get Kirsten, but because there were still concerns about Kirsten's safety, another emergency custody order was obtained in North Dakota, and a "deprivation" petition was filed.

After a hearing in April 2017, the Foster County Juvenile Court in North Dakota entered its order in May. The court found that competent evidence regarding the sexual abuse allegations was not presented to the court, noting that a forensic interview of Kirsten was done but the interviewer did not testify. The court also noted that although there were allegations of corporal punishment being used in the home, Victoria testified that she had abandoned "spanking" as a form of discipline and that she now used "time outs and restriction of privileges." However, the court found Kirsten was a "deprived" child, in that she was a child "without proper parental care, control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health, or morals and the deprivation is not due primarily to the lack of financial means of the parent or custodian of the child." That finding was made to allow Kirsten time to finish the current school year and complete or transfer therapy to Nebraska. The court ordered that

> pending further order, the child, Kirsten . . . , be and is hereby placed under the full care, custody, and control of the Executive Director of Foster County Social Services, or her successor, for placement and care, for a period dating from February 13, 2017 until July 1st, 2017 when

> she shall be returned to [Victoria's] home in Nebraska . . . and the petitions will be dismissed.

The Foster County Juvenile Court's May order was received into evidence in the current Nebraska juvenile court proceeding.

### Current Nebraska Case

On June 16, 2017, the State of Nebraska filed a juvenile court petition in the county court for Box Butte County, sitting as a juvenile court, alleging that Kirsten was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), because she lacked proper parental care by reason of the faults or habits of Victoria in that Victoria failed to protect Kirsten from sexual abuse while in her care, custody, and control and in that Victoria failed to report child abuse reported to her by Kirsten. The State further alleged that Kirsten was in a situation dangerous to life or limb or injurious to her health or morals, in that Kirsten was sexually abused while in Victoria's care, custody, and control; Victoria engaged in acts toward Kirsten that would constitute physical and/or mental abuse; and Victoria sought to destroy or tamper with evidence regarding the alleged sexual abuse of Kirsten by John. The juvenile petition noted that Kirsten was living with her grandparents in North Dakota, but did not mention that there was an ongoing juvenile case in North Dakota.

Also on June 16, 2017, the State filed an ex parte motion for temporary custody of Kirsten, which attached and incorporated the supporting affidavit of an investigator with the Nebraska Attorney General's office. The ex parte motion for temporary custody also failed to mention the ongoing North Dakota case, but the "pending juvenile case in North Dakota" was mentioned in the supporting affidavit. On June 17, the court granted the State's ex parte motion for temporary custody of Kirsten.

An order filed on June 22, 2017, notes that a protective custody hearing was held and that Kirsten was to be placed into the temporary custody of DHHS; the hearing does not appear

in our record. The court ordered that "[a]ny communication or contact between Kirsten and [Victoria] will only occur if Kirst[e]n agrees, and must be supervised and in a therapeutic setting."

On July 17, 2017, Victoria filed a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112 for lack of subject matter jurisdiction. Victoria alleged:

> 1. At the time Petition was filed in the above-captioned case, [Kirsten] was not present in the State of Nebraska;
>
> 2. [Kirsten] is not present in the State of Nebraska as of the date hereof;
>
> 3. The Nebraska Supreme Court has held that the State lacks *parens patriae* power to provide the basis for finding jurisdiction over a child where the child is not within the State's borders at the time the petition was filed. *In re Interest of Violet T.*, 286 Neb. 949, 840 N.W.2d 959 (2013)[.]

Also on July 17, 2017, Victoria filed an answer denying the allegations in the petition, and she asserted several affirmative defenses, including the court's lack of jurisdiction over the proceedings.

An order filed on July 27, 2017, states that a hearing was held on Victoria's motion to dismiss and the case was taken under advisement; the hearing does not appear in our record. In an order filed on July 31, the court found there was insufficient evidence adduced at the July 27 hearing in order to decide the motion. The court stated, "What is unknown, or unclear, is whether North Dakota has adopted the [Uniform Child Custody Jurisdiction and Enforcement Act], if so, the specific statutory basis for the Foster County, North Dakota Juvenile Court's jurisdiction over Kirsten . . . and how long Kirsten was in North Dakota before the North Dakota petition was filed." The court overruled Victoria's motion to dismiss, but said the motion could be renewed and more evidence adduced.

On August 10, 2017, a hearing was held on Victoria's motion for change of placement, filed on July 18, which had asked the court to place Kirsten in her home or another suitable place in Scottsbluff, Nebraska. The court treated the hearing as an initial detention hearing, and testimony was given. In its order filed that same day, the court found that reasonable efforts had been made to prevent or eliminate the need for removal and make it possible for Kirsten to safely return home, but that it was necessary for her to be placed in the custody of DHHS. The court further found that placement with her grandparents in North Dakota was the least restrictive placement and in Kirsten's best interests. The court stated: "Reasonable visitation to be determined by DHHS[.] Further visitation conditions are: To be determined by Kirsten and her therapist . . . and should begin in a therapeutic setting." Victoria's motion for change of placement was denied.

On August 17, 2017, the State filed an amended juvenile court petition, once again alleging that Kirsten was a child as defined by § 43-247(3)(a). The allegations in the amended petition varied from those in the original petition. The amended petition did not include an allegation that Victoria failed to report child abuse reported to her by Kirsten. But it added an allegation that Victoria continued to sustain a relationship with John and other individuals whose relationships and proximity to Victoria were dangerous to the health or morals of Kirsten. It also added an allegation that Kirsten was in need of specialized treatment, including but not limited to counseling, and that Victoria has refused to facilitate or participate in such treatment.

On August 28, 2017, Victoria filed a renewed motion to dismiss pursuant to § 6-1112 for lack of subject matter jurisdiction, making the same allegations as in her July 17 motion to dismiss. She further alleged that the State of Nebraska lacked jurisdiction over Kirsten under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2016),

and that the State of North Dakota was actively exercising jurisdiction over Kirsten at the time the petition in this case was filed.

At a hearing on August 31, 2017, the court heard arguments on Victoria's renewed motion to dismiss. Various exhibits had previously been received into evidence at the August 10 hearing; among the exhibits were the bill of exceptions from April hearings in North Dakota, a May order from North Dakota, and a copy of the sections of the North Dakota Century Code regarding the UCCJEA and the Uniform Juvenile Court Act. The court noted that Kirsten had lived in Nebraska for some time prior to her being removed from the home and then placed with her grandparents in North Dakota. The court further noted that at the time the case was originally filed, Victoria lived in Box Butte County, and that she still works there. In its order filed on August 31, the court overruled Victoria's motion to dismiss. The court also overruled a motion in limine filed by Victoria, made discovery orders, and ordered a parenting assessment and psychological evaluation. An adjudication hearing was set for September 21.

Victoria appeals the orders from both August 10 and 31, 2017.

## ASSIGNMENTS OF ERROR

Victoria assigns that the juvenile court erred in (1) overruling her motion to dismiss for lack of subject matter jurisdiction, (2) continuing temporary custody of Kirsten and finding that reasonable efforts were made prior to removal to prevent or eliminate the need for removal and to make it possible for Kirsten to return to her care, (3) finding that Kirsten's placement in North Dakota was the least restrictive placement, and (4) delegating its authority to determine Victoria's visitation rights to DHHS, Kirsten, and Kirsten's counselor.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile

court's findings. *In re Interest of Dana H.*, 299 Neb. 197, 907 N.W.2d 730 (2018).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Id*.

## ANALYSIS

### Jurisdiction

Victoria asserts that the juvenile court did not have subject matter jurisdiction in this case and should have granted her motion to dismiss.

Generally, a denial of a motion to dismiss is not a final order. *Herman Trust v. Brashear 711 Trust*, 22 Neb. App. 758, 860 N.W.2d 431 (2015). We need not determine whether an exception exists in juvenile proceedings where the motion questions subject matter jurisdiction under the UCCJEA, because the denial of Victoria's motion to dismiss (order filed August 31, 2017) is not the only order being appealed. See *In re Interest of Carmelo G.*, 296 Neb. 805, 896 N.W.2d 902 (2017) (appellate court not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it). In this case, Victoria also appeals from the court's order filed on August 10, which, following what it treated as an initial detention hearing, ordered that Kirsten remain in the custody of DHHS and that her placement with her grandparents in North Dakota continue. Assuming that the court had proper subject matter jurisdiction on August 10, that order would have been a final, appealable order. See *In re Interest of Stephanie H. et al.*, 10 Neb. App. 908, 914, 639 N.W.2d 668, 675 (2002) ("[a]lthough an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, an order under Neb. Rev. Stat. § 43-254 (Cum. Supp. 2000) and § 43-247(3)(a) after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing is final and thus appealable").

[3,4] Subject matter jurisdiction is a court's power 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 involved in the action or proceeding before the court and the particular question which it assumes to determine. *In re Interest of Violet T.*, 286 Neb. 949, 840 N.W.2d 459 (2013). Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017). Therefore, although the August 10, 2017, order (continuing custody and placement of Kirsten) would ordinarily be final and appealable, we must still consider whether the juvenile court had subject matter jurisdiction over the proceedings.

Victoria states that at the time the present case was filed on June 16, 2017, "the State of North Dakota was actively exercising jurisdiction" over Kirsten and "made specific orders that the case would remain open until July 1, when Kirsten would return to Victoria's care." Brief for appellant at 14. She claims that on June 16, the juvenile court (in Nebraska) lacked jurisdiction over Kirsten under the UCCJEA. She also claims the State of Nebraska lacked parens patriae power.

We agree that Nebraska could not exercise jurisdiction using its parens patriae power because Kirsten was not present in Nebraska at the time the juvenile proceedings were filed in June 2017, nor anytime thereafter up to and including August 31 when the juvenile court overruled Victoria's motion to dismiss. In *In re Interest of Violet T.*, 286 Neb. at 953, 840 N.W.2d at 463, the Nebraska Supreme Court recalled its previous decisions in which the court stated:

> "'The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child *within its borders* to determine its status and the custody that will best meet its needs and wants, and

> residence within the state suffices even though the domicile may be in another jurisdiction.'"

(Emphasis in original.) Nebraska could not exercise jurisdiction using parens patriae power.

[5] However, the UCCJEA must also be addressed when determining jurisdiction in all child custody proceedings. See *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006) (stating jurisdiction over child custody proceedings is governed by UCCJEA). The UCCJEA, § 43-1227(4), defines "[c]hild custody proceeding" as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear."

We note that in its brief, the State cites to case law determining jurisdiction under the Nebraska Child Custody Jurisdiction Act; however, that act was repealed in 2003, see Laws 2003, L.B. 148, § 105, and is not helpful in our determination of jurisdiction in the instant case.

Both Nebraska and North Dakota have adopted the UCCJEA. See, §§ 43-1226 through 43-1266; N.D. Cent. Code §§ 14-14.1-01 through 14-14.1-37 (2017). For the remainder of this opinion, all the UCCJEA citations will be to the Nebraska statutes unless otherwise noted. Nebraska has determined that the UCCJEA is applicable to juvenile proceedings filed under § 43-247(3)(a). *In re Interest of Maxwell T.*, 15 Neb. App. 47, 57, 721 N.W.2d 676, 686 (2006) (finding that "case brought under § 43-247(3)(a) fits the definition of a '[c]hild custody proceeding' under the UCCJEA, see § 43-1227(4), and that therefore, the UCCJEA is applicable").

The UCCJEA, § 43-1238, addresses initial child custody jurisdiction and provides in relevant part:

> (a) Except as otherwise provided in section 43-1241 [temporary emergency jurisdiction], a court of this state

> has jurisdiction to make an initial child custody determination only if:
>
> (1) this state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

See, also, N.D. Cent. Code § 14-14.1-12. "Initial determination means the first child custody determination concerning a particular child." § 43-1227(8); N.D. Cent. Code § 14-14.1-01(7). A "[c]hild custody determination means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order." § 43-1227(3); N.D. Cent. Code § 14-14.1-01(2). And

> [h]ome state means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

§ 43-1227(7); N.D. Cent. Code § 14-14.1-01(6).

At the April 2017 North Dakota hearing (received into evidence as exhibit 7 in the Nebraska hearing), Victoria testified that Kirsten was born in Hawaii in 2007. At some point, they moved to North Dakota. While in North Dakota, Victoria "started a divorce" in January 2009; Victoria's father also testified that Victoria got a divorce from Garvin in North Dakota. Then, in 2012, Victoria moved to Nebraska. Based on this testimony, the initial child custody determination concerning Kirsten was made in North Dakota because that is where at least Kirsten and Victoria were living, and where Victoria

and Garvin were divorced, and although that decree does not appear in our record, it presumably addressed the legal and physical custody of Kirsten, as well as visitation rights. (Victoria's father testified that "it stated in the divorce papers that if [Garvin] went overseas during the summer, Kirsten would either go to [Garvin's] parents or us.")

[6] A court which makes an initial child custody determination (in this case, North Dakota) will have exclusive, continuing jurisdiction over child custody until certain determinations are made pursuant to § 43-1239. The parties suggest Kirsten's "home state" status impacts jurisdiction. It is true that Nebraska would have become Kirsten's home state 6 months after she and Victoria moved here in 2012. But there is some question as to whether Nebraska was still Kirsten's home state at the time the juvenile petition was filed in Box Butte County in June 2017, given that she had been living in North Dakota since late July or early August 2016. The parties disagree about whether Kirsten's time in North Dakota can be considered a "temporary absence" pursuant to § 43-1227(7). However, as will be explained below, Kirsten's home state in June 2017 is irrelevant because North Dakota had exclusive, continuing jurisdiction at the time of the various juvenile court proceedings in 2016 and 2017.

[7] As stated previously, North Dakota made the initial child custody determination concerning Kirsten in Victoria and Garvin's divorce. Exclusive and continuing jurisdiction remains with the court under the UCCJEA either until a determination is made under § 43-1239(a) or until the court declines to exercise jurisdiction under § 43-1244 on the basis of being an inconvenient forum. See *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006). Section 43-1239 states:

> (a) Except as otherwise provided in section 43-1241 [temporary emergency jurisdiction], a court of this state which has made a child custody determination consistent with section 43-1238 [initial child custody determination] or 43-1240 [jurisdiction to modify determination]

> has exclusive, continuing jurisdiction over the determination until:
>
> (1) a court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
>
> (2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.
>
> (b) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under section 43-1238.

See, also, N.D. Cent. Code § 14-14.1-13 (exclusive, continuing jurisdiction). There is nothing in our record to demonstrate that the North Dakota court made the requisite determination under either subsection (a)(1) or subsection (a)(2) of § 43-1239. Nor is there evidence that the North Dakota court declined to exercise jurisdiction under § 43-1244 on the basis that it was an inconvenient forum. See, also, N.D. Cent. Code § 14-14.1-18 (inconvenient forum).

To the contrary, the North Dakota court affirmatively exercised jurisdiction over Kirsten's custody as evidenced by its May 2017 order. In that order, which was entered after an evidentiary hearing, the North Dakota court found Kirsten came "within the provisions of the Uniform Juvenile Court Act," see N.D. Cent. Code §§ 27-20-01 through 27-20-60 (2016), and was a "deprived" child. See N.D. Cent. Code § 27-20-03(1)(a) (juvenile court has jurisdiction over proceedings in which child alleged to be deprived). The court found Kirsten was a "deprived" child, in that she was a child "without proper parental care, control, subsistence, education as required by law, or other care or control necessary for the child's physical,

mental, or emotional health, or morals and the deprivations is not due primarily to the lack of financial means of the parent or custodian of the child." See N.D. Cent. Code § 27-20-02(8) (defining "'[d]eprived child'"). The May 2017 order of the North Dakota court is similar in effect to a Nebraska juvenile court exercising jurisdiction over a juvenile after finding that the juvenile comes within the meaning of § 43-247(3)(a). The North Dakota court ordered that

> pending further order, the child, Kirsten . . . , be and is hereby placed under the full care, custody, and control of the Executive Director of Foster County Social Services, or her successor, for placement and care, for a period dating from February 13, 2017 until July 1st, 2017 when she shall be returned to [Victoria's] home in Nebraska . . . and the petitions will be dismissed.

Although it appears from its May order that the North Dakota court intended that the juvenile petitions would be dismissed on July 1, there is no evidence in our record that the North Dakota proceedings have, in fact, been dismissed. (We note that at the August 10 hearing in Nebraska, the State's counsel said there was no ongoing case in North Dakota.) See *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007) (attorney's assertions at trial are not to be treated as evidence). Also at the August 10 hearing, a North Dakota family service specialist testified that her supervisor told her that since the Nebraska court had signed an order on June 17, the North Dakota order was "no longer valid." Despite counsel's and the witness' assertions as to the status of the North Dakota proceedings, there is nothing in our record from the North Dakota court to show that its proceedings have been dismissed.

Notably, at the time the juvenile petition was filed in Nebraska in June 2017, there was an existing proceeding in North Dakota, and as stated previously, North Dakota was properly exercising jurisdiction under the UCCJEA. The UCCJEA has provisions regarding "[s]imultaneous proceedings." See § 43-1243. Section 43-1243 provides in part:

> (a) Except as otherwise provided in section 43-1241 [temporary emergency jurisdiction], a court of this state may not exercise its jurisdiction under sections 43-1238 to 43-1247 if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction and Enforcement Act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under section 43-1244.
>
> (b) Except as otherwise provided in section 43-1241, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to section 43-1246. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the act, the court of this state *shall stay its proceeding and communicate with the court of the other state*. If the court of the state having jurisdiction substantially in accordance with the act does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(Emphasis supplied.) Clearly, under § 43-1243(a), Nebraska could not exercise jurisdiction when the juvenile petition was filed in June 2017, because the North Dakota proceeding had not been terminated or stayed by the North Dakota court on the basis that Nebraska was a more convenient forum under § 43-1244(a). And Nebraska did not comply with § 43-1243(b), which required it, prior to hearing, to stay its juvenile proceeding and communicate with the North Dakota court. The juvenile court acknowledged the lack of communication when, at the August 31 hearing on the motion to dismiss, it said, "What, perhaps, would have been better is if there would have been some communication between the

North Dakota Court and the Nebraska Court. That didn't happen for whatever reason."

We note that the State, in its June 2017 juvenile petition, did not comply with § 43-1246, which required certain information (including knowledge of any other proceeding that could affect the current proceeding) to be contained in the initial pleading or attached affidavit. However, the same day the juvenile petition was filed, the State also filed an ex parte motion for temporary custody. Attached and incorporated into that motion was an affidavit from an investigator with the Nebraska Attorney General's office, and that affidavit made several references to the North Dakota case, including that it was "pending." Accordingly, the juvenile court should have been immediately aware of a potential jurisdiction problem.

We take a moment to make an observation. As stated previously, it appears from its May 2017 order that the North Dakota court intended that the juvenile petitions would be dismissed on July 1. However, there is no evidence in our record that the North Dakota juvenile proceedings were actually dismissed. But even if they were, North Dakota would still have exclusive and continuing jurisdiction under the UCCJEA because it made the initial child custody determination concerning Kirsten in Victoria and Garvin's divorce. And its exclusive and continuing jurisdiction continues either until a determination is made under § 43-1239(a) or until the court declines to exercise jurisdiction under § 43-1244 on the basis of being an inconvenient forum. We note that, among other reasons, the purpose of the UCCJEA is to promote cooperation between courts of other states so that a custody determination can be rendered in a state best suited to decide the case in the interest of the child. See *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008) (setting forth six purposes for which UCCJEA was enacted). In the present matter, it is evident that both North Dakota and Nebraska have an interest in protecting Kirsten. However, without an order or other evidence showing that a determination was made by a

North Dakota court as discussed above, Nebraska was without jurisdiction over child custody proceedings related to Kirsten under the UCCJEA.

[8-10] Based on the record before us, the North Dakota court had exclusive and continuing jurisdiction of child custody proceedings involving Kirsten when the June 2017 juvenile petition was filed in Box Butte County. North Dakota affirmatively exercised such jurisdiction over Kirsten's custody as evidenced by its May 2017 order. There is nothing in our record to show that the North Dakota court declined jurisdiction on the basis that Nebraska was a more convenient forum. And the Nebraska court failed to comply with § 43-1243(b), once the current juvenile proceedings were commenced. Accordingly, the juvenile court for Box Butte County did not have subject matter jurisdiction under the UCCJEA at the time of its orders on August 10 and 31, 2017. As our Nebraska Supreme Court has stated:

> A court action taken without subject matter jurisdiction is void. A void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on this court. But an appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.

*In re Interest of Trey H.*, 281 Neb. 760, 766-67, 798 N.W.2d 607, 613 (2011) (determining that because juvenile court's order was void, DHHS had not appealed from final order or judgment; juvenile court's order vacated and appeal dismissed for lack of jurisdiction). Because the juvenile court did not have jurisdiction to issue orders on August 10 and 31, those orders are void. We vacate those orders, dismiss the appeal, and remand the cause to the juvenile court with directions to comply with the UCCJEA, including § 43-1243(b).

For the sake of completeness, we note that the juvenile court of Box Butte County did not have temporary emergency

jurisdiction under § 43-1241, because Kirsten was not "present" in Nebraska. Section 43-1241(a) provides:

> A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

The juvenile petition filed on June 16, 2017, specifically states that Kirsten is "[l]iving with" her grandparents in North Dakota. And the affidavit attached to and incorporated into the State's ex parte motion for temporary custody also specifically states that Kirsten "currently resides . . . in . . . North Dakota with her maternal grandparents." Because Kirsten was not "present" in Nebraska, the juvenile court of Box Butte County could not exercise temporary emergency jurisdiction under § 43-1241.

## Remaining Assignments of Error

[11] Because our resolution of the jurisdiction issue is dispositive of this appeal, we cannot address Victoria's remaining assignments of error. When a lower court does not have jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim. *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000).

## CONCLUSION

For the reasons stated above, we find that the juvenile court of Box Butte County did not have subject matter jurisdiction at the time of its orders on August 10 and 31, 2017, and that therefore, those orders are void. We vacate those orders, dismiss the appeal, and remand the cause with directions to comply with the UCCJEA, including § 43-1243(b).

Orders vacated, appeal dismissed, and cause remanded with directions.

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

# Roth Grading, Inc., doing business as Impact Roller Technology, a Nebraska corporation, appellant, v. Martin Brothers Construction, a California corporation, appellee.

916 N.W.2d 70

Filed May 29, 2018. No. A-17-097.

1. **Motions to Dismiss: Jurisdiction: Pleadings.** When a trial court relies solely on pleadings and supporting affidavits in ruling on a motion to dismiss for want of personal jurisdiction, the plaintiff need only make a prima facie showing of jurisdiction to survive the motion.
2. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
3. **Motions to Dismiss: Appeal and Error.** In reviewing the grant of a motion to dismiss, an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
4. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.
5. **Constitutional Law: Jurisdiction: Due Process: Service of Process: States.** The Due Process Clause of the 14th Amendment to the U.S. Constitution bars a court from exercising personal jurisdiction over an out-of-state defendant, served with process outside the state, unless that defendant has sufficient ties to the forum state.
6. **Constitutional Law: Jurisdiction: Statutes: Due Process: States.** A two-step analysis is used to determine whether a Nebraska court may validly exercise personal jurisdiction over an out-of-state defendant. First, a court must consider whether Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), authorizes the exercise of personal

jurisdiction over the defendant. Second, a court must consider whether the exercise of personal jurisdiction over the defendant comports with due process.

7. **Constitutional Law: Jurisdiction: Statutes: Due Process.** If a Nebraska court's exercise of personal jurisdiction would comport with the Due Process Clause of the 14th Amendment, it is authorized by the long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016).
8. **Constitutional Law: Jurisdiction: Due Process: States: Words and Phrases.** To satisfy the Due Process Clause, a court may only exercise personal jurisdiction over a defendant that is not present in the forum state if that defendant has minimum contacts with the forum such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. To constitute sufficient minimum contacts with the forum, the defendant's conduct and connection with the forum state must be such that he or she should reasonably anticipate being haled into court there.
9. **Jurisdiction: States.** Whether a defendant's contacts with the forum state are sufficient to support the exercise of personal jurisdiction will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.
10. ____: ____. Personal jurisdiction is proper where the defendant's contacts proximately result from actions by the defendant himself or herself that create a substantial connection with the forum state.
11. **Jurisdiction: States: Words and Phrases.** General, or all-purpose, jurisdiction arises where a defendant's affiliations with the forum state are continuous and systematic.
12. **Jurisdiction: Words and Phrases.** Specific, or case-linked, jurisdiction requires that a claim arise out of or relate to the defendant's contacts with the forum.
13. ____: ____. With regard to specific personal jurisdiction, there must be a substantial connection between the defendant's contacts and the operative facts of the litigation.
14. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
15. **Due Process: Jurisdiction: States.** The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are

such that the defendant should reasonably anticipate being haled into court there.

16. **Jurisdiction: States.** Whether a defendant's contacts with the forum state are sufficient to support the exercise of personal jurisdiction will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.
17. ____: ____. Personal jurisdiction is proper where the defendant's contacts proximately result from actions by the defendant himself or herself that create a substantial connection with the forum state.
18. **Jurisdiction: States: Contracts: Parties.** To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing.
19. **Jurisdiction: Contracts: States.** The existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and of itself, provide the necessary contacts for personal jurisdiction.
20. ____: ____: ____. The existence of a contract and the use of interstate communications may be considered in an overall personal jurisdiction analysis.
21. **Jurisdiction: Parties.** When considering the issue of personal jurisdiction, a court will consider the prior negotiations between the parties and contemplated consequences, and if a substantial connection is created, even a single contact can support jurisdiction.
22. **Jurisdiction.** An ongoing relationship, by itself, is not sufficient to establish personal jurisdiction.
23. **Jurisdiction: States.** In analyzing personal jurisdiction, a court must first establish whether there are necessary minimum contacts with Nebraska, and then, if such minimum contacts have been established, the contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.

Appeal from the District Court for Cass County: Paul W. Korslund, Judge, Retired. Affirmed.

Aaron F. Smeall, of Smith, Slusky, Pohren & Rogers, L.L.P., for appellant.

Patrick T. Vint and Todd W. Weidemann, of Woods & Aitken, L.L.P., for appellee.

Pirtle, Bishop, and Arterburn, Judges.

Bishop, Judge.

## INTRODUCTION

Roth Grading, Inc., a Nebraska corporation doing business as Impact Roller Technology (IRT), agreed to sell equipment to Martin Brothers Construction (Martin Brothers), a California corporation. After Martin Brothers refused to take delivery of the equipment, IRT brought a breach of contract action against Martin Brothers in the district court for Cass County. IRT appeals from the district court's dismissal of the action for lack of personal jurisdiction. We affirm.

## BACKGROUND

Martin Brothers' motion to dismiss for lack of personal jurisdiction was considered on the pleadings filed and the affidavits submitted to the district court; they provide the following facts: IRT is a Nebraska corporation, with a principal place of business in Plattsmouth, Nebraska. Martin Brothers is a California corporation, with a principal place of business in Sacramento, California. IRT's principal product is the "Impactor," a heavy piece of equipment which employs a large rotating drum to "break concrete, perform soil compaction, and perform similar tasks for contractors in the construction and mining industries." On July 29, 2016, IRT received an information request on its website from Felipe Martin, the president of Martin Brothers.

Scott Roth, the president of IRT, spoke with Martin via telephone on August 1, 2016. Martin informed Roth he was interested in purchasing one of IRT's Impactors, but wanted to make sure it could be on site for a project by August 17. Roth assured Martin an Impactor was available and could be delivered. Roth and Martin discussed having a "price quote" emailed to Martin Brothers, and Roth emailed a quote for

$143,400 that same day. This was a discounted purchase price of $138,600, plus $4,800 for shipping from Plattsmouth to Sacramento.

Subsequent conversations took place, but specific dates are not provided. In one conversation, Martin informed Roth he wanted to get a freight price from his own trucking company to see if he could save on the $4,800 shipping price quoted. Greg Aguilera, equipment manager for Martin Brothers, called Roth and asked for the shipping specifications. In a subsequent call, Aguilera informed Roth that Martin Brothers could save $1,000 on shipping with their own trucking company. The parties eventually agreed that IRT would ship the Impactor, but would discount the shipping cost by $1,000. Aguilera and Roth also discussed Martin Brothers' obtaining a tractor to pull the Impactor. In a subsequent call, Aguilera informed Roth that he had found a tractor that could be rented for $2,500 per month and that "he was happy with that price." Aguilera also advised that Martin Brothers had an equipment leasing company that might be able to rent out the Impactor to other parties in the future.

On August 5, 2016, Roth emailed to Martin Brothers a "Contract Purchase Order," which reflected the $1,000 shipping discount, and was signed by Roth on that date. A project engineer at Martin Brothers subsequently called Roth and advised him that Martin Brothers was signing the purchase contract and that he wanted to know if it could be emailed back to the same email address that was used to send it. Roth advised the project engineer that emailing the signed purchase contract back to the same email address would be fine, and he thanked him for the business.

On August 9, 2016, the project engineer emailed back the purchase contract, signed by Martin as president of Martin Brothers and hand dated August 9. The email stated, "'[Roth], See attached signed purchase order for the Impactor 3000h. Let me know if you need anything else.'" The ".pdf file" attached to the August 9 email contained the "IRT Contract Purchase

Order" signed by both parties. It also included, after the signed purchase contract, an unsigned and untitled document. The email did not reference the document that appeared after the signed purchase contract.

While IRT was making preparations to ship the Impactor, Roth received a call from Martin on August 16, 2016, in which Martin stated that "Martin Brothers no longer wanted an Impactor, citing some difficulties with their current project." Roth advised Martin that they already had a signed contract. On August 22, Roth sent an email to Martin "expressing concern that Martin Brothers was refusing to take delivery, and advising that IRT would consider that a breach of the parties' contract." Martin responded by email the next day, claiming that "they had never received a copy of the purchase order executed by Roth" and that "pursuant to their prior conversation, they had 'cancelled the order.'" A few hours later, Martin sent another email stating that "although he did now see that Roth had signed the purchase order, that there was a provision in the (unsigned) Martin Brothers document appended to the .pdf file with the signed contract that allowed Martin Brothers to 'terminate' the purchase because the Impactor had never been shipped." Roth emailed Martin Brothers stating that IRT had never agreed to any cancellation of the order and "would consider that a breach of contract." In-house counsel for Martin Brothers subsequently sent Roth a letter informing him that Martin Brothers was refusing to take delivery and that it was permitted to do so pursuant to the terms of the parties' agreement.

IRT filed a complaint against Martin Brothers on October 6, 2016, alleging breach of contract. On November 10, Martin Brothers filed a motion to dismiss for lack of personal jurisdiction pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(2). Martin Brothers alleged the following: It was a California corporation "with no continued or systemic presence in Nebraska"; it had no continuing relationships or obligations with citizens of Nebraska which would make it subject to regulation

and sanction by Nebraska; the transaction, to its knowledge, was the only transaction Martin Brothers conducted with a Nebraska resident; its sole contact with Nebraska was contacting IRT to purchase a piece of equipment that was already built; and therefore, its brief and cursory contact is "insufficient to meet the standard of minimum contacts necessary so as not to offend traditional notions of fair play and substantial justice necessary to preserve the constitutional right to due process."

Counsel appeared in court on November 28, 2016. Martin Brothers offered, and the court received, exhibit 1, the affidavit of the general counsel for the corporation. He averred that Martin Brothers does not hold, nor ever sought, a license to conduct business in Nebraska; owns no real estate, operates no office, and maintains no physical presence in Nebraska; and is engaged in no sustained or ongoing business transactions in Nebraska. IRT offered, and the court received, exhibit 2, the affidavit of Roth. Roth's affidavit contained the allegations set forth in its complaint, with the facts as noted above.

The district court sustained Martin Brothers' motion to dismiss in an order entered on December 30, 2016. The court concluded that "[m]erely contracting with a resident of Nebraska is insufficient to provide the requisite contact to confer personal jurisdiction." The court further stated that "there is no underlying business relationship, only a series of communications resulting in a single transaction." The court found that it was "significant that Martin Brothers contacted IRT based on IRT's internet advertising, and therefore IRT was the 'aggressor' in the transaction." The court found that "[t]here is no relationship between the parties other than the single contract involved in this case" and that the "only basis for jurisdiction is the series of communications from outside Nebraska based on IRT's internet posting." Accordingly, the court found there was "an insufficient basis for exercise of the long-arm statute in this case." IRT appeals.

## ASSIGNMENT OF ERROR

IRT assigns that the district court erred by granting Martin Brothers' motion to dismiss.

## STANDARD OF REVIEW

[1] When a trial court relies solely on pleadings and supporting affidavits in ruling on a motion to dismiss for want of personal jurisdiction, the plaintiff need only make a prima facie showing of jurisdiction to survive the motion. *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014).

[2,3] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo. *Nimmer v. Giga Entertainment Media*, 298 Neb. 630, 905 N.W.2d 523 (2018). In reviewing the grant of a motion to dismiss, an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party. *Id.*

## ANALYSIS

[4-10] IRT argues the district court erred by granting Martin Brothers' motion to dismiss for lack of personal jurisdiction. We begin our analysis with the analytical framework for personal jurisdiction set forth in *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse*, 298 Neb. 705, 905 N.W.2d 644 (2018). The Nebraska Supreme Court stated:

> Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions. Courts' ability to validly exercise personal jurisdiction is not without limit. The Due Process Clause of the 14th Amendment to the U.S. Constitution bars a court from exercising personal jurisdiction over an out-of-state defendant, served with process outside the state, unless that defendant has sufficient ties to the forum state.

A two-step analysis is used to determine whether a Nebraska court may validly exercise personal jurisdiction over an out-of-state defendant. First, a court must consider whether Nebraska's long-arm statute [Neb. Rev. Stat. § 25-536 (Reissue 2016)] authorizes the exercise of personal jurisdiction over the defendant. Second, a court must consider whether the exercise of personal jurisdiction over the defendant comports with due process.

Nebraska's long-arm statute authorizes courts to exercise personal jurisdiction over any person "[w]ho has any . . . contact with or maintains any . . . relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." Thus, if a Nebraska court's exercise of personal jurisdiction would comport with the Due Process Clause of the 14th Amendment, it is authorized by the long-arm statute. . . .

To satisfy the Due Process Clause, a court may only exercise personal jurisdiction over a defendant that is not present in the forum state if that defendant has "minimum contacts" with the forum such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" To constitute sufficient minimum contacts, "the defendant's conduct and connection with the forum State [must be] such that he [or she] should reasonably anticipate being haled into court there." Whether a defendant's contacts with the forum state are sufficient to support the exercise of personal jurisdiction "will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Thus, "[j]urisdiction is proper . . . where the [defendant's] contacts

> proximately result from actions by the defendant [himself or herself] that create a 'substantial connection' with the forum State."

*Hand Cut Steaks Acquisitions v. Lone Star Steakhouse*, 298 Neb. at 722-24, 905 N.W.2d at 660-61.

[11] *Lone Star Steakhouse* also addresses the two categories of personal jurisdiction: general jurisdiction and specific jurisdiction. General, or "all-purpose," jurisdiction arises where a defendant's affiliations with the forum state are continuous and systematic. *Id*. at 725, 905 N.W.2d at 662. In the present case, there is no allegation that Martin Brothers' contacts with Nebraska were so continuous and systematic as to give rise to Nebraska having general jurisdiction over this California corporation. The facts presented in this case do not support a finding of general jurisdiction, and notably, IRT does not make such an argument. Instead, IRT argues that "[e]ven where, as here, a defendant's *general* contacts with the forum state may not be substantial, continuous, and systematic, 'specific jurisdiction' over the defendant may be present depending upon the quality and nature of *individual contact* with the plaintiff." Brief for appellant at 11 (emphasis in original).

[12-14] Specific, or case-linked, jurisdiction requires that a claim arise out of or relate to the defendant's contacts with the forum. *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse*, 298 Neb. 705, 905 N.W.2d 644 (2018). Thus, there must be a substantial connection between the defendant's contacts and the operative facts of the litigation. *Id*. We agree that our analysis should focus on specific personal jurisdiction, and we begin with Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), which provides in relevant part:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:

> (a) Transacting any business in this state;
>
> . . . .
>
> (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

Nebraska's long-arm statute, § 25-536, extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. *Nimmer v. Giga Entertainment Media*, 298 Neb. 630, 905 N.W.2d 523 (2018). Section 25-536 "suggests a broad application of the exercise of personal jurisdiction by the courts of this state, an application which is supported by case law." *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 480, 675 N.W.2d 642, 648 (2004). "It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents." *Id*. "Thus, if a Nebraska court's exercise of personal jurisdiction would comport with the Due Process Clause of the 14th Amendment, it is authorized by the long-arm statute." *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse*, 298 Neb. at 723, 905 N.W.2d at 661.

Nebraska's long-arm statute provides for personal jurisdiction over business transactions in this State; therefore, we consider whether the exercise of personal jurisdiction in the present matter would comport with the Due Process Clause of the 14th Amendment. To satisfy due process, we would have to conclude that Martin Brothers had sufficient minimum contacts with Nebraska and that the exercise of jurisdiction over Martin Brothers in Nebraska does not offend traditional notions of fair play and substantial justice. See *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse, supra*.

[15-17] The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled

into court there. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). Whether a defendant's contacts with the forum state are sufficient to support the exercise of personal jurisdiction will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse, supra*. Personal jurisdiction is proper where the defendant's contacts proximately result from actions by the defendant himself or herself that create a substantial connection with the forum state. *Id*.

[18] IRT contends that Martin Brothers' contacts with Nebraska were greater than those of the Florida defendant in *Quality Pork Internat. v. Rupari Food Servs., supra*, a case in which the Nebraska Supreme Court concluded there were sufficient minimum contacts with Nebraska to satisfy the due process requirements for the exercise of specific personal jurisdiction. In that case, a Nebraska company only agreed to do business with a Texas distributor if the Florida defendant agreed to pay for all the products ordered. When the Florida defendant failed to pay after a third order, the Nebraska company filed a lawsuit in Nebraska. The Florida defendant claimed there was no personal jurisdiction because it never made any sales directly to Nebraska, it did not apply to do business in Nebraska, it did not have offices located in Nebraska, it did not own property in Nebraska, and at no time did any officer or employee visit Nebraska while employed by the Florida company. The Nebraska Supreme Court concluded that the Florida defendant induced a Nebraska company to ship products to Texas and that it would not be unduly burdensome for the Florida defendant to defend an action in Nebraska. The court stated that the Nebraska company had a valid interest in obtaining convenient and effective relief which supported bringing the action in Nebraska. Further,

by purposefully conducting business with the Nebraska company, the Florida defendant "could reasonably anticipate that it might be sued in Nebraska if it failed to pay for products ordered from [the Nebraska company]." *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 485, 675 N.W.2d 642, 652 (2004). Notably, the Nebraska Supreme Court stated that "[t]o determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing." *Id*. at 484, 675 N.W.2d at 651.

IRT argues that "[t]he sum total of contacts in *Quality Pork* [*Internat.*] consisted of an oral agreement to pay for some food shipments to be sent to Texas, receiving invoices in Florida, mailing two checks from Florida to Nebraska, and two phone conversations after default." Brief for appellant at 14. IRT points out that in the instant case, Martin Brothers initiated the contact with IRT and "engaged in numerous communications related to pricing, delivery, operation and possible collateral uses of the product after purchase and, ultimately, agreed to the purchase, confirmed by a signed purchase agreement faxed to Nebraska." Brief for appellant at 12. "It is difficult to comprehend how [Martin Brothers] can claim it could not have expected to be haled into court in Nebraska, after unequivocally contracting to purchase a six-figure piece of equipment and repeatedly contacting IRT regarding [the] purchase." *Id*.

[19] On the other hand, Martin Brothers argues that "[m]erely contracting with a resident of a particular forum is insufficient to provide the requisite contact to confer personal jurisdiction." Brief for appellee at 9. This assertion is supported in *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 512, 658 N.W.2d 40, 47-48 (2003), which states, "[T]he existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and

of itself, provide the necessary contacts for personal jurisdiction." See, also, *Nimmer v. Giga Entertainment Media*, 298 Neb. 630, 905 N.W.2d 523 (2018) (while contract alone does not establish minimum contacts, establishment of continuing relationship with obligations to instate party could); *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014) (mail and telephone communication sent by defendant into forum state may count toward minimum contacts, but existence of contract or mere use of interstate facilities does not, in and of itself, provide necessary contacts for personal jurisdiction); *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998) (jurisdiction not sought on basis of single contract or few contacts; rather, companies engaged in ongoing contractual and business relationship over period of years).

[20,21] *Kugler Co.* goes on to state, "But this does not mean that the existence of a contract and the use of interstate communications may not be considered in the overall analysis." 265 Neb. at 512, 658 N.W.2d at 48. "We will also consider the prior negotiations between the parties and contemplated consequences." *Id*. And, "[I]f a substantial connection is created, even a single contact can support jurisdiction." *Id*. at 512-13, 658 N.W.2d at 48. While the Nebraska Supreme Court concluded there were sufficient minimum contacts for the exercise of personal jurisdiction in *Kugler Co.*, of significance is that there was an ongoing relationship between the Nebraska company and the New York defendant involved in that case, and a substantial amount of product was sold to the Nebraska company. (Between 1992 and 1999, 399 tons of nitrogen products were sold at an approximate cost of $179,472.) The products were then sold within Nebraska. The Nebraska Supreme Court stated that "[p]arties who '"'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities."'" *Id*. at 513, 658 N.W.2d at 48.

[22] Applied here, both *Quality Pork Internat.* and *Kugler Co.* would support personal jurisdiction when a single contract is involved; however, the existence of a contract or the mere use of interstate communications does not, in and of itself, provide the necessary contacts for personal jurisdiction. Rather, whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a substantial connection must be created, which calls for consideration of the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing. See *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004), and *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse*, 298 Neb. 705, 905 N.W.2d 644 (2018). *Quality Pork Internat. v. Rupari Food Servs., supra*, involved ongoing product shipments to a Texas distributor and ongoing payments by the Florida defendant, and *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003), involved ongoing product sales over many years. The quality and nature of these ongoing business transactions was found to satisfy the requirement of a substantial connection between the nonresident defendant and the forum state, thus establishing the necessary minimum contacts. However, we also note that an ongoing relationship, by itself, is not sufficient to establish personal jurisdiction. See *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014) (television programming service claimed breach of affiliation agreement; although monthly payments were made over course of at least 2 years, actual business dealings were extremely limited, and court found insufficient minimum contacts for personal jurisdiction). Clearly, the quality and nature of the ongoing business relationship is important, not just the fact that a business relationship exists.

We conclude a substantial connection was not established between Martin Brothers and Nebraska as a result of the execution of a single purchase order contract, along with the

emails and telephone calls which took place between July 29 and August 16, 2016. Unlike *Quality Pork Internat.* and *Kugler Co.*, the facts alleged here do not establish that Martin Brothers and IRT negotiated or contracted for any kind of ongoing, substantive business relationship; rather, the contract was for the purchase of a single piece of equipment, albeit of significant value. Although Martin Brothers did mention it had an equipment leasing company that might be able to rent out the Impactor to other parties in the future, there is no allegation that any other discussions were had or agreements reached in that regard. Therefore, even when considering the facts in the light most favorable to IRT, we conclude IRT failed to make a prima facie showing that Martin Brothers had sufficient minimum contacts with Nebraska to subject them to the jurisdiction of our courts.

[23] Having determined that Martin Brothers did not have the necessary minimum contacts to support the exercise of personal jurisdiction in Nebraska, we need not weigh the facts of the case to determine whether the exercise of personal jurisdiction would comport with fair play and substantial justice, which involves other considerations (such as the burden on the defendant, or as argued by IRT, the forum state's interest in adjudicating the dispute) for establishing jurisdiction upon a lesser showing of minimum contacts. See *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998) (determination of whether district court has jurisdiction is two-step process; first, court must establish necessary minimum contacts with Nebraska, and then, if such minimum contacts have been established, contacts may be considered in light of other factors to determine whether assertion of personal jurisdiction would comport with fair play and substantial justice). Since these other factors or considerations only come into play once minimum contacts are established, we need not consider them in the present appeal given our conclusion that the facts do not set forth the necessary minimum contacts for

a Nebraska court to exercise personal jurisdiction over Martin Brothers.

## CONCLUSION

For the reasons set forth above, we affirm the district court's order dismissing IRT's complaint for lack of personal jurisdiction.

Affirmed

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