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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

JANUARY 11, 2019 and MAY 2, 2019

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS
VOLUME CCCII

PEGGY POLACEK
OFFICIAL REPORTER

PUBLISHED BY
THE STATE OF NEBRASKA
LINCOLN
2024

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DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Jeffrey J. Funke, Associate Justice
Jonathan J. Papik, Associate Justice
John R. Freudenberg, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
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

Peggy Polacek . . . . . Reporter
Wendy Wussow . . . . . Clerk
Corey Steel . . . . . State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

First District

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

Judges in District	*City*
Vicky L. Johnson	Wilber
Ricky A. Schreiner	Beatrice
Julie D. Smith	Tecumseh

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
George A. Thompson	Papillion
Michael A. Smith	Plattsmouth
Stefanie A. Martinez	Papillion
Nathan B. Cox	Papillion

Third District

Counties in District: Lancaster

Judges in District	*City*
John A. Colborn	Lincoln
Jodi L. Nelson	Lincoln
Robert R. Otte	Lincoln
Andrew R. Jacobsen	Lincoln
Lori A. Maret	Lincoln
Susan I. Strong	Lincoln
Darla S. Ideus	Lincoln
Kevin R. McManaman	Lincoln

Fourth District

Counties in District: Douglas

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

Fifth District

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

Judges in District	*City*
Robert R. Steinke	Columbus
James C. Stecker	Seward
Rachel A. Daugherty	Aurora
Christina M. Marroquin	Wahoo

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth District

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

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

Seventh District

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

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

Eighth District

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

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

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Mark J. Young	Grand Island
John H. Marsh	Kearney
Ryan C. Carson	Kearney

Tenth District

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

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

Eleventh District

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

Judges in District	*City*
James E. Doyle IV	Lexington
David W. Urbom	McCook
Richard A. Birch	North Platte
Michael E. Piccolo	North Platte

Twelfth District

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

Judges in District	*City*
Leo P. Dobrovolny	Gering
Derek C. Weimer	Sidney
Travis P. O'Gorman	Alliance
Andrea D. Miller	Gering

JUDICIAL DISTRICTS AND COUNTY JUDGES

First District

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

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

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
Robert C. Wester	Papillion
Todd J. Hutton	Papillion
PaTricia A. Freeman	Papillion
David J. Partsch	Nebraska City

Third District

Counties in District: Lancaster

Judges in District	*City*
Laurie J. Yardley	Lincoln
Timothy C. Phillips	Lincoln
Matthew L. Acton	Lincoln
Holly J. Parsley	Lincoln
Thomas E. Zimmerman	Lincoln
Rodney D. Reuter	Lincoln
Joseph E. Dalton	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
Lawrence E. Barrett	Omaha
Marcena M. Hendrix	Omaha
Darryl R. Lowe	Omaha
John E. Huber	Omaha
Jeffrey L. Marcuzzo	Omaha
Craig Q. McDermott	Omaha
Marcela A. Keim	Omaha
Sheryl L. Lohaus	Omaha
Thomas K. Harmon	Omaha
Derek R. Vaughn	Omaha
Stephanie R. Hansen	Omaha
Stephanie S. Shearer	Omaha

Fifth District

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

Judges in District	*City*
Frank J. Skorupa	Columbus
Linda S. Caster Senff	Aurora
C. Jo Petersen	Seward
Stephen R.W. Twiss	Central City
Andrew R. Lange	Wahoo

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth District

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

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

Seventh District

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

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

Eighth District

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

Judges in District	*City*
James J. Orr	Valentine
Tami K. Schendt	Broken Bow
Kale B. Burdick	O'Neill

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Gerald R. Jorgensen, Jr.	Kearney
Arthur S. Wetzel	Grand Island
John P. Rademacher	Kearney
Alfred E. Corey III	Grand Island

Tenth District

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

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

Eleventh District

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

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

Twelfth District

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

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

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

Douglas County

Judges	*City*
Douglas F. Johnson	Omaha
Elizabeth G. Crnkovich	Omaha
Christopher E. Kelly	Omaha
Vernon Daniels	Omaha
Matthew R. Kahler	Omaha
Chad M. Brown	Omaha

Lancaster County

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

Sarpy County

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

WORKERS' COMPENSATION COURT AND JUDGES

Judges	*City*
James R. Coe	Omaha
J. Michael Fitzgerald	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha
Julie A. Martin	Lincoln
Dirk V. Block	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 301

Shannon Christine Acton
Zachary David Clausen
Pierce D. Fiala
Angie M. Fletcher
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Jason Gene Glanzer
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Gabriella Emily Hezel
Tara Elizabeth Holterhaus
Katherine Ann Huiskamp
Jason Kamerath
Clifton James Kephart
Danielle Marie Kerr
Stephen Butler King
Kenneth Michael Krome
Dayna Leigh Langdon
Kirk L. Lavengood
Spencer Andrew Low
Lindy Lee Mahoney
Katy Michele Manuel
Tyler P. Matson
Ann Michele McManigal
Emily Elizabeth Palmiscno
Marcos Alberto Pena
James Patrick Pottorff, Jr.
Bryan Edward Rash
Marcus Vaughn Rechtenbach
Taylor Nicole Renfro
Cassandra Robinson
Michael Joseph Roccaforte
Kale Benson Rogers
Nickolaus T. Schlegel
Steven Richard Standish
Susan Kay Tvrdy
Frederick Zarate

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No. S-18-383: **In re Estate of Castonguay**. Affirmed. Miller-Lerman, J.

No. S-18-392: **State v. Johnson**. Reversed and remanded for further proceedings. Cassel, J.

No. S-18-482: **Mumin v. Nebraska Dept. of Corr. Servs**. Affirmed. Stacy, J. Freudenberg, J., not participating.

No. S-18-510: **State v. McCurry**. Affirmed. Heavican, C.J.

No. S-18-556: **State v. Nolt**. Affirmed. Stacy, J.

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No. S-18-127: **State v. Brooks**. Affirmed. See § 2-107(A)(1).

No. S-18-565: **State v. Alexander**. Affirmed. See § 2-107(A)(1).

No. S-18-806: **In re Interest of Kallie M**. Appeal dismissed. See § 2-107(A)(2).

No. S-18-822: **In re Interest of Maverick Y**. Appeal dismissed. See § 2-107(A)(2).

No. S-18-873: **State v. Kidder**. Motion of appellee for summary dismissal for lack of jurisdiction sustained.

No. S-18-981: **In re Estate of Ryan**. Motion of appellee for summary dismissal sustained.

No. S-18-1023: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-18-1068: **State v. Braesch**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-19-120: **Gaytan v. Wal-Mart**. Appeal dismissed. See § 2-107(A)(2).

No. S-19-176: **State v. Wells**. Appeal dismissed. See § 2-107(A)(2).

No. S-19-232: **State v. Baker**. Appeal dismissed. See § 2-107(A)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-16-1213: **Gustafson v. Bodlak**. Petition of appellants for further review denied on February 26, 2019.

No. A-17-350: **Gonzales v. Nebraska Pediatric Practice**, 26 Neb. App. 764 (2019). Petition of appellees for further review denied on April 10, 2019.

No. A-17-543: **State v. Howard**, 26 Neb. App. 628 (2018). Petition of appellant for further review denied on February 12, 2019.

No. A-17-722: **Woodcock v. Navarrete-James**, 26 Neb. App. 809 (2019). Petition of appellee for further review denied on March 29, 2019.

No. A-17-724: **In re Interest of Treasean J. et al**. Petition of appellant for further review denied on January 9, 2019.

No. A-17-732: **State v. Ueding-Nickel**. Petition of appellant for further review denied on January 8, 2019.

No. A-17-749: **In re Guardianship of Aimee S.**, 26 Neb. App. 380 (2018). Petition of appellants for further review denied on February 26, 2019.

No. A-17-749: **In re Guardianship of Aimee S.**, 26 Neb. App. 380 (2018). Petition of appellee Dempsey-Cook for further review denied on February 26, 2019.

No. A-17-749: **In re Guardianship of Aimee S.**, 26 Neb. App. 380 (2018). Petition of appellee Turner for further review denied on February 26, 2019.

No. A-17-834: **Farm & Garden Ctr. v. Kennedy**, 26 Neb. App. 576 (2018). Petition of appellant for further review denied on January 23, 2019.

No. A-17-846: **In re Guardianship of K.R.**, 26 Neb. App. 713 (2018). Petition of appellant for further review denied on February 11, 2019, as premature. See § 2-102(F)(1).

No. S-17-846: **In re Guardianship of K.R.**, 26 Neb. App. 713 (2018). Petition of appellant for further review sustained on March 12, 2019.

No. A-17-881: **State v. Russell**. Petition of appellant for further review denied on January 16, 2019.

No. A-17-935: **State v. Myles**. Petition of appellee for further review denied on February 7, 2019.

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No. A-17-976: **Peterson v. Peterson**. Petition of appellant for further review denied on February 7, 2019, as untimely. See § 2-102(F)(1).

No. A-17-993: **Shriner v. Friedman Law Offices**. Petition of appellees for further review denied on March 21, 2019.

No. A-17-994: **State v. Sims**. Petition of appellant for further review denied on April 3, 2019.

No. A-17-996: **State v. Busch**. Petition of appellant for further review denied on March 1, 2019.

No. A-17-1017: **Plautz v. Plautz**. Petition of appellant for further review denied on April 12, 2019.

No. S-17-1024: **Bortolotti v. Universal Terrazzo and Tile Co**. Petition of appellee Bortolotti for further review sustained on April 10, 2019.

No. A-17-1050: **State v. Schaetzle**. Petition of appellant for further review denied on April 3, 2019.

No. A-17-1053: **Yates v. Casto**. Petition of appellant for further review denied on April 2, 2019.

No. A-17-1072: **State v. Martinez**. Petition of appellant for further review denied on March 22, 2019.

No. A-17-1114: **State v. Valdez**. Petition of appellant for further review denied on January 28, 2019.

No. A-17-1115: **State v. Dunn**. Petition of appellant for further review denied on March 22, 2019.

No. A-17-1131: **State v. Heckard**. Petition of appellant for further review denied on March 21, 2019.

No. A-17-1154: **State v. Jackson**, 26 Neb. App. 727 (2019). Petition of appellant for further review denied on March 19, 2019.

No. A-17-1186: **State v. Howell**, 26 Neb. App. 842 (2019). Petition of appellant for further review denied on April 3, 2019.

No. A-17-1237: **In re Interest of Aly T. & Kazlynn T.**, 26 Neb. App. 612 (2018). Petition of appellant for further review denied on January 23, 2019.

No. S-17-1272: **State v. Gibson**, 26 Neb. App. 559 (2018). Petition of appellee for further review sustained on January 23, 2019.

No. A-17-1301: **Applied Underwriters v. E.M. Pizza**, 26 Neb. App. 906 (2019). Petition of appellant for further review denied on April 10, 2019.

No. A-17-1308: **In re Interest of Audrey T.**, 26 Neb. App. 822 (2019). Petition of appellant for further review denied on April 2, 2019.

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No. A-17-1319: **Gray v. Nebraska Dept. of Corr. Servs.**, 26 Neb. App. 660 (2018). Petition of appellant for further review denied on January 9, 2019.

No. S-18-006: **State v. Bigelow**. Petition of appellant for further review sustained on March 19, 2019.

No. A-18-008: **State v. Claiborne**. Petition of appellant for further review denied on January 23, 2019.

No. A-18-016: **State v. Marcial**. Petition of appellant for further review denied on February 1, 2019.

No. A-18-021: **Applied Underwriters v. Warwick Amusements**. Petition of appellant for further review denied on April 18, 2019.

No. A-18-034: **In re Interest of Michael C**. Petition of appellant for further review denied on April 3, 2019.

No. A-18-038: **State v. Wagner**. Petition of appellant pro se for further review denied on January 28, 2019.

No. A-18-038: **State v. Wagner**. Petition of appellant pro se for further review denied on March 6, 2019, as untimely.

No. A-18-053: **In re Interest of Orlando D**. Petition of appellant for further review denied on January 23, 2019.

No. A-18-054: **State v. Cappucci**. Petition of appellant for further review denied on February 4, 2019.

No. A-18-081: **State v. Khat**. Petition of appellant for further review denied on March 5, 2019.

No. A-18-169: **State v. Vallejo**. Petition of appellant for further review denied on January 16, 2019.

Nos. A-18-211, A-18-212: **In re Interest of Londyn W. & Itally W**. Petitions of appellant for further review denied on February 26, 2019.

No. A-18-217: **State v. Lewis**. Petition of appellant for further review denied on March 11, 2019.

No. A-18-223: **State v. Pugmire**. Petition of appellant for further review denied on March 22, 2019.

No. A-18-237: **In re Interest of D.I**. Petition of appellant for further review denied on March 19, 2019.

No. A-18-243: **State v. Grasmick**. Petition of appellant for further review denied on April 18, 2019.

No. A-18-279: **State v. Lopez**. Petition of appellant for further review denied on April 12, 2019.

No. A-18-353: **State v. Meyer**. Petition of appellant for further review denied on April 18, 2019.

No. A-18-401: **State v. Meints**. Petition of appellant for further review denied on February 21, 2019.

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No. A-18-420: **In re Conservatorship & Guardianship of Dolores L**. Petition of appellant for further review denied on April 3, 2019.

No. A-18-439: **In re Interest of Jacquetta S**. Petition of appellant for further review denied on January 28, 2019.

No. A-18-479: **State v. Gonzales**. Petition of appellant for further review denied on April 2, 2019.

No. A-18-480: **State v. Mitchell**. Petition of appellant for further review denied on February 11, 2019, as untimely. See § 2-102(F)(1).

No. A-18-522: **State v. Pradhan**. Petition of appellant for further review denied on January 23, 2019.

No. A-18-551: **State v. Bitter**. Petition of appellant for further review denied on April 9, 2019.

No. A-18-560: **In re Interest of Ivanna E**. Petition of appellant for further review denied on April 10, 2019.

No. A-18-561: **Crow v. Chelli**. Petition of appellant for further review denied on March 1, 2019.

No. A-18-624: **In re Interest of Louis C**. Petition of appellant for further review denied on April 12, 2019.

No. A-18-638: **In re Interest of Devin M. et al**. Petition of appellee Eugene E. for further review denied on April 10, 2019.

No. A-18-650: **Engstrom v. Frakes**. Petition of appellant for further review denied on February 26, 2019.

No. A-18-739: **State v. Gray**. Petition of appellant for further review denied on February 7, 2019.

No. A-18-918: **Longs v. Draper**. Petition of appellant for further review denied on January 28, 2019. See § 2-102(F)(1).

No. A-18-941: **State v. Morton**. Petition of appellant for further review denied on April 5, 2019.

No. A-18-961: **State v. Longsine**. Petition of appellant for further review denied on March 21, 2019, as untimely.

No. A-18-976: **Cutler v. Frakes**. Petition of appellant pro se for further review denied on March 29, 2019.

No. A-18-991: **Harden v. State**. Petition of appellant for further review denied on March 12, 2019.

No. A-18-1002: **State v. Dunn**. Petition of appellant for further review denied on February 26, 2019.

No. A-18-1055: **State v. Gomez-Molina**. Petition of appellant for further review denied on April 5, 2019.

No. A-18-1153: **State v. Choul**. Petition of appellant for further review denied on February 11, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-18-1169: **State v. Wesner**. Petition of appellant for further review denied on March 21, 2019.

No. A-19-077: **State v. Gardner**. Petition of appellant pro se for further review denied on March 12, 2019, as premature.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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Karen Simms, biological grandmother and next friend of Megan Marie Friel et al., minor children, appellee, v. Jeffrey Allen Friel, appellant.

921 N.W.2d 369

Filed January 11, 2019. No. S-17-054.

1. **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.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
3. **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.
4. ____: ____. An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Riedmann, Judge, and Inbody, Judge, Retired, on appeal thereto from the District Court for Sarpy County, Stefanie A. Martinez, County Judge. Judgment of Court of Appeals affirmed.

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellant.

Aimee S. Melton, of Reagan, Melton & Delaney, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

After the district court granted temporary visitation of his minor children to the children's maternal grandmother, Karen Simms, Jeffrey Allen Friel appealed. Friel contended that the district court lacked the authority to make a temporary order. The Nebraska Court of Appeals determined that the temporary visitation order was a final, appealable order, but that the appeal was moot because the order had expired by its terms. See *Simms v. Friel*, 25 Neb. App. 640, 911 N.W.2d 636 (2018). The Court of Appeals nonetheless examined the merits of Friel's claims under the public interest exception to the mootness doctrine and found that district courts do have authority to issue temporary orders allowing visitation during the pendency of grandparent visitation proceedings. On further review, we conclude that the order for temporary grandparent visitation was not a final, appealable order. Therefore, although we disagree with the Court of Appeals' conclusion that it had jurisdiction over the case, we affirm its dismissal of the appeal.

BACKGROUND

District Court.

Simms, the maternal grandmother of Friel's three minor children, filed a petition for grandparent visitation under Neb. Rev. Stat. § 43-1802 (Reissue 2016). Simms alleged that since her daughter, the mother of the children, had died, Friel had refused to allow Simms to see her grandchildren. Simms alleged that it would be in the best interests of Friel's children for Simms to be granted grandparent visitation rights. Friel denied, among other things, that it would be in the best interests of the children to have grandparent visitation and asked that the petition be dismissed.

After an attempt to resolve the matter through mediation failed, Simms made an oral motion for "some temporary

visitation." Her counsel argued that temporary visitation was warranted, because several months had passed since the action was filed and various holidays were approaching. The district court heard arguments on the motion, and the parties submitted affidavits, which are not in our record.

Expressly in response to Simms' "oral [m]otion for [t]emporary [v]isitation," the district court granted Simms monthly visitation with the children. It granted Simms visitation on 7 specific days, 1 day each month from November 2016 through May 2017. The district court specified that each visit was to take place from 9 a.m. until 5 p.m., with the exception of the May 2017 visit, which was to occur "after school until 8:00 pm." The district court made no express findings concerning a significant beneficial relationship between Simms and the grandchildren or the children's best interests under § 43-1802.

Friel filed a motion to alter or amend. At a hearing on the motion, the district court stated that the temporary order was "not meant to be a final order" but was intended as a "temporary order through the holidays, mostly." The district court also scheduled a trial date of January 27, 2017. The district court took the motion to alter or amend under advisement and subsequently denied it.

Court of Appeals.

Friel appealed. He assigned that the district court erred in ordering the temporary visitation, because the statutes establishing grandparent visitation do not allow for temporary orders and because it did not make the required statutory findings before ordering grandparent visitation.

In a published opinion, the Court of Appeals concluded that the order appealed from was a final, appealable order but dismissed the appeal as moot because the order expired by its terms in May 2017. Despite its finding of mootness, the Court of Appeals considered the merits of the appeal. The Court of Appeals found that because there were no reported appellate

cases addressing the issues on appeal, consideration was warranted under the public interest exception to the mootness doctrine. See *Simms v. Friel*, 25 Neb. App. 640, 911 N.W.2d 636 (2018).

The Court of Appeals acknowledged that the grandparent visitation statutes do not provide for temporary orders but concluded that district courts have inherent authority to enter temporary orders of grandparent visitation during the pendency of a grandparent visitation proceeding. The Court of Appeals further observed that, as required by § 43-1802(2), in order to award grandparent visitation, a court must find that there is a significant beneficial relationship between the grandparent and child, that it is in the child's best interests for that relationship to continue, and that any visitation ordered will not adversely interfere with the parent-child relationship. See *Simms v. Friel, supra*.

We granted Friel's petition for further review.

ASSIGNMENT OF ERROR

Upon further review, Friel assigns that the Court of Appeals erred by finding that the district courts had authority to issue temporary visitation orders during the pendency of an action for grandparent visitation.

STANDARD OF REVIEW

[1] 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).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is our duty to determine whether we have jurisdiction to decide them. See *Al-Ameen v. Frakes, supra*. For an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is

taken. *Jennifer T. v. Lindsay P.*, 298 Neb. 800, 906 N.W.2d 49 (2018). Because the temporary order did not dismiss the action or make a final determination on the merits, it was not a final judgment. See *id.* The jurisdictional question before us is thus whether we are presented with a final order.

[3,4] Relevant here, 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. See Neb. Rev. Stat. § 25-1902 (Reissue 2016). A "substantial right" is an essential legal right, not a mere technical right. See *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009). A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.* It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial. See *Cano v. Walker*, 297 Neb. 580, 901 N.W.2d 251 (2017). 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.* Most fundamentally, an order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review. *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018).

Where visitation, custody, and the parent-child relationship are involved, we have previously looked to juvenile cases for guidance to determine whether the grant or denial of visitation and custody affects a substantial right. See *Steven S. v. Mary S., supra*. In doing so, we have said that "'"[t]he question . . . 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.* at 130, 760 N.W.2d at 33-34.

On a number of occasions, we have analyzed orders temporarily limiting a parent's custody or visitation rights under the framework set forth above. For instance, in *Steven S. v.*

Mary S., supra, the parties were awarded joint legal custody of their children in a divorce, with the father receiving primary physical custody subject to the mother's rights of visitation. After the mother was arrested for alleged child abuse, the trial court entered a temporary order awarding legal and physical custody to the father and suspending the mother's visitation. The mother appealed, but we determined that the order did not affect a substantial right, because the mother's "relationship with the children will be disturbed for only a brief time period and the order was not a permanent disposition." *Id.* at 131, 760 N.W.2d at 34.

In *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010), we relied upon *Steven S.* and reiterated that an order affecting custody temporarily does not affect a substantial right. There, the trial court granted the father custody during the mother's 400-day military deployment, and the mother appealed. We concluded that this did not constitute a final order because it was temporary: Custody would revert to the mother when she returned from active duty. Additionally, we observed that the temporary order merely enforced the terms of the original order, which provided that the father would have custody while the mother was on active duty.

In *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014), we found another order that affected a custody arrangement only temporarily did not affect a substantial right. The order at issue in that case permitted a mother who had custody of two children to relocate the children to Georgia where she would serve a military assignment for approximately 8 months. The order had the effect of disrupting the parenting time of the children's father, who resided in Nebraska. Citing *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009), and *Carmicheal v. Rollins, supra*, we held that the order did not affect a substantial right. We pointed out that the order did not make a "permanent disposition," but "affected the custody arrangement of the parties only temporarily." *Huskey v. Huskey*, 289 Neb. at 451, 855 N.W.2d at 387. We also emphasized that the

order would disrupt, but not substantially reduce, the father's parenting time.

As *Steven S.*, *Carmicheal*, and *Huskey* illustrate, an order that reduces a party's custody or visitation rights on a temporary basis pending a more permanent disposition does not generally affect a substantial right for purposes of § 25-1902. The order granting Simms temporary visitation in this case is such an order. The order did not affect Friel's custody at all. It disturbed his relationship with his children only to the extent it provided for 1 day of visitation per month between November 2016 and May 2017. Most importantly for purposes of analyzing whether the order affected a substantial right, it specifically said it was granting Simms' motion for "temporary visitation" and did not provide for any visitation after May 2017. Further, the district court set the matter for trial after granting the visitation order at issue, dispelling any possible belief that the order was not temporary.

We have previously recognized that circumstances could arise wherein successive temporary orders or a temporary order of long duration could affect a substantial right and constitute a final order, despite being labeled "temporary." See *Huskey v. Huskey, supra*. But there is no indication of successive orders here, and the duration of the order is no longer than other temporary orders we have found to not affect a substantial right. See, *Huskey v. Huskey, supra*; *Carmicheal v. Rollins, supra*. We thus see no basis in the controlling case law to find that the order at issue affected a substantial right.

The Court of Appeals found that the order of temporary visitation affected a substantial right in reliance on *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015), and *In re Interest of Zachary W. & Alyssa W.*, 3 Neb. App. 274, 526 N.W.2d 233 (1994). See *Simms v. Friel*, 25 Neb. App. 640, 911 N.W.2d 636 (2018). We find that these cases do not squarely address the order at issue here.

In *In re Interest of Cassandra B. & Moira B., supra*, we held that a juvenile court order prohibiting a parent from

homeschooling her child affected a substantial right, but we explicitly characterized the order there as not temporary. We pointed out that the order was subject to reconsideration at a review hearing in approximately 6 months, but the juvenile court was required to review the case every 6 months and thus "no order would have a longer duration than that." *Id.* at 626, 861 N.W.2d at 404. And while the order at issue in *In re Interest of Zachary W. & Alyssa W.* granted grandparent visitation, the visitation was for an unspecified and indefinite period of time. Neither of these cases involved truly temporary orders like the one at issue here.

Friel makes a slightly different argument as to whether the order affected a substantial right. He contends that because a district court must make certain findings set forth in § 43-1802(2) before ordering any grandparent visitation and because the district court ordered grandparent visitation in its November 2016 order, the district court "determine[d] the action." Brief for appellant at 1. We understand Friel to be contending that despite the temporary nature of the November 2016 order, the district court could only have awarded visitation consistent with § 43-1802(2) if it made the findings necessary to finally decide the petition for visitation and that thus, the order affects a substantial right. We have recently rejected substantially the same argument, however, finding that even if the findings necessary to make a temporary and final disposition of a matter are the same, it does not follow that a temporary order is appealable. See *In re Interest of Zachary B.*, 299 Neb. 187, 907 N.W.2d 311 (2018).

At oral argument, counsel for both parties expressed hope that this court could provide guidance as to whether temporary orders are permitted in grandparent visitation proceedings. As counsel observed, the grandparent visitation statutes do not refer to temporary orders and this court has never before addressed whether such orders are permissible. But as helpful as resolution of this issue by this court might be, we do not have the authority to resolve issues merely because it would be

helpful. Our appellate jurisdiction, as defined by statute, is limited to reviewing final orders or judgments. See, e.g., *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017). Because there is no final order or judgment to be reviewed in this case, there is no appellate jurisdiction. The Court of Appeals should not have addressed the merits, and neither can we.

CONCLUSION

Contrary to the Court of Appeals' findings, we hold that the district court's order of temporary grandparent visitation did not affect a substantial right and that therefore, the Court of Appeals lacked jurisdiction to decide the issues presented for review. It follows that we too lack jurisdiction and that the appeal is subject to dismissal. We thus affirm the Court of Appeals' dismissal of the appeal, albeit on different grounds.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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Robert J. Prokop, appellant and cross-appellee, v. Lower Loup Natural Resources District et al., appellees and cross-appellants.

921 N.W.2d 375

Filed January 11, 2019. No. S-18-082.

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. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
5. **Natural Resources Districts: Political Subdivisions: Legislature.** A natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and an appellate court strictly construes a grant of power to a political subdivision.
6. **Natural Resources Districts.** A natural resources district possesses and can exercise the following powers and no others: first, those granted in express words; second, those implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the district—not simply convenient, but indispensable.

7. **Administrative Law.** Generally, for purposes of construction, a rule or order of an administrative agency or political subdivision is treated like a statute.
8. ____. Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
9. ____. A rule is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
10. **Administrative Law: Political Subdivisions: Appeal and Error.** An appellate court accords deference to an agency or political subdivision's interpretation of its own rules unless plainly erroneous or inconsistent.
11. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
12. **Statutes: Words and Phrases.** In statutory interpretation, "shall," as a general rule, is considered mandatory and inconsistent with the idea of discretion.
13. **Due Process.** Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.
14. ____. Procedural due process claims require a two-step analysis: (1) whether the plaintiff has asserted a life, liberty, or property interest that is protected by the Due Process Clause and (2) whether the plaintiff was deprived of that interest without sufficient process.
15. **Administrative Law: Due Process.** A party appearing in an adjudication hearing before an agency or tribunal is entitled to due process protections similar to those given to litigants in a judicial proceeding.
16. **Due Process: Notice.** Due process does not guarantee an individual any particular form of state procedure. Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it.
17. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.
18. **Due Process: Notice.** Due process requires notice reasonably calculated to inform the party to the action of the subject and issues involved in the proceeding.
19. **Administrative Law.** While similar to a judicial proceeding, an adjudication hearing before an agency does not guarantee an individual any particular form of state procedure.

20. ____. Administrative bodies have the authority to provide discovery which must be exercised judicially and not arbitrarily.
21. **Due Process: Property: Notice.** Due process involving deprivation of a significant property interest requires notice and an opportunity to be heard that is appropriate to the nature of the case.
22. **Due Process: Notice: Time.** Due process depends on, in part, whether the notice was sufficient to provide the party a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence.
23. **Administrative Law: Due Process: Natural Resources Districts: Notice.** Due process does not require that a natural resources district provide notice of its specific evidence to a party prior to a hearing.
24. **Property.** A takings analysis begins with an examination of the nature of the owner's property interest.
25. **Waters.** Ground water, as defined by Neb. Rev. Stat. § 46-706 (Reissue 2010), is owned by the public, and the only right held by an overlying landowner is in the use of the ground water.
26. **Constitutional Law: Waters: Appurtenances: Property.** The right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21.
27. **Waters: Public Policy.** Through its police power, the State has the power to determine public policy with regard to ground water and can alter the common law governing the use of ground water.
28. **Property: Constitutional Law.** The appropriate exercise of police power occurs where an owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him, because his use or enjoyment of such property is injurious to the public welfare.
29. **Waters.** Appropriate use of police power includes that the State place limitations on the withdrawals of ground water in times of shortage.
30. **Administrative Law: Appeal and Error.** In a de novo review on the record of an administrative order, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.

Appeal from the District Court for Valley County: Karin L. Noakes, Judge. Affirmed.

Brian C. Buescher and Dwyer Arce, of Kutak Rock, L.L.P., for appellant.

Blake E. Johnson and Katherine J. Spohn, of Bruning Law Group, for appellees.

Donald G. Blankenau and Kennon G. Meyer, of Blankenau, Wilmoth & Jarecke, L.L.P., for amicus curiae Nebraska Groundwater Coalition.

Heavican, C.J., Cassel, Stacy, Funke, and Papik, JJ.

Funke, J.

Robert J. Prokop appeals from the district court's order affirming the findings and modifying a cease and desist order of the Lower Loup Natural Resources District (LLNRD) Board directing Prokop to suspend use of ground water wells for noncompliance with LLNRD's annual reporting requirements.

Prokop challenges LLNRD's authority under the Nebraska Ground Water Management and Protection Act (GWMPA)[1] and LLNRD rules which require operators to provide actual crop yield data in their annual reports and to impose sanctions for noncompliance with LLNRD reporting requirements. Prokop further argues that LLNRD failed to provide him sufficient due process in its proceedings on whether he complied with LLNRD reporting requirements and that LLNRD's suspension of his ground water rights constituted a taking without just compensation. Prokop additionally challenges the district court's refusal to receive certain exhibits during his appeal to the district court and its failure to award him attorney fees. LLNRD and the board cross-appeal and argue the district court improperly reduced the duration of Prokop's suspension of ground water access. For the reasons set forth herein, we affirm.

I. BACKGROUND

LLNRD is a natural resources district (NRD) authorized by GWMPA to regulate certain activities which may contribute to ground water contamination due to nitrate nitrogen and other contaminants.[2] GWMPA enables NRD's to establish ground

[1] See Neb. Rev. Stat. §§ 46-701 to 46-756 (Reissue 2010 & Cum. Supp. 2016).

[2] § 46-704.

water management areas for the protection of ground water quality.[3] GWMPA requires NRD's to maintain a ground water management plan that, among other obligations and to the extent possible, identifies the levels and sources of ground water contamination within the district; ground water quality goals; long-term solutions necessary to prevent the levels of ground water contaminants from becoming too high and to reduce high levels sufficiently to eliminate health hazards; and practices recommended to stabilize, reduce, and prevent the occurrence, increase, or spread of ground water contamination.[4] GWMPA authorizes NRD's to adopt rules and regulations necessary to discharge the administrative duties assigned under GWMPA and to require such reports from ground water users as may be necessary.[5] GWMPA provides that a ground water user who violates any controls, rules, or regulations "shall be subject to the imposition of penalties imposed through the controls adopted by the district, including, but not limited to, having any allocation of water granted or irrigated acres certified by the district reduced in whole or in part."[6] Cease and desist orders may also be issued by NRD's against ground water users following 3 days' notice to the person affected stating the contemplated action and, in general, the grounds for the action and following a reasonable opportunity to be heard.[7]

Pursuant to GWMPA directives, LLNRD established a ground water management area comprising a large portion of its geographical area, adopted water quality and pollution control as one of its goals, and enacted rules and regulations to implement its obligations under GWMPA. Rule 7 of LLNRD's "Groundwater Management Area Rules & Regulations" directs that LLNRD is divided into 28 ground water quality

[3] § 46-712(1)(b).

[4] § 46-709.

[5] § 46-707(1).

[6] § 46-746(1).

[7] § 46-707(1)(h). See, also, § 46-746(1).

management subareas and provides that each subarea may be subject to water quality controls in three separate phases based upon median nitrate nitrogen levels. Under "Phase III," rule 7 directs that an operator—a person with direct control over day-to-day farming operations of the land—must, among other obligations, "[s]ubmit, on forms provided by [LLNRD], a report of yearly water tests, flow meter reading, water applied, soil tests, crops planted, yield goals, nitrogen applied, and other field operations required prior to January 31st . . . ." The forms which LLNRD provides to operators require specific information of farming operations, including number of acres, the crop planted, expected yield, nitrogen readings and application, water applied, irrigation date, and actual crop yield. Operators are also required to sign and date the forms. To enforce compliance with this obligation and other controls, rules, and regulations adopted by LLNRD, rule 2 provides:

> [LLNRD] shall have the authority to enforce these rules and regulations for the . . . protection of groundwater quality . . . by issuing cease and desist orders in accordance with the procedure hereinafter specified and by bringing appropriate actions in the District Court for the county in which any violations occur for enforcement of such orders.

Since 1962, Prokop has operated a farm on property he owns within LLNRD's regulated area in which he irrigates a significant portion of his crops. Prokop's property is within a phase III subarea of the district, and he is required to submit yearly reports to LLNRD on its forms provided.

In 2013, prior to the actions underlying the present case, Prokop was subject to an enforcement action by LLNRD in the district court for Nance County under case No. CI 13-01. LLNRD initiated that case against Prokop for illegal wells and failure to submit completed forms for 2010 and 2011 by not providing the actual crop yield data for those years. The district court found Prokop in violation of LLNRD's reporting requirements and ordered him to provide the required reports.

1. Administrative Action

The instant case involves Prokop's annual reports from 2015 and 2016 and arose from LLNRD concerns about missing information from those reports, including actual crop yield data, irrigation data, nitrogen application, and dates and signatures. Due to these concerns, LLNRD's board voted in April 2017 to file a complaint against Prokop and issued a "Notice of Intent to Issue Cease and Desist Order and Impose Penalties for Failing to Submit Annual Reporting" which was served on Prokop on May 2. In the notice, LLNRD alleged that Prokop "failed to submit timely and complete annual reports . . . for the [2015 and] 2016 crop year[s]," that "LLNRD sent multiple notice to [Prokop] requesting he submit the annual reports," and that "LLNRD has reason to believe [Prokop] has intentionally and repeatedly violated the annual reporting requirements." LLNRD stated its belief that Prokop "should be subject to penalties pursuant to the GWMPA and a cease and desist order should be issued." The notice additionally provided that Prokop "has until June 1, 2017 to submit the complete annual reports" and informed Prokop of "LLNRD's intention to enforce the penalty provisions of the GWMPA in the event [Prokop] fails to submit timely and complete annual reporting in accordance with this Notice." In particular, the notice stated LLNRD's intention to "de-certify [Prokop's] irrigated acres" and "seek maximum civil penalties." The notice also informed Prokop that "a hearing is scheduled regarding this Notice at 5:00 p.m. on May 25, 2017," "[t]he hearing shall be conducted on the record," Prokop "will be given the opportunity to present any evidence or testimony he may have with respect to the violations identified in this Notice," Prokop may appear through counsel, and the board will determine whether a cease and desist order should be issued based on the record developed at the hearing.

A hearing before the board on LLNRD's notice was held on May 25, 2017. At the hearing, LLNRD offered and the board received a copy of LLNRD's ground water rules and

regulations, a blank "Groundwater Management Area Annual Report Form," the notice, the return of service of the notice, proofs of publication of the notice, the complaint and order in case No. CI 13-01, Prokop's "Groundwater Management Area Annual Report Form" for the 2015 crop year, and Prokop's "Groundwater Management Area Annual Report Form" for the 2016 crop year.

LLNRD presented testimony from the assistant general manager of LLNRD. He testified to the rules and regulations adopted by LLNRD. He explained Prokop's property is within a subarea of the district that is designated "Phase III" and the rules that apply to the property, including Prokop's annual reporting obligations as the operator.

LLNRD also presented testimony from an agronomy technician for LLNRD. He testified that the subarea in which Prokop's land is located has an issue with ground water nitrates which are unsafe for consumption at certain levels. He explained that the purpose of LLNRD's annual reports is to record nitrogen characteristics and develop a plan to reduce nitrate contamination. He testified that actual crop yield data is part of the factors that record nitrogen characteristics as it helps determine how many pounds of nitrogen are removed from the field.

The agronomy technician testified that he reviewed Prokop's 2015 and 2016 reports and that the 2015 report was incomplete, because it failed to indicate an actual crop yield and was missing a signature, and that the 2016 report was late and incomplete, because it failed to indicate actual crop yields, failed to provide the irrigation data, failed to provide the nitrogen applications, and was not signed or dated. He explained that Prokop's reporting insufficiencies are ongoing and that LLNRD has had issues with the quality of Prokop's reporting since 2009.

Prokop presented no evidence or witnesses, but he made factual arguments during the hearing and cross-examined both LLNRD witnesses. Prokop stipulated to the receipt of the

notice and acknowledged publication in the newspapers of general circulation within the district. However, Prokop repeatedly objected to the hearing, arguing that he was not provided LLNRD's evidence with sufficient time prior to the hearing to enable a fair opportunity to develop his defense. He additionally challenged the applicability of the reports' actual crop yield requirements, stating he "has long taken the position that the LLNRD's demand that farmers provide actual yield information is unnecessary from a scientific standpoint and the request for such information is a governmental overreach not allowed or required by law."[8]

After the presentation of evidence and argument by the parties, LLNRD's board took the matter under advisement and delayed any action until June 22, 2017, the next regularly scheduled meeting. The delay allowed Prokop additional time to meet the June 1 deadline set out in the notice to Prokop. However, Prokop failed to complete the reports and the board voted at the June 22 meeting to find Prokop had violated LLNRD reporting rules by failing to submit timely and complete reports for the 2015 and 2016 crop years.

Pursuant to its vote on June 29, 2017, LLNRD's board executed a cease and desist order to impose penalties, which order was served on Prokop July 6. Through this order, the board found the following: Prokop's land was located in a phase III subarea; Prokop's 2015 annual report failed to include data on actual crop yields, nitrogen application, and a signature; and Prokop's 2016 annual report was filed after the January 31 deadline and failed to include data on actual crop yields, nitrogen application, water applied, and Prokop's signature. The order also noted Prokop's history of noncompliance with LLNRD's reporting requirements. In consideration of its findings and Prokop's noncompliant history, the board ordered:

> 1) [Prokop] and all heirs, successors, assigns, or agents cease and desist the use of all groundwater irrigation

[8] Brief for appellant at 17.

wells on the Property for a period of four (4) years commencing January 1, 2018 and continuing through December 31, 2021;

2) [Prokop] to submit complete annual report forms for the Property for the 2015 crop year and the 2016 crop year by January 31, 2018; and

3) [Prokop] to submit timely and complete annual report forms for the Property for all subsequent crop years.

2. Appeal to District Court

Prokop filed a pro se petition for review in the district court in June 2017, prior to the board's executing the cease and desist order. After obtaining counsel, Prokop filed an amended petition in July, claiming: the cease and desist order was not supported by the evidence; LLNRD's hearing and actions were not conducted in accordance with Nebraska law, LLNRD's rules and regulations, and the requirements of due process; the board's order was in violation of Nebraska law, LLNRD's rules and regulations, and the requirements of due process; the cease and desist order constituted a taking without just compensation and the due process required for such action; and the cease and desist order was issued for reasons not allowed by law.

At a hearing on Prokop's amended petition, Prokop offered exhibits 4 and 5 to support his claims that LLNRD's actions, the hearing, and the cease and desist order were in violation of his due process rights. LLNRD objected to these exhibits because they were not part of the administrative record, while Prokop argued these exhibits fell within an exception for evidence showing a procedural due process violation.

Exhibit 4 was an affidavit from Mitch Husmann, a location manager for a co-op, who sold Prokop and his tenants fertilizer and assisted Prokop in filling out the annual reports for LLNRD. Husmann explained that he would work with Prokop to fill out the reports, Prokop would sign them, and they would

be delivered to LLNRD. While this is what occurred in 2015, Husmann provided that the typical procedure was interrupted in 2016 because Prokop's new tenant purchased fertilizer through another sales representative. Therefore, Husmann did not have all the information necessary to fill out Prokop's forms, so he filled out what he could and delivered the incomplete 2016 report to LLNRD in mid-January under the understanding that Prokop would come in to complete it.

Exhibit 5 was an affidavit from Prokop detailing his relationship with Husmann and explaining that he was unaware until the hearing that the typical procedure was not followed for the 2016 report due to his tenant's using a different sales representative. The affidavit also asserted that Prokop believed the notice concerned only his refusal to provide actual crop yield data and that the notice failed to mention the 2016 reports were not signed and submitted in the same manner Husmann had submitted previous reports.

The district court entered an order on the petition in January 2018. The court stated that exhibits 4 and 5 were not received because they are outside the scope of the official record. The order then affirmed the cease and desist order's findings. First, the court determined LLNRD rules and GWMPA enable LLNRD to require actual crop yield data on its annual reports as "'other field operations'" and suspend ground water rights for noncompliance. Second, the court determined LLNRD complied with its due process obligations. Specifically, the court found the notice adequately informed Prokop of the purpose of the hearing and the allegations against him. Because the court found Prokop was informed of the purpose of the hearing and the court's understanding that due process does not require notice of evidence to be presented at an administrative hearing, the court found Prokop was not denied due process as a result of insufficient notice from LLNRD of the evidence it would present. The court also found the order's factual findings were supported by the evidence. Finally, the court determined the purpose of

the annual reports serves a substantial and legitimate government interest in preventing ground water contamination and, therefore, the cease and desist order is an appropriate exercise of police power that does not deprive Prokop of property rights without just compensation.

However, the district court's order modified the cease and desist order's penalty. The district court found the suspension of 4 years to be an unreasonable use of LLNRD's police power under the facts of the case and determined the public health and welfare could be preserved by imposing a less severe restriction. Therefore, the court modified the penalty from the 4-year suspension of Prokop's ground water rights to a 1-year suspension with the possibility of 3 additional years if Prokop continues to violate LLNRD's reporting requirements.

II. ASSIGNMENTS OF ERROR

Prokop assigns, restated, that the district court erred in affirming the board's order and determining (1) LLNRD had the authority under LLNRD rules and GWMPA to require Prokop to provide information in his annual reports, including actual crop yield data; (2) LLNRD had the authority under LLNRD rules and GWMPA to impose a suspension of ground water access as a penalty for noncompliance with LLNRD rules; (3) LLNRD did not violate Prokop's right to procedural due process and deny him a reasonable opportunity to be heard; (4) LLNRD did not erroneously limit the possibility of competent judicial review by violating Prokop's due process rights; and (5) LLNRD's suspension of Prokop's ground water access did not constitute a taking without just compensation. Prokop also assigns the district court erred in sustaining LLNRD's objection to Prokop's exhibits 4 and 5 and failing to award Prokop attorney fees.

LLNRD and the board assign on cross-appeal that the district court erred in modifying the duration of the penalty imposed by LLNRD.

III. STANDARD OF REVIEW

[1,2] 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.[9] 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.[10]

[3,4] 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.[11] An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.[12]

IV. ANALYSIS

1. LLNRD Authority to Require Actual Crop Yield Data

Prokop first assigns the district court erred in determining LLNRD had authority to require Prokop to provide actual crop yield data.

[5,6] LLNRD, as a political subdivision, has only that power delegated to it by the Legislature, and we strictly construe a grant of power to a political subdivision.[13] An NRD possesses and can exercise the following powers and no others: first, those granted in express words; second, those implied in

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[9] *Medicine Creek v. Middle Republican NRD*, 296 Neb. 1, 892 N.W.2d 74 (2017).

[10] *Id.*

[11] *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

[12] *Id.*

[13] *Medicine Creek, supra* note 9.

or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the district—not simply convenient, but indispensable.[14]

As stated above, GWMPA directs NRD's to regulate certain activities which may contribute to ground water contamination due to nitrate nitrogen and other contaminants.[15] GWMPA authorizes NRD's to adopt rules and regulations necessary to discharge the administrative duties assigned under GWMPA, require such reports from ground water users as may be necessary, and issue cease and desist orders to enforce any provisions of GWMPA.[16]

LLNRD rule 7 directs that each subarea of the district may be subject to water quality controls in three separate phases based upon median nitrate nitrogen levels. Under phase III, the phase Prokop's land was designated, rule 7 directs that an operator must "[s]ubmit, on forms provided by [LLNRD], a report of yearly water tests, flow meter reading, water applied, soil tests, crops planted, yield goals, nitrogen applied, and other field operations required prior to January 31st . . . ." Among other information, the forms which LLNRD provides to operators require actual crop yield data.

Prokop claims rule 7 fails to authorize LLNRD to collect actual crop yield data, because the rule does not include it in the list of operators' reporting obligations. Prokop also argues that actual crop yield data was not implicitly included under the phrase "other field operations," because actual yield data is not an operation.

[7-10] Generally, for purposes of construction, a rule or order of an administrative agency or political subdivision is treated like a statute.[17] Absent a statutory or regulatory indication to

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[14] *Id.*

[15] § 46-704.

[16] § 46-707(1).

[17] See *Nebraska Protective Servs. Unit v. State*, 299 Neb. 797, 910 N.W.2d 767 (2018).

the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.[18] A rule is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.[19] We accord deference to an agency or political subdivision's interpretation of its own rules unless plainly erroneous or inconsistent.[20]

Here, LLNRD's interpretation of "other field operations" to include actual crop yield data is not inconsistent or plainly erroneous. The use of "other field operations" requires interpretation, and LLNRD has interpreted it to include data on actual crop yield. In the blank "Groundwater Management Area Annual Report Form," as well as Prokop's reports from crop years 2015 and 2016, LLNRD asks for actual crop yield data along with other information from operators' farming operations. LLNRD's agronomy technician testified that requiring actual crop yield is important to LLNRD's adopted goals of water quality and pollution control and LLNRD's obligations under GWMPA to implement these goals. He testified that the actual crop yield data is used in connection with the other farming operations data to record nitrogen characteristics and develop a plan to reduce nitrate contamination, because actual crop yield data helps determine how many pounds of nitrogen are removed from the field. LLNRD, in requiring the data on the reports, clearly interpreted "other field operations" to encompass actual crop yield data, which is supported by LLNRD's utilization of the data in implementing its statutory duties.

Prokop contends that interpreting "other field operations" to include actual crop yield data is inconsistent with a plain reading of rule 7, because actual crop yield data is not an operation. However, such a reading is incorrect. Rule 7 lists specific field operations, including items such as "soil tests" and "yield

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[18] *Id.*

[19] *Id.*

[20] See *id.*

goals." If actual crop yield data, which is the end product of field operations, is not field operations data, then neither would soil tests as the state of the soil during field operations or yield goals which are what operators believe they will produce through field operations even though soil tests and yield goals are explicitly included in the list of required field operations data.

Prokop additionally contends that interpreting "other field operations" to include actual crop yield data is inconsistent and plainly erroneous, because the purpose of rule 7 is to implement LLNRD's goals of water quality and pollution control through the reduction of nitrogen contamination, and actual crop yield data is unnecessary to do so. However, we cannot say that requiring actual crop yield data is clearly erroneous to reducing nitrogen contamination. Moreover, the record contains testimony on how actual yield data is relevant to a determination of nitrogen levels removed from the soil and how it is helpful to LLNRD and operators in determining other relevant data required in the annual reporting. Thus, on the record before us, we cannot say the interpretation of "other field operations" to include actual crop yield data was inconsistent and plainly erroneous due to its relationship to LLNRD's stated goals.

In consideration of all of the above, the district court did not err in determining LLNRD had the authority to require actual crop yield data.

2. LLNRD Authority to Impose Suspension of Ground Water Access

Prokop next assigns the district court erred in determining LLNRD had authority to impose a suspension of ground water access for a violation of LLNRD reporting requirements.

Under § 46-707(1), NRD's may adopt rules and regulations necessary to discharge the administrative duties assigned under GWMPA; require such reports from ground water users as may be necessary; and issue cease and desist orders to enforce any provisions of GWMPA.

Under § 46-746(1), any person who violates any controls, rules, or regulations "shall be subject to the imposition of penalties imposed through the controls adopted by the district, including, but not limited to, having any allocation of water granted or irrigated acres certified by the district reduced in whole or in part."

Additionally, LLNRD enacted rule 2, which addresses enforcement of noncompliance with LLNRD rules and regulations and GWMPA. Rule 2 provides:

> [LLNRD] shall have the authority to enforce these rules and regulations for the . . . protection of groundwater quality . . . by issuing cease and desist orders in accordance with the procedure hereinafter specified and by bringing appropriate actions in the District Court for the county in which any violations occur for enforcement of such orders.

Prokop contends the language of § 46-746(1) that

> [a]ny person who violates . . . any controls, rules, or regulations adopted by [an NRD] relating to a management area shall be subject to the imposition of penalties imposed through the controls adopted by the district, including, but not limited to, having any allocation of water granted or irrigated acres certified by the district reduced in whole or in part

requires LLNRD to adopt rules and regulations that specifically list the penalties available. Further, Prokop argues, such an interpretation required LLNRD to adopt rules and regulations which explained that a violation of LLNRD reporting requirements could result in the allocation of ground water reduced in whole or in part.

[11] Contrary to Prokop's argument, a "penalty" and a "control" under GWMPA are separate and distinct terms. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[21] The inclusion

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[21] *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018).

of both terms leads to the determination that the words are not synonymous.

Section 46-746(1) enables an NRD to enforce a ground water user's obligations under GWMPA and the rules and regulations of an NRD by imposing penalties, including, but not limited to, having any allocation of water granted or irrigated acres certified by the district reduced in whole or in part by utilizing the procedure adopted in the rules and regulations of an NRD. Section 46-746(1) does not require an NRD to restate in its rules and regulations that a violation could result in a reduction of ground water access. Instead, § 46-746(1) articulates one specific penalty which an NRD can impose upon the violator—the reduction of allocated water. As to the controls adopted by an NRD, in this case, LLNRD adopted rule 2, which enables LLNRD to issue cease and desist orders following the procedure outlined in the subsequent rules.

[12] Such a determination aligns with our opinions in *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*[22] and *Goodyear Tire & Rubber Co. v. State*.[23] In *Loup City Pub. Sch.*, we addressed the question of whether the Department of Revenue was required to promulgate rules and regulations under Neb. Rev. Stat. § 79-3809 (Reissue 1994).[24] We concluded that the department was required to do so.[25] That statute, which has since been amended and recodified, provided in relevant part: "Establishment of the adjusted valuation shall be based on assessment practices established by rule and regulation adopted and promulgated by the Department of Revenue."[26] We noted that in statutory interpretation, "shall," as a general

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[22] *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*, 252 Neb. 387, 562 N.W.2d 551 (1997).

[23] *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008).

[24] *Loup City Pub. Sch., supra* note 22.

[25] *Id.*

[26] § 79-3809(1) (now codified at Neb. Rev. Stat. § 79-1016 (Supp. 2017)).

rule, is considered mandatory and inconsistent with the idea of discretion.[27] Thus, under the plain language of that statute, the department was required to adopt and promulgate rules and regulations to regulate the valuation process.[28] Because the department had not adopted and promulgated rules and regulations governing the valuation process, we concluded that the adjusted valuations of the department were not in conformity with the law.[29]

In contrast, in *Goodyear Tire & Rubber Co.*, we addressed whether the State Tax Commissioner was required to promulgate rules and regulations under Neb. Rev. Stat. § 77-4111 (Reissue 2003) to define "qualified property," a term utilized in the Employment and Investment Growth Act.[30] Section 77-4111 provides that the commissioner "shall adopt and promulgate all rules and regulations necessary to carry out the purposes of the Employment and Investment Growth Act." In concluding the commissioner was not required to establish rules and regulations regarding its interpretation of "qualified property," we noted the language in § 77-4111 required the adoption and promulgation of "only those rules that are necessary for carrying out the purposes" of the act.[31]

While § 46-707(1)(a) authorizes the adoption and promulgation of rules necessary to discharge the administrative duties assigned in GWMPA, § 46-746(1) establishes that the penalties for violations under GWMPA and rules and regulations of an NRD include reducing the violator's ground water access in whole or in part. As such, we conclude that it is unnecessary for LLNRD to promulgate rules and regulations restating the potential for LLNRD to restrict a violator's ground water access.

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[27] *Loup City Pub. Sch., supra* note 22.

[28] *Id.*

[29] *Id.*

[30] *Goodyear Tire & Rubber Co., supra* note 23.

[31] *Id.* at 602, 748 N.W.2d at 49.

In consideration of the above, the district court did not err in determining LLNRD had the authority to suspend Prokop's ground water access under § 46-746(1).

3. Procedural Due Process

Prokop assigns LLNRD violated his due process rights by not providing him adequate notice of the charges against him and of the evidence to be presented.

[13,14] Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.[32] Procedural due process claims require a two-step analysis: (1) whether the plaintiff has asserted a life, liberty, or property interest that is protected by the Due Process Clause and (2) whether the plaintiff was deprived of that interest without sufficient process.[33] Here, Prokop's interest in the use of ground water is a property interest that is under due process protections.[34] Therefore, the issue is whether Prokop was deprived of that interest without sufficient process.

[15-17] A party appearing in an adjudication hearing before an agency or tribunal is entitled to due process protections similar to those given to litigants in a judicial proceeding.[35] Due process does not guarantee an individual any particular form of state procedure. Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it.[36] In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time

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[32] *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 906 N.W.2d 285 (2018). See, also, U.S. Const. amends. V and XIV; Neb. Const. art. I, § 3.

[33] *White v. Busboom*, 297 Neb. 717, 901 N.W.2d 294 (2017).

[34] See *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985) (superseded by statute on other grounds).

[35] *Cain, supra* note 32.

[36] *Id.*

and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.[37]

(a) Notice of Factual Basis for LLNRD's Accusations

In its notice, LLNRD alleged that Prokop "failed to submit timely and complete annual reports . . . for the [2015 and] 2016 crop year[s]," that "LLNRD sent multiple notice to [Prokop] requesting he submit the annual reports," and that "LLNRD has reason to believe [Prokop] has intentionally and repeatedly violated the annual reporting requirements." The notice stated LLNRD's belief that Prokop "should be subject to penalties pursuant to the GWMPA and a cease and desist order should be issued" for the violation. The notice additionally provided that Prokop "has until June 1, 2017 to submit the complete annual reports" and informed Prokop of "LLNRD's intention to enforce the penalty provisions of the GWMPA in the event [Prokop] fails to submit timely and complete annual reporting in accordance with this Notice." In particular, the notice stated LLNRD's intention to "de-certify [Prokop's] irrigated acres" and "seek maximum civil penalties." The notice also informed Prokop that "a hearing is scheduled regarding this Notice at 5:00 p.m. on May 25, 2017," "[t]he hearing shall be conducted on the record," Prokop "will be given the opportunity to present any evidence or testimony he may have with respect to the violations identified in this Notice," Prokop may appear through counsel, and the board will determine whether a cease and desist order should be issued based on the record developed at the hearing.

Prokop acknowledges the notice accused Prokop of "'fail[ing] to submit timely and complete annual reports,'" but claims that the notice provided no factual basis as to what it alleged was deficient in the reports.[38] Instead, Prokop

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[37] *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

[38] Brief for appellant at 26.

claims he was unaware of LLNRD's allegations of missing signatures, dates, irrigation data, and nitrogen application until the hearing. Prokop argues that without such explanation of deficiencies, he was deprived of the opportunity to gather evidence and present witnesses on the precise allegations and was prevented from taking action to correct any deficiency before the hearing.

[18] However, contrary to Prokop's claim, the notice was sufficient to inform Prokop of LLNRD's claims and supporting factual allegations. Due process requires notice reasonably calculated to inform the party to the action of the subject and issues involved in the proceeding.[39] LLNRD's notice alleged Prokop "failed to submit timely and complete annual reports" for 2015 and 2016 and that Prokop "intentionally and repeatedly violated the annual reporting requirements." These allegations informed Prokop that the reports for 2015 and 2016 were deficient and incomplete. The deficiencies of missing annual yield data, nitrogen application, water applied, and Prokop's signatures were apparent on the face of the reports listed in the notice.

Prokop relies upon our decision in *Blanchard v. City of Ralston*[40] to support his contention that the notice of LLNRD's claims and supporting factual allegations were insufficient. In *Blanchard*, a city determined that a vacant house was a public nuisance and that its nonremedy was an immediate emergency. The city posted a notice on the house alleging only that the building was an unsafe nuisance because of an "odor and health-related hazards" and that the owner had 3 days to repair or demolish it before the city would subsequently demolish the house itself.[41] The owner received no other notice and was only made aware of the posted notice after the 3-day period lapsed

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[39] *Robinson v. Morrill Cty. Sch. Dist. #63*, 299 Neb. 740, 910 N.W.2d 752 (2018).

[40] *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997).

[41] *Id.* at 709, 559 N.W.2d at 737.

but before the demolition occurred. A hearing was scheduled for 1 hour prior to the demolition, with no further information given to the owner on the specific problems posed by the house. We determined that this violated the owner's due process rights, because the notice failed, under the circumstances, to give her a statutorily required reasonable amount of time and failed to meaningfully inform her of the complicated and substantial specific problems alleged to constitute the hazards so that she could have an opportunity to remedy the situation and defend her case.[42]

Unlike *Blanchard*, LLNRD's notice alleged a specific violation—that Prokop had "intentionally and repeatedly violated the annual reporting requirements"—and provided specific factual allegations that the 2015 and 2016 reports were incomplete and late. The individual violations of Prokop's missing data were simple and readily apparent from the listed forms without the need of an expert, in contrast to the issues alleged to constitute a hazard in *Blanchard*.[43]

LLNRD's notice was reasonably calculated to inform Prokop about the allegations against him and the issues involved in the proceeding. Accordingly, the notice satisfied Prokop's due process rights by informing him of the factual basis for the accusation.

(b) Notice of LLNRD's Evidence

Prokop also claims that his due process rights were violated by not receiving notice of the evidence LLNRD intended to present and that such violation limits the possibility of competent judicial review. Prokop argues the notice appropriate to the nature of the present case includes "notice of the evidence, witnesses, and factual basis for the allegations against him,"[44] in part due to his significant property interest to the access of ground water.

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[42] *Blanchard, supra* note 40.

[43] See *id.*

[44] Brief for appellant at 29.

GWMPA does not set forth a specific formal due process hearing procedure containing the requirement that an NRD provide the names of any witnesses who will be called to testify against the alleged violator, an opportunity to examine any documents that will be presented at the hearing, the right to be represented, and an opportunity to cross-examine all witnesses and to present evidence material to the issues.[45] Neither do the rules of LLNRD set forth rules of procedure regarding prehearing discovery. As a result, we must consider Prokop's argument under the bare minimum due process requirements.

Prokop alleges not only that LLNRD failed to provide him notice of the evidence but also that he repeatedly requested the evidence prior to the hearing and was denied. However, in the record before us, there is no available evidence or stated allegations that would indicate Prokop requested and was denied access to LLNRD's evidence prior to the hearing, including the 2015 and 2016 reports. Thus, we consider whether LLNRD was required to provide Prokop with notice of the evidence it intended to present and not whether LLNRD violated its due process obligations by refusing Prokop's alleged request for access to the evidence.

[19,20] There is no due process requirement that an NRD provide notice of evidence to an adverse party prior to a hearing. In *Cain v. Custer Cty. Bd. of Equal.*,[46] we stated that, while similar to a judicial proceeding, an adjudication hearing before an agency does not guarantee an individual any particular form of state procedure. In *States v. Anderson*,[47] we declined to recognize prehearing discovery as a requirement of due process but acknowledged that administrative bodies have the authority to provide discovery which must be exercised judicially and not arbitrarily. And in *Marshall v. Wimes*,[48] in

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[45] Compare § 46-743, with Neb. Rev. Stat. § 79-832 (Reissue 2014).

[46] See, e.g., *Cain, supra* note 32.

[47] *States v. Anderson*, 219 Neb. 545, 364 N.W.2d 38 (1985).

[48] *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

addressing the refusal of an administrative body to issue a subpoena for appearance at a hearing, we explained that due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

[21,22] We have held that due process involving deprivation of a significant property interest requires notice and an opportunity to be heard that is appropriate to the nature of the case.[49] Stated another way, due process depends on, in part, whether the notice was sufficient to provide the party a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence.[50]

Here, LLNRD's notice was sufficient to provide Prokop a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence. The notice was given 23 days before the hearing, informed him of the time and location of the hearing, provided potential penalties, informed him that he would have the opportunity to address the charges and present evidence in his defense, and, as determined above, was sufficient to notify him of the charges and factual allegations supporting those charges, including that the 2015 and 2016 reports were deficient and that these deficiencies were part of an intentional and continuing pattern.

The evidence LLNRD provided at the hearing included the notice, proof of service and publication of the notice, the reports specified in the notice, LLNRD rules establishing LLNRD's authority to require and enforce the information on the reports, the complaint and order in Nance County District Court case No. CI 13-01, and testimony concerning the deficiencies of the reports and why the deficient material was important. All of this evidence was either a source of authority that was referenced in the notice, documents involving

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[49] See, *Cain, supra* note 32; *Blanchard, supra* note 40.

[50] *Id.*

the notice and its receipt, or factual confirmation of specific allegations set forth in the notice. As such, the evidence presented was a natural extension of the notice and Prokop was sufficiently informed to provide him a reasonable opportunity to cross-examine LLNRD's witnesses and present evidence at the hearing.

(c) Notice of Use of Prior Violation

Prokop specifically claims his due process rights were violated by not receiving notice of LLNRD's intended use of case No. CI 13-01. By not receiving notice of LLNRD's intent, Prokop argues, he was denied the opportunity to gather evidence, present witnesses, and prepare a defense concerning the use of the prior proceedings. Further, Prokop claims case No. CI 13-01 had nothing to do with the present allegations and should not have been admitted and considered by the board.

[23] First, as discussed above, due process does not require that LLNRD provide notice of its specific evidence to Prokop prior to the hearing.[51]

LLNRD's notice did inform Prokop of its allegation that Prokop has "intentionally and repeatedly violated the annual reporting requirements." Case No. CI 13-01 was relevant to LLNRD's allegation because it was evidence of continued, similar violations. Prokop emphasizes in his brief that case No. CI 13-01 concerned illegal wells and alleges he would have presented further evidence on the facts surrounding those wells, but LLNRD used case No. CI 13-01 as evidence that Prokop had a history of violating LLNRD's reporting requirements. While case No. CI 13-01 does address the illegal wells, it also, more relevantly, finds Prokop in violation of reporting obligations and orders him to provide the required reports. As such, LLNRD's notice informing Prokop of its allegation that he has "intentionally and repeatedly violated the annual reporting requirements" appropriately informed him that his

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[51] See, e.g., *Cain, supra* note 32; *Marshall, supra* note 48; *Anderson, supra* note 47.

prior violations, including those violations under case No. CI 13-01, would be at issue and that they would be relevant to the board's consideration of a potential penalty.

4. Possibility of Competent Judicial Review

Prokop assigns the district court erred in finding LLNRD's action did not limit the possibility of competent judicial review. Specifically, Prokop claims he was not provided adequate notice of the claims against him and LLNRD's intended evidence, which deprived him of the opportunity to gather evidence and arrange for witnesses to testify on his behalf.

Because we determined above that Prokop was provided adequate notice of the claims against him, was not entitled to notice of the specific evidence LLNRD intended to present, and was given opportunity to present his own evidence and call his own witnesses, Prokop's assignment that he was deprived of the possibility of competent judicial review due to lack of notice is without merit.

5. Taking Without Just Compensation

Prokop contends LLNRD's issuance of a cease and desist order suspending his access to ground water, as modified by the district court, amounts to a taking without just compensation.

[24-26] A takings analysis begins with an examination of the nature of the owner's property interest.[52] Ground water, as defined by § 46-706, is owned by the public, and the only right held by an overlying landowner is in the use of the ground water.[53] As noted above, the right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21.[54]

[27-29] Through its police power, the State has the power to determine public policy with regard to ground water and can

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[52] *Hill v. State*, 296 Neb. 10, 894 N.W.2d 208 (2017).

[53] See *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987).

[54] *Sorensen, supra* note 34.

alter the common law governing the use of ground water.[55] The appropriate exercise of police power occurs where an owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him, because his use or enjoyment of such property is injurious to the public welfare.[56] This is in contrast to eminent domain, where property is taken from the owner and applied to public use because the use or enjoyment of such property is beneficial to the public.[57] Appropriate use of police power includes that the State place limitations on the withdrawals of ground water in times of shortage.[58]

Here, LLNRD's reporting requirements were implemented, in part, to address the goals under GWMPA of water quality and pollution control and address levels of nitrate nitrogen and other contaminants in ground water. In order to do so, LLNRD rules and regulations and GWMPA require various data from operators, including actual crop yield, nitrogen application, and water applied. This information is necessary to create long-term solutions to prevent levels of ground water contaminants from becoming too high and creating health hazards.[59] By not complying with the reporting requirements, Prokop was preventing LLNRD from information necessary to perform its duties under GWMPA. Thus, LLNRD limited Prokop's use, because his use or enjoyment of such property was injurious to the public welfare and, in doing so, this was an appropriate exercise of police power and did not amount to a taking without just compensation.

6. Exhibits 4 and 5

Prokop assigns the district court erred in declining to receive exhibits 4 and 5 to supplement LLNRD's record. Prokop

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[55] See *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994).

[56] *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998).

[57] *Id.*

[58] See *Bamford, supra* note 55.

[59] See § 46-709.

claims these exhibits were admissible under "an exception to the general prohibition of extra-record evidence" for evidence of alleged procedural irregularities.[60]

However, exhibits 4 and 5 do not provide evidence relevant to whether there were procedural irregularities denying Prokop due process. Instead, Prokop purports that these exhibits demonstrate what evidence he could have presented if those procedural irregularities were not present. Evidence of what could have been presented if not for the alleged procedural violations is not evidence that would indicate whether or not such procedural violations occurred. Therefore, the district court did not err in declining to supplement LLNRD's record and receive exhibits 4 and 5.

In the alternative, Prokop claims the district court abused its discretion in failing to remand the matter to the board for further proceedings to allow Prokop the opportunity to present the evidence from exhibits 4 and 5 in the interest of justice. Prokop's argument centers on the allegation that he was denied due process and not provided sufficient notice of the claims against him. Having determined that the notice was sufficient to inform Prokop of the claims against him and that he was not entitled to a notice of the evidence which LLNRD intended to present, Prokop's claim that the district court erred in failing to remand the matter to allow him to supplement the record is without merit.

7. Attorney Fees

Finally, Prokop assigns the district court erred in failing to reverse the board's order and failing to award attorney fees, because LLNRD's position was not substantially justified. Under Neb. Rev. Stat. § 25-1803 (Reissue 2016), a court having jurisdiction over a civil action brought by the State or an action for judicial review brought against the State pursuant to the APA shall award fees and other expenses to the prevailing party unless the prevailing party is the State. Because

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[60] Brief for appellant at 33.

we determined the district court did not err in affirming the board's order, Prokop was not the prevailing party and the district court did not err in declining to award Prokop attorney fees.

8. Modification of Duration of Penalty LLNRD Imposed

On cross-appeal, LLNRD and the board assign the district court erred in modifying the penalty from a 4-year suspension of Prokop's ground water rights to a 1-year suspension with the possibility of 3 additional years if Prokop continues to violate LLNRD's reporting requirements. In support of this assignment, LLRND asserts the district court should have given deference to the board's penalty. However, this assertion is at odds with the district court's standard of review.

[30] Any person aggrieved by an order of an NRD issued pursuant to GWMPA may appeal the order, and that appeal shall be in accordance with the APA.[61] That appeal is conducted by the district court without a jury de novo on the record of the agency.[62] In a de novo review on the record of an administrative order, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.[63]

Here, the district court performed such a de novo review and determined that the 4-year suspension was unreasonable under the circumstances of the case and modified the penalty to a 1-year suspension with a possibility of 3 more years if continued noncompliance.

LLNRD and the board acknowledge the statutory standard of review is de novo when a court is reviewing questions of fact or law. However, LLNRD and the board argue that the determination of a penalty is not a factual or legal issue but is,

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[61] See § 46-750.

[62] Neb. Rev. Stat. § 84-917(5)(a) (Reissue 2014).

[63] See *Medicine Creek, supra* note 9.

instead, a policy matter. LLNRD and the board argue GWMPA provides NRD's deference to determine such penalties through operation of § 46-746(1), which provides a violator "shall be subject to the imposition of penalties imposed through the controls adopted by the district, including, but not limited to, having any allocation of water granted or irrigated acres certified by the district reduced in whole or in part."

We disagree with LLNRD and the board's interpretation. First, the language of § 46-746(1) does not limit the possibility of judicial review of the determination of penalties. Moreover, GWMPA does not limit what parts of an order are to be reviewed under the APA, stating "[a]ny person aggrieved by any order . . . may appeal,"[64] and the APA states "the review shall be conducted . . . de novo," without limiting the review of the order.[65] As stated above, a district court in reviewing an administrative order is required to make independent factual determinations and reach independent conclusions with respect to the matters at issue.[66] Clearly, the imposition of Prokop's penalty was a matter at issue in the board's proceedings, as evidenced by the amount of thought and consideration LLNRD alleges the board undertook in determining the severity of the issued penalty.

Because the district court utilized the appropriate de novo review in considering LLNRD's imposition of the penalty and because the modified penalty conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, the district court did not err in modifying the duration of Prokop's penalty.

V. CONCLUSION

For the reasons stated above, the district court did not err in determining that LLNRD had authority to require actual crop yield data from Prokop, that LLNRD had authority to impose

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[64] § 46-750.

[65] § 84-917(5)(a).

[66] See *Medicine Creek, supra* note 9.

a suspension of ground water access for noncompliance with reporting requirements, that Prokop's right to due process was not violated in the proceedings before LLNRD's board, that Prokop was not denied the possibility of competent judicial review, that the suspension of Prokop's ground water access was not a taking without just compensation, that exhibits 4 and 5 should not have been admitted as "extra-record evidence," and that Prokop was not entitled to attorney fees. The district court also did not err in its modification of the duration of Prokop's penalty.

Affirmed.

Miller-Lerman and Freudenberg, JJ., not participating.

Papik, J., concurring.

This court concludes that LLNRD had the authority to require the submission of actual crop yield data in at least partial reliance on the principle that courts are to afford deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. We have cited and applied this principle on many occasions over the last several decades. See, e.g., *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015); *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995); *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984).

But while we have precedent for the principle that courts defer to an agency's interpretation of its own regulations, I am not sure that precedent rests on stable ground. The principle appears to have entered our jurisprudence in *Wilken, supra*. In that case, we cited a case from the Eighth Circuit holding that an agency is entitled to deference when interpreting its own regulations. *Id.*, citing *Columbus Community Hospital, Inc. v. Califano*, 614 F.2d 181 (8th Cir. 1980). That Eighth Circuit case, in turn, cited *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945), a U.S. Supreme Court case which stated that the administrative interpretation

of a regulation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." The Court in *Seminole Rock Co.* did not offer an explanation as to why the agency would be entitled to deference in those circumstances. See *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 617, 133 S. Ct. 1326, 185 L. Ed. 2d 447 (2013) (Scalia, J., concurring in part and in part dissenting) (observing that *Seminole Rock Co.* "offered no justification whatever"). Even so, the U.S. Supreme Court reaffirmed this principle decades later in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

In recent years, however, the principle recognized in *Seminole Rock Co., supra*, and reaffirmed in *Auer, supra*, has been called into question. It has been criticized for lacking a coherent rationale, see *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015) (Thomas, J., concurring in judgment); for incentivizing the promulgation of vague regulations, see *Decker, supra* (Scalia, J., concurring in part and in part dissenting), and for violating the separation of powers, *Perez, supra* (Thomas, J., concurring in judgment). See, also, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996).

The criticism leveled at *Seminole Rock Co., supra*, and *Auer, supra*, by multiple justices of the U.S. Supreme Court (including the author of *Auer*) had led some to speculate that "*Auer* may not be long for this world." *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015) (Easterbrook, Circuit Judge, concurring in denial of rehearing en banc). See, also, *Turtle Island Restoration Network v. US DOC*, 878 F.3d 725, 742 n.1 (9th Cir. 2017) (Callahan, Circuit Judge, dissenting in part) ("*Auer's* continued vitality is a matter of considerable debate"). Such speculation may prove to be prescient, as the U.S. Supreme Court very recently granted certiorari on the question of whether *Auer* and *Seminole Rock Co.* should be overturned. See *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir.

2017), *cert. granted in part sub nom. Kisor v. Wilkie*, No. 18-15, 2018 WL 6439837 (U.S. Dec. 10, 2018).

We thus appear to have adopted the principle that courts are to defer to agencies' interpretations of their own regulations by decades ago uncritically adopting a dubious proposition of federal law that itself may not stand the test of time. While that seems reason enough for reconsideration of the principle in the appropriate case, I believe there is an additional reason to do so: The principle also seems to be in tension, if not at outright odds, with Nebraska's version of the Administrative Procedure Act (APA).

In this case, and many others like it, Nebraska courts are called on to review the decisions of administrative agencies under the authority granted by the APA. The APA, however, provides that the review is to be conducted by the court "without a jury de novo on the record of the agency." Neb. Rev. Stat. § 84-917(5)(a) (Reissue 2014). This standard has been interpreted to require district courts to make independent determinations of both factual and legal issues. See *Medicine Creek v. Middle Republican NRD*, 296 Neb. 1, 892 N.W.2d 74 (2017). But if the APA directs district courts to independently decide factual and legal questions without deferring to the agency, on what basis can courts defer to the agency's interpretation of its own regulations? In my view, the lack of an obvious answer to that question is yet another reason why we should reconsider whether deference is owed to agencies' interpretations of their own regulations.

With all that said, the parties have not asked us to reconsider our precedent in this case. Without the aid of argument from the parties, I do not believe such reconsideration is appropriate here. Therefore, I concur in this court's decision in all respects. For the reasons expressed above, however, I would be open to reconsidering in a future case whether courts owe deference to agencies' interpretations of their own regulations.

Nebraska Supreme Court
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Abdi Hassan, appellant, v. Trident Seafoods and Liberty Mutual Insurance, its workers' compensation insurer, appellees.

921 N.W.2d 146

Filed January 11, 2019. No. S-18-255.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. ____: ____. 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 that are clearly wrong in light of the evidence.
3. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
4. **Workers' Compensation: Employer and Employee: Statutes.** Under the Nebraska Workers' Compensation Act, in most compensation cases, there must be at least one statutory employer and one statutory employee for the compensation court to acquire jurisdiction.
5. **Workers' Compensation: Employer and Employee: Statutes: Words and Phrases.** For the purpose of the Nebraska Workers' Compensation Act, the terms "employer" and "employee" are not words of common understanding, but, rather, of statutory definition.

Appeal from the Workers' Compensation Court: Thomas E. Stine, Judge. Affirmed.

Travis Allan Spier, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellant.

Robert Kinney-Walker, of Law Office of James W. Nubel, for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg JJ.

Miller-Lerman, J.

NATURE OF CASE

On July 21, 2015, appellant Abdi Hassan sustained a work-related injury in the course of his employment with appellee Trident Seafoods at Trident Seafoods' Alaska plant. Hassan was a Nebraska resident when he was hired by Trident Seafoods, a State of Washington corporation without a permanent presence in Nebraska. Although Hassan received certain benefits in Alaska, he later filed a petition in the Nebraska Workers' Compensation Court. The sole issue before us is whether the Nebraska Workers' Compensation Court correctly determined that it lacked jurisdiction and dismissed his claim. Because we agree with the Nebraska Workers' Compensation Court that Trident Seafoods was not a statutory employer subject to the Nebraska Workers' Compensation Act, we affirm.

STATEMENT OF FACTS

Hassan resided in Lexington, Nebraska, and worked as a meat trimmer at a meat processing plant. In 2015, Hassan learned from a friend that Trident Seafoods was hiring and, with the friend's help, he completed an online application. He then attended an in-person recruitment event hosted by Trident Seafoods at a hotel conference facility in Omaha, Nebraska. Trident Seafoods rented conference space for the event, and Hassan met and interviewed with several of Trident Seafoods' employees. Trident Seafoods did not employ workers in Nebraska year round, but it sent a recruitment team to Nebraska to recruit seasonal workers one or two times each year from 2013 through 2016. Trident Seafoods hires employees from all over the country to staff its operations in the Pacific Northwest and Alaska.

At the event in Omaha, Hassan completed an onsite drug test administered by Trident Seafoods employees. Hassan recalled observing around six Trident Seafoods employees at the recruitment event. However, Trident Seafoods maintains that the number of recruiters was fewer than six. After he returned home from the recruitment event, Hassan remained in contact with Trident Seafoods and continued to move forward with the online employment application process. On June 8, 2015, Hassan executed a contract for hire in Seattle, Washington, and was hired as a seafood processor for the upcoming season.

While working in Alaska, Hassan suffered a low-back injury. Alaska's Department of Labor and Workforce Development (Alaska Department) established a case file for Hassan's injuries. Trident Seafoods' Alaska workers' compensation insurer, Liberty Mutual Insurance, accepted Hassan's claim and paid over $30,000 in medical expenses and indemnity to Hassan, based on Alaska law.

Hassan's work injuries resulted in permanent physical restrictions which prevent him from returning to his preaccident work capacity level. Following his injury, Hassan returned to Lexington.

The Alaska Department referred Hassan to a rehabilitation specialist in Nebraska who evaluated him and determined that Hassan met the requirements necessary to receive reemployment benefits under Alaska workers' compensation law. On December 1, 2016, the Alaska Department sent Hassan a letter to inform him he was eligible for reemployment benefits. The letter indicated that he could elect to receive reemployment benefits. The letter noted that if Hassan failed to complete the required form within 30 days after receipt of the letter, the reemployment benefits would terminate. Hassan did not complete the required form, and the Alaska Department deemed him noncooperative.

On March 16, 2017, Hassan filed a petition in the Nebraska Workers' Compensation Court and claimed benefits under the Nebraska Workers' Compensation Act. Trident Seafoods and

Liberty Mutual Insurance denied that the Nebraska Workers' Compensation Court had jurisdiction and moved to dismiss.

The compensation court held a hearing and admitted evidence including personnel records, email records, indemnity payment summaries, employment policies, discovery responses, and transcripts of depositions taken of Hassan and of a senior recruiter at Trident Seafoods. In a written order, filed February 14, 2018, the compensation court dismissed Hassan's petition for lack of jurisdiction.

The compensation court found that Trident Seafoods was not a statutory employer under Neb. Rev. Stat. § 48-106(1) (Reissue 2010), because Trident Seafoods was not performing work in Nebraska. The written order noted that Trident Seafoods' primary business operation is the manufacturing and production of seafood and that recruiting workers in Nebraska is not "performing work" as understood under § 48-106(1).

The compensation court also concluded that Hassan was not a statutory employee under Neb. Rev. Stat. § 48-115(2)(c) (Reissue 2010). The compensation court noted that the online correspondence between Hassan and Trident Seafoods was preliminary to the contract of hire executed on June 8, 2015, in Seattle and that thus, Hassan's contract for hire was not made in Nebraska.

Hassan appeals.

ASSIGNMENTS OF ERROR

Hassan claims, summarized and restated, that the compensation court erred when it concluded that it did not have jurisdiction and dismissed the case.

STANDARDS OF REVIEW

Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), the judgment made by the compensation court shall have the same force and effect as a jury verdict in a civil case and 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. *Bower v. Eaton Corp.*, 301 Neb. 311, 918 N.W.2d 249 (2018).

[1] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id*.

[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 that are clearly wrong in light of the evidence. *Id*.

ANALYSIS

[3-5] As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Id*. Under the Nebraska Workers' Compensation Act, in most compensation cases, including the one before us, there must be at least one statutory employer and one statutory employee for the compensation court to acquire jurisdiction. *Jensen v. Floair, Inc.*, 212 Neb. 740, 326 N.W.2d 19 (1982). For the purpose of the Nebraska Workers' Compensation Act, the terms "employer" and "employee" are not words of common understanding, but, rather, of statutory definition. *Id*. Because the record supports the determination that Trident Seafoods is not a statutory employer under § 48-106(1), the Nebraska Workers' Compensation Act does not apply and the Nebraska Workers' Compensation Court correctly concluded that it lacked jurisdiction.

Section 48-106(1) states that the Nebraska Workers' Compensation Act applies to "every resident employer in this state" and the "nonresident employer performing work in this state who employs one or more employees in the regular trade, business, profession, or vocation of such employer."

Neb. Rev. Stat. § 48-114(2) (Reissue 2010) defines "employer" to include, in relevant part, "every person, firm,

or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession as described in section 48-106, and who has any person in service under any contract of hire, express or implied, oral or written."

This statutory definition of employer found at § 48-114(2) by its terms incorporates § 48-106. Synthesizing these statutes, we therefore understand that to be a statutory employer subject to the Nebraska Workers' Compensation Act, the "nonresident employer [must be] performing work in this state," § 48-106(1), and the nature of that work must be "in the regular trade," § 48-106(1), of such employer. We do not believe that in the ordinary case, performing occasional tasks in Nebraska amount to a presence in Nebraska subjecting the employer to the coverage of the Nebraska Workers' Compensation Act. However, we do believe that the employer is subject to the Nebraska Workers' Compensation Act where workers, including support staff, are regularly performing work in Nebraska. See § 48-106.

As noted above, Trident Seafoods is incorporated in the State of Washington and is a "nonresident employer." Given the facts recited above and not repeated here, the evidence shows that Trident Seafoods manufactures and produces seafood; was not performing such work in this state; and did not frequently have employees either as support personnel or directly engaged in Nebraska "in the regular trade, business, profession, or vocation of such employer," § 48-106(1). Therefore, the Nebraska Workers' Compensation Act did not apply to Trident Seafoods.

Hassan contends that Trident Seafoods' recruiting activity subjected it to the Nebraska Workers' Compensation Act. We do not agree. Although Hassan showed that Trident Seafoods sent several of its recruiters to Nebraska to host occasional recruiting events, its presence in the state was incidental. And there is no claim that Trident Seafoods was a labor broker, which the appellate courts of this state have recognized as an

employer under the Nebraska Workers' Compensation Act. Compare *Morin v. Industrial Manpower*, 13 Neb. App. 1, 687 N.W.2d 704 (2004) (concluding that labor broker was employer under Nebraska Workers' Compensation Act).

The record shows that Trident Seafoods' contacts with the State of Nebraska were scant as compared with the activities identified in § 48-106(1), which establish jurisdiction over an employer. For completeness, we note our analysis undertaken pursuant to the Nebraska Workers' Compensation Act is consistent with the national trend which favors finding that state workers' compensation laws primarily cover the employee in the location of the employment relationship rather than other factors. See, e.g., 13 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 143.04[1] (2017).

Having determined that Trident Seafoods is not a statutory employer, and as a result, that the Nebraska Workers' Compensation Act does not apply, we need not address Hassan's other arguments, including his assertion that he is a covered employee under § 48-115(2). In the circumstances of this case, without a statutory employer, Hassan's status as an employee is of no legal significance. See *Jensen v. Floair, Inc.*, 212 Neb. 740, 326 N.W.2d 19 (1982).

CONCLUSION

Because Trident Seafoods is a nonresident and its limited activities in Nebraska are not within the definition of "employer" described by the Nebraska Workers' Compensation Act, the compensation court correctly determined it lacked jurisdiction and dismissed Hassan's petition for injuries sustained on the job in Alaska.

Affirmed.

Nebraska Supreme Court
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State of Nebraska, appellee, v.
Zachary A. Mueller, appellant.
921 N.W.2d 584

Filed January 18, 2019. No. S-17-387.

SUPPLEMENTAL OPINION

Appeal from the District Court for Morrill County: Leo P. Dobrovolny, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Per Curiam.

This case is before us on a motion for rehearing filed by the appellant, Zachary A. Mueller, concerning our opinion in *State v. Mueller*.[1] We overrule the motion, but we modify the opinion as follows:

In the statement of facts section, we withdraw the word "no" in the second sentence in the 16th paragraph and substitute the word "another" in the quotation.[2]

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[1] *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

[2] *Id.* at 786, 920 N.W.2d at 432.

In the analysis section, we withdraw the fifth paragraph[3] under the subheading "*Venue Instruction*" and substitute the following:

> We note that although Mueller argued that the court should have given a venue instruction based on § 29-1306, he did not actually tender such an instruction, and that therefore, to the extent Mueller asserts on appeal that the court erred when it refused a requested instruction, under the applicable standards set forth above, we do not ordinarily review whether the "tendered instruction" was a correct statement of the law or whether it was warranted by the evidence. See *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018). Here, we can review whether the venue instruction the court actually gave was proper under the circumstances; a consideration of whether the instruction should have included the content of § 29-1306 is an incidental part of that analysis.

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

Freudenberg, J., not participating.

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[3] *Id.* at 791, 920 N.W.2d at 435.



Nebraska Supreme Court

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State of Nebraska, appellee, v. Rolander L. Brown, appellant.

921 N.W.2d 804

Filed January 18, 2019. No. S-17-1039.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When 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. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court.
4. **Telecommunications: Records: Warrants: Probable Cause.** The government must generally obtain a warrant supported by probable cause before acquiring cell site location information from a wireless carrier.
5. **Constitutional Law: Search and Seizure: Evidence.** The exclusion of evidence obtained in violation of the Fourth Amendment is not a personal constitutional right. Rather, the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.
6. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Evidence.** The exclusionary rule does not apply to evidence obtained by police in objectively reasonable reliance on a statute later found to be unconstitutional.
7. **Trial: Evidence.** Evidence that is irrelevant is inadmissible.

8. **Evidence.** Evidence is relevant if it has 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.
9. ____. Relevancy requires only that the probative value be something more than nothing.
10. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
11. **Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
12. ____: ____. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.
13. **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 a 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.
14. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.
15. ____. 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.
16. ____. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

Following a jury trial, Rolander L. Brown was convicted of second degree murder and other offenses arising out of the death of Carlos Alonzo. Brown appeals his convictions and sentences, primarily arguing that in light of the U.S. Supreme Court's recent opinion in *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), the district court erred by denying his motion to suppress cell site location information. We find that the district court did not err in denying Brown's motion to suppress and that Brown's other assignments of error also lack merit. We affirm.

BACKGROUND

In the early morning hours of May 28, 2016, Alonzo was found dead in the front yard of a home near 20th and Lake Streets in Omaha, Nebraska. Alonzo died from a single gunshot wound to his head. The State filed several charges against Brown arising out of Alonzo's death: first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person.

Brown's Motion to Suppress.

As part of its investigation into Alonzo's death, the State submitted an application to the district court under the federal Stored Communications Act seeking an order compelling the disclosure of certain records pertaining to a cell phone that evidence showed was used by Brown. The court granted the order, and the State obtained the records from the relevant wireless carrier. The records included cell site location information (CSLI), the details of which are discussed below.

Brown moved to suppress the CSLI on the ground that the State obtained it in violation of his Fourth Amendment rights. The district court denied the motion to suppress.

Trial Evidence.

At trial, the State introduced evidence indicating that Alonzo was shot outside the residence of Doloma Curtis. Both Alonzo and Brown were dating Curtis at the time. Cell phone records introduced into evidence showed that Brown was communicating with Curtis via text message late in the evening of May 27, 2016, into the early morning hours of May 28. Cell phone records also showed that Curtis did not answer several calls from Brown after 1 a.m. The last such call was made at 2:23 a.m. CSLI from Brown's cell phone records indicated that Brown was in the area of 20th and Lake Streets when he made that call.

At approximately 2:24 a.m., Omaha's "ShotSpotter" location system detected a single gunshot in the vicinity of Curtis' home. Officers were dispatched to Curtis' home. When they arrived, they found Alonzo lying on his back on the sidewalk with a single gunshot wound to the head. During a subsequent search of the area, officers found a single Smith & Wesson .40-caliber shell casing in the grass not far from Alonzo's body.

Surveillance video from a nearby convenience store showed a sedan, which appeared to be missing the hubcap on its front passenger-side tire, back into a parking space near the building at 2:21 a.m. A male exited the car and headed toward Curtis' residence. The male ran back from the direction of Curtis' residence a few minutes later and drove out of the parking lot. Evidence at trial indicated that Brown had access to and drove a sedan that did not have a hubcap on its front passenger-side tire.

The State also relied heavily on the testimony of Parris Stamps. Stamps was a friend of Brown's. At the time of Alonzo's death, Stamps lived near 40th and Boyd Streets with another friend of Brown's, James Nelson. Stamps testified that in the early morning hours of May 28, 2016, Brown arrived at the house where Stamps and Nelson lived. According to Stamps, Brown told him and Nelson that he had just come

from Curtis' house, that he had been in an altercation with Alonzo, and that he "had to put [Alonzo] down." Stamps testified that Brown then pulled out a black Smith & Wesson .40-caliber handgun and removed the clip, which was missing one bullet. Stamps testified that after Brown shared this information, the men were concerned that Brown was "hot." Based on this concern, they traveled to Brown's apartment near 67th and Grover Streets to retrieve two firearms that belonged to Nelson.

Stamps was also allowed to testify, over Brown's objection, that he and his girlfriend were shot in January 2017 and that as a result of the shooting, he was hospitalized and his girlfriend died. Prior to this testimony, the district court instructed the jury that there was no evidence that Brown was responsible for this shooting and that the jury was to consider this evidence only for the effect that it had on Stamps.

Brown's cell phone records corroborated some elements of Stamps' testimony. The cell phone records showed that Brown called Nelson at 2:25 and 2:26 a.m. They also showed that Brown was in the area of Nelson's residence at approximately 2:34 a.m. Brown's cell phone records also showed that Brown returned to his apartment near 67th and Grover Streets around 3:15 a.m.

Convictions and Sentences.

The jury found Brown guilty of second degree murder, possession of a firearm by a prohibited person, and use of a firearm to commit a felony. The district court sentenced Brown to 90 to 120 years' imprisonment for second degree murder, 3 to 50 years' imprisonment for possession of a firearm by a prohibited person, and 10 to 20 years' imprisonment for use of a firearm to commit a felony. The district court ordered the sentence for possession of a firearm by a prohibited person to run concurrently with the sentence for second degree murder and the sentence for use of a firearm to commit a felony to run consecutively to the other two sentences.

Brown appealed his convictions and sentences. We subsequently granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Brown assigns, restated, that the district court erred (1) by denying his motion to suppress, because the CSLI was obtained in violation of his Fourth Amendment rights; (2) by denying his motion to suppress, because the CSLI was obtained in violation of the Stored Communications Act; (3) by allowing Stamps to testify about being shot in January 2017; and (4) by imposing excessive sentences.

STANDARD OF REVIEW

[1] When 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. Barbeau*, 301 Neb. 293, 917 N.W.2d 913 (2018). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *Id.*

[2] 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. *Lindsay Internat. Sales & Serv. v. Wegener*, 301 Neb. 1, 917 N.W.2d 133 (2018).

[3] An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court. *State v. Steele*, 300 Neb. 617, 915 N.W.2d 560 (2018).

ANALYSIS

Fourth Amendment.

Brown contends that by obtaining CSLI from his cell phone without a warrant supported by probable cause, law enforcement violated his Fourth Amendment rights. Brown argues the

district court thus erred by denying his motion to suppress. For the reasons set forth below, we disagree.

CSLI is generated by cell phone providers. Individual cell phones function by communicating with "cell sites," radio antennas that are mounted on towers and other structures. See *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). When a cell phone connects to a cell site, a time-stamped record is produced. This record is known as CSLI. See *id.* Because the cell phone will connect to the cell site with the best signal, CSLI can be used to determine the location of the cell phone when the connection was made. See *id.* Cell phone providers collect and store CSLI for their own purposes, but because it can be used to determine where a cell phone was at a particular time, it can be useful to law enforcement as well. See *id.*

In this case, law enforcement relied on the federal statute known as the Stored Communications Act, see 18 U.S.C. §§ 2701 to 2711 (2012 & Supp. V 2017), to request and obtain CSLI relating to the cell phone believed to be used by Brown. Under the Stored Communications Act, the government may obtain a court order that requires a cell phone provider to disclose a customer's records if it can demonstrate "specific and articulable facts showing that there are reasonable grounds to believe [the information sought is] relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Section 2703(d) does not require the government to show probable cause. *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016).

On May 31, 2016, a city of Omaha police officer submitted to the district court an application requesting an order compelling disclosure of CSLI pertaining to the cell phone believed to be used by Brown. The district court issued an order that same day finding that in the language of § 2703(d), the applicant "has offered specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material

to an ongoing criminal investigation." The order compelled the cellular service provider to turn over the CSLI to the city of Omaha Police Department. Brown later moved to suppress the CSLI, contending that it was obtained in violation of his Fourth Amendment rights.

The district court denied Brown's suppression motion, finding that the result was controlled by *Jenkins, supra*. *Jenkins*, which was released a few months after law enforcement obtained the CSLI in this case, held that individuals do not have a reasonable expectation of privacy in CSLI and that thus, the acquisition of CSLI does not implicate, let alone violate, the Fourth Amendment.

[4] While this case was on appeal, however, the U.S. Supreme Court concluded in *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), that individuals *do* have a reasonable expectation of privacy in the record of physical movements captured by CSLI. Based on this conclusion, the Court held that "the Government must generally obtain a warrant supported by probable cause before acquiring such records." *Id.*, 585 U.S. at 316.

As the State is forced to concede, our decision in *Jenkins* was effectively overruled by *Carpenter*. And, without the benefit of *Jenkins*, the State also concedes that the acquisition of CSLI without a warrant supported by probable cause violated Brown's Fourth Amendment rights.

The fact that Brown's Fourth Amendment rights were violated, however, does not necessarily mean that it was error for the district court to deny Brown's motion to suppress. See *Herring v. United States*, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009) (explaining that application of the exclusionary rule is not "a necessary consequence of a Fourth Amendment violation"). Indeed, the U.S. Supreme Court has observed that the exclusionary rule is to be a "last resort" and not a "first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006). We thus proceed to the question of whether the exclusionary rule applies here.

[5] The exclusion of evidence obtained in violation of the Fourth Amendment is "'not a personal constitutional right.'" *Davis v. United States*, 564 U.S. 229, 236, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), quoting *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). Rather, the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017). With this purpose in mind, the U.S. Supreme Court has recognized a number of circumstances in which application of the exclusionary rule would not sufficiently deter Fourth Amendment violations and thus the rule does not apply. See, e.g., *Davis, supra* (exclusionary rule does not apply when officers conduct search in objectively reasonable reliance on binding appellate precedent); *Herring, supra* (exclusionary rule does not apply where officers reasonably relied on incorrect information in warrant database); *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (exclusionary rule does not apply when police conduct search in objectively reasonable reliance on warrant later held invalid).

[6] One circumstance recognized to not trigger the exclusionary rule is of particular relevance to this case. In *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987), the U.S. Supreme Court held that the exclusionary rule did not apply to evidence obtained by police in objectively reasonable reliance on a statute later found to be unconstitutional. As the Court explained, unless a statute is "clearly unconstitutional," application of the exclusionary rule when the officer acts in reliance on a statute would not serve the purpose of deterring Fourth Amendment violations "[i]f the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.*, 480 U.S. at 349, 350.

We have previously followed *Krull*, declining to apply the exclusionary rule when officers obtained evidence in reasonable reliance on a statute later declared unconstitutional. See *Hoerle, supra*.

The rationale for not applying the exclusionary rule in *Krull* applies with full force here. As summarized above, law enforcement obtained the CSLI without first securing a warrant supported by probable cause, but did so as authorized by the Stored Communications Act. It cannot be said that by doing so, law enforcement relied on a statute that was clearly unconstitutional. At the time officers obtained the CSLI in this case, many courts had held, as we did in *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016), that CSLI did not implicate Fourth Amendment protection. See, e.g., *U.S. v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc); *U.S. v. Davis*, 785 F.3d 498 (11th Cir. 2015) (en banc); *In re U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013). And, in *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 2214, 201 L. Ed. 2d 507 (2018), while the U.S. Supreme Court ultimately reached a contrary conclusion, it acknowledged that the question did "not fit neatly under existing precedents."

By obtaining the CSLI in this case under the Stored Communications Act and without the benefit of the U.S. Supreme Court's not-yet-issued decision in *Carpenter*, officers were merely following the statute as written. That is not the type of police activity the exclusionary rule seeks to deter. See *Davis v. United States*, 564 U.S. 229, 241, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), quoting *Leon, supra* ("the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity'").

We are hardly the first court to conclude that CSLI obtained under the Stored Communications Act prior to *Carpenter* is not subject to exclusion. Many other courts have found the same, and Brown has not directed us to any that concluded otherwise. See, e.g., *U.S. v. Curtis*, 901 F.3d 846 (7th Cir. 2018); *U.S. v. Joyner*, 899 F.3d 1199 (11th Cir. 2018); *U.S. v. Chavez*, 894

F.3d 593 (4th Cir. 2018); *U.S. v. Chambers*, No. 16-163-cr, 2018 WL 4523607 (2d Cir. Sept. 21, 2018).

Finally, we note that Brown's only argument against the application of the exclusionary rule is misplaced. Brown contends that the State should not be able to argue for the first time on appeal that an exception to the exclusionary rule applies. Brown argues that he may have been able to introduce factual evidence that would indicate law enforcement officers did not act reasonably in this case and that thus, the exclusionary rule should apply. Brown claims he did not place such evidence into the record at the district court because the State did not assert there that the exclusionary rule should not apply even if Brown's Fourth Amendment rights were violated. But, in fact, the State did make such an assertion in the district court. The State primarily argued that there was no Fourth Amendment violation, but counsel for the State also argued at a hearing on Brown's motion to suppress that even if the Fourth Amendment were violated, the exclusionary rule should not apply, because the officers acted in good faith. While it is not clear to us what evidence Brown could have offered to negate the applicability of *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987), under these circumstances, Brown cannot point us to any such evidence, nor can he claim that he lacked the opportunity to present it to the district court.

For these reasons, we find that even though the acquisition of CSLI violated Brown's Fourth Amendment rights, the district court did not err by denying Brown's motion to suppress.

Stored Communications Act.

In addition to his Fourth Amendment argument, Brown contends that the CSLI should have been suppressed for another reason. Brown contends that the affidavit submitted in support of the court order failed to establish reasonable grounds to believe that the CSLI was relevant and material to an ongoing criminal investigation, as required by the Stored

Communications Act. Once again, we find that Brown's argument lacks merit.

We need not analyze the affidavit or the showing required under the Stored Communications Act in order to dispose of Brown's argument. This is so because even assuming the affidavit failed to make the required showing under the Stored Communications Act, it does not follow that the CSLI should have been suppressed.

The Stored Communications Act provides a number of specific remedies for violations thereof, but suppression of evidence in a criminal case is not one of them. See 18 U.S.C. § 2707(b) and (d). Additionally, the act provides that the listed remedies are exclusive. 18 U.S.C. § 2708. On this basis, many courts have found that suppression is not an available remedy even if evidence is obtained in violation of the act. See, e.g., *U.S. v. Gasperini*, 894 F.3d 482 (2d Cir. 2018); *U.S. v. Guerrero*, 768 F.3d 351 (5th Cir. 2014); *U.S. v. Clenney*, 631 F.3d 658 (4th Cir. 2011); *U.S. v. Perrine*, 518 F.3d 1196 (10th Cir. 2008); *U.S. v. Madison*, 643 Fed. Appx. 886 (11th Cir. 2016).

We agree that suppression is not an available remedy for a violation of the Stored Communications Act, and we thus find no merit to Brown's argument that the evidence should have been suppressed.

Stamps' Testimony.

Brown next argues the district court erred by allowing Stamps to testify that months before trial, he and his girlfriend were shot, and that as a result, he suffered serious injury and his girlfriend died. Brown argues that this evidence was irrelevant and that even if it were relevant, it should have been excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), because its probative value was outweighed by the danger of unfair prejudice. Brown argues the district court committed reversible error by allowing the testimony. We disagree.

[7-9] Evidence that is irrelevant is inadmissible. Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2016); *Lindsay Internat. Sales & Serv. v. Wegener*, 301 Neb. 1, 917 N.W.2d 133 (2018). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2016). The bar for establishing relevance is not a high one. Relevancy requires only that the probative value be "'something more than nothing.'" *Lindsay Internat. Sales & Serv.*, 301 Neb. at 16, 917 N.W.2d at 144. We will not reverse a trial court's determination regarding the relevancy of evidence unless it constitutes an abuse of discretion. See *id.*

Some background regarding Stamps' cooperation in this case is pertinent to the analysis. Stamps' cooperation with law enforcement in the investigation of Brown was inconsistent. It began in July 2016 while Stamps was under arrest and being questioned for an unrelated homicide. At that time, Stamps offered to provide information regarding the death of Alonzo in exchange for a bond reduction. According to Stamps, he provided some information implicating Brown in Alonzo's death, but not all the information he could have provided. Stamps received a bond reduction and was released from jail.

Stamps later came to regret this act of cooperation. Stamps attended Brown's preliminary hearing with several of Brown's other friends. At the hearing, the officer to whom Stamps had provided information implicating Brown identified Stamps as a source of information regarding Brown's involvement. Stamps responded by executing an affidavit denying the statements the officer had attributed to him and threatened to sue the officer for defamation. Stamps testified that he signed the affidavit in an attempt to be "loyal" to Brown.

Stamps would reverse course again, however. He testified that on January 26, 2017, he and his girlfriend were shot as they sat in a car, and that as a result, he was injured and his

girlfriend died. Stamps testified that after he was released from the hospital, he came to law enforcement and indicated a desire to "cooperate on everything that I knew, clear my conscience."

The State argued in the district court and now argues on appeal that the fact that Stamps was shot is relevant because it explains why he testified against Brown after initially claiming that an officer defamed him by claiming he offered information against Brown. According to the State, Stamps' experience as a victim of gun violence prompted a desire to "clear [his] conscience" and thus was relevant to his credibility. Although Stamps does not appear to have explicitly testified that his ultimate decision to testify against Brown was influenced by being shot, that can be fairly implied from his testimony.

We believe the district court did not abuse its discretion by finding such testimony to be relevant. Stamps wavered between providing partial information to law enforcement regarding Brown's involvement in Alonzo's death, to denying having provided any information at all, to providing a fuller account of Brown's involvement. The fact that he was shot provided an explanation for his ultimate decision to testify, and thus the district court did not abuse its discretion by finding it to be relevant to his credibility.

[10-12] We also conclude that the district court did not abuse its discretion by finding that the testimony was not subject to exclusion under rule 403. Under rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018). Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. *Id.* It speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis. *Id.*

Brown argues that even if the fact that Stamps and his girlfriend were shot were relevant to his credibility, any relevance

was outweighed by the danger of unfair prejudice. Brown argues that upon hearing the testimony that Stamps and his girlfriend were shot, the jury would assume that Brown or his associates were responsible. The district court, however, specifically instructed the jury that there was no evidence Brown was involved in the shooting and that the evidence was not being offered for this purpose. The district court's instruction was as follows:

> [Y]ou're going to hear some testimony on a line of questioning that relates to an event in . . . Stamps' life. It's being offered for the limited [purpose] of showing the effect that that event had on . . . Stamps. There is no evidence of and there is no suggestion by the State that the event you're going to hear described had anything at all to do with the defendant, . . . Brown, in any manner or in any fashion. This is evidence that you are to hear solely for the limited purpose . . . of the effect of this event on the witness, . . . Stamps.

In its final jury instructions, the district court again instructed the jury regarding evidence received for a limited purpose, stating, "During the trial, I called your attention to some evidence that was received for a specific limited purpose. You must consider that . . . evidence only for those limited purposes and for no other reason."

We have recently held that while a limiting instruction or an instruction to disregard does not automatically eliminate any risk of unfair prejudice, such an instruction can sufficiently mitigate the risk of unfair prejudice in a particular case. See *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017). In *Rocha*, we held that the district court did not abuse its discretion in admitting opinion statements made by a law enforcement officer in a recorded interview of the defendant. We noted that the officer's statements had minimal probative value and that they "carr[ied] a special risk of unfair prejudice." *Id.* at 744, 890 N.W.2d at 201. Even so, we held that the district court did not abuse its discretion by admitting the statements.

We pointed to instructions from the trial court, in which it informed the jury that it should not consider the officer's statements as substantive evidence and that they should not be given weight in determining the truthfulness of the defendant's statements in response. We held these instructions mitigated the risk of unfair prejudice. *Id.*

For similar reasons, we reach the same conclusion here. The district court did not allow the State to introduce evidence suggesting Brown had anything to do with the shooting of Stamps and his girlfriend. And to the extent any juror was inclined to speculate about Brown's involvement, the district court's instruction informed jurors that there was "no evidence" and "no suggestion" Brown had anything to do with the shooting and that jurors were to consider Stamps' testimony only for the effect the incident had on him. We believe these instructions mitigated the risk of unfair prejudice and thus cannot say the district court abused its discretion by admitting the testimony.

Excessive Sentences.

Lastly, we address Brown's claim that he received excessive sentences. He does not dispute that the sentences imposed were within statutory limits for his respective offenses. Rather, he argues that the district court did not adequately account for his difficult upbringing in fashioning his sentences.

[13-16] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a 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. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018). Relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense

and (8) the amount of violence involved in the commission of the crime. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*. And generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

Having reviewed the record, we cannot say that the district court abused its discretion in sentencing Brown. The district court stated that in sentencing Brown, it had considered, among other things, a presentence investigation report and a sentencing memorandum provided by Brown's counsel. Both the report and the sentencing memorandum provided background on Brown's difficult upbringing. We thus have no reason to believe that the district court failed to consider Brown's upbringing along with other factors in its sentencing calculus. Those other factors, however, would include the fact that Brown had been previously convicted of three felonies and was found responsible for a shooting that left a man dead. In light of the relevant sentencing factors, we conclude that the district court did not abuse its discretion in sentencing Brown.

CONCLUSION

We conclude that the district court did not err in denying Brown's motion to suppress, in admitting the testimony that Stamps and his girlfriend were shot, or in sentencing Brown. Consequently, we affirm.

Affirmed.

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

Kim M. Thompson, an individual, appellant, v. Millard Public School District No. 17 and Millard Public Schools Board of Education, appellees.

921 N.W.2d 589

Filed January 18, 2019. No. S-18-140.

1. **Judges: Recusal.** A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.
2. ____: ____. A judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
3. **Judges: Recusal: Presumptions.** A party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality.
4. **Rules of the Supreme Court: Judges: Witnesses: Words and Phrases.** For purposes of Neb. Rev. Code of Judicial Conduct § 5-302.11(A)(2)(d), a material witness is one who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about those matters; a person who is capable of testifying in some relevant way in a legal proceeding.
5. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
6. **Judges: Recusal: Time.** The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.
7. **Judges: Recusal: Appeal and Error.** The three-factor special harmless error test in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S.

847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988), should be used for determining when vacatur is the appropriate remedy for a trial judge's failure to recuse himself or herself when disqualified under the Nebraska Revised Code of Judicial Conduct.

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

Abby Osborn and Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Duncan A. Young, Jeff C. Miller, and Keith I. Kosaki, of Young & White Law Office, for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

Kim M. Thompson resigned from her employment with a school district after the district, asserting she had been insubordinate, offered her the option to resign in lieu of termination. Thompson then filed suit against Millard Public School District No. 17 and its school board (collectively Millard). In the midst of her employment discrimination suit against Millard, the district court judge assigned to the case became aware that due to a new claim asserted after counsel appeared for Thompson, his brother-in-law was a potential witness. At that point, Thompson moved for recusal and Millard moved for summary judgment on Thompson's remaining claims. The district court overruled the motion to recuse and granted summary judgment on all remaining claims. Because the judge's brother-in-law was likely to be a material witness, the judge should have recused himself. We vacate in part, and remand for a new summary judgment hearing with a different judge.

BACKGROUND

Thompson, a former project manager of Millard, had a consensual extramarital affair with an independent contractor for Millard. After their tumultuous breakup, the contractor's wife sent a complaint to Millard's superintendent about privacy and safety concerns for her children due to Thompson's online and offline behavior. In July 2014, following an insubordinate act, Millard requested Thompson's resignation in lieu of termination of her employment.

Acting without counsel, Thompson originally brought suit against Millard claiming (1) retaliation, (2) hostile work environment, (3) false light/invasion of privacy, (4) intentional infliction of emotional distress, and (5) breach of contract. Millard moved for partial summary judgment on claims (3) through (5). The district court granted summary judgment on those claims. After they were disposed, Thompson obtained counsel. Millard then moved for summary judgment on the retaliation and hostile work environment claims.

At the summary judgment hearing, off the record, the district court judge became aware that his brother-in-law, Stephen Mainelli, was a potential witness for Thompson. Thompson moved for recusal.

At the recusal hearing, Millard stated that it was undisputed that Mainelli was hired in January 2014 as a project manager and assumed the same job description as Thompson. Thompson argued she intended to call Mainelli as a witness, because his testimony would be relevant to show other areas or examples of discrimination. Millard argued that even if Mainelli was a witness, he would not be competent to testify, because there was no issue of his hiring, salary, or Thompson's firing about which he could competently testify. The court took the matter under advisement.

While the recusal motion remained under advisement, Thompson amended her complaint and added a claim under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012). The amended complaint alleged as follows:

> In December, 2013, [Millard] hired [Mainelli] as project manager to begin working January 31, 2014, which was [Thompson's] same position;
>
> . . . His rate of pay at hire was $96,163. [Thompson's] salary while being in the job 8 and ½ years of [sic] $88,985;
>
> . . . The failure to pay [Thompson] the same sum of money as male employees in a similar position is a willful violation of the Equal Pay Act . . . .

Shortly after the complaint was amended, the court issued an order denying the motion to recuse. Reasoning that because Millard would not call Mainelli as a witness and the outcome of Thompson's litigation would not impact Mainelli, the court concluded that the judge's impartiality would not be questioned under an objective standard of reasonableness. The court overruled the motion for recusal.

Millard moved for summary judgment on the Equal Pay Act claim. Thompson renewed her motion to recuse. At the summary judgment and renewed recusal hearing, Thompson argued that Mainelli's testimony would be relevant for the comparison of qualifications and finding a pretextual motive for hiring Mainelli at a higher pay. Millard argued that Mainelli's testimony was not relevant, because he could not testify to the decisionmaking process behind his employment. From the bench, the court overruled the renewed motion for recusal.

In analyzing the merits of the Equal Pay Act claim, the court compared both Thompson's and Mainelli's work experiences. The court extensively described Mainelli's 38 years of construction industry experience. The court stated that Mainelli had "exemplary professional qualifications" and that Thompson's former supervisor knew Mainelli had "a considerable amount of skill and a depth of experience and technical knowledge." Yet when the court discussed Thompson's qualifications, it summarized her 15 years of experience in two sentences. The

judge granted Millard's motions for summary judgment on the three remaining claims.

Thompson filed a timely appeal, which we moved to our docket.[1]

ASSIGNMENTS OF ERROR

Thompson assigned, condensed and restated, that the district court erred in (1) failing to recuse himself, (2) applying the prohibited market forces theory, (3) failing to find a dispute of material fact that Millard retaliated against Thompson for engaging in protected activity, and (4) failing to find a dispute of material fact that Millard violated Thompson's right to be free from discrimination, harassment, and a hostile work environment.

STANDARD OF REVIEW

[1] A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.[2]

ANALYSIS

Appearance of Impartiality

[2,3] A judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[3] A party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality.[4]

Thompson argues that because Mainelli was listed as a witness and he was the comparator for the Equal Pay Act claim, a reasonable person would question the judge's impartiality

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[1] Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[2] *State v. Thompson*, 301 Neb. 472, 919 N.W.2d 122 (2018).

[3] *Id.*

[4] *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014).

and the judge should have recused himself. Thompson contends that before the events with the contractor came to light, Thompson's supervisor had been grooming her to take over his job; but afterward, a decision was made to hire Mainelli and groom him to take over that position and terminate Thompson's employment. This, she argues, was by itself sufficient to demonstrate that an objectively reasonable person would question the judge's impartiality. She also contends that the judge's failure to recuse is not harmless error and that the cause must be remanded for assignment to a new judge to erase the taint of bias.

However, Thompson conceded at oral argument that summary judgment on Thompson's original claims (3) through (5) was proper and unaffected by the later development regarding the judge's brother-in-law. Therefore, in determining whether recusal was mandatory and how to remedy its denial, we discuss recusal only in relation to the remaining claims of retaliation, a hostile work environment, and the Equal Pay Act.

Judicial disqualification is codified under Neb. Rev. Code of Judicial Conduct § 5-302.11. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances."[5] One specific circumstance that requires a judge to disqualify himself or herself is when a person within the "fourth degree of relationship" to the judge, the judge's spouse, or the judge's domestic partner is likely to be a material witness in the proceeding.[6]

Neither party disputes that Mainelli was within the fourth degree of relationship to the judge. Under the terminology section of the judicial code, a "fourth degree of relationship" includes brothers and sisters. During the first motion for recusal, Thompson clarified on the record that the judge's

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[5] § 5-302.11(A).

[6] See § 5-302.11(A)(2)(d).

wife is Mainelli's sister. Because the judge's wife is in a fourth degree relationship with Mainelli, so is the judge.[7]

[4] Although Nebraska case law has discussed when a judge is a material witness for purposes of being compelled to testify regarding a case over which she or he was or had been presiding,[8] we have not addressed a situation where a witness related to the judge is a material witness, such that recusal would be mandatory under § 5-302.11(A)(2)(d). The judicial code does not define "material witness." Black's Law Dictionary defines material witness as "[a] witness who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about those matters; a person who is capable of testifying in some relevant way in a legal proceeding."[9] We adopt this definition for purposes of § 5-302.11(A)(2)(d).

This definition appears consistent with decisions from other states which have considered disqualification of a judge where the judge has a relationship with someone who is a witness or has an interest in the case. The Louisiana Supreme Court, in *State v. Daigle*,[10] reasoned that a judge should have recused himself in a capital murder trial when the victim's widow had a longtime working relationship with the judge, they were social media friends, and she was designated as a "penalty phase witness." In *People v. Suazo*,[11] the Supreme Court of

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[7] See *Morton v. Benton Publishing Co.*, 291 Ark. 620, 727 S.W.2d 824 (1987) (by affinity, judge was in same degree of relationship to wife's relative as wife was by consanguinity).

[8] See, *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006); *Village of Exeter v. Kahler*, 9 Neb. App. 1, 606 N.W.2d 862 (2000).

[9] Black's Law Dictionary 1839 (10th ed. 2014). See, also, *Rubashkin v. United States*, Nos. 13-CV-1028-LRR, 08-CR-1324-LRR, 2016 WL 237119 (N.D. Iowa Jan. 20, 2016).

[10] See, *State v. Daigle*, 241 So. 3d 999, 1000 (La. 2018) (analyzing recusal under Due Process Clause of 14th Amendment using framework from *Rippo v. Baker*, 580 U.S. 285, 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017)).

[11] See *People v. Suazo*, 120 A.D.3d 1270, 992 N.Y.S.2d 138 (2014).

New York, Appellate Division, remanded a hearing to a different judge when the original judge was the trier of fact and had to determine the credibility of a detective who was married to the judge's law clerk. The appellate court reasoned that the judge should have recused himself to maintain the appearance of impartiality. In *Ex parte Jackson*,[12] the Supreme Court of Alabama reasoned that a judge's brother's affiliation as a "director" of the defendant's bank, even though the legal relationship of the bank and brother may not be true, was sufficient to reasonably question the judge's impartiality and that the judge should have recused himself. We find these cases persuasive and consistent with this definition of a material witness.

Mainelli's testimony would have a logical connection and relevance to the Equal Pay Act claim. Mainelli was the sole comparator for the Equal Pay Act claim and potentially would have relevant information of the hiring process. From the hiring process and salary determination, as well as the testimony of his experience and qualifications for the job, Mainelli's testimony was likely to make him a material witness. Contrary to Millard's argument that Mainelli was simply one of 3,000 full- and part-time employees of Millard, Mainelli was the only employee who shared Thompson's job. Out of Millard's 3,000 employees, the only employees whose experiences and qualifications were relevant to the Equal Pay Act claim were Thompson and Mainelli. Thus, Mainelli's testimony would be relevant and have a logical connection to the Equal Pay Act claim, making him likely to be a material witness, such that one would reasonably question the judge's impartiality. Therefore, § 5-302.11(A)(2)(d) mandated disqualification of the judge.

Timeliness

[5,6] Because the judicial code mandated disqualification of the judge, we must determine if Thompson waived her right to

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[12] See *Ex parte Jackson*, 508 So. 2d 235 (Ala. 1987).

obtain disqualification. A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.[13] The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.[14]

Thompson moved for recusal at the earliest practicable opportunity. The earliest opportunity to request recusal was after the judge told the parties, at the summary judgment hearing, that Mainelli was his brother-in-law. At that point, Thompson did so. After Thompson added the Equal Pay Act claim to the complaint, specifically naming Mainelli as the comparator, she renewed her motion to recuse. Not only did Thompson submit her motion to recuse at the earliest practicable opportunity, but she renewed the motion at each practicable opportunity. Thus, Thompson did not waive her right to obtain judicial disqualification.

Appropriate Remedy

[7] Because the judge's impartiality might reasonably be questioned and Thompson did not waive her right to obtain disqualification, we analyze whether vacatur is the appropriate remedy under the three-factor special harmless error test in *Liljeberg v. Health Services Acquisition Corp.*[15] The *Liljeberg* test should be used for determining when vacatur is the appropriate remedy for a trial judge's failure to recuse himself or herself when disqualified under the Nebraska Revised Code of Judicial Conduct.[16] In *Liljeberg*, "the Court considered three factors: (1) the risk of injustice to the parties in the particular

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[13] *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011).

[14] *Id.*

[15] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

[16] See *Tierney, supra* note 13.

case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process."[17]

As we noted in *Tierney v. Four H Land Co.*,[18] we first consider the third factor, because it is the most important. In this case, the risk of undermining the public's confidence in the judicial process is high. Although the judge did inform the parties of his relationship with Mainelli, the circumstances changed once Thompson added the Equal Pay Act claim. At that point, the judge was conscious of the role Mainelli could play in the litigation.

As the U.S. Supreme Court said in a somewhat comparable factual situation, "These facts create precisely the kind of appearance of impropriety that [the federal judicial code] was intended to prevent."[19] When Thompson first moved to recuse the judge, the Equal Pay Act claim had not yet been asserted. At that point, there was not an appearance of impartiality, because Mainelli would not have been relevant for the retaliation or hostile work environment claims. But once Thompson added the Equal Pay Act claim, Mainelli became highly relevant to the litigation. At that point, the judge's impartiality was reasonably questioned.[20] The judge's impartiality was questioned further when he evaluated and compared his brother-in-law's experience, qualifications, and hiring process with Thompson. The risk of undermining the public's confidence in the judicial process is simply too high under these circumstances.

The risk to future litigants will be lessened by vacatur. Although this particular circumstance is rarely seen, when the circumstance does appear, as it does here, it imports a

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[17] *Id.* at 670, 798 N.W.2d at 595.

[18] See *id.*

[19] *Liljeberg, supra* note 15, 486 U.S. at 867.

[20] See *Liljeberg, supra* note 15 (analyzing when judge should have become aware and did become aware of fiduciary conflict which raised appearance of impropriety).

reasonable question of the judge's impartiality. This case will prevent injustice in future cases by encouraging judges to more carefully examine possible grounds for disqualification. "Thus, under *Liljeberg*, the lower court's judgment must be vacated unless the risk of unfairness to the parties cautions against it."[21]

Regarding the fairness to these particular litigants, the district court's analysis of the merits suggests a greater risk of unfairness in upholding the judgment than in directing a new judge to review the issues. The court's lengthy analysis of Mainelli's experience and qualifications in the summary judgment order is suggestive. Millard made no showing of special hardship by reason of reliance on the original judgment. "There is little to lose and much to be gained by letting a different judge examine the [party's] motions for summary judgment."[22] Under the *Liljeberg* test, vacatur is the appropriate remedy in this case.

Because an analysis on the merits would not erase the taint of bias, we express no opinion on the merits of the remaining claims. Therefore, we do not address Thompson's other assignments of error. Our decision affects only those orders made after Thompson amended the complaint to add the Equal Pay Act claim.

CONCLUSION

Therefore, we affirm the judgment to the extent of the claims disposed before the assertion of the Equal Pay Act claim. We vacate the judgment regarding the disposition of the retaliation, hostile work environment, and Equal Pay Act claims and remand the cause for a new summary judgment hearing before another judge to be appointed by this court.

Affirmed in part, and in part vacated and remanded with directions.

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[21] *Tierney, supra* note 13, 281 Neb. at 672, 798 N.W.2d at 597.

[22] *Id*. at 672-73, 798 N.W.2d at 597.

Nebraska Supreme Court
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Leon V. and Cristy V. on behalf of Paige V., a minor child, appellees, v. Nebraska Department of Health and Human Services et al., appellants.

921 N.W.2d 584

Filed January 18, 2019. No. S-18-197.

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.** An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. **Administrative Law: Judgments: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, an appellate court decides such questions of law independently of the decision made by the court below.
5. **Administrative Law: Statutes.** Properly adopted and filed agency regulations have the effect of statutory law.
6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed in part, and in part reversed and remanded with directions.

Douglas J. Peterson, Attorney General, and Ryan C. Gilbride for appellants.

Ann C. Mangiameli and Joanna Uden, Senior Certified Law Student, of Legal Aid of Nebraska, for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Because the Nebraska Department of Health and Human Services (DHHS) found that Paige V.'s gastrointestinal impairments would not last for at least 12 months, it determined that Paige was ineligible for Medicaid funding through the Nebraska Medicaid Assistance Program and hence ineligible for "assistance to the aged, blind, or disabled" (AABD) Medicaid waiver services. See Neb. Rev. Stat. § 68-1001 et seq. (Reissue 2018). Leon V. and Cristy V., on behalf of their minor child Paige, sought review by the district court for Lancaster County under the Administrative Procedure Act (APA). The district court found that the evidence showed that Paige was disabled for purposes of determining Medicaid benefits. The district court reversed the DHHS order and remanded the matter with directions to award Paige AABD waiver services and reimburse Leon and Cristy for medical expenses. DHHS and two of its officers, in their official capacities, appeal. Although they do not dispute the finding that Paige was disabled for determining Medicaid eligibility, they claim that the district court erred in its instructions on remand when it directed DHHS to award Medicaid waiver services and retroactive medical expenses. We affirm that portion of the order of the district court which found that Paige is disabled, but because we find error in the scope of the remand, we reverse the district court's order of remand, and we remand the matter with directions on further proceedings.

STATEMENT OF FACTS

Leon and Cristy, on behalf of their minor child Paige, applied for Medicaid on October 27, 2016. Knowing that Paige would be ineligible for Medicaid due to their household income, Leon and Cristy requested AABD on November 4. Paige was 12 years old at the time of the application. In 2016, due to a serious gastrointestinal medical condition, Paige was hospitalized several times and underwent surgeries.

DHHS made a disability determination in which it concluded that Paige would not be sick long enough to meet the 12-month disability durational requirement and denied the application. Leon and Cristy requested an administrative hearing regarding Paige's disability determination. Following the hearing, DHHS issued a written decision on April 12, 2017, in which it found that Paige's impairments would not last for at least 12 months and affirmed the denial.

Leon and Cristy sought review of the disability determination by the district court under the APA. In its January 30, 2018, order, the district court found that Leon and Cristy had established by a preponderance of the evidence that Paige met the requirement for a qualifying impairment expected to last for at least 12 months and was therefore disabled under applicable regulations. The district court reversed the April 12, 2017, order of DHHS and remanded the cause "with directions to award [Leon and Cristy] AABD Medicaid [w]aiver [s]ervices and reimburse [Leon and Cristy] for medical expenses which should have been covered on and after October 1, 2016." In its order, the district court denied Leon and Cristy's request for attorney fees, from which denial no appeal has been taken.

DHHS and its officers appeal.

ASSIGNMENT OF ERROR

Although DHHS and its officers do not contest the district court's finding of disability and medical eligibility, they claim that the district court erred when it remanded with directions to DHHS to award Paige Medicaid waiver services and retroactive medical expenses.

STANDARDS OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017). 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*. An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Lingenfelter v. Lower Elkhorn NRD*, 294 Neb. 46, 881 N.W.2d 892 (2016).

[4] To the extent that the meaning and interpretation of statutes and regulations are involved, an appellate court decides such questions of law independently of the decision made by the court below. See *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015).

ANALYSIS

At the outset, DHHS and its officers note on appeal that there is a distinction between eligibility for Medicaid and eligibility for receipt of AABD Medicaid waiver services. They assert generally that this distinction was overlooked by the district court, leading it to exceed the proper scope of its order of remand. On appeal, they contend specifically that because additional criteria must be satisfied before Paige is eligible for or could receive AABD Medicaid waiver services, they cannot comply with the district court's directions on remand as a matter of law. We agree.

Relevant Regulations.

AABD services are administered by DHHS and consist of money payments to, medical care in behalf of, or any type of remedial care in behalf of needy individuals. See § 68-1001. In

a recent case, we have described Medicaid waiver services as intended for clients who are at a nursing-home level of care but choose to receive home and community-based services. *Merie B. on behalf of Brayden O. v. State*, 290 Neb. 919, 863 N.W.2d 171 (2015).

[5,6] DHHS promulgates rules and regulations providing for services to AABD clients. § 68-1001.01. Properly adopted and filed agency regulations have the effect of statutory law. *Merie B. on behalf of Brayden O. v. State, supra*. When an appeal calls for statutory or regulatory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. See *id*. Statutory language is to be given its plain and ordinary meaning, and we will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Merie B. on behalf of Brayden O. v. State, supra*.

The provisions of 480 Neb. Admin. Code, ch. 5 (1998), are applicable to this case. Under the regulations, Medicaid waiver services are provided statewide to eligible clients for whom a slot is available. 480 Neb. Admin. Code, ch. 5, § 002. Under § 002, to be eligible for waiver services, clients must

> 1. Be eligible for the Nebraska Medical Assistance Program (NMAP);
>
> 2. Have participated in an assessment with a services coordinator;
>
> 3. Meet the Nursing Facility (NF) level of care criteria (471 NAC 12-000);
>
> 4. Have care needs which could be met through waiver services at a cost that does not exceed the cap; and
>
> 5. Have received an explanation of NF services and waiver services and elected to receive waiver services.

The regulations contained in 480 Neb. Admin. Code, ch. 5, § 003.B, and other regulations anticipate that a sequence of various events occur prior to becoming eligible for Medicaid waiver services. For example, § 003.B4(c) provides that a

"child's waiver eligibility period may begin no earlier tha[n] the date of the guardian's signature on the consent form" and the "waiver consent form is not valid . . . until the child's eligibility for Medicaid has been determined." Thus, to the extent that Leon and Cristy contend that the regulations require simultaneous eligibility determinations, we do not agree, and in any event, the parties agree that not all criteria in 480 Neb. Admin. Code, ch. 5, § 002 et seq., have been achieved. However, to the extent that Leon and Cristy assert that an ultimate award of waiver services may be retroactive, the appellate briefing of DHHS and its officers appears to agree.

DHHS Cannot Provide Medicaid Waiver Services Based Solely on Determination of Eligibility for Medicaid.

The district court conducted a limited review of the DHHS determination that Paige was not disabled for purposes of eligibility for Medicaid. Based on the evidence and the law, the district court found that Paige satisfied the first requirement of 480 Neb. Admin. Code, ch. 5, § 002, i.e., that she was eligible for Medicaid. We find no error in this district court finding. Due to the issue raised in the appeal, however, the district court's review was limited in scope; it did not make a determination as to the satisfaction of the remaining criteria contained in § 002. The only issue on review from DHHS was whether Paige had a qualifying disability. Nevertheless, in its order, the district court remanded the matter to DHHS with directions to award Leon and Cristy full AABD Medicaid waiver services.

We agree with DHHS and its officers that under § 002, Medicaid "waiver" services is a term of art, defined at 480 Neb. Admin. Code, ch. 5, § 001.E, and that eligibility for Medicaid does not equate to eligibility for Medicaid waiver services. With respect to the criteria in § 002 et seq., there is no evidence in the record of a services coordinator assessment, a plan of services, a signed consent form, or evidence

that a waiver slot was available for Paige which would have enabled DHHS to provide Paige with appropriate and individualized waiver services. The district court's instruction on remand appears to assume that Paige and the facts met the additional criteria in § 002 et seq., with neither proceedings nor evidence to this effect. Because the district court's order on remand exceeded the record and the scope of its review, we reverse the portion of the order directing payment of Medicaid waiver services.

CONCLUSION

Because the only issue presented in the district court for its review under the APA was whether Paige's disability made her eligible for Medicaid, the district court exceeded its scope of review when it determined that Paige was eligible for Medicaid waiver services. We affirm the decision of the district court with regard to its disability determination, but reverse the district court's order of remand which awarded Medicaid waiver services. The district court is directed to remand the cause to DHHS for further proceedings whereupon Leon and Cristy may complete waiver forms and steps required by Nebraska law to receive payment for an eligibility period.

Affirmed in part, and in part reversed and remanded with directions.

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

Trevor Pitts and Rebekah Pitts, a married couple, appellants, and Haco Electric Company, Incorporated, a Nebraska corporation, appellee, v. Genie Industries, Inc., a Washington corporation, appellee.

921 N.W.2d 597

Filed January 18, 2019. No. S-18-219.

1. **Summary Judgment: Appeal and Error.** An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
2. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony. But a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **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. In the summary judgment context, a fact is material only if it would affect the outcome of the case.
5. **Products Liability: Actions: Negligence.** In a products liability cause of action based on strict liability in tort, the central question involves

the quality of the manufactured product, that is, whether the product was unreasonably dangerous.

6. **Products Liability: Words and Phrases.** "Unreasonably dangerous" means that the product has a propensity for causing physical harm beyond that which could be contemplated by the ordinary user or consumer.
7. **Products Liability: Proof.** In a products liability action based on defect, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of the plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect.
8. **Products Liability: Negligence: Proximate Cause: Proof.** To establish proximate cause in a products liability action, the plaintiff must meet three basic requirements: (1) Without the defect, the injury would not have occurred, commonly known as the "but for" rule or "cause in fact"; (2) the injury was a natural and probable result of the defect; and (3) there was no efficient intervening cause.
9. **Expert Witnesses: Testimony.** Findings of fact as to technical matters beyond the scope of ordinary experience are not warranted in the absence of expert testimony supporting such findings.
10. **Trial: Expert Witnesses.** With respect to the requirement of expert testimony, the test is whether the particular issue can be determined from the evidence presented and the common knowledge and usual experience of the fact finders.
11. **Summary Judgment.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
12. **Rules of Evidence: Expert Witnesses.** When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to the evidence rule governing expert witness testimony, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.
13. **Courts: Expert Witnesses.** In evaluating expert opinion testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,

113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.

14. **Expert Witnesses: Words and Phrases.** Expert testimony based upon possibility or speculation is insufficient to establish causation; it must be stated as being at least probable, in other words, more likely than not.
15. **Negligence: Products Liability.** The malfunction theory is based on the same principle underlying res ipsa loquitur, which permits a fact finder to infer negligence from the circumstances of the incident, without resort to direct evidence of the wrongful act.
16. **Products Liability: Proof.** Under the malfunction theory, also sometimes called the indeterminate defect theory or general defect theory, a plaintiff may prove a product defect circumstantially, without proof of a specific defect, when (1) the incident causing the harm was of a kind that would ordinarily occur only as a result of a product defect and (2) the incident was not, in the particular case, solely the result of causes other than a product defect existing at the time of sale or distribution.
17. ____: ____. The malfunction theory simply provides that it is not necessary for the plaintiff to establish a specific defect so long as there is evidence of some unspecified dangerous condition or malfunction from which a defect can be inferred—the malfunction itself is circumstantial evidence of a defective condition.
18. **Products Liability: Proximate Cause: Damages: Proof.** The malfunction theory does not alter the basic elements of the plaintiff's burden of proof and is not a means to prove proximate cause or damages.
19. **Products Liability: Strict Liability: Proof.** The malfunction theory is applicable in a strict liability manufacturing defect claim.
20. **Products Liability: Proof.** The malfunction theory is not available when specific defects are alleged.

Appeal from the District Court for Lancaster County: Darla J. Ideus, Judge. Affirmed.

Peter C. Wegman, Mark R. Richardson, and Alyssa P. Martin, of Rembolt Ludtke, L.L.P., and John W. Ballew, Jr., of Ballew Hazen, P.C., L.L.O., for appellants.

Michael L. Moran, of Engles, Ketcham, Olson & Keith, P.C., for appellee Haco Electric Company, Incorporated.

Michael F. Coyle and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellee Genie Industries, Inc.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

An electrician was injured when an aerial lift malfunctioned and tipped over while the electrician was working approximately 30 feet in the air on the lift's raised platform. After sustaining serious injuries, the electrician brought strict liability claims, negligence claims, and an implied warranty claim against Genie Industries, Inc. (Genie), the manufacturer and designer of the lift. Genie moved for summary judgment as to all of the electrician's claims and sought to exclude the electrician's expert opinions on the issues of unreasonably dangerous conditions, defect, causation, and alternative design. Following a hearing, the district court partially granted Genie's motion to exclude expert testimony and granted Genie's motion for summary judgment on all claims. The electrician appeals.

FACTS

Aerial Lift

Genie manufactured an aerial lift named Genie model "TZ-34/20." In order to operate the lift, an operator stands on a platform, or "bucket" or "basket," and the platform is raised and lowered. The platform is raised and lowered by an extension of the lift referred to as a "boom." The lift sits atop of four outriggers that can be retracted when the lift is being transported. The outriggers are intended to extend, make contact with the ground, and raise the lift off the ground in a level manner.

The user operates the lift by pressing buttons on one of two control panels: (1) a ground control panel that operates the outriggers, boom, and platform and (2) a platform control

panel located directly on the platform that operates only the boom and the platform. There is also a key switch located at the platform controls that selects which of these two controls will operate. For example, when the key switch is turned to the platform setting, the ground controls will not operate. In theory, an operator standing on the platform should not be able to move or control the outriggers by pressing buttons on the platform control panel. This mechanism was designed to avoid destabilization while an operator is on the platform.

The lift in question was sold by Genie to Nebraska Machinery Company (Nebraska Machinery) in May 2011. Over the next few years, a number of repairs were performed on the lift. According to Nebraska Machinery's work orders, the lift was first repaired in August 2011, 4 months after the sale, when the "limit switch" failed, which caused the lift to become incapable of lowering. In the 2 years prior to the electrician's accident, there were approximately 30 total work orders for repairs on this particular lift, several of which related to issues with the "auto-leveling" system and the outriggers.

Genie started manufacturing this type of lift in 2003 and has made more than 4,600 of them. Genie is not aware of any other lift falling over in the same manner on any other occasion. During the end of the manufacturing process, Genie tested the lift's functions and determined that the tested movement functions worked properly. Genie's senior product safety manager testified that the lift's design was consistent with all relevant national standards and that in his opinion, the lift's design used the best technology reasonably available at the time it was made.

Accident

In June 2013, Nebraska Machinery leased the lift to a general contractor for use at a jobsite in Seward, Nebraska. Trevor Pitts is an electrician and was working for an electrical subcontractor. On August 21, the lift tipped over while Pitts was working on the platform approximately 30 feet in the air. Pitts had used the lift without any problems for 10 days before the

accident. On the day of the accident, other subcontractors had used the lift less than an hour before the incident.

There appeared to be electrical tape over a button on the platform control panel, but Pitts did not know why the tape was on the button or who put it there. According to Genie, the button that was taped over was the button that levels the platform when it is in the air. Genie argues that this indicates that the leveling system was altered after the machine left Genie's possession.

After the accident, bystanders who came to the scene saw that the left rear outrigger was "retracted." As a result of that outrigger's being shorter than the others, the lift was not level and tipped over, causing Pitts' injuries.

Pitts and his wife brought several claims against Genie (and two other parties, now dismissed) in the Lancaster County District Court. These claims included three strict liability claims for manufacturing and design defects and a failure to warn, three negligence claims, one breach of implied warranty claim, and a loss of consortium claim.

Dr. John Boye's Testimony

The Pittses' sole expert was an electrical engineer, Dr. John Boye. Boye is a professor emeritus in the University of Nebraska-Lincoln electrical and computer engineering department who holds a Ph.D. in electrical engineering. Along with another electrical engineer, Boye also formed a small electrical engineering consulting firm as a licensed electrical and computer engineer with the state. Boye had never before examined, used, repaired, or designed an aerial lift. He also had never reviewed any other lift in the industry.

In preparing his expert report, Boye reviewed video footage from a November 2014 inspection that he did not attend. In the video, at least 20 different malfunctions of the left outrigger occurred. He also reviewed several photographs taken at the time of the accident and from the 2014 inspection, some technical documents, the work order history, depositions, and a fuel log from Nebraska Machinery. The extensive work order

history and fuel log indicated that the auto-leveling system was not working correctly prior to the date of the accident.

Boye reported that the photographs from the 2014 inspection showed the wiring inside the ground control panel was "not well done." He explained that the leads of the diodes were not insulated and were very close together. Boye describes a diode as an electrical device that allows current to flow in one direction.

Boye later participated in a physical inspection of the lift in November 2015. In the year since the November 2014 inspection, the lift remained in the sole possession of Nebraska Machinery. However, when Boye completed his 2015 inspection, the lift behaved differently than it did in 2014. In his report, Boye explained that the lift clearly malfunctioned in the 2014 videos but that during the 2015 inspection, the lift either did not malfunction at all or malfunctioned differently when posed with the same tests. Based on the machine's failing to malfunction as it did in 2014 and at the time of the accident, Boye assumed that the lift had been altered between 2014 and 2015. Because of the lift's alleged alteration, Boye opined that the "[parties] may never be able to find [out] what was wrong originally."

Boye reported generally that the accident occurred from an electrical malfunction. However, based on his overall observations, Boye was unable to precisely pinpoint what component caused the lift to malfunction on the day of Pitts' accident. Although his report proposed an "overview of a few possibilities" that could have been the cause of the malfunction, he conceded several times that he had no opinion as to what specifically failed on August 21, 2013.

The possible causes of the electrical malfunction were (1) incorrect or shorted wiring; (2) bad components, such as bad or touching diodes; (3) other bad or faulty components; (4) failed or stuck limit switches; (5) the sticking of failed or "worn out" switches, buttons, and relays; and (6) potential movement earlier in the day of the accident which loosened diodes or wires

and could have caused a short circuit. He also thought the taped button on the platform control panel may have been a factor, but he was unsure how.

Boye reported that Genie's technical schematics and diagrams had at least 19 "errors and inconsistencies." In other words, in reviewing seven pages of the "*Genie Service Manual*" and six sheets of the "*ED, TZ34 DC Control*" drawings, Boye identified multiple inconsistencies between these documents as to the lift's design. However, he did not opine that the documents identified design defects. Boye stated that he was never provided a number of documents that would have helped in the evaluation, including certain design documents and other specifications and technical information regarding circuit elements. He admitted in his deposition that these missing documents are critical to understanding the design.

Boye opined that the lift "could have been designed better." In particular, he suggested that Genie could have used a "4-position keyed switch" instead of a "3-position keyed switch." As designed, the lift has a three-position switch in which the user turns a key to activate either the platform control panel or the ground control panel or turns off the machine. It is designed so that only one control panel can be activated at a given time, and none of the buttons on the platform controls should operate the outriggers. Still, Boye explained that this technology could fail if diodes fail. In other words, power could be sent to the outriggers even if the switch was in "platform" position, if diodes failed.

Considering the current design, Boye proposed a four-position switch as an alternative design which would have "totally isolate[ed] the outrigger power from the platform control panel." He testified as to his design in a deposition and stated that the three-position switch increased the risk of a particular kind of electrical diode failure. But Boye admitted that this four-position switch design could also fail. He also admitted that this proposed four-position switch design would require a completely revamped circuitry "from scratch." Boye's

opinion was not peer reviewed, nor did Boye test or analyze the feasibility of a four-position switch design.

In 2017, Boye wrote and signed an additional affidavit for the purposes of clarifying his testimony. This affidavit stated that the lift tipped over because of an "electrical malfunction in the lift's circuit[r]y." In the same affidavit, he again opined that he could not determine the exact cause of the accident, but that the lift was in an unreasonably dangerous condition when it left Genie's possession, because the platform and ground control circuitry were interconnected, the diodes and wires were too close together, the diodes and wires did not have protective sheathing, and a three-position switch design was used as opposed to a proposed four-position switch. Boye did not elaborate as to the foundation of his conclusion that these defects were present at the time it left Genie's possession and did not retract his prior testimony that six or more possible causes could have resulted in the lift's electrical malfunction.

Motions to Exclude Expert Testimony and Summary Judgment

Genie moved to exclude Boye's testimony and for summary judgment. The district court granted Genie's motion to exclude testimony in part and denied it in part. The court held that Boye's opinions regarding alternative design were not admissible as they were not relevant and lacked reliability under a *Daubert*/*Schafersman*[1] analysis. However, the district court overruled Genie's motion to exclude testimony regarding Boye's opinions that the lift was unreasonably dangerous because the platform control and ground control circuitry were "'interconnected,'" the diodes and wires were too close together, and the diodes and wires lacked adequate sheathing.

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[1] See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

The court then granted Genie's motion for summary judgment. The court held that the Pittses lacked the necessary expert testimony for the proximate cause element of their negligence and product liability claims. Boye's expert testimony, the court explained, only speculated a "'choice of possibilities'" as to causation, and such testimony did not create a fact question on summary judgment. The court held that the malfunction theory could not be used to create a material issue for proximate cause in this case because Boye pointed to several specific defects. With no expert evidence to show that the lift was defective at the time it left Genie's possession or that the defects proximately caused the platform controls to operate the outriggers, the district court granted summary judgment in favor of Genie on all claims.

ASSIGNMENTS OF ERROR

The Pittses assign, reordered and rephrased, that the district court erred in (1) finding that Genie was entitled to summary judgment on the Pittses' strict liability design defect claim, (2) excluding portions of Boye's expert testimony, (3) misconstruing the scope of Boye's opinion regarding causation, (4) failing to consider and/or excluding evidence related to issues of causation regarding the strict liability design defect claim, (5) finding that Genie was entitled to summary judgment with respect to the Pittses' strict liability manufacturing defect claim, and (6) failing to allow the Pittses to proceed on and further apply the "malfunction theory" with regard to their strict liability manufacturing defect claim.

STANDARD OF REVIEW

[1] An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.[2]

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[2] *Waldron v. Roark*, 298 Neb. 26, 902 N.W.2d 204 (2017).

[2,3] We review de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.[3] But a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[4] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.[5]

ANALYSIS

The Pittses contend that the district court erred in granting Genie's motion for summary judgment against their strict products liability design and manufacturing defects claims. The Pittses argue that they presented sufficient evidence that the lift was defectively designed, unreasonably dangerous, and defectively manufactured at the time the lift left Genie's possession to create a genuine dispute rendering summary judgment improper. They add that they presented sufficient evidence of causation as it relates to Pitts' injuries.

[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[6] 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

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[3] *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

[4] *Schafersman v. Agland Coop, supra* note 1.

[5] *Id.*

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

facts and that the moving party is entitled to judgment as a matter of law.[7] In the summary judgment context, a fact is material only if it would affect the outcome of the case.[8]

[5,6] In a products liability cause of action based on strict liability in tort, the central question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.[9] "Unreasonably dangerous" means that the product has a propensity for causing physical harm beyond that which could be contemplated by the ordinary user or consumer.[10] Whether the product is in a defective condition and is unreasonably dangerous to its user are generally questions of fact.[11]

[7] In a products liability action based on defect, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of the plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect.[12]

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[7] *Freeman v. Hoffman-La Roche, Inc.*, 300 Neb. 47, 911 N.W.2d 591 (2018).

[8] See *id*.

[9] See, *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

[10] *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).

[11] *Rahmig v. Mosley Machinery Co., supra* note 9.

[12] See *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[8] Proximate cause is the cause that in a natural and continuous sequence unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.[13] To establish proximate cause in a products liability action, the plaintiff must meet three basic requirements: (1) Without the defect, the injury would not have occurred, commonly known as the "but for" rule or "cause in fact"; (2) the injury was a natural and probable result of the defect; and (3) there was no efficient intervening cause.[14]

[9,10] Findings of fact as to technical matters beyond the scope of ordinary experience are not warranted in the absence of expert testimony supporting such findings.[15] With respect to the requirement of expert testimony, the test is whether the particular issue can be determined from the evidence presented and the common knowledge and usual experience of the fact finders.[16] This case involves the mechanical functioning of an aerial lift, its component parts, and its electrical circuitry, which are technical matters well outside the scope of ordinary experience. Therefore, to create a material issue of fact, the Pittses were required to present expert testimony that a defective product caused the malfunction that led to Pitts' injuries. Their only expert was Boye. Thus, the question is whether Boye's testimony created issues of fact as to each element of their products liability claims.[17]

The notion of a defective product embraces two separate concepts—a manufacturing defect and a design defect.[18] A manufacturing defect is one in which the product differs from

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[13] *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

[14] See, generally, *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015).

[15] *Id.*

[16] *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991).

[17] See, *Freeman v. Hoffman-La Roche, Inc., supra* note 7; *Roskop Dairy v. GEA Farm Tech., supra* note 14.

[18] See *Freeman v. Hoffman-La Roche, Inc., supra* note 9.

the specifications and plan of the manufacturer, while a design defect is one in which the product meets the specifications of the manufacturer, but nonetheless poses an unreasonable risk of danger.[19] We first address the Pittses' assignments of error related to a design defect.

Design Defect

The Pittses argue that they presented sufficient evidence to show that defectively designed circuitry was the proximate cause of the electrical malfunction that ultimately caused Pitts' injuries. They argue that the district court, in concluding that Boye's testimony was speculative and inadequate to create a material issue of fact as to causation, misunderstood and mischaracterized Boye's expert testimony. According to the Pittses, Boye testified with sufficient certainty that the electrical malfunction was caused by one of several possible reasons, all of which could be attributed to design defects that created an unreasonable danger of an electrical malfunction. We disagree.

[11] An expert must have "good grounds" for his or her belief in every step of the analysis.[20] The term "good grounds" means an inference or assertion derived by scientific method and supported by appropriate validation.[21] Good grounds do not include conclusions based on guess, speculation, conjecture, or a choice of possibilities.[22] Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.[23]

Boye initially presented an "overview of a few possibilities" that could have been the cause of the malfunction, none

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[19] See *id.*

[20] *Roskop Dairy v. GEA Farm Tech., supra* note 14.

[21] *Id.*

[22] See *id.*

[23] *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

of which he directly identified as specifically relating to the product's design. Indeed, several possible causes appear to be things that would have occurred after the lift left Genie's possession. The possible causes of the electrical malfunction were: (1) incorrect or shorted wiring; (2) bad components, such as bad or touching diodes; (3) other bad or faulty components; (4) failed or stuck limit switches; (5) the sticking of failed or "worn out" switches, buttons, and relays; and (6) potential movement earlier on the day of the accident which loosened diodes or wires and could have caused a short circuit. He also thought the taped button on the platform control panel may have been a factor, but he was unsure how. He asserted that Genie's three-position switch design could have been the cause of the malfunction and provided, albeit untested and not reviewed by peers, a four-position switch design as an alternative.

Boye later attempted to clarify his opinion in a supplemental affidavit that was admitted into evidence by the district court. In the affidavit, he opined that the lift was unreasonably dangerous when it left Genie's possession because (1) the platform and ground control circuitry were interconnected, (2) the diodes and wires were too close together, (3) the diodes and wires did not have proper protective sheathing, and (4) Genie utilized a three-position switch design as opposed to a proposed four-position switch. In the affidavit, Boye did not retract his prior testimony that he had no opinion as to what specifically failed and caused the accident on August 21, 2013. In making its decision, the district court considered only the first three elements of Boye's opinion from the affidavit; it excluded the alternate design of a four-position switch.

[12,13] First, we find that the district court did not abuse its discretion in determining that Boye was not qualified to opine that the specific underlying design defect was the failure to design the lift with a four-position switch. When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to the evidence rule governing expert witness

testimony, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[24] This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.[25] In evaluating expert opinion testimony under *Daubert*/*Schafersman*, where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.[26]

It is undisputed that Boye had expertise in the field of electrical engineering, but Boye testified that he did not know how any other aerial lifts are designed and admitted he was unaware of the standards used in the industry for the design and manufacture of machines of this nature. He provided no evidence of any other lift manufacturer's utilizing a four-position switch design. He stated that his four-position switch design was conceptual. He did not actually create and test his theory, nor was his assertion peer reviewed by other electrical engineers. He further asserted that, even with a four-position switch instead of Genie's three-position switch, an electrical malfunction could still have occurred. Without testing, peer review, and knowledge of whether this theory or alternative design would be generally accepted in the industry, Boye's expert opinion that the lift should have been designed with a four-position switch was simply unreliable under a *Daubert*/*Schafersman* analysis. As such, the district court did not abuse its discretion in determining that Boye lacked knowledge in the relevant discipline to testify that the lift should have been

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[24] *Schafersman v. Agland Coop, supra* note 1. See, also, Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016).

[25] *Schafersman v. Agland Coop, supra* note 1.

[26] *Id.*

designed with a four-position switch and in excluding those portions of his testimony.

As to the remainder of Boye's testimony that was admitted into evidence, we find that the district court did not err in granting summary judgment in favor of the Pittses. Boye, as a qualified and trained electrical engineer, reviewed pictures, diagrams, and charts related to the wiring and schematics of the machine. Boye generally opined that the lift was unreasonably dangerous in its design because it had inadequate sheathing, interconnected circuitry, and diodes that were too close in proximity. Essentially, his affidavit testimony asserts that these unreasonably dangerous conditions are defects in Genie's design. However, Boye testified that any one of a number of problems or occurrences, including those not linked to design and outside of Genie's control after the point of sale, could have been the actual cause of the electrical malfunction that resulted in Pitts' injuries.

Specifically, Boye stated that one of six or more possibilities could have been the cause of the accident. While some of the initial report's "possibilities" could possibly be connected to the affidavit's "unreasonably dangerous" elements of the design, others cannot. For example, Boye stated that a failed limit switch, faulty components or diodes, or even recalled parts could have been the cause of the malfunction. He even stated that incorrect, damaged, or shorted wiring could have easily caused the malfunction, which he notes was altered or repaired just months prior to Pitts' accident. He also stated that the taped leveling button could have been a cause of the accident. Boye was unable to precisely pinpoint what component caused the lift to malfunction on the day of Pitts' accident. Although his report proposed an "overview of a few possibilities" that could have been the cause of the malfunction, he conceded several times that he had no opinion as to what specifically failed on August 21, 2013.

Some courts have held that a particular product may be sufficiently identified as having caused harm even though

the evidence does not exclude every other possible cause.[27] However, courts clarify that, though the plaintiff is not required to eliminate all possible causes, the plaintiff must still establish a logical sequence of cause and effect between the defect and the injury.[28] We need not decide in this case if the Pittses were required to eliminate all possible nondesign causes in order to create a material issue of fact, because even if they were not, the evidence's logical sequence of cause and effect was lacking. In other words, Boye did not opine with a requisite degree of certainty that any of the "possibilities" was the one that caused the malfunction.

[14] We have held that expert testimony "based upon possibility or speculation is insufficient [to establish causation]; it must be stated as being at least 'probable,' in other words, more likely than not."[29] Even assuming that Boye's reasons for the lift's being in an "unreasonably dangerous condition" were all affirmatively connected to the lift's design, he failed to sufficiently connect the possible causes of the malfunction stated in his report to these design defects. Throughout his opinion, Boye merely speculated that defects *could have been* related to the ultimate cause of the malfunction, while also proposing potential causes that overtly did not relate to Genie's design, such as the failure of a limit switch, the taped over leveling button, or faulty components. Because of the intermingling of possible causes that are related and unrelated to the design, with no testimony that any one of them was more probable than another, there is no way for a fact finder to determine without speculation whether a defective design

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[27] See 49 Am. Jur. Proof of Facts 2d 293 *Defect Not Cause* § 3 (1987 & Supp. 2018).

[28] See *id*. See, also, *Whitmire v. Terex Telelect, Inc.*, 390 F. Supp. 2d 540 (E.D. Tex. 2005); *Skinner v Square D Co*, 445 Mich. 153, 516 N.W.2d 475 (1994); *MASB-SEG v. Metalux*, 231 Mich. App. 393, 586 N.W.2d 549 (1998).

[29] *Fackler v. Genetzky*, 263 Neb. 68, 74, 638 N.W.2d 521, 528 (2002). Accord *Barrett v. Rhodia, Inc.*, 606 F.3d 975 (8th Cir. 2010).

was the proximate cause of the electrical malfunction and Pitts' injuries.

In sum, Boye's testimony as to causation was too speculative for a jury to conclude that the specific alleged design defect or defects were the "but for" cause of the electrical malfunction leading to Pitts' injuries. Because failure of proof concerning an essential element of the nonmoving party's case on a motion for summary judgment necessarily renders all other facts immaterial,[30] we hold that the district court did not err in finding that there remained no genuine issue of fact as to the element of causation and that Genie was entitled to judgment as a matter of law on the Pittses' strict liability design defect claim.

Manufacturing Defect and Malfunction Theory

In addition to the Pittses' design defect claim, they assert that the district court erred in granting summary judgment against their strict liability manufacturing defect claim. The Pittses rely on what is known as the malfunction theory to support the causation prong of this claim. They contend that although they presented evidence of specific design defects, they did not present any direct evidence that there was a specific manufacturing defect. They assert that in lieu of proving a specific manufacturing defect, the malfunction theory allows them to circumstantially prove an unspecified defect in the lift.

[15,16] The malfunction theory is based on the same principle underlying res ipsa loquitur, which permits a fact finder to infer negligence from the circumstances of the incident, without resort to direct evidence of the wrongful act.[31] Under the malfunction theory, also sometimes called the indeterminate defect theory or general defect theory,[32] a plaintiff may prove

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[30] See *Freeman v. Hoffman-La Roche, Inc., supra* note 7.

[31] *Roskop Dairy v. GEA Farm Tech., supra* note 14.

[32] *Id.*

a product defect circumstantially, without proof of a specific defect, when (1) the incident causing the harm was of a kind that would ordinarily occur only as a result of a product defect and (2) the incident was not, in the particular case, solely the result of causes other than a product defect existing at the time of sale or distribution.[33]

[17,18] The malfunction theory is narrow in scope. The theory simply provides that it is not necessary for the plaintiff to establish a specific defect so long as there is evidence of some unspecified dangerous condition or malfunction from which a defect can be inferred—the malfunction itself is circumstantial evidence of a defective condition.[34] The malfunction theory does not alter the basic elements of the plaintiff's burden of proof and is not a means to prove proximate cause or damages.[35] Although some circumstances may justify the use of the malfunction theory to bridge the gap caused by missing evidence, the absence of evidence does not make a fact more probable but merely lightens the plaintiff's evidentiary burden despite the fact that the missing evidence might well have gone either way, and this rationale is too often subject to misapplication by courts in situations in which evidence is actually available.[36]

As a matter of policy, the malfunction theory is meant to allow circumstantial proof of a product defect without evidence of the specific defect, because in many instances, the dealer or manufacturer has either purposefully or inadvertently tampered with the evidence.[37] When examination of the product unit is impossible because the unit is lost or destroyed after the harm-causing incident, responsibility for spoliation

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[33] *Id.* (citing Restatement (Third) of Torts: Products Liability § 3, comment *a*. (1998)).

[34] *Roskop Dairy v. GEA Farm Tech., supra* note 14.

[35] *Id.*

[36] *Id.*

[37] *Id.*

of evidence may be relevant to the application of the malfunction theory.[38]

[19] We have yet to expressly hold that the malfunction theory applies to strict liability claims,[39] but we have made the malfunction theory available to plaintiffs in an implied warranty context.[40] And we have approved of the general approach set forth in the Restatement (Third) of Torts § 2(b)[41] that identifies a product defect as the core similarity between strict liability and implied warranty claims, thereby merging theories of recovery for implied warranty with theories of recovery based on allegations of design or manufacturing defects.[42] There is no reason to prohibit the malfunction theory in a strict liability matter when we do not do so for its implied warranty counterpart. We hold that the malfunction theory is applicable in a strict liability manufacturing defect claim.

[20] To support a manufacturing defect through the malfunction theory, the Pittses rely on Boye's opinion that, given the nature of the malfunction that occurred, "the only reasonable inference to be drawn from this set of events is that a flaw in the lift's circuitry caused this electrical malfunction." However, they simultaneously point to several specific design defects in their design defect claim, as we discussed above. We recently held in *O'Brien v. Cessna Aircraft Co.*[43] that the malfunction theory is not available when specific defects are alleged.

In *O'Brien*, a commercial pilot specifically claimed that the deicing system on the plane was defectively designed and

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[38] See Restatement, *supra* note 33, comment *b*.

[39] See *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017).

[40] See, e.g., *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001) (holding that precise or specific defect does not need to be proved in order to find product defective).

[41] Restatement, *supra* note 33, § 2(b).

[42] *Freeman v. Hoffman-La Roche, Inc., supra* note 9. See, also, *Shuck v. CNH America, LLC*, 498 F.3d 868 (8th Cir. 2007).

[43] *O'Brien v. Cessna Aircraft Co., supra* note 39.

unreasonably dangerous. He argued that it was defectively designed, because the deicing boot provided insufficient coverage and the deicing system lacked a water separator to prevent contaminants from entering and affecting its operation. The pilot then attempted to rely on the malfunction theory to prove a nonspecific defect that the aircraft was susceptible to "'ice contaminated tail stall.'"[44] We held that because the pilot alleged that the plane crash was caused by several specific design defects, he could not simultaneously rely on the malfunction theory in an effort to prove the accident was caused by a nonspecific defect rendering the aircraft susceptible to "ice contaminated tail stall."[45]

This case mirrors *O'Brien* in that the Pittses have pointed to evidence of specific design defects in the lift that possibly caused an electrical malfunction; but, later, in an effort to forward his manufacturing defect theory, relied on the malfunction theory by generally asserting that a flaw in the lift's circuitry caused this electrical malfunction. For this reason, the malfunction theory is inapplicable in this case and the district court did not err in refusing to apply it. We need not address whether there are additional reasons why the Pittses failed to create a material issue of fact for recovery under the malfunction theory.

There being no other evidence of a manufacturing defect, the district court did not err in granting summary judgment in favor of Genie on the Pittses' strict liability manufacturing defect claim.

CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment as to the Pittses' strict products liability defect claim.

Affirmed.

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[44] *Id.* at 114, 903 N.W.2d at 444.

[45] *O'Brien v. Cessna Aircraft Co.*, *supra* note 39.

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

State of Nebraska, appellee, v. Donald R. Thalmann, appellant.

921 N.W.2d 816

Filed January 25, 2019. No. S-18-111.

1. **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.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Final Orders: Appeal and Error.** Numerous factors have been set forth defining when an order affects a substantial right. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue. It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.
4. **Words and Phrases.** A substantial right is an essential legal right, not merely a technical right.
5. **Final Orders: Appeal and Error.** An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Appeal dismissed.

Joseph D. Nigro, Lancaster County Public Defender, and Matthew F. Meyerle for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

Donald R. Thalmann was serving a sentence of probation following a conviction for possession of a controlled substance. After several positive drug and alcohol screens, his probation officer sought the imposition of a custodial sanction. The district court imposed a 15-day custodial sanction. Thalmann appeals. We dismiss Thalmann's appeal.

BACKGROUND

Thalmann was convicted of possession of a controlled substance, a Class IV felony, and sentenced to a term of 3 years' probation. Just 2 months into that term of probation, Thalmann's probation officer sought the imposition of a custodial sanction. A hearing was held on the motion for a custodial sanction.

At that hearing, the State offered the testimony of Thalmann's probation officer and various exhibits in support of the request for a custodial sanction. The district court granted the motion and imposed a custodial sanction of 15 days' imprisonment.

ASSIGNMENTS OF ERROR

On appeal, Thalmann assigns that the district court erred in (1) considering exhibits 2 and 7 through 9, because receipt of those exhibits violated Thalmann's due process rights, and (2) finding there was sufficient evidence to support a finding that Thalmann violated the terms of his probation.

STANDARD OF REVIEW

[1] 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.[1]

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[2] After reviewing the record, we conclude that we lack appellate jurisdiction because Thalmann has not appealed from a final order.

Neb. Rev. Stat. § 25-1911 (Reissue 2016) gives appellate courts jurisdiction to review "[a] judgment rendered or final order made by the district court . . . for errors appearing on the record." For purposes of appellate jurisdiction, "[a] judgment is the final determination of the rights of the parties in an action."[3] "Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action."[4] In a criminal case, the judgment from which the appellant may appeal is the sentence.[5] Here, the sentence was the placement of Thalmann on probation.

Because the order from which Thalmann attempts to appeal was not a judgment, we must consider whether it was a final order. Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order affecting a substantial right in an action that,

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[1] *Simms v. Friel, ante* p. 1, 921 N.W.2d 369 (2019).

[2] *Last Pass Aviation v. Western Co-op Co.*, 296 Neb. 165, 892 N.W.2d 108 (2017).

[3] Neb. Rev. Stat. § 25-1301(1) (Reissue 2016).

[4] *Rehn v. Bingaman*, 157 Neb. 467, 479, 59 N.W.2d 614, 620 (1953).

[5] *State v. Ratumaimuri*, 299 Neb. 887, 911 N.W.2d 270 (2018).

in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. We have not previously opined on the finality of an order imposing a custodial sanction. Because such a sanction is common to all three categories of a final order under § 25-1902, we turn first to whether this order affects a substantial right.

[3] Numerous factors have been set forth defining when an order affects a substantial right. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue.[6] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[7]

[4,5] Regarding the importance of the right affected, we often state that a substantial right is an essential legal right, not merely a technical right.[8] It is a right of "'substance.'"[9] We have elaborated further that an order affects a substantial right if it "'affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.'"[10] Whether the effect of an order is substantial depends on "'whether it affects with finality the rights of the parties in the subject matter.'"[11] This aspect of "'affecting a substantial right'" also depends on whether the right could otherwise be effectively vindicated.[12] An order affects a substantial

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[6] *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 913, 870 N.W.2d at 138.

[10] *Id.* at 914, 870 N.W.2d at 138.

[11] *Id.*

[12] *Id.*

right when the right would be "'significantly undermined'" or "'irrevocably lost'" by postponing appellate review.[13] The duration of the order is relevant to whether its effect on the substantial right is substantial.[14]

This case presents two distinct rights that are affected by the order imposing a custodial sanction of 15 days' imprisonment. The first is Thalmann's liberty interest. The second is Thalmann's right to not have his probation revoked, a possible consequence because, under Neb. Rev. Stat. § 29-2267(3) (Reissue 2016), revocation proceedings may be instituted against him "in response to a substance abuse or noncriminal violation if the probationer has served ninety days of cumulative custodial sanctions during the current probation term."

The second right—the possibility of the revocation of his probation—is not a substantial right. The imposition of 15 days toward the 90 days after which Thalmann's revocation proceeding might be instituted is speculative. Thalmann might not have further days of custodial sanction imposed, the State might not choose to institute revocation proceedings, or the court might deny any request to revoke probation. This right is not an essential right, but is a mere technical right.

Moreover, this right would not be significantly undermined or irrevocably lost if it is not reviewed at this time, because that right is not at risk as a result of this order. Should proceedings to revoke Thalmann's probation be instituted at a later date, the merits of this custodial sanction could be addressed in an appeal from those proceedings.

Having concluded that the second right is not substantial, we turn to the first right—Thalmann's liberty interest. We likewise conclude that on these facts, such is not a substantial right.

First, this order does not affect Thalmann's custodial status under Nebraska law. When Thalmann was sentenced to

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[13] *Id.*

[14] *State v. Jackson, supra* note 6.

probation, he was in custody for purposes of Nebraska law.[15] Even after the entry of the district court's order, Thalmann remains on probation. The imposition of the custodial sanction does not change his status as being in custody—it simply modifies the nature of that custody. During his postrelease supervision, Thalmann was always subject to a custodial sanction.

Moreover, the custodial sanction imposed in this case was just 15 days—a relatively brief modification in the nature of his custody. Orders of a temporary nature are often not final, because the temporary nature of the order prevents it from substantially affecting an individual's rights.[16]

Because we conclude that the order imposing a custodial sanction did not affect a substantial right, Thalmann does not appeal from a final order. Accordingly, we must dismiss his appeal for lack of jurisdiction.

CONCLUSION

The order imposing a custodial sanction does not affect a substantial right and is not final. Accordingly, Thalmann's appeal is dismissed.

Appeal dismissed.

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[15] Cf. *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992).

[16] See, e.g., *In re Interest of Zachary B.*, 299 Neb. 187, 907 N.W.2d 311 (2018); *State v. Jackson, supra* note 6; *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006); *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009).

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

Harley Smith, appellant, v. Meyring Cattle Company, L.L.C., appellee.

921 N.W.2d 820

Filed January 25, 2019. No. S-18-184.

1. **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.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Animals: Liability: Legislature: Words and Phrases.** The meaning of each term in the list of acts by a dog which subject its owner to liability under Neb. Rev. Stat. § 54-601(1)(b) (Reissue 2010)—currently, "killing, wounding, injuring, worrying, or chasing"—is dependent on the other in the context that the Legislature chose to place them.
4. **Animals: Liability.** The common-law basis for strict liability for the acts of one's dog depends upon establishing that the dog has dangerous propensities or tendencies, because at common law, dogs are presumed harmless.
5. **Statutes.** Statutes effecting a change in the common law should be strictly construed.
6. **Animals: Liability: Words and Phrases.** "Injuring" under Neb. Rev. Stat. § 54-601(1)(b) (Reissue 2010) is limited to bodily hurt caused by acts directed toward the person or animal hurt.

Appeal from the District Court for Box Butte County: Travis P. O'Gorman, Judge. Affirmed.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellant.

Steven W. Olsen and Jonathan C. Hunzeker, of Simmons Olsen Law Firm, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

A ranch employee was injured, allegedly as a result of the ranch's herding dog nipping at a cow, causing the cow to charge into the employee. The question presented is whether, as a matter of law, such allegations fall outside the strict liability statute, which states in relevant part that the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue to any person, firm, or corporation by reason of such dog or dogs killing, wounding, injuring, worrying, or chasing any person or persons.

BACKGROUND

Harley Smith worked for the Meyring Cattle Company, L.L.C. (Meyring), and was injured in an accident that occurred in December 2011. He sued Meyring under negligence theories and also under strict liability as set forth in Neb. Rev. Stat. § 54-601(1) (Reissue 2010), alleging damages accruing from a Meyring herding dog "injuring" him. During a jury trial, the following evidence was adduced.

On the day of the accident, Smith had been pouring a lice control product on cows' backs, while Jay Meyring, a co-owner of Meyring, vaccinated them and another employee tagged them. This process involved herding cattle into holding pens, moving a few cows at a time into a "tub," and then guiding them from the tub into an alley that led into a chute.

Jerry Meyring, Jay's father and co-owner of Meyring, herded the cattle into the holding pens. He then spent most

of the day moving them in small groups into the tub and then into the alley. From a platform outside the alley, Smith poured the lice control product onto the cattle as they moved in the alley toward the chute, where the tagging and vaccinations occurred.

Occasionally, when Jerry had to move more cattle into the holding pens from "the hill" where the herd congregated, Smith was placed in charge of moving the small group of cows from the tub into the alley. Smith was performing that task at the time of the accident, which occurred near the end of the workday.

According to Smith, there were two cows left in the tub. Smith moved toward the alley to see how many cows were inside. At that time, one cow moved past Smith from the tub into the alley. The other cow was still near the gate opposite the alley. Smith testified that he then saw the herding dog named "Gunner" on the outside of the gate leading into the tub, "nipping" or "snapping" at the remaining cow's hooves through a 6-inch opening at the bottom of the gate. Smith stated the cow immediately charged forward.

Smith was trampled by the cow and sustained extensive injuries. Smith was found lying in the middle of the alley with three cows in front of him and one behind. Smith did not clearly describe how he got there but stated that it was the result of being knocked down by the cow that Gunner had nipped. Smith opined that the only reason the cow had "charged" at him was that Gunner was "nipping on the bottom of its foot."

Jerry confirmed that the herding dogs at the ranch were bred and trained to nip at the heels of cattle, which is designed to make the cattle move away from the dog, or "escape" in a "flight response." Meyring's herding dogs were not allowed to be near cattle in enclosed areas. That, Jerry conceded, would create a danger, especially if a person was in the enclosed space with the cattle.

Gunner was trained to stay away from the enclosed tub/alley/chute area and instead lie down by the "chute house" some distance away. Jay testified that he had never had any trouble with Gunner staying where he was supposed to be. Jay, Jerry, and another employee who testified had never seen Gunner around the tub area, and they did not see him there on the day of the accident.

Both Jay and Jerry testified that Smith should have never entered the alley and that there were several other avenues of escape from an agitated cow in the tub. Evidence was presented that the cow in question did not appear agitated immediately after the accident, and Jerry suggested that the tub was not large enough for any cow to build up significant speed. Jay testified that Smith should not have been near the alley, looking in, because that was not part of the process.

Smith's girlfriend at the time of the accident testified that she and Smith had stayed up the night before the accident "getting high on methamphetamine" and that Smith "smoked another bowl of meth" on his lunch break. There was medical evidence that Smith was under the influence of methamphetamine at the time of the accident.

The district court granted Meyring's motion for a directed verdict on the strict liability claim under § 54-601. Smith's negligence claims were submitted to the jury, which rendered a verdict in favor of Meyring. Smith appeals the directed verdict on the strict liability claim under § 54-601(1).

ASSIGNMENTS OF ERROR

Smith assigns that the district court erred in finding as a matter of law that § 54-601 did not apply to the facts of this case and in granting Meyring's motion for partial directed verdict on the issue of strict liability.

STANDARD OF REVIEW

[1] 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.[1]

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[2]

ANALYSIS

The question in this case is whether strict liability under § 54-601(1) encompasses the act of a herding dog nipping at the heels of a cow, causing the cow to move forward, collide with a ranch employee, and inflict "bodily hurt" on the employee. Section 54-601(1) provides:

> Dogs are hereby declared to be personal property for all intents and purposes, and, except as provided in subsection (2) of this section, the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue (a) to any person, other than a trespasser, by reason of having been bitten by any such dog or dogs and (b) to any person, firm, or corporation by reason of such dog or dogs killing, wounding, injuring, worrying, or chasing any person or persons or any sheep or other domestic animals belonging to such person, firm, or corporation. Such damage may be recovered in any court having jurisdiction of the amount claimed.

Smith argues that he presented evidence from which a jury could have concluded that Meyring was liable by reason of Gunner "injuring . . . any person" as stated in § 54-601(1)(b).

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[1] *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018).

[2] *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018).

He points out that to "injure" has a broad definition of "'to inflict bodily hurt on [someone or something],'"[3] that standard principles of proximate causation apply in strict liability actions,[4] and that an animal's normal response to an action is not a superseding cause in the chain of proximate causation.[5] Regardless of the merits of these propositions in the abstract, we agree with the district court that Smith misinterprets § 54-601.

[3] We have long strictly construed § 54-601, and the Legislature has repeatedly acquiesced to our understanding of its intent.[6] In particular, we have held that the meaning of each term in the list of acts by a dog which subject its owner to liability under § 54-601(1)(b)—currently, "killing, wounding, injuring, worrying, or chasing"—"is dependent on the other in the context that the Legislature chose to place them."[7] We have consistently explained that the relevant context was the Legislature's intent in enacting § 54-601 to derogate from the corresponding strict liability common-law action only by eliminating the need to prove that the owner had knowledge of the dog's dangerous propensities—and only as to the acts and persons described in the statute.[8] Under the common-law strict liability action that was modified by § 54-601 for those to which § 54-601 applies, a plaintiff had to demonstrate both (1) that the dog was vicious or had

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[3] *Grammer v. Lucking*, 292 Neb. 475, 478, 873 N.W.2d 387, 389 (2016), quoting Merriam-Webster's Collegiate Dictionary 601 (10th ed. 2001).

[4] See, *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); 5 American Law of Torts § 18:36 (2016); 65 C.J.S. *Negligence* § 250 (2010).

[5] See *Brown v. Kaar*, 178 Neb. 524, 134 N.W.2d 60 (1965).

[6] See *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

[7] *Donner v. Plymate*, 193 Neb. 647, 650, 228 N.W.2d 612, 614 (1975).

[8] See, *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996); *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979); *Donner v. Plymate, supra* note 7.

dangerous propensities and (2) that the owner knew the dog to be vicious or dangerous.[9]

[4,5] The common-law basis for strict liability for the acts of one's dog depends upon establishing that the dog has dangerous propensities or tendencies,[10] because at common law, dogs are presumed harmless.[11] The common law recognizes the right of the owner to keep a vicious dog for the necessary protection of life and property, but that one exercising the right to keep an inherently dangerous dog must do so at his or her own risk and be held strictly liable for any damage resulting to another.[12] The vicious or dangerous nature of the dog is essential to such a claim.[13] Statutes effecting a change in the common law should be strictly construed.[14]

Thus, we have held that the terms in the list of actions described in § 54-601(1)(b) must be "read together"[15] in light of the context of the statute to provide for strict liability without proof of the owner's knowledge of the dog's "'dangerous propensities.'"[16] It is improper to read the words as "detached and separated."[17] Instead, "the meaning of each is dependent on the other."[18] And we have noted that many of the words

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[9] See *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931). See, also, *Paulsen v. Courtney, supra* note 8; *Lee v. Weaver*, 195 Neb. 194, 237 N.W.2d 149 (1976); *Fritz v. Marten*, 193 Neb. 83, 225 N.W.2d 418 (1975); 7 American Law of Torts § 21:50 (2018).

[10] See, e.g., 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 23 (2010); 4 J.D. Lee & Barry A. Lindahl, Modern Tort Law: Liability and Litigation § 37:4 (2d ed. 2006).

[11] See 7 American Law of Torts § 21:52 (2018).

[12] See *Netusil v. Novak, supra* note 9.

[13] See, generally, *id.*

[14] See *Paulsen v. Courtney, supra* note 8.

[15] *Donner v. Plymate, supra* note 7, 193 Neb. at 650, 228 N.W.2d at 614.

[16] *Paulsen v. Courtney, supra* note 8, 202 Neb. at 795, 277 N.W.2d at 235.

[17] *Donner v. Plymate, supra* note 7, 193 Neb. at 650, 228 N.W.2d at 614.

[18] *Id.*

of this statutory list inherently entail violence or an intent to harm. Thus, a "'wound'" is "'[a]n injury of a person or animal in which the skin or other membrane is broken, as *by violence* or surgery.'"[19] To "'worry'" is "'to treat *roughly* as with continual biting' or 'to bite or tear with the teeth.'"[20] To "'chase'" under the statute has been defined variously as "'to follow quickly or persistently *in order to catch or harm*,'" "'to make run away; drive,'" or "'to go in pursuit.'"[21] In other words, the element that the dog be vicious or have dangerous propensities is implicitly part of the statute through these terms, read jointly.[22]

Because the acts described in § 54-601(1)(b) were intended to be understood as violent acts stemming from dangerous propensities, we have held that playful and mischievous acts of dogs directed toward the person sustaining bodily hurt were not encompassed by § 54-601.[23] In *Donner v. Plymate*,[24] for example, we affirmed summary judgment in favor of the dog owner on a § 54-601 claim when the plaintiff sustained an injury after a dog collided with her knee in the course of chasing her playfully as part of the dog's exercise. Similarly, in *Holden v. Schwer*,[25] we held that acts of a puppy playfully running after a three-wheeler and abruptly stopping in front of it, causing the driver to sustain injuries when she veered to avoid the puppy, were not encompassed by § 54-601. We have explained that "[o]bviously the Legislature was fully aware of the need for protection from the intentional, deliberate,

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[19] *Id.* (emphasis supplied).

[20] *Id*. (emphasis supplied).

[21] *Id.* (emphasis supplied).

[22] See, *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993); *Paulsen v. Courtney, supra* note 8; *Donner v. Plymate, supra* note 7.

[23] See *id.* See, also, *Underhill v. Hobelman, supra* note 6.

[24] *Donner v. Plymate, supra* note 7.

[25] *Holden v. Schwer, supra* note 22.

and purposeful acts of dogs and as a result restricted section 54-601 . . . to those acts manifesting such qualities."[26]

We have also explained in relation to the meaning of the language of § 54-601(1)(b) that "[t]he purpose of the original statute was to protect domestic animals, which are ordinary prey of dogs."[27] In fact, it was not until 1961 that the language of this "nonbiting" subsection of the statute was amended to apply to a "person or persons" "kill[ed], wound[ed], worr[ied], or chas[ed]" by the dog.[28] Before that time, the provision here at issue encompassed only actions directed toward domestic animals owned by the plaintiff and allowed recovery only for damages caused by harm to such domestic animals.[29] Before 1961, bodily hurt sustained directly by a person fell under § 54-601 only if such person had been bitten as described in subsection (1)(a) of the statute.

When the Legislature added "any person or persons" as an object of the dog's acts described by § 54-601(1)(b), the Legislature clearly meant to expand compensability under the statute to harm to a person caused by acts other than biting, acts which manifested the dangerous propensities that are the historical foundation for the common-law strict liability claim. Thus, after the amendment, people could bring strict liability claims under § 54-601(1)(b) for injuries they sustained during falls precipitated by dogs "worrying, or chasing" them; whereas before, they could not.

That language, however, has never been understood as encompassing bodily hurt to a person by way of a dog worrying or chasing "any sheep or other domestic animals" that, in turn, collided with the person. Such behavior toward the dog's "ordinary prey" has historically been compensable under

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[26] *Donner v. Plymate, supra* note 7, 193 Neb. at 649-50, 228 N.W.2d at 614.

[27] *Id.* at 649, 228 N.W.2d at 614.

[28] See 1961 Neb. Laws, ch. 268, § 1, p. 786. See, also, *Donner v. Plymate, supra* note 7.

[29] *Id.*

§ 54-601 only if the owner of the "prey" sustained indirect damages by virtue of the harm to the animal. And, as stated, all the words of § 54-601(1)(b) must be read together in the context that the Legislature chose to place them.

To understand the statute more broadly, as Smith suggests, would vastly expand the scope of strict liability for dog owners. In fact, Smith's proposed interpretation of the statute would effectively abrogate the common-law negligence action that has traditionally coexisted with § 54-601 and with the common-law strict liability action. A broad reading of the statute limited only by proximate causation and without any additional requirement that the dog's behavior somehow manifest dangerous propensities would eliminate any reason for nontrespassing persons suffering bodily hurt to proceed in negligence, where they would have the additional burden to prove that the owner of the nonvicious dog should have reasonably anticipated the occurrence.[30]

To accept Smith's suggested interpretation of the statute would make dog owners strictly liable for actions directed toward "ordinary prey" whenever the prey's inadvertent physical harm to a bystander was part of that animal's normal response to the dog. It would make cattle ranch owners susceptible to strict liability whenever a herding dog's normal behavior directed toward a cow leads the cow to collide with and injure a ranch employee. Based on the history of the statute and the Legislature's prior acquiescence to our understanding of the statute's limited scope in light of such history, we cannot conclude that this was the Legislature's intent. We have never held that a dog's actions directed toward another animal can lead to strict liability under § 54-601 for bodily hurt to a person by way of such animal instrumentality.

[6] Perhaps Gunner's alleged act of nipping at a cow's heels is not properly characterized as "playful and mischievous," but it was nothing more than the normal behavior of

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[30] See *Donner v. Plymate, supra* note 7.

a herding dog, which has never been considered vicious. In this case, unlike the cases where we have concluded that playful and mischievous acts do not fall under § 54-601(1)(b), the dog's acts were not even directed toward the entity suffering the bodily hurt. Gunner had no direct contact with Smith, and there is no evidence that Gunner's actions were in any way directed toward Smith. Indeed, this is our first occasion to address the applicability of § 54-601(1)(b) in circumstances where the dog's acts were directed solely toward its "ordinary prey" and harm to the animal is not the basis for the plaintiff's claim. Given that other words in § 54-601(1)(b)—"worrying" and "chasing" "any person or persons or any sheep or other domestic animals belonging to such person, firm, or corporation"—entail action directed toward the injured person or toward the injured animal owned by the damaged plaintiff, we hold that "injuring" must also be limited to bodily hurt caused by acts directed toward the person or animal hurt.

Even resolving every controverted fact in Smith's favor and giving him the benefit of every inference that can reasonably be deduced from the evidence,[31] there was no evidence that Gunner bit Smith, worried Smith, or chased Smith. And while Smith allegedly was hurt by a cow that was put in motion by Gunner, there was no evidence that Gunner's actions were directed toward Smith. There might be situations where a dog, in an act manifesting aggression toward a person, utilizes an instrumentality to cause the person bodily hurt, but this is not that case.

Whether Meyring should have foreseen that Gunner would attempt to herd cattle in an enclosed space and thereby injure one of its employees was a question of negligence that was properly presented to the jury. The district court did not err in concluding that the evidence presented did not fall within the purview of strict liability under § 54-601.

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[31] See *Jacobs Engr. Group v. ConAgra Foods, supra* note 1.

CONCLUSION

For the foregoing reasons, we affirm the district court's order granting a directed verdict in favor of Meyring on Smith's statutory strict liability claim.

Affirmed.

Miller-Lerman, J., concurring.

I do not read our opinion herein as necessarily endorsing the majority opinion in *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009), regarding "injuring" under § 54-601(1)(b), from which I dissented, and accordingly, I concur.

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

In re Grand Jury of Douglas County. State of Nebraska, appellant, v. Douglas County District Court et al., appellees.

922 N.W.2d 226

Filed January 25, 2019. No. S-18-328.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Final Orders: Appeal and Error.** An order is final for purposes of appeal under Neb. Rev. Stat. § 25-1902 (Reissue 2016) if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
4. **Actions: Statutes.** Special proceedings include every special civil statutory remedy not encompassed in chapter 25 of the Nebraska Revised Statutes which is not in itself an action.
5. ____: ____. Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."
6. **Jurisdiction.** A court has jurisdiction to issue orders on motions pertaining to incidental matters within the scope of the matter over which the court has jurisdiction.
7. **Final Orders: Appeal and Error.** In a special proceeding, an order is final and appealable if it affects a substantial right of the aggrieved party.
8. ____: ____. The inquiry of whether an order affects a substantial right focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that right.

9. ____: ____. Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Appeal dismissed.

Douglas J. Peterson, Attorney General, Corey M. O'Brien, and Mariah Haffield, Senior Certified Law Student, for appellant.

Michael C. Cox and Daniel J. Fischer, of Koley Jessen, P.C., L.L.O., for appellees Omaha World-Herald and KETV Channel 7.

Michael P. Dowd, of Dowd & Corrigan, L.L.C., for amicus curiae Omaha Police Officers Association.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

The district court impaneled a grand jury to investigate the in-custody death of Zachary Bearheels. At the close of the evidence, the grand jury returned indictments against two police officers. The court then issued an order sua sponte to make the grand jury transcript publicly available, which prompted the State to file a motion to seal the grand jury documents. The court held a hearing and overruled the motion. We conclude that the order overruling the State's motion was made in a special proceeding but did not affect a substantial right. As a result, the district court's order was not a final, appealable order. The appeal is dismissed.

BACKGROUND

On July 6, 2017, the Douglas County coroner certified to the Douglas County District Court that Bearheels "died while being apprehended by or while in the custody of a law

enforcement officer or detention personnel."[1] The district court called a grand jury and appointed a special prosecutor from the Nebraska Attorney General's office. The grand jury convened and returned "A True Bill," which indicated that at least 12 of the 16 grand jurors found probable cause to believe that a crime had been committed by the two police officers.[2]

On its own motion and without a hearing, pursuant to Neb. Rev. Stat. § 29-1407.01(2)(b) (Reissue 2016), the district court ordered that a transcript of the grand jury proceedings be prepared and made available for public review in the office of the clerk of district court. The following day, the special prosecutor filed a motion requesting that the grand jury documents not be publicly disclosed. The special prosecutor's motion maintained that public disclosure is appropriate only when the grand jury does not return an indictment, known as a "no true bill,"[3] and that disclosure of the transcript containing the testimony of 20 witnesses and 847 exhibits presented to the grand jury would undermine the pending criminal prosecutions of the two individuals who were indicted.

The court held a hearing on the matter. The special prosecutor appeared, as well as counsel for each police officer and counsel for the Omaha World-Herald and KETV Channel 7 (the media). The court heard arguments, received evidence, took the matter under advisement, and issued a written order in which it maintained its previous ruling based upon its interpretation of the plain and ordinary meaning of § 29-1407.01(2)(b), which provides:

> In the case of a grand jury impaneled pursuant to subsection (4) of section 29-1401, a transcript, including any exhibits of the grand jury proceedings, shall be prepared at court expense and shall be filed with the court where

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[1] See Neb. Rev. Stat. § 29-1401(4) (Reissue 2016).

[2] See Neb. Rev. Stat. §§ 25-1633, 29-1406(2)(e), and 29-1416(1) (Reissue 2016).

[3] See § 29-1406(2)(g)(ii).

> it shall be available for public review. Such transcript shall not include the names of grand jurors or their deliberations.

Based upon its understanding of the requirements of § 29-1407.01(2)(b), the court instructed the clerk to "upon a request, make a location available for the requesting individual to review said transcript and exhibits and complete said review within a reasonable time." The court's order did not allow for dissemination or photocopying of the transcript.

The special prosecutor argues on appeal that there is a lack of clarity regarding the mandate of public disclosure under § 29-1407.01(2)(b). The special prosecutor points to the Legislature's adoption of 2016 Neb. Laws, L.B. 1000, which amended § 29-1407.01(2)(b) to make grand jury transcripts available for public review for all in-custody deaths, and amended § 29-1406(2)(g), which makes a grand jury report and transcript for in-custody deaths publicly available when a grand jury returns no true bill. The special prosecutor argues that the Legislature intended to create transparency in a grand jury proceeding in which a police officer is exonerated, but did not anticipate that the grand jury transcript and exhibits would be made public when a true bill is returned and the indictment process is ongoing. The special prosecutor stated that the exhibits before the grand jury included investigative reports, autopsy and toxicology reports, photographs, and digital media. The special prosecutor acknowledged that it filed this appeal to protect the record and to provoke legislative change.

We moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

ASSIGNMENTS OF ERROR

The special prosecutor assigns, restated, that the district court erred in interpreting § 29-1407.01(2)(b), and related

[4] See Neb. Rev. Stat. § 24-1106 (Cum. Supp. 2018).

statutes, to require that the grand jury transcript and exhibits be made publicly available. In particular, the special prosecutor argues that grand jury records should not be made public when the grand jury is impaneled pursuant to § 29-1401(4) and the grand jury returns a true bill.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[5]

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[6] The threshold issue is whether the special prosecutor has appealed from a final, appealable order.

The parties point out that this court has, on three prior occasions, exercised appellate review over a district court order which concerned the release of grand jury documents.[7] However, our prior cases did not discuss a basis for appellate jurisdiction, and each case occurred prior to the passage of L.B. 1000 in 2016, which enacted § 29-1407.01(2)(b), the provision which prompted the court's action. This appeal therefore raises the novel issue of whether this court has appellate jurisdiction over a district court order which makes a grand jury transcript available for public review under the circumstances described within § 29-1407.01(2)(b). Our inquiry focuses on

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[5] *Fidler v. Life Care Centers of America*, 301 Neb. 724, 919 N.W.2d 903 (2018).

[6] *State v. Coble*, 299 Neb. 434, 908 N.W.2d 646 (2018).

[7] See, *In re Grand Jury of Lancaster Cty.*, 269 Neb. 436, 693 N.W.2d 285 (2005); *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002); *In re Grand Jury of Douglas Cty.*, 244 Neb. 798, 509 N.W.2d 212 (1993).

whether the order overruling the special prosecutor's motion in opposition to public disclosure of the grand jury transcript is a final, appealable order.

[3] Appellate jurisdiction turns on whether the order was a final order under Neb. Rev. Stat. § 25-1902 (Reissue 2016). An order is final for purposes of appeal under § 25-1902 if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[8]

As a matter of first impression, we conclude that a hearing on a motion concerning the public disclosure of grand jury documents under § 29-1407.01(2)(b) is a special proceeding.

[4,5] Special proceedings include every special civil statutory remedy not encompassed in chapter 25 of the Nebraska Revised Statutes which is not in itself an action.[9] An action is any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment.[10] Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.[11] Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."[12]

Examples of special proceedings include juvenile court proceedings, probate actions, and workers' compensation

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[8] *Fidler, supra* note 5.

[9] See, *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006); *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

[10] *Id.*

[11] *In re Interest of D.I.*, 281 Neb. 917, 799 N.W.2d 664 (2011).

[12] *Id.*; *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

cases.[13] We have held that various proceedings under chapter 29 of the Nebraska Revised Statutes constitute special proceedings affecting substantial rights. Examples of orders made in special proceedings under chapter 29 include orders overruling a motion for discharge based on a violation of speedy trial rights, orders finding a defendant not competent to stand trial, and orders on an application for writ of habeas corpus.[14]

We find that an order regarding the public disclosure of grand jury documents pursuant to § 29-1407.01(2)(b) is made during a special proceeding. The special prosecutor's motion was not itself an action. The motion was filed within a grand jury proceeding, which involves a probable cause determination and does not result in a final determination of rights between parties. Further, § 29-1407.01(2)(b) concerns the civil statutory remedy of making publicly available information regarding an in-custody death, a remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes.

[6] We note that while the special proceeding in this case was the hearing on the special prosecutor's motion, § 29-1407.01(2)(b) and its surrounding statutes do not explicitly afford a party the right to file a motion, and there is no explicit requirement that the parties be heard prior to a court's taking action to make the records public. Here, the court interpreted § 29-1407.01(2)(b) and made the grand jury transcript and exhibits publicly available on its own initiative. Thereafter, the special prosecutor filed a motion to "alter and/or amend" the court's order, the media filed a motion to release the grand jury transcript and exhibits, and one of the police officers filed a motion for a protective order and a motion to quash. Even though these motions are not explicitly authorized by statute, we find that the district court had jurisdiction over the motions and properly considered them, because the motions

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[13] See *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[14] See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

clearly pertained to the court's jurisdiction over the disclosure of grand jury records under § 29-1407.01(2)(b). A court has jurisdiction to issue orders on motions pertaining to incidental matters within the scope of the matter over which the court has jurisdiction.[15] Once the parties filed motions regarding § 29-1407.01(2)(b) which requested a civil remedy, they initiated a special proceeding.

[7] However, the fact that the order was made during a special proceeding does not end our inquiry. In a special proceeding, an order is final and appealable if it affects a substantial right of the aggrieved party.[16] The parties have not demonstrated that a substantial right has been affected under the circumstances of this case.

[8,9] Numerous factors determine whether an order affects a substantial right for purposes of appeal. The inquiry focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that right.[17] Whether an order affects a substantial right depends on "'"whether it affects with finality the rights of the parties in the subject matter."'"[18] It also depends on whether the right could otherwise effectively be vindicated.[19] An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.[20]

The special prosecutor argues the order affected the State's rights by compromising the prosecutions of the police officers. The special prosecutor argues that releasing the transcript of the grand jury proceedings undermines the testimony of the

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[15] *Coble, supra* note 6; *State v. McNerny*, 239 Neb. 887, 479 N.W.2d 454 (1992).

[16] *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996).

[17] *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016), citing *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015).

[18] *Id.* at 581, 879 N.W.2d at 33, quoting *Jackson, supra* note 17.

[19] See *id.*, citing *Jackson, supra* note 17.

[20] *Id.*

witnesses and could make the witnesses unwilling to testify in the future. In addition, the special prosecutor argues that release of the transcript will generate pretrial publicity that will impede the State's ability to seat an impartial jury.

There are many reasons why the special prosecutor has not shown that the order affected a substantial right of the State. First, the special prosecutor conceded that these concerns are for the Legislature to address, and not this court. Second, the rights asserted do not relate to the grand jury that is the subject of this case, but, rather, go to the question of whether a substantial right of the parties is affected in a future prosecution.[21] Third, the arguments do not account for the tailored manner in which the court allowed for public disclosure of the transcript. The order required interested members of the public to check out the materials from the clerk of court and complete their review at the court within a reasonable period of time, and the court prohibited dissemination of the materials. Fourth, there is no concrete set of facts in our record that would establish good cause to not have the information be released to the media. For example, there has been no showing that the media coverage would not be factual, as opposed to invidious or inflammatory.[22] Fifth, the State has already completed the first prosecution, which was scheduled to last twice as long as the second prosecution and therefore would involve more evidence than the second prosecution. The testimony and exhibits concerning Bearheels' death have been made public independent of the court's order.

No other party has shown that the order affected a substantial right. The media argue the substantial right at issue is the public's right to view the transcript and exhibits from the grand jury proceeding, a right expressly provided by § 29-1407.01(2)(b). However, the court's order upheld this right; the media were not aggrieved by the order. We note

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[21] See *Fidler, supra* note 5.

[22] See *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

the court interpreted the phrase "available for public review" within § 29-1407.01(2)(b) to not include dissemination of the records. Assuming for the sake of argument that the court's tailored release of the records was inconsistent with § 29-1407.01(2)(b), the media did not cross-appeal from the court's order and did not show that the order interfered with the public's right to transparency. In addition, if the grand jury court failed to comply with § 29-1407.01(2)(b), an aggrieved party could seek relief through a mandamus action rather than through an appeal.

Lastly, one of the police officers who was indicted filed a motion for a protective order and a motion to quash before the grand jury court, but did not appeal from the court's order. It would seem that a defendant in a pending criminal prosecution would be the most natural party to demonstrate that the release of grand jury documents affects a substantial right. The parties noted in their arguments that § 29-1407.01(2)(b) does not affirmatively require that the records be made public prior to the conclusion of a criminal prosecution following an indictment. Therefore, where the grand jury returns a true bill and the court proceeds to make grand jury records publicly available under § 29-1407.01(2)(b), we see no reason why a party in a subsequent prosecution cannot move for a protective order. Likewise, we see no reason why a grand jury court or a trial court proceeding over the criminal prosecutions cannot consider a motion for protective order and, upon good cause shown, grant relief consistent with a party's right to a fair trial while still adhering to § 29-1407.01(2)(b).

CONCLUSION

For the reasons stated above, we dismiss the appeal for lack of jurisdiction.

Appeal dismissed.

Miller-Lerman, J., not participating.



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

Jose Sandoval et al., appellants and cross-appellees, v. John Peter Ricketts, Governor of the State of Nebraska, et al., appellees, Don Stenberg, Nebraska State Treasurer, et al., appellees and cross-appellants, and Arthur L. Gales et al., appellees and cross-appellees.

922 N.W.2d 222

Filed January 25, 2019. No. S-18-390.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which 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.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
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 appeal.
4. **Declaratory Judgments.** An action for a declaratory judgment will not lie where another equally serviceable remedy is available.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Brian William Stull, of American Civil Liberties Union Foundation, Amy A. Miller, of American Civil Liberties Union of Nebraska Foundation, Christopher L. Eickholt, of Eickholt Law, L.L.C., and Brett J. Williamson, Luann Simmons, and Bill Trac, of O'Melveny & Myers, L.L.P., for appellants.

Douglas J. Peterson, Attorney General, and Ryan S. Post for appellees John Peter Ricketts et al.

Bartholomew L. McLeay, of Kutak Rock, L.L.P., for appellee John Peter Ricketts in his individual capacity.

J.L. Spray and Christina L. Usher, of Mattson Ricketts Law Firm, and Ryan K. McIntosh, of Brandt, Horan, Hallstrom & Sedlacek, for appellees Don Stenberg et al.

Tracy Hightower-Henne, of Hightower Reff Law, and Kevin Barry, of Quinnipiac University School of Law Legal Clinic, for amici curiae Legal Scholars.

Heavican, C.J., Cassel, Stacy, Funke, and Papik, JJ., and Pirtle and Riedmann, Judges.

Heavican, C.J.

INTRODUCTION

Plaintiffs are eight death row inmates. The inmates filed suit seeking a declaratory judgment that 2015 Neb. Laws, L.B. 268, which abolished the death penalty in Nebraska, was not repealed by referendum. The inmates further sought injunctive relief preventing the Department of Correctional Services and its director, Scott R. Frakes, from carrying out executions or steps toward execution against any plaintiffs or indispensable parties. The Lancaster County District Court dismissed the complaint for failure to state a claim. The inmates appeal. We affirm the district court's dismissal.

BACKGROUND

Plaintiffs in this case are Jose Sandoval, Roy L. Ellis, Jorge Galindo, Nikko Jenkins, John L. Lotter, Raymond Mata, Marco E. Torres, and Eric F. Vela (the inmates). Indispensable parties are Arthur L. Gales, Jeffrey Hessler, and Carey Dean Moore. The inmates and indispensable parties were all convicted of first degree murder and sentenced to death. Since the filing of the complaint, Moore has been executed.

The Nebraska Legislature passed L.B. 268 over the veto of Governor John Peter Ricketts on May 27, 2015. L.B. 268 abolished the death penalty in Nebraska. The Legislature adjourned on May 29; under Neb. Const. art. III, § 27, L.B. 268 would take effect on August 30.

Following the passage of L.B. 268, opponents of the bill organized as "Nebraskans for the Death Penalty, Inc.," and, on June 1, 2015, filed documents with the Nebraska Secretary of State seeking a referendum to repeal L.B. 268. On August 26, the opponents so organized filed with the Secretary of State petitions purporting to include the signatures of approximately 166,000 Nebraskans in support of the referendum. On October 16, the Secretary of State's office announced that verification of those signatures was complete and that enough signatures (in this case 143,000) had been verified to suspend the operation of L.B. 268. During the November 8 election, a vote was held on the referendum. The referendum passed, and L.B. 268 was repealed.

The complaint in this case was filed on December 4, 2017, and seeks declaratory and injunctive relief. Defendants in this action are Ricketts (in both his individual and official capacities), State Treasurer Don Stenberg (in both his individual and official capacities), Attorney General Doug Peterson (in only his official capacity), Frakes (in only his official capacity), Judy Glassburner, Aimee Melton, and Bob Evnen.

Count I seeks a declaratory judgment that the referendum was not legally sufficient or effective because members of the executive branch, including Ricketts and Stenberg, proposed, initiated, financed, organized, managed, and directed the process, in violation of the Nebraska Constitution's separation of powers provision.

Count II seeks a declaratory judgment that the referendum against L.B. 268 failed for lack of a sworn statement from the sponsors stating that the list of identified sponsors was truthful and accurate.

Count III seeks a declaratory judgment that the punishments for the inmates and the indispensable parties (except Jenkins, who was not sentenced to death as of May 30, 2017) were, by operation of law, converted into sentences of life imprisonment on August 30, 2015, and that the August 26 filing of unverified signatures did not suspend the effect of L.B. 268. Moreover, the October 15 announcement that sufficient signatures had been verified did not reinstate the death penalty for those individuals whose penalties had been changed to life imprisonment on August 30.

Defendants filed motions to dismiss, which were granted by the district court. The court reasoned that (1) the inmates had equally serviceable remedies, (2) the inmates failed to state a claim that Ricketts or Stenberg violated the separation of powers doctrine, (3) L.B. 268 never took effect, and (4) the Legislature lacked the power to modify the inmates' sentences.

The inmates appeal.

ASSIGNMENTS OF ERROR

The inmates assign, renumbered and restated, that the district court erred in finding that (1) the inmates had other serviceable remedies; (2) L.B. 268 was suspended on August 26, 2015, upon the filing of unverified signatures; (3) the Legislature was without the power to modify the inmates' sentences from death to life imprisonment; and (4) the inmates failed to state a cause of action under the separation of powers provisions of the Nebraska Constitution, and by failing to allow the inmates to amend their pleading to state a claim.

On cross-appeal, defendants Stenberg, Glassburner, Melton, and Evnen assign that the district court erred in not finding they were misjoined parties and not accordingly dismissing them from the action.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which 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.[1]

[2] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[2]

ANALYSIS

Subject Matter 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 appeal.[3] In this case, defendants sought dismissal on the basis of the district court's jurisdiction. The district court implicitly rejected this argument, and defendants again raise it here. They argued that the inmates

> filed a civil declaratory judgment action to collaterally attack their final death penalty sentences ordered by other district courts who had jurisdiction over [the inmates] and their crimes, which sentences were final after having been affirmed on appeal by the Nebraska Supreme Court. In short, [the inmates] filed the wrong procedure in the wrong court against the wrong defendants to obtain the remedy of having their death penalty sentences vacated and enjoined from being carried out.[4]

We disagree. Plainly, a district court has jurisdiction to hear and decide a declaratory judgment action.[5] But defendants' argument regarding jurisdiction certainly touches on the allegations made by the inmates and whether those allegations stated

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[1] *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018).

[2] *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018).

[3] *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 917 N.W.2d 903 (2018).

[4] Brief for appellees Ricketts et al. at 17.

[5] Neb. Rev. Stat. § 25-21,149 (Reissue 2016).

a claim for which relief could be granted (i.e., the merits of this appeal). We now turn to that question.

Equally Serviceable Remedies.

The inmates argue that the district court erred in finding they could not maintain a declaratory judgment claim because they had other equally serviceable remedies—in their cases, postconviction actions arguing that their death sentences were void as a result of L.B. 268.

[4] We have held under similar circumstances that an action for a declaratory judgment does not lie where another equally serviceable remedy is available.[6] In *Hall v. State*, the defendant was convicted of second degree murder and sentenced to life imprisonment. This court affirmed that conviction and sentence and later dismissed an appeal of the denial of the defendant's motion seeking postconviction relief. The defendant then filed three motions seeking declaratory judgments and a second petition for postconviction relief. In those motions, he sought a finding that the second degree murder statute was unconstitutionally vague and overbroad.

We rejected the defendant's argument that declaratory judgment was an available remedy, observing that he had the opportunity to challenge the constitutionality of the relevant statutes in the criminal proceedings against him, through his direct appeal or a postconviction motion, but failed to do so. The defendant's motions seeking a declaratory judgment were a collateral attack on his convictions. We also dismissed his postconviction motion seeking similar relief as procedurally barred.

We addressed a similar situation in *State v. Dunster*.[7] In *Dunster*, the defendant filed a motion for new trial and a motion to vacate his death sentence. He asked us to recognize a new procedure for the purpose of challenging a purportedly

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[6] *Hall v. State*, 264 Neb. 151, 646 N.W.2d 572 (2002).

[7] *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005).

void sentence. We declined that invitation, noting that a postconviction motion, properly made, would be available to assert that one's sentence was void.

In this case, the record establishes that Jenkins' direct appeal is pending and that the other inmates have filed motions seeking postconviction relief. Each has raised the assertion that his death sentence or sentences are unconstitutional and void under L.B. 268. While we decline to hold that a postconviction action will always be the correct procedure, it is available here and provides all but Jenkins with a remedy which, compared to the declaratory judgment sought, is equally serviceable. Jenkins' equally serviceable remedy is his pending direct appeal.

We conclude that the inmates have equally serviceable remedies and accordingly affirm the district court's dismissal of their declaratory judgment action. We need not reach the inmates' remaining assignments of error or the cross-appeal filed by Stenberg, Glassburner, Melton, and Evnen.

CONCLUSION

We affirm the decision of the district court dismissing the inmates' suit because other equally serviceable remedies were available.

Affirmed.

Miller-Lerman and Freudenberg, JJ., not participating.



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

Bryson L., appellee, v. Izabella L., appellee, and David B., interested party, appellant.

921 N.W.2d 829

Filed January 25, 2019. No. S-18-459.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. 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: Time: Notice: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal.
4. **Motions to Vacate: Judgments: Time.** In the absence of an applicable rule to the contrary, a motion asking the court to exercise its inherent power to vacate or modify its own judgment does not terminate the time for taking an appeal.
5. **Motions to Vacate: Final Orders: Time: Notice: Appeal and Error.** A party can move a court to vacate or modify a final order, but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it.
6. **Pleadings: Judgments: Time: Appeal and Error.** Filing a timely motion to alter or amend a judgment terminates the time in which a notice of appeal must be filed.
7. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Reissue 2016), and must seek substantive alteration of the judgment.
8. **Pleadings: Judgments: Time: Appeal and Error.** A timely motion to alter or amend a judgment terminates the time to file an appeal, and the

full 30-day period to appeal begins to run from the entry of the order ruling upon the motion to alter or amend a judgment.

9. ____: ____: ____: ____. An untimely motion to alter or amend a judgment does not terminate the time for perfection of an appeal and does not extend or suspend the time limit for filing a notice of appeal.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Appeal dismissed.

Aaron C. Wegner, of Husker Law, for appellant.

Heather L. Horst, of Walz Law Offices, P.C., L.L.O., for appellee Bryson L.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

This appeal turns upon a jurisdictional issue. Approximately 10 months after a marital dissolution decree was entered adjudicating paternity of a child, David B. sought to intervene and disestablish paternity. The district court entered a final order denying intervention. David then filed two motions to reconsider, one within 10 days of the final order, and after it was denied because it lacked a notice of hearing, he filed a second motion 11 days after the final order. Because David did not appeal within 30 days after the denial of his first motion to reconsider, which was properly construed as a motion to alter or amend the judgment, we lack jurisdiction of this appeal. The second motion, which was untimely as a motion to alter or amend, did not terminate or extend the time for appeal. We therefore dismiss the appeal.

BACKGROUND

Approximately 3 months after Izabella L. married Bryson L., she gave birth to a child. In November 2016, the district court approved the parties' property settlement agreement and dissolved the 2-year marriage. The decree awarded Bryson sole

physical custody of the child and ordered that neither party shall pay child support due to Izabella's unemployment and limited income.

In September 2017, David filed a motion to intervene in the dissolution case as an interested party. David alleged that when Izabella was pregnant and engaged to marry Bryson, she "indicated to [David] that he could be the father of the minor child." In light of Izabella's divorce, David obtained genetic testing. The test results, obtained in August, showed David's probability of paternity to be 99.999 percent. Thus, David sought to be included in the dissolution case in order to disestablish Bryson's custodial rights to the child under Neb. Rev. Stat. § 43-1412.01 (Reissue 2016). In October, David filed a motion to set aside the paternity finding within the decree of dissolution. He also requested that the court appoint a guardian ad litem for the child.

Although not in our record, Bryson apparently filed a motion to dismiss David's motions to intervene and to set aside paternity. The district court held a hearing on that motion along with David's motions.

On March 2, 2018, the district court entered an "Opinion and Order." The court observed that the child had lived with Bryson since birth and was now 3 years old. The court found that David failed to act in a timely manner, noting that David had actual knowledge in 2014 that he could be the child's father and took no action to determine paternity until after Bryson and Izabella divorced. The court sustained Bryson's motion to dismiss and denied David's motions to intervene and to set aside paternity.

On March 9, 2018, David filed a "Motion to Vacate/Reconsider." He asked "for the Court to set this matter for a hearing to reconsider the Opinion and Order entered on March 2, 2018 and to consider the best interests of the minor child at issue, amongst other issues stated herein." On March 13, the court denied the motion "for the procedural error that no Notice of Hearing was filed with the Motion."

Later on March 13, 2018, David filed a second "Motion to Vacate/Reconsider" with a notice of hearing specifying a hearing date. The addition of a notice of hearing and the date on the certificate of service are the only differences between the two motions.

On April 10, 2018, the district court denied David's motion. The court found that the motion should be considered to be one to alter or amend under Neb. Rev. Stat. § 25-1329 (Reissue 2016) and that it was "initially filed timely on March 9, 2018." However, the court found that David's motion lacked merit. On May 8, David filed a notice of appeal.

ASSIGNMENTS OF ERROR

David assigns four errors, which we consolidate and restate as alleging that the court erred in (1) denying his motions to intervene and to set aside paternity and (2) failing to appoint a guardian ad litem to provide an analysis of the child's best interests.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[1]

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[2] Bryson asserts that we lack appellate jurisdiction, because David's March 13, 2018, motion to vacate/reconsider was not timely filed and did not terminate the running of the time for filing a notice of appeal. We agree.

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[1] *State on behalf of Marcelo K. & Rycki K. v. Ricky K.*, 300 Neb. 179, 912 N.W.2d 747 (2018).

[2] *Id.*

[3] Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal.[3] The notice of appeal must be filed within 30 days of the judgment, decree, or final order from which the party is appealing.[4] Here, the parties do not dispute that the March 2, 2018, order was final and appealable.

[4,5] We begin by considering the effect of David's first filing of a "Motion to Vacate/Reconsider." A motion for reconsideration is nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.[5] In the absence of an applicable rule to the contrary, a motion asking the court to exercise its inherent power to vacate or modify its own judgment does not terminate the time for taking an appeal.[6] A party can move the court to vacate or modify a final order, but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it.[7] If David's motion should have been treated as one to reconsider or to vacate, the court's denial of the motion meant that he needed to file his notice of appeal within 30 days of the March 2, 2018, order in order to vest jurisdiction in this court.

[6-8] But if David's motion qualified as a motion to alter or amend a judgment, the time in which to file an appeal was effectively extended. That is because filing a timely motion to alter or amend a judgment terminates the time in

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[3] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[4] See § 25-1912(1).

[5] *Applied Underwriters v. Oceanside Laundry*, 300 Neb. 333, 912 N.W.2d 912 (2018).

[6] See *In re Change of Name of Whilde*, 298 Neb. 510, 904 N.W.2d 707 (2017).

[7] *Id.*

which a notice of appeal must be filed.[8] In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment.[9] A timely motion to alter or amend a judgment terminates the time to file an appeal, and the full 30-day period to appeal begins to run from the entry of the order ruling upon the motion to alter or amend a judgment.[10]

David filed his first motion within 10 days of the March 2, 2018, order, and sought substantive alteration of the March 2 order. Thus, the first motion qualified as a motion to alter or amend, thereby terminating the appeal time. But the court denied the first motion on March 13, which started the running of a new 30-day period for appeal.

[9] David's second motion to reconsider was untimely and could not be construed as a motion to alter or amend the judgment. David filed his second motion to vacate or reconsider 11 days after the March 2, 2018, order. An untimely motion to alter or amend does not terminate the time for perfection of an appeal and does not extend or suspend the time limit for filing a notice of appeal.[11] Because that motion was not filed within 10 days, it did not terminate the time for filing an appeal. Thus, the appeal time ran 30 days after the entry of the March 13 order denying his first motion. David's notice of appeal, filed in May 2018, was not timely. We therefore lack jurisdiction over this appeal.

The circumstances of this case provide a cautionary tale for both bar and bench. On March 13, 2018, when David filed his second motion, the 10-day period for filing a motion to alter or

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[8] See § 25-1912(3).

[9] *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018).

[10] See *id.*

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

amend had expired. Thus, unlike his first motion to vacate or reconsider, the second motion could not be treated as a motion to alter or amend a judgment. The second motion was only a motion to reconsider, which, as we explained above, does not extend the time for appeal. Although David did file an appeal of the April 10 order denying his second motion and did so within 30 days after the second motion was denied, the time for appeal had already expired.

The bar should be cognizant of and follow any applicable statutes and rules concerning motions. A statute sets forth that "[w]here notice of a motion is required, it must be in writing and shall state . . . the place where and the day on which it will be heard . . . ."[12] Although we see nothing in the Uniform District Court Rules of Practice and Procedure[13] requiring a notice of hearing at the time of filing a motion, some local district court rules contain such a requirement.[14] We do not find an equivalent requirement in the local rules for the Second Judicial District, which includes Sarpy County.[15]

Where a local rule does require a notice of hearing, it can be crafted to provide some leeway for compliance. For example, a local rule of the 12th Judicial District, which by its terms is applicable only to Scotts Bluff County, states: "If it is impossible to secure a time for hearing, the motion may be filed, but notice of hearing must be furnished promptly thereafter. Failure to secure and serve notice of . . . hearing within 10

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[12] Neb. Rev. Stat. § 25-910 (Reissue 2016).

[13] Neb. Ct. R. §§ 6-1501 to 6-1526.

[14] See, Rules of Dist. Ct. of First Jud. Dist. 1-9 (rev. 2005); Rules of Dist. Ct. of Third Jud. Dist. 3-2 (rev. 2014); Rules of Dist. Ct. of Fourth Jud. Dist. 4-2 (rev. 2005); Rules of Dist. Ct. of Eighth Jud. Dist. 8-3 (rev. 1995); Rules of Dist. Ct. of Ninth Jud. Dist. 9-11 (rev. 2010); Rules of Dist. Ct. of 10th Jud. Dist. 10-21 (rev. 2010); Rules of Dist. Ct. of 11th Jud. Dist. 11-3 (rev. 2012).

[15] See Rules of Dist. Ct. of Second Jud. Dist. 2-2 and 2-4 (rev. 2018).

days after filing a motion will be deemed an abandonment of the motion."[16]

Because we lack jurisdiction of this appeal, we express no opinion whether the district court erred in overruling David's first motion because it did not include a notice of hearing. Where a notice of hearing is required, we recently explained that a district court has the discretion to excuse that requirement. There, as here, a party timely filed a motion to alter or amend, but the motion did not contain a notice of hearing.[17] In that case, unlike the situation here, the opposing party objected that the district court lacked "jurisdiction" due to noncompliance with a local court rule requiring a party to obtain a hearing date at the time of filing a motion, but the court accepted and ruled upon the merits of the motion. In the context of discussing appellate jurisdiction, this court stated that the "statutory description of the motion to alter or amend does not include any requirement that the motion be accompanied simultaneously by a notice of hearing before the district court."[18] We found no error in the district court's consideration of the motion, noting that "district courts have discretion to excuse procedural court rules."[19]

But what a court cannot do is extend the time for filing an appeal. The district court here denied David's first motion to reconsider—which was timely as a motion to alter or amend the judgment. Upon the entry of that denial order, the new 30-day appeal time began to run. After David filed his second motion to reconsider (outside of the 10-day period), the district court apparently tried to help David by finding that his motion for reconsideration should be considered as a motion to alter or amend and that it "was initially filed timely on March 9,

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[16] Rules of Dist. Ct. of 12th Jud. Dist. 12-3(A)(1) (rev. 2010).

[17] See *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

[18] *Id.* at 413, 908 N.W.2d at 641.

[19] *Id.* at 413-14, 908 N.W.2d at 641.

2018." But the court had already denied that March 9 motion. David's March 13 motion was not timely. A successive motion to alter or amend the same judgment does not terminate the time to appeal.[20] As we recently stated: "Allowing an untimely motion to alter or amend would have the effect of extending the time for filing an appeal. But when the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly."[21]

CONCLUSION

David's second motion to reconsider did not terminate the time for filing an appeal, because it was not filed within 10 days of the final order. Because David did not appeal within 30 days of the overruling of his first motion to reconsider, which was properly construed as a motion to alter or amend, we lack jurisdiction and must dismiss his appeal.

Appeal dismissed.

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[20] See *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008). See, also, *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994) (time for filing appeal cannot be extended by successive filings of motions for new trial).

[21] *State v. Lotter, supra* note 9, 301 Neb. at 137, 917 N.W.2d at 860.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jeffery S. Smith, appellant.

922 N.W.2d 444

Filed February 1, 2019. No. S-18-178.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. **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.
3. **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. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
4. **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.
5. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.

6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
8. **Constitutional Law: Criminal Law: Trial: Witnesses.** While the Confrontation Clause guarantees a criminal defendant a face-to-face meeting with witnesses appearing before the trier of fact, that guarantee is not an absolute right. But while the face-to-face requirement is not absolute, it cannot be disposed of easily.
9. **Constitutional Law: Trial: Witnesses: Public Policy.** A defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.
10. **Constitutional Law: Trial: Witnesses: Appeal and Error.** An unconstitutional denial of face-to-face confrontation, like other types of violations of the Confrontation Clause, is subject to harmless error review.
11. **Constitutional Law: Trial: Proof: Appeal and Error.** Where the trial error is of a constitutional dimension, the burden must be on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained.
12. **Verdicts: Juries: Appeal and Error.** Harmless error review ultimately looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
13. **Effectiveness of Counsel: Postconviction: 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 in a subsequent postconviction proceeding.
14. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court.

15. **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.
16. **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 a 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.
17. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.
18. ____. 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 Harlan County: Terri S. Harder, Judge. Affirmed.

D. Brandon Brinegar, of Ross, Schroeder & George, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Jeffery S. Smith appeals his convictions and sentences for first degree sexual assault of a child and felony child abuse following a bench trial in the district court for Harlan County. Smith claims that the court violated his constitutional right of confrontation when it allowed the alleged victim to testify outside Smith's presence. Smith also makes claims of ineffective assistance of trial counsel, insufficiency of the

evidence, and excessive sentences. We affirm Smith's convictions and sentences.

STATEMENT OF FACTS

Smith lived in Alma, Nebraska, with his wife, Rochelle Smith, their two children, and Rochelle's two children from a prior relationship. The State originally charged Smith with four counts of first degree sexual assault of a child in violation of Neb. Rev. Stat. § 28-319.01(1)(b) (Reissue 2016) and four counts of felony child abuse in violation of Neb. Rev. Stat. § 28-707(1)(a) or (e) and (4) (Reissue 2016). The State amended the information to charge one count of each offense. The alleged victim with respect to each charge was R.F., who is Rochelle's daughter from a prior relationship and who was born in February 2001. Smith was born in January 1978. The offenses were charged as having been committed between August 1 and September 30, 2016, when R.F. was 15 years old. Smith's trial on the charges was held in October 2017, when R.F. was 16 years old.

In October 2016, police investigated suspected sexual abuse of R.F. by Ronald Lauhead, an adult friend of Smith and Rochelle. The investigation began after Smith reported to police that one of the other children had told him that she had seen Lauhead naked with R.F. The investigation led police to suspect that Smith and Rochelle had also been involved in the abuse of R.F., and eventually Smith, Rochelle, and Lauhead were each charged with offenses related to such abuse.

Smith waived his right to a jury trial, and the district court scheduled a bench trial for October 24, 2017. The State called Rochelle as its first witness. Rochelle's testimony was as follows.

At the time of the trial, Rochelle was divorced from Smith. She had married Smith in 2007, and they had been married for over 10 years prior to the divorce. Rochelle has four children—two older children from a prior relationship and two younger children with Smith. R.F. is the oldest of Rochelle's children. In 2013, Rochelle and Smith and the four children

moved into a house in Alma. Soon thereafter, Rochelle introduced Smith to Lauhead, whom she had known from high school. Smith and Lauhead became friends, and Lauhead frequently spent time at Smith and Rochelle's house. One night in March 2016, when the children were asleep in their beds, Smith invited Lauhead to engage in a sexual encounter with Smith and Rochelle. Rochelle testified that she initially objected, but she eventually gave in and the three engaged in sexual activities in Smith and Rochelle's bedroom. The next day, Rochelle told Smith that she was not comfortable with what they had done with Lauhead. However, Smith convinced Rochelle to engage in sexual encounters with Lauhead "[t]wo or three more times" in April.

The last time that Rochelle recalled engaging in group sexual activity with Smith and Lauhead was at the end of September 2016. Rochelle finished working at 11 p.m., and when she returned home, Smith and Lauhead were watching television in the living room. The children were asleep in their rooms. Eventually, Smith "suggested another threesome" and Rochelle "went along with" the suggestion. The three went to Smith and Rochelle's bedroom and removed their clothing. Smith and Rochelle lay on their bed touching one another, while Lauhead performed oral sex on Rochelle.

At some point, Smith got out of bed, put on his boxer shorts and left the bedroom. Shortly thereafter, Smith returned to the bedroom with R.F., who was wearing sweatpants and a T-shirt. Smith said that R.F. "was going to join in on the activity." Rochelle told him "no, it wasn't going to happen," but Smith threatened that "if it didn't happen he was going to take all the kids and leave [the] state and [Rochelle would] never see them again." Smith then proceeded to undress R.F. and touch her breasts with his hands as they were standing beside the bed. After Smith had taken all of R.F.'s clothes off, he had her lie down on the bed and then he lay on the bed with R.F. and Rochelle. Lauhead, who had been performing oral sex on Rochelle, moved to the other side of the bed beside

R.F. Lauhead and Smith were both touching R.F.'s breasts and vagina.

In response to the State's question regarding how Smith was touching R.F.'s vagina, Rochelle testified, "Just putting his hand on it and rubbing it." The State further inquired regarding Smith's touching R.F.'s vagina by asking, "[D]id you see him put his finger inside of her vagina?" Rochelle responded, "No." The State asked, "What did you see him do?" Rochelle responded, "He was just fondling the top of it." When the State asked Rochelle to describe what she meant by "fondling," Rochelle stated, "Rubbing it." The State returned to the topic in its redirect examination of Rochelle. The State asked Rochelle to describe Smith's touching of R.F.'s vagina in "better detail." Rochelle replied that "[h]e was touching the outward part of her vagina." The State asked, "Was that between the skin folds known as the labia?" Rochelle replied, "Yes." Upon further questioning, Rochelle testified that Smith had touched R.F. "between the lips of her vagina" for "[m]aybe three to five seconds" and that she had seen him do so "[j]ust once." The State also asked, "But you did not see him actually insert his finger into her vaginal opening?" Rochelle replied, "No, ma'am."

Rochelle testified on direct examination that during the encounter among the four, Lauhead had vaginal intercourse with R.F., while Smith had vaginal intercourse with Rochelle. She also testified that Smith did not attempt to stop Lauhead from having intercourse with R.F. After the encounter was finished, the four all got dressed, and Lauhead went home while R.F. returned to her bed. Thereafter, Rochelle never talked to R.F. about what had happened and R.F. did not try to talk to Rochelle about it.

On cross-examination, Rochelle testified that she had been arrested for child abuse with respect to the abuse of R.F. and that, as a result, her testimony in this case was being given pursuant to a plea agreement related to those charges. According to Rochelle, pursuant to the plea agreement, some charges

against her were being dismissed and the State agreed not to attempt to terminate her parental rights.

Rochelle testified that in her initial statement to police regarding the abuse of R.F., she had indicated that she had refused to participate in the sexual activity involving Smith, Lauhead, and R.F. She also testified that in the initial statement, she had said that Smith had touched R.F.'s breasts but she had not said that Smith touched R.F.'s vagina. On cross-examination, Rochelle testified that an examination in October 2016 revealed that R.F. was pregnant and that Rochelle subsequently learned that neither Smith nor Lauhead was the father of the baby.

After Rochelle's testimony was completed, the State called R.F. as a witness. Prior to trial, the State had filed a motion to allow R.F. to testify in camera and outside Smith's presence. The State asserted in the motion that the request was being made pursuant to Neb. Rev. Stat. § 29-1926(1)(d) (Reissue 2016), which generally relates to accommodations for child victims and child witnesses. In this case, the State sought in camera testimony by R.F. because of its concern that R.F. "will be harmed emotionally and psychologically if forced to testify in the presence of . . . Smith." The State further asserted in the motion that R.F., who was 16 years old at the time, "has been diagnosed with Fragile X and functions at a much younger age than her biological age would suggest." The State also requested that R.F.'s guardian ad litem be allowed to sit beside her when she testified.

At a hearing prior to trial, the court stated that its understanding was that Smith's counsel had "indicated that he does not object to the State's motion to allow [R.F.] to testify in camera and with a [guardian ad litem] present." Smith's counsel replied that he was not willing to stipulate to the request. The court therefore took the motion up as a contested matter and allowed the State to argue. In response to the court's questions, the State said that R.F. was 16 years old and that she had "been diagnosed with among other things Fragile X, [and] was

in special education." The State asserted that R.F.'s "biological age [was] much different than her functioning age." After the State presented its argument, Smith stated, "I would object, Judge. I guess [on] the primary basis of confrontation . . . ." Smith requested that the court reserve ruling on the motion until the court had had a chance to voir dire R.F. The court stated that it would delay ruling until voir dire could be made of R.F. at the time of trial.

After the State called R.F. as a witness, the court asked whether the State was withdrawing its motion. The State said that it was not and that it renewed its motion to have R.F. testify in camera. The court stated its understanding that the plan had been to wait until the trial to rule on the motion and decided to move from the courtroom to the jury room in order to hear the motion.

The court began the hearing on the motion by stating that the proceeding was taking place "in the jury room outside the presence of . . . Smith" and that R.F., R.F's guardian ad litem, the State's counsel, and Smith's counsel were present in the jury room. The court explained the proceeding to R.F. and had R.F. take an oath. The State began by asking R.F. general questions regarding her age, her school, and her baby. R.F. testified that she was 16 years old, that she was in 11th grade in high school, that she had a baby, and that she generally took care of the baby but was helped by her foster mother. R.F. also testified that she did not know if she had ever been diagnosed with any illness. The State then asked R.F. whether she remembered that she had come to tell the judge what had happened to her. R.F. replied, "Yes," and the State asked "do you want to do that in front of [Smith]?" R.F. replied, "Um, probably not." The State asked why not, and R.F. replied, "Because I probably going to get scared." The State asked why she would be scared, and R.F. replied, "Because I'm going to probably do is probably I kind of — I'm going to get — probably going to end up doing is probably do is just try." The State then asked questions to establish that R.F.

knew the difference between the truth and a lie and that R.F. was going to tell the truth.

Smith's counsel cross-examined R.F. and elicited testimony that R.F. had talked to several people about what had happened to her. Counsel asked whether R.F. understood that Smith would not get to ask her questions and that instead counsel would ask questions. R.F. replied that she understood and that it did not scare her to be questioned by counsel. Counsel asked whether it would be impossible for R.F. to talk if Smith were in the room, and she replied, "Um, well, I, um, I'm going to be kind of scared." Upon further questioning by Smith's counsel, R.F. stated:

> I probably I don't want to see him because I don't want to and I just think that I just don't want to see him at all. And I really do not want to live with him anymore because I know what happened and I just don't think that he is not a good dad to me.

After Smith's counsel finished questioning R.F., the court said, "All right. [R.F.], I am going to allow you to give your testimony in this room outside the presence of [Smith.]" The court also stated that R.F.'s guardian ad litem would be allowed to stay with her during her testimony. After allowing a brief time for counsel to prepare, the court began R.F.'s testimony by noting for the record that the court was in the jury room with R.F., R.F.'s guardian ad litem, the State's counsel, and Smith's counsel present. The court reminded R.F. that she was under oath, and the State began its direct examination of R.F.

After some initial general questioning, the State asked R.F. whether she remembered "a time when you were in your mom and dad's bedroom with your mom and your dad and [Lauhead]." R.F. replied that she remembered. R.F. testified that Smith came downstairs to her bedroom and took her upstairs. R.F. testified that when she was in Smith and Rochelle's bedroom, Smith took her clothes off and he lay on top of her while he had no clothes on. R.F. testified that Lauhead and Rochelle were also present in the bedroom. The

State used diagrams of male and female bodies to aid R.F.'s testimony. By referencing the diagrams, R.F. indicated that Smith had touched her breasts with his hands. She also testified that both Smith and Lauhead had touched her genital area with "that thing," indicating the genital area of the male body diagram.

After the State completed its direct examination of R.F., Smith's counsel asked to leave the jury room before cross-examining R.F. in order to confer with Smith who had not been present for R.F.'s testimony. The court allowed a break of 5 minutes. The trial thereafter continued with defense counsel's cross-examination of R.F. in the jury room outside of Smith's presence. Smith's counsel questioned R.F. regarding, inter alia, her prior interviews by advocacy counselors.

After R.F.'s testimony was completed, the court returned to the courtroom and the trial continued in Smith's presence. After the State completed its presentation of evidence and rested, Smith moved to dismiss the charges. The court overruled Smith's motion.

Smith testified in his own defense. He generally denied that he had been involved in sexual encounters with Rochelle and Lauhead in March and April 2016. He testified that in late September, he was suspicious that Rochelle was having a sexual relationship with Lauhead. One day while the children were in school, he argued with Rochelle and told her that if she had sexual relations with Lauhead behind his back she might as well have them in front of him. Rochelle led Smith and Lauhead, who was also in the house, to the bedroom where she had sexual relations with Smith while Lauhead watched. After Smith was finished, Rochelle had sexual relations with Lauhead. Smith testified that he watched Rochelle and Lauhead for a while but became disgusted and left. Smith denied that R.F. was involved in the encounter in September, and he denied having had any sexual relations with R.F. or touching her breasts or vagina at any time. Smith testified that in October, one of his younger daughters told him she

had seen Lauhead naked with R.F. Smith had the daughter tell Rochelle what she had seen, and he then went to the police to report what Lauhead had done.

During its cross-examination of Smith, the State recited certain statements and asked Smith whether he had ever made those statements to anyone. Smith denied making the statements. In its rebuttal, the State called as a witness Russell Solky, who in October 2016 had spent 2 days in the Harlan County jail with Smith as his cellmate. Solky testified regarding statements Smith had made to him during that time. The statements Solky recited included some of the statements Smith had just denied having made to anyone during the State's cross-examination of Smith. Solky testified that he and Smith talked about why each of them was in jail and that Smith said that he had been arrested for child molestation and that "his wife made a statement or something like that." Smith also told Solky that his wife "kept breaking his self-esteem down, trying to say that he was a worthless piece of shit, no woman would ever want to be with him." Solky asked Smith whether he had had an affair, and Smith replied that he could not, because "it's a real small town, everybody knows me. . . . [I]f I go to a bar and try to pick somebody up, everybody knows me, I can't do that." During the State's redirect examination, Solky further testified that Smith "said when he wasn't getting [sex] from his wife he was getting it from his kid." When Solky asked which of his children, Smith replied that "it was his special needs daughter."

On cross-examination, Smith elicited testimony from Solky to the effect that charges against Solky had been dismissed in exchange for his testimony in this case. On surrebuttal, Smith testified and denied the statements Solky attributed to him. Smith testified that he had told Solky that he was in jail for "assault," not child molestation.

After all the evidence had been presented, the court ordered a schedule for the parties to submit written closing statements. On November 15, 2017, the court filed an order in which it

found Smith guilty beyond a reasonable doubt of both first degree sexual assault of a child and felony child abuse. In the order, the court reviewed the charges against Smith and the evidence presented at the trial. In connection with its review of R.F.'s testimony, the court stated that it had sustained the State's motion and allowed R.F. to give her testimony in camera. The court stated, "There was evidence during the trial that R.F. is autistic and has Fragile X Syndrome. R.F. clearly suffers from a mental disability. Her manner was very child-like, not at all what you would expect of a 16 year old."

In its order, after reviewing the evidence, the court set forth the reasoning behind its findings of guilt and which evidence it found determinative. The court stated that it found Rochelle's testimony to be credible. The court noted that if Rochelle was lying, it would have been easy for her to say that Smith had penetrated R.F. with his finger or with his penis; the court stated that it was "doubtful that Rochelle knew that under the law, placing your fingers between the lips of the labia or rubbing the top of the vagina was penetration, and thereby, first degree sexual assault." Turning to R.F.'s testimony, the court stated that her testimony alone would not support conviction beyond a reasonable doubt, because R.F.'s testimony was "troubling" and "inconsistent" with regard to whether Smith had assaulted her. But the court stated that it had not "wholly disregarded" R.F.'s testimony, because R.F. was consistent in her testimony that Lauhead had sexually assaulted her and because R.F. had credibly testified that Smith retrieved her from her bedroom and had undressed her. The court further found credible Solky's testimony regarding statements Smith made to him when they were cellmates. The court specifically found credible Solky's testimony regarding Smith's statements concerning the way his wife treated him and how when he was not getting sex from his wife, he would get it from his "special needs daughter."

The court stated that it gave the court pause that Smith was the one who had initially reported Lauhead's sexual assault of

R.F. to police. But the court's concerns appeared to be satisfied by the State's argument that two factors may have prompted Smith's report to police. First, Smith feared that R.F. might be pregnant, and second, Smith's younger daughter had seen Lauhead naked with R.F. These two factors gave Smith reason to fear that "a lot of questions were going to be asked" and gave him motivation to "'rat out'" Lauhead.

Based on the evidence and reasoning set forth above, the court found Smith guilty of first degree sexual assault of a child. Regarding the charge of felony child abuse, the court determined that evidence of Smith's "introducing R.F. into the foursome, penetrating her and not stopping Lauhead from sexually assaulting her is child abuse that meets both prongs of § 28-707 as charged in this case." The court further noted that even if Smith had not himself sexually assaulted R.F., "he would be guilty of child abuse for allowing Lauhead to sexually assault her." The court therefore found Smith guilty of child abuse beyond a reasonable doubt.

The district court thereafter sentenced Smith to imprisonment for 20 to 30 years for first degree sexual assault of a child with a mandatory minimum sentence of 15 years and with credit for time served of 199 days. The court also sentenced him to imprisonment for 2 to 3 years for felony child abuse and ordered the sentence to be served concurrently to the sentence for first degree sexual assault of a child.

Smith appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Smith claims that the district court erred when it heard R.F.'s testimony outside Smith's presence, in violation of § 29-1926 and in violation of Smith's constitutional right of confrontation. Smith, who has new counsel on direct appeal, also claims that trial counsel provided ineffective assistance when counsel (1) failed to call witnesses that Smith had informed counsel he wanted to testify, (2) failed to use video recordings of prior interviews of R.F. to impeach her testimony, and (3) failed

to use a video recording of a prior interview of Rochelle to impeach her testimony. Smith further claims that there was insufficient evidence to support his convictions and that the court imposed excessive sentences.

STANDARDS OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Kennedy*, 299 Neb. 362, 908 N.W.2d 69 (2018).

[2] 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).

[3] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Golyar*, 301 Neb. 488, 919 N.W.2d 133 (2018). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance. *Id.*

[4] 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. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

[5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *Id*.

ANALYSIS

District Court Erred by Hearing R.F.'s Testimony Outside Smith's Presence Without Following Constitutional Requirements to Protect Smith's Confrontation Rights, but Such Error Was Harmless Error.

Smith first claims that the district court erred when it heard R.F.'s testimony outside his presence. He contends that the court's decision violated both § 29-1926 and his constitutional right of confrontation. Smith makes three general arguments with respect to R.F.'s in camera testimony outside his presence. Smith argues that (1) § 29-1926 did not apply to R.F.'s testimony, because the statute does not apply to a witness who is older than 11 years of age; (2) even if § 29-1926 applied, the court failed to make the particularized findings required under the statute; and (3) whether or not § 29-1926 applied, the court infringed upon his constitutional right of confrontation when it heard R.F.'s testimony outside his presence and without making accommodations to protect his right of confrontation. We determine that § 29-1926 did not apply to R.F.'s testimony and did not justify the court's decision to hear R.F.'s testimony outside Smith's presence. We further determine that, to the extent the court had authority outside § 29-1926 to hear R.F.'s testimony in camera rather than in the courtroom, the court's decision to hear R.F.'s testimony outside Smith's presence did not comport with constitutional requirements to protect Smith's right of confrontation. However, given the court's explicit findings in this bench trial, we conclude that the error was harmless.

We first address, without reference to constitutional confrontation requirements, whether § 29-1926 applied to the court's decision to allow R.F. to testify in camera. The State had filed a motion prior to trial in which it requested that R.F. be allowed

to testify at trial in camera pursuant to § 29-1926(1)(d). We note that at both the hearing prior to trial and the hearing immediately prior to R.F.'s testimony, § 29-1926 and its requirements were not explicitly referenced, and that therefore, it is not clear whether the court made its decisions regarding R.F.'s testimony pursuant to § 29-1926 or pursuant to some other authority. Nevertheless, because the State's motion stated that it was made pursuant to § 29-1926(1)(d), we examine the statute and its applicability to this case.

Section 29-1926 generally provides that under specific circumstances, "a child victim of or child witness to" a felony may provide testimony by videotape deposition rather than testifying in court. Section 29-1926(d) provides, "If the child testifies at trial in person rather than by videotape deposition, the taking of the child's testimony may, upon request of the prosecuting attorney and upon a showing of compelling need, be conducted in camera." Section 29-1926(g) also provides, "For purposes of this section, child means a person eleven years of age or younger at the time the motion to take the deposition is made or at the time of the taking of in camera testimony at trial."

At the time of the trial in this case, R.F. was 16 years old. In its motion, the State asserted that R.F. "functions at a much younger age than her biological age would suggest." However, the definition of "child" in § 29-1926(g) refers to the chronological age of "a person eleven years of age or younger." The definition makes no reference to a person who functions at the level of a person 11 years of age or younger.

[6,7] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018). Giving § 29-1926(g) its plain and ordinary meaning, a "child" for purposes of § 29-1926 is defined as a person whose biological age is 11 years or younger. It is not within the province of the courts to read

a meaning into a statute that is not there or to read anything direct and plain out of a statute. *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018). We therefore cannot read into § 29-1926 the inclusion of persons whose biological age is over 11 years but whose mental or functional age is equivalent to that of one who is 11 years of age or younger. To the extent there is sentiment that such a witness should be included within the operation of the statute, "the remedy lies with the Legislature to amend" § 29-1926. See *State v. Wright*, 261 Neb. 277, 288, 622 N.W.2d 676, 684 (2001). In this regard, we are aware of at least one other state which has statutes that operate like § 29-1926 but explicitly apply to witnesses with intellectual disabilities. See Fla. Stat. Ann. §§ 92.53 and 92.54 (West Cum. Supp. 2019).

Having determined that § 29-1926 did not apply to R.F.'s testimony in this case, we need not consider whether the court complied with the specific requirements of § 29-1926 when it made its decision. Nevertheless, we note in passing that § 29-1926(h) provides, in part, that "[n]othing in this section [regarding making accommodations] shall restrict the court from conducting the pretrial deposition or in camera proceedings in any manner . . . consistent with the right to confrontation guaranteed in the [federal and Nebraska Constitutions]." These portions of the statute indicate a legislative recognition that the statute applies to a decision to allow a witness to testify outside a courtroom setting but that the decision whether a deposition may be taken or testimony given outside the presence of the defendant is to be determined pursuant to other authority, including constitutional requirements protecting the right of confrontation.

In this regard, Smith's complaint focuses on the fact that R.F.'s testimony was given outside his presence. Thus, our analysis inevitably turns to whether the court's decision to hear R.F.'s testimony outside Smith's presence comported with constitutional requirements to protect his confrontation rights. The U.S. Supreme Court addressed constitutional

confrontation requirements with regard to a child witness' testimony outside the defendant's physical presence in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). In that case, the Court considered a Maryland statute which, unlike our reading of § 29-1926 set forth above, the Maryland court had interpreted to allow the child to testify outside the presence of the defendant. In considering whether the Maryland statute could be used to allow testimony outside the defendant's presence without violating constitutional confrontation rights, the Court set forth principles of confrontation analysis that we believe have application whether a court's decision on how to take witness testimony is made pursuant to a statute or pursuant to some other authority of the court.

[8] In *Maryland v. Craig*, the Court reasoned that while the Confrontation Clause guaranteed a criminal defendant a face-to-face meeting with witnesses appearing before the trier of fact, that guarantee was not an absolute right. The Court further stated that while the face-to-face requirement was not absolute, it could not be disposed of easily. We note that Justice Scalia, joined by three other justices, dissented and questioned whether face-to-face confrontation could be dispensed with even under the standards set forth by the majority. Justice Scalia reasoned that the Confrontation Clause "guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation." *Maryland v. Craig*, 497 U.S. at 862 (Scalia, J., dissenting) (emphasis in original).

[9] Based on its reasoning that a face-to-face confrontation was not an absolute right but could not be disposed of easily, the Court in *Maryland v. Craig* held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." 497 U.S. at 850. The Court then

analyzed the Maryland statutory procedure in light of these two requirements.

The Court in *Maryland v. Craig* first addressed the second requirement—that reliability of the testimony is otherwise assured—and concluded that Maryland's statute preserved "all of the other elements of the confrontation right," which the Court described to include requirements that the witness must be found competent to testify and must testify under oath; that the defendant retained full opportunity for contemporaneous cross-examination; and that the judge, jury, and, notably, the defendant were able to view the demeanor of the witness as he or she testified. 497 U.S. at 851. The Court stated that this final requirement was satisfied, because the statute required use of a one-way closed circuit television procedure through which the court, the jury, and the defendant were able to view the questioning of the witness by prosecutors and defense counsel.

Having found that the statute met the second requirement, the Court indicated that the critical inquiry in *Maryland v. Craig* was whether dispensing with face-to-face confrontation was necessary to further an important public policy. The Court concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Maryland v. Craig*, 497 U.S. 836, 853, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The Court cautioned, however, that the "requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Id.*, 497 U.S. at 855. The Court further stated that the trial court "must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id.*, 497 U.S. at 856. The Court reasoned that "[d]enial of

face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma," and it noted that general courtroom trauma could be addressed by permitting the child witness "to testify in less intimidating surroundings, albeit with the defendant present." *Id.*, 497 U.S. at 856. The Court finally stated that in order to dispense with face-to-face confrontation, the trial court must further "find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i. e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" *Id.*, 497 U.S. at 856. The Court did not set forth a "minimum showing of emotional trauma required for use of the special procedure," but it found that the standard used in the Maryland statute—that the "child witness will suffer 'serious emotional distress such that the child cannot reasonably communicate'"—was sufficient to meet constitutional standards. *Id.*, 497 U.S. at 856. Having set forth these standards, the Court remanded the cause for further proceedings to determine whether a showing of necessity had been made under these standards. *Maryland v. Craig, supra*.

The Court summarized its holding in *Maryland v. Craig*, 497 U.S. at 857, as follows:

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

We set forth similar standards in *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986), a case that was decided before *Maryland v. Craig* and before the 1988 enactment of § 29-1926. In *Warford*, the trial court allowed a child victim-witness to

testify in chambers with the judge and counsel for both parties present in chambers, while the defendant and the jury watched from the courtroom by closed-circuit television. We determined that the procedure used by the trial court in *Warford* failed to protect the defendant's right to confrontation under both the federal and Nebraska Constitutions. Similar to the U.S. Supreme Court's subsequent holding in *Maryland v. Craig*, we held in *Warford* that "[t]he right of confrontation is not . . . immune to exception," but that "a limitation of the right can only be necessitated by a showing of a compelling interest and any infringement must be as minimally obtrusive as possible." 223 Neb. at 375, 389 N.W.2d at 580-81.

With respect to the "showing of a compelling interest," we concluded that the record in *Warford* did not show "a compelling need to protect the child witness from further injury." 223 Neb. at 376, 389 N.W.2d at 581. We stated that before the witness could be allowed to testify outside the defendant's presence, there should be "a particularized showing on the record that the child would be further traumatized or was intimidated by testifying in the courtroom in front of the defendant." *Id*. at 377, 389 N.W.2d at 581. With respect to the infringement of the right to confrontation being as minimally obtrusive as possible, we stated that "[a]t the very least, the defendant must at all times have a means of communicating with his attorney, and the court must be able to control the examination by interrupting the questioning to rule on objections." *Id*. We noted that under the procedure used in *Warford*, "[t]he defendant could not physically confront his accuser, nor could he confront the witness through counsel because he had no means of communicating with his attorney," and we concluded that this procedure "unduly inhibited the defendant's confrontation right and was therefore constitutionally objectionable." 223 Neb. at 377, 389 N.W.2d at 582.

We review the procedure used by the district court in this case under the standards set forth in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), and in

Warford. As did the Court in *Maryland v. Craig*, we first look to the second requirement—whether reliability of the testimony is otherwise assured despite the absence of face-to-face confrontation, or as stated in *Warford*, whether the infringement of a defendant's right of confrontation was as minimally obtrusive as possible. The Court in *Maryland v. Craig* found this requirement was met, because the Maryland statutory procedure preserved all the other "elements" of confrontation, including that the witness must be found competent to testify and must testify under oath; that the defendant retains full opportunity for contemporaneous cross-examination; and that the judge, jury, and the defendant are able to view the demeanor of the witness as he or she testified. 497 U.S. at 851. In the present case, R.F. was found competent to testify and she testified under oath. This was a bench trial, so the jury's ability to view the witness was not relevant, but the court, as the fact finder, was able to view R.F. as she testified.

However, because Smith was not able to view R.F.'s demeanor as she testified, whether by closed-circuit television or otherwise, the procedure in this case fell short of that set forth in *Maryland v. Craig* in a significant way. This failure limited Smith's ability to confront R.F., because he was not able to advise counsel on matters that he observed that might provide avenues to challenge the credibility of R.F. Furthermore, in *Warford*, we stated that the defendant must at all times have a means of communicating with his attorney. Although in the present case the court allowed Smith's attorney to briefly meet with Smith after R.F.'s direct testimony and before the cross-examination, the procedure did not fully protect Smith's right of confrontation, because he had not been able to view R.F.'s direct testimony and he was not able to communicate with his attorney during R.F.'s direct testimony or during the cross-examination.

Turning to the requirement in *Maryland v. Craig* that infringement of the right of confrontation must be found to be necessary to further an important public policy, or, as stated

in *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986), a showing of a compelling interest, we acknowledge that there is an important public policy in protecting young victims who may be retraumatized by testifying in front of a defendant. In this respect, we note that Nebraska's public policy has been expressed, at least to some extent, in § 29-1926, and as discussed above, the present case does not fit within the public policy stated in § 29-1926, because R.F. was 16 years old and the statute applies only to those 11 years of age and younger. Also as noted above, even when § 29-1926 applies, it does not explicitly allow for testimony outside the presence of the defendant and it does show a legislative intent to respect the defendant's right of confrontation, including the right to face-to-face confrontation. Taking guidance from the constitution, cases, and statute, we cannot unreservedly state that adherence to a generally recognized important public policy or compelling interest was demonstrated in this case.

We believe that in the absence of an express public policy that covers a specific case, before an infringement of confrontation rights can be justified in a specific case, it is vital under *Maryland v. Craig* that there is a clear determination of the justification made on a case-specific basis.

In *Warford*, we required "a particularized showing on the record that the child would be further traumatized or was intimidated by testing in the courtroom in front of the defendant." 223 Neb. at 377, 389 N.W.2d at 581. Although it does not apply here, § 29-1926(h) requires "particularized findings on the record" to determine that "there is a compelling need that child testimony accommodation is required." But, foremost, the constitutional requirements for several ultimate findings were set forth in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). That decision mandates those findings, at a minimum.

In the present case, the court held a hearing to determine whether R.F. could testify outside Smith's presence. However, after the hearing, the court did not make the ultimate findings

mandated by *Maryland v. Craig*, which, in essence, require a compelling interest to support its decision to allow R.F. to testify outside Smith's presence. Instead, at the end of the hearing, the court simply told R.F. that it would allow her to testify in camera outside Smith's presence. As set forth in *Maryland v. Craig*, the requisite findings include findings that (1) the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant, and (2) "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i. e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" 497 U.S. at 856. The Court noted in this respect that general courtroom trauma could be addressed by permitting the child witness "to testify in less intimidating surroundings, albeit with the defendant present," thus respecting the defendant's confrontation right. *Id*., 497 U.S. at 856. Incidentally, this is consistent with the terms of § 29-1926, which we see as protecting the child witness from courtroom trauma while protecting the defendant's right of confrontation.

We read the record before us, but without the benefit of such findings. R.F.'s responses during the hearing indicate feelings of nervousness, excitement, or reluctance to testify in the presence of Smith, but not necessarily severe emotional distress. R.F. understandably states that she does not want to be around Smith, but she frames her aversion as not wanting to live with him again because he is not a good parent. When asked whether she wants to testify in front of Smith, she says that she does not and expresses nervousness but concludes that what she will "probably do is just try." This does not clearly show that R.F. would suffer trauma that would prevent her from being able to communicate.

In the absence of the ultimate findings required by *Maryland v. Craig*, it is difficult for us to determine from the cold record of R.F.'s statements how the prospect of testifying in front of Smith affected her; nonverbal cues and body language could inform an impression that her words do not. And although

not a requirement, it might have been productive in this case to have testimony from an expert or someone who knew R.F. well to indicate the effect testifying in front of Smith could have had on R.F. Furthermore, in the record before us, there are assertions that R.F. suffers certain developmental impairments, but it is not clear whether there has been expert evidence regarding her level of functioning or how testifying in Smith's presence might cause her a special trauma due to a disability.

Given the applicable law and record in this case, we conclude the procedure used was constitutionally deficient. We note that in the present case, there were not sufficient particularized findings to support a public policy or a compelling interest to curtail Smith's confrontation rights. We further determine that there were not adequate procedures to compensate for the lack of face-to-face confrontation, mainly because Smith was not able to view R.F.'s testimony, even remotely, and he did not have communication with counsel at all times. Based on these shortcomings, we conclude that the court's decision to hear R.F.'s testimony outside Smith's presence did not comport with constitutional confrontation requirements as set forth in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), and *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986).

[10] Although the court erred in hearing R.F.'s testimony outside Smith's presence without adequately safeguarding Smith's confrontation rights, such error is subject to harmless error review. We have said that a violation of a defendant's constitutional right of confrontation that results in the improper admission of evidence is trial error subject to harmless error review. See *State v. Leibel*, 286 Neb. 725, 838 N.W.2d 286 (2013). The U.S. Supreme Court has said that an unconstitutional "denial of face-to-face confrontation," like other types of violations of the Confrontation Clause, is subject to harmless error review. *Coy v. Iowa*, 487 U.S. 1012, 1021, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

[11,12] Where the trial error is of a constitutional dimension, the burden must be on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. *State v. Leibel, supra*. This standard applies equally to jury and bench trials. *Id*. Whether error is harmless in a particular case depends "'upon a host of factors,'" and we find the fact of a bench trial a proper consideration in conducting our harmless error review. *Id.* at 740, 838 N.W.2d at 298. Harmless error review ultimately looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id*. As outlined below, we find the error in this case to be harmless.

In our harmless error review in this case, we consider whether Smith's convictions were surely unattributable to R.F.'s in camera testimony outside Smith's presence. If this were a jury trial, it would be challenging for an appellate court to say that a conviction for sexual assault was surely unattributable to the alleged victim's testimony. However, in this case, there was a bench trial and we have the benefit of the court's order which set forth in detail the reasoning behind the court's finding of guilt beyond a reasonable doubt. In that order, the court specifically stated that R.F.'s testimony, standing alone, would not support conviction beyond a reasonable doubt and the court described her testimony as "troubling" and "inconsistent." Instead, the court relied mainly on Rochelle's testimony to establish the elements of the offenses and it characterized R.F.'s testimony as merely helpful to the extent it corroborated portions of Rochelle's testimony. The court also cited Solky's testimony regarding Smith's statements in jail as an important factor in its verdicts.

We think that the court's order makes clear that the error in hearing R.F.'s testimony outside Smith's presence was harmless error in at least two respects. First, the court relied on

evidence other than R.F.'s testimony and R.F.'s testimony was helpful only to the extent it corroborated other evidence. Second, despite Smith's absence at the time of R.F.'s testimony, the presence of other "elements" of the right of confrontation, particularly cross-examination by defense counsel, was sufficient to call the credibility of R.F.'s testimony into doubt; this is evidenced by the court's limited reliance on her testimony and the court's explicit statement that R.F.'s testimony alone would not have supported conviction.

Given the court's order and the record, we determine that the court's verdicts were surely unattributable to R.F.'s testimony and more specifically that they were surely unattributable to R.F.'s testimony that was given outside Smith's presence in violation of his right of confrontation. We therefore conclude that although the court erred by allowing R.F. to testify outside Smith's presence without following constitutional requirements to protect Smith's right of confrontation, such error was harmless error and does not require reversal of Smith's convictions.

Smith's Claims of Ineffective Assistance of Counsel Cannot Be Reviewed on Direct Appeal but Are Stated With Sufficient Particularity to Be Preserved for Postconviction Review.

[13] Smith next claims that his trial counsel provided ineffective assistance in various respects. 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 in a subsequent postconviction proceeding. *State v. Golyar*, 301 Neb. 488, 919 N.W.2d 133 (2018). Smith has different counsel on appeal, and Smith specifically claims that his trial counsel provided ineffective assistance when counsel (1) failed to call witnesses that Smith had informed counsel he wanted to testify, (2) failed to use

video recordings of prior interviews of R.F. to impeach her testimony, and (3) failed to use a video recording of a prior interview of Rochelle to impeach her testimony.

[14,15] An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. *Id*. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id*. The determining factor is whether the record is sufficient to adequately review the question. *Id*.

With regard to his claim that trial counsel failed to call witnesses, Smith states in his brief that the three persons trial counsel failed to call were named "Linda Mask, Verlon Mask, and Sherri Hopkins." Brief for appellant at 15. He argues that the record on direct appeal is not sufficient to address this claim, because the record does not disclose what testimony the witnesses would have provided, nor does it disclose counsel's reasons for failing to call the witnesses. Smith states that he raised the claim and named the potential witnesses in order to preserve the claim for postconviction review.

In response, the State notes that the record indicates that Smith might have intended to refer to "'Linda Mast'" and "'Verlon Mast,'" rather than "'Linda Mask'" and "'Verlon Mask.'" Brief for appellee at 14. However, the State agrees with Smith's argument that the record on direct appeal is not sufficient to review the claim and that Smith sufficiently alleged the claim to preserve it for postconviction review.

Smith further claims that counsel failed to impeach the testimony of both R.F. and Rochelle by using video recordings of prior interviews that each witness had given. Smith argues that the record is not sufficient to review these claims on direct appeal because the full video recordings are not in the

record. The State concedes that each of these claims was sufficiently alleged by Smith, but the State argues that the record on direct appeal is sufficient to review each claim and that the record demonstrates that each claim is without merit. The State notes that Smith used statements from the prior interviews to impeach each of the witnesses and that each of the witnesses admitted to making the statements. However, Smith argues in reply that the record shows only the statements that trial counsel actually used to impeach the witnesses, but it does not show statements that could or should have been used to impeach the witnesses' testimony.

We determine that with regard to his claim that trial counsel failed to call witnesses, Smith sufficiently identified three particular potential witnesses. We further determine that with regard to his claims that trial counsel failed to use prior interviews to impeach the testimony of witnesses, Smith identified two particular witnesses and the particular prior interviews of each witness. We conclude with respect to each of these three claims of ineffective assistance of trial counsel that the record on direct appeal is not sufficient to review the claim but that Smith alleged the claim with sufficient particularity to preserve the claim for postconviction review.

The Evidence Was Sufficient to Support Smith's Convictions.

Smith next claims that there was not sufficient evidence to support his convictions. With respect to his conviction for first degree sexual assault of a child, Smith contends that there was no evidence that he had sexually penetrated R.F. With respect to his conviction for child abuse, Smith concedes that the testimony of R.F. and Rochelle could establish the elements of child abuse but he contends that the testimony was not credible. We conclude there was sufficient evidence to support both convictions.

One is guilty of first degree sexual assault of a child under § 28-319.01(1)(b) "[w]hen he or she subjects another person

who is at least twelve years of age but less than sixteen years of age to sexual penetration and the actor is twenty-five years of age or older." Smith does not dispute that there was sufficient evidence that R.F. was at least 12 but less than 16 years of age and that he was 25 years of age or older at the time of the alleged incident. But he contends that there was no evidence that he subjected R.F. to "sexual penetration" which is defined under Neb. Rev. Stat. § 28-318(6) (Reissue 2016) to include, inter alia, "any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body."

In this case, Rochelle testified that Smith touched R.F.'s vagina during the group encounter. When asked by the State to describe how Smith had touched R.F.'s vagina, Rochelle described Smith's actions as "putting his hand on it," "rubbing it," and "fondling the top of it." Upon further questioning, Rochelle testified that she had not seen Smith put his finger inside R.F.'s vagina, but when the State asked whether Smith had touched R.F. "between the skin folds known as the labia," Rochelle replied, "Yes." The State then asked how long Smith had touched R.F. "between the lips of her vagina," and Rochelle replied that he had done so for "[m]aybe three to five seconds" and that she had seen him touch R.F. in this way "[j]ust once."

Based on our precedent, we determine that evidence that Smith had touched R.F. "between the skin folds known as the labia" and "between the lips of her vagina" was sufficient to support a finding of sexual penetration. Interpreting the definition of "sexual penetration" quoted above, we have said:

> The slightest intrusion into the genital opening is sufficient to constitute penetration, and such element may be proved by either direct or circumstantial evidence. It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient.

State v. Archie, 273 Neb. 612, 642, 733 N.W.2d 513, 536 (2007). See, also, *State v. Kays*, 21 Neb. App. 376, 838 N.W.2d

366 (2013), *disapproved on other grounds, State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014), and *State v. Newman*, 21 Neb. App. 29, 838 N.W.2d 317 (2013). Rochelle's testimony that Smith touched the "skin folds known as the labia" and "between the lips of her vagina" was sufficient to prove entry of the vulva or labia and therefore to support a finding of sexual penetration and a conviction for first degree sexual assault of a child.

One is guilty of child abuse under § 28-707(1) if

> he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or physical or mental health; [or]
>
> . . . .
>
> (e) Placed in a situation to be sexually abused as defined in section 28-319, 28-319.01, or 28-320.01[.]

The offense is a Class IIIA felony under § 28-707(4) if the offense is committed knowingly and intentionally and does not result in serious bodily injury.

Evidence supporting the conviction for child abuse included Rochelle's testimony that Smith brought R.F. into the group sexual encounter, wherein Smith subjected R.F. to sexual contact and sexual penetration and allowed Lauhead to subject R.F. to sexual penetration.

Smith does not argue that such testimony, if believed, would not support a finding that he had placed R.F. in a situation to be sexually abused. Instead, he attacks the credibility of Rochelle and argues that a fact finder could not have found her testimony believable.

As discussed above in connection with our harmless error analysis, the court in this bench trial made specific findings regarding the credibility and reliability of witnesses, including Rochelle. In reviewing a conviction for sufficiency of the evidence, we do not pass on the credibility of witnesses and instead we recognize that it is a matter for the fact finder. See *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

Viewing the evidence in this case in the light most favorable to the prosecution, we conclude that based on its witness credibility assessment, the court could have found the elements of felony child abuse had been proved beyond a reasonable doubt.

We conclude that there was sufficient evidence to support Smith's convictions for first degree sexual assault of a child and felony child abuse.

District Court Did Not Abuse Its Discretion in Sentencing Smith.

Smith finally claims that the district court imposed excessive sentences. We find no abuse of discretion in the court's sentencing of Smith.

Under § 28-319.01(2), first degree sexual assault of a child is a Class IB felony with a mandatory minimum sentence of 15 years in prison for the first offense. Child abuse committed knowingly and intentionally that does not result in serious bodily injury is a Class IIIA felony under § 28-707(4). Under Neb. Rev. Stat. § 28-105(1) (Reissue 2016), a Class IB felony is punishable by imprisonment for a minimum of 20 years and a maximum of life, and a Class IIIA felony is punishable by imprisonment for a maximum of 3 years. Smith was sentenced to concurrent terms of imprisonment for 20 to 30 years for first degree sexual assault of a child with a mandatory minimum sentence of 15 years and for 2 to 3 years for felony child abuse. Therefore, Smith's sentences were within statutory limits and we review his sentencing for an abuse of discretion.

[16-18] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a 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. Mueller, supra*. In determining a sentence to be imposed, relevant factors customarily considered and

applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

Smith focuses mainly on the sentence for first degree sexual assault of a child and contends that given certain factors, imprisonment for a term of 15 to 20 years would have been a more appropriate sentence than the term of 20 to 30 years that was imposed. Smith asserts that certain factors mitigate for a lesser sentence including that he is "an extremely low risk individual," see brief for appellant at 32; his criminal history was minimal; he has no substance abuse issue; an evaluation showed that he was not violent and did not meet the criteria to be classified as a pedophile; and he is an honorably discharged veteran who was disabled because of a combat injury.

As Smith acknowledges, at the sentencing hearing, the court stated that it had considered the results of testing that had been done as part of a presentence evaluation, as well as Smith's lack of a criminal record, his military service, and his disability. But the court stated it had also considered that Smith had sexually assaulted a person who the record indicates was disabled and that he had continued to deny responsibility. Given that the court considered the factors urged by Smith, that the record does not show the court considered improper factors, and that the offense carried a potential maximum sentence of imprisonment for life, we cannot say that the sentence of imprisonment for 20 to 30 years was an abuse of discretion. We determine that the district court did not abuse its discretion in sentencing Smith.

CONCLUSION

We conclude that the district court's decision to hear R.F.'s testimony outside Smith's presence did not comport with constitutional requirements to protect Smith's right of confrontation; however, in this bench trial, given the court's order detailing its findings, the error was harmless error and does not require reversal of Smith's convictions. We further conclude that the record on direct appeal is not sufficient to review Smith's claims of ineffective assistance of trial counsel but that Smith alleged the claims with sufficient particularity to preserve the claims for postconviction review. We finally conclude that there was sufficient evidence to support Smith's convictions and that the district court did not abuse its discretion in sentencing Smith. We therefore affirm Smith's convictions and sentences for first degree sexual assault of a child and felony child abuse.

Affirmed.

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

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Jeremy C. Jorgenson, respondent.

922 N.W.2d 753

Filed February 8, 2019. No. S-17-1028.

1. **Disciplinary Proceedings: Appeal and Error.** Because attorney discipline cases are original proceedings before the Nebraska Supreme Court, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline evaluated under the particular facts and circumstances of the case.
3. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.
5. **Judgments: Records: Judicial Notice.** A court has the right to examine its own records and take judicial notice of its own proceedings and judgments in a former action.
6. **Disciplinary Proceedings.** The Nebraska Supreme Court has generally, but not always, disbarred attorneys who continue to practice law despite their suspensions.
7. ____. Repeatedly ignoring requests for information from the Counsel for Discipline indicates a disrespect for the Nebraska Supreme Court's

disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.

8. ____. The Nebraska Supreme Court considers an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as an important matter and as a threat to the credibility of attorney disciplinary proceedings.
9. ____. A history of violating disciplinary rules and a history of failing to communicate with clients, courts, and the Counsel for Discipline represent a pattern of noncompliance with disciplinary rules, and cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
10. ____. Cumulative acts of attorney misconduct can, and often do, lead to disbarment.
11. ____. Remorse is a mitigating factor when considering the appropriate sanction in an attorney disciplinary proceeding.
12. **Disciplinary Proceedings: Proof.** To establish depression as a mitigating factor in a proceeding to discipline an attorney, the attorney is required to show (1) medical evidence that he or she is affected by depression, (2) that depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct.
13. ____: ____. The Nebraska Supreme Court will apply the issue of substance abuse as a mitigating factor in an attorney disciplinary proceeding only after the attorney presents evidence that he or she acknowledges the condition, voluntarily seeks treatment, and terminates use of the substance.
14. **Disciplinary Proceedings.** The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether it is in the public interest that an attorney be permitted to practice, which question includes considerations of the protection of the public.
15. ____. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

Original action. Judgment of disbarment.

Julie L. Agena, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

This is an attorney discipline case against Jeremy C. Jorgenson stemming from violations occurring after Jorgenson was administratively suspended from the practice of law in Nebraska for failing to satisfy mandatory continuing legal education (MCLE) reporting requirements. Formal charges were filed against Jorgenson, claiming violations of Neb. Ct. R. § 3-316 (rev. 2014) (notification requirements by disbarred or suspended members) and Neb. Ct. R. of Prof. Cond. §§ 3-501.4 (communications), 3-501.16 (declining or terminating representation), 3-505.5 (rev. 2012) (unauthorized practice of law), 3-508.1 (bar admission and disciplinary matters), and 3-508.4 (rev. 2016) (misconduct), as well as his oath of office as an attorney as provided by Neb. Rev. Stat. § 7-104 (Reissue 2012). Jorgenson admitted the charges, a judgment on the pleadings was entered, and a hearing on the question of appropriate sanctions was held before an appointed referee. The referee's report following this hearing recommended Jorgenson be disbarred. Upon our de novo review and for the reasons set forth herein, we agree with the referee's recommendation and conclude that disbarment is the proper sanction.

BACKGROUND

Jorgenson was admitted to the practice of law in Nebraska on April 15, 2008. At all relevant times, he was engaged in the practice of law in Nebraska. Between December 2016 and July 2017, Jorgenson was also practicing law in Illinois, where he had moved. In July, Jorgenson apparently moved back to Nebraska but has failed to provide updated contact information to the Attorney Services Division or the Counsel for Discipline since that time.

Previous Disciplinary Actions

Jorgenson has previously been the subject of two disciplinary cases and one administrative suspension in Nebraska. In the first action in October 2012, Jorgenson received a public reprimand and was placed on probation for 1 year due to a

violation relating to contingent fee agreements.[1] In the second action, Jorgenson was disciplined for failing to provide competent and diligent representation to a client when he failed to appear for oral arguments at the U.S. Court of Appeals for the Eighth Circuit, failed to adequately supervise his support staff, and failed to timely respond to demands for information from the Counsel for Discipline.[2] In that case, Jorgenson was indefinitely suspended in February 2018 from the practice of law in Nebraska, with a minimum suspension of 2 years. Finally, and relevant to the present violations, Jorgenson was the subject of an administrative suspension commencing June 14, 2017, for failure to fulfill his MCLE requirements for 2016. Although Jorgenson testified in the present case that he completed his MCLE for 2016, no substantive evidence regarding completion of those requirements was submitted.

Formal Charges

In the present action, Jorgenson admitted to all the allegations within the formal charges with the exception of one sentence, which was subsequently withdrawn. Therefore, the facts alleged are uncontested and may be taken as true.

The amended formal charges contain five counts. Count I alleges Jorgenson continued to practice law by filing pleadings for a client in Douglas County Court after his administrative suspension. These pleadings included a "Plea of Not Guilty/Waiver of Appearance/Appearance of Counsel" on the client's behalf on July 7, 2017. Jorgenson failed to notify this client in writing that he had been suspended, failed to assist the client with obtaining new representation, and failed to promptly refund all client funds and provide a full accounting. These failures continued after he was contacted by the client's new counsel in early August.

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[1] *State ex rel. Counsel for Dis. v. Jorgenson*, 284 Neb. 507, 822 N.W.2d 367 (2012).

[2] *State ex rel. Counsel for Dis. v. Jorgenson*, 298 Neb. 855, 906 N.W.2d 43 (2018).

Count II alleges that during his administrative suspension, Jorgenson represented a client in a criminal matter in Merrick County District Court who had entered a guilty plea and was scheduled to be sentenced on August 7, 2017. Jorgenson failed to attend the sentencing hearing and notified the client by text message on the morning of the hearing that he was suspended. Jorgenson failed to notify the client in writing that his license had been suspended, failed to assist the client in obtaining new representation, and failed to file an affidavit with this court to attest his compliance with § 3-316 of the disciplinary rules.

Count III alleges that Jorgenson failed to cooperate with the formal investigation conducted by the Counsel for Discipline into the matters involving his representation of clients after his administrative suspension.

Count IV alleges that Jorgenson was hired in November 2016 to represent an individual in a legal matter for which Jorgenson was paid $1,500. Jorgenson failed to notify his client about his administrative suspension and failed to appear for a scheduled court appearance on July 11, 2017. Additionally, Jorgenson failed to notify his client in writing that he was suspended, failed to assist his client in obtaining new representation, failed to promptly refund all client funds and provide a full accounting, failed to file an affidavit with this court to attest his compliance with § 3-316, and failed to cooperate with the formal investigation conducted by the Counsel for Discipline and provide any of the requested information.

Count V alleges that after Jorgenson's administrative suspension, he continued to email attorneys and other individuals using a signature block on emails which purported he was a part of a law partnership in Omaha, Nebraska.

Discipline Hearing Before Referee

At the hearing before the referee, three exhibits were submitted and testimony was taken. Exhibit 1 was a copy of the June 14, 2017, letter from this court advising Jorgenson that he was suspended from the practice of law for failure to satisfy

the MCLE reporting requirements for 2016. Exhibit 2 was a copy of the 2012 disciplinary opinion.[3] Exhibit 3 was a copy of the 2018 disciplinary opinion.[4] Jorgenson was the only witness called to testify, and he was called to do so by the Counsel for Discipline.

During his testimony, Jorgenson addressed various aspects of the admitted allegations from the amended formal charges. First, Jorgenson testified about when he received notice that he was administratively suspended and stated that "there was a gap between my suspension [on June 14, 2017,] and me having knowledge of it, and, yes, during that gap, there were things that I was filing." On this subject, Jorgenson also responded to questioning from the Counsel for Discipline that he had learned his license was administratively suspended "[s]hortly before" he talked to the Counsel for Discipline on the telephone, which occurred "somewhere right around the 4th of July weekend, maybe after the 4th or 6th of July [in 2017]."

Jorgenson also testified to his remorse and embarrassment for the violations. Jorgenson testified that his life was in disarray both personally and professionally after being involved in a highly publicized murder trial and his decision to thereafter move to Illinois. Additionally, Jorgenson was undergoing marital discord when his wife moved to another state with their children, precipitating an ensuing custody battle. Jorgenson testified that he was severely depressed and drinking "a lot," which attributed to the acts and omissions leading to the violations. When asked about how he is addressing the depression and alcohol issues, Jorgenson responded:

> A. Yeah, I . . . have not been drinking since [my son] broke his arm, which is — I'm not really afraid to talk about it at all, to be honest with you, I — you know, what happened was an accident. You know, the Juvenile Court system, the social workers, the visitation workers,

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[3] See *Jorgenson, supra* note 1.

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

> the caseworkers, every — everyone believes that this is a substance abuse case, alcohol, primarily, for me . . . not a child abuse case. But since that happened, I've been sober. Since that happened, I've been attending AA, not — you know, hit-and-miss a little bit. I think it's just sort of my personality, it's hard, AA is tough for me because I just can decide to do or not do something. . . . I have a diagnostic assessment for both chemical dependency and mental health, which recommended outpatient, so group meetings, and then individual therapy. I'm doing some individual therapy. . . .
>
> Q. So, for the alcohol problem that you've admitted that you have, you've stopped drinking, you're going to some AA meetings. Have you gotten any treatment, or is it — that's the therapy for mental health, or is it for both?
>
> A. So the, the — there is a group meeting component, which deals with the substance abuse.
>
> Q. So it's more dual diagnosis then?
>
> A. Yeah, yeah, I mean . . . when I went to the evaluation, I was as honest as I'm being here, that, you know, I don't think I had ever admitted — I didn't think I had a drinking problem, you know? I mean, I — I've been, like, a daily drinker for a very long time, but never a lot, you know, I mean, until [these issues with my wife], and, and I didn't even really recognize it myself, but I started progressing — or drinking more and more, and, at some point, you know, I'm waking up and drinking and, and it still didn't occur to me that, I thought, like, well, this is how you can make the anxiety go away and — looking back, it's kind of a blur, it was obviously a problem. So, yeah, the group meetings address that.

Jorgenson also addressed his failure to repay client funds and indicated he intends to do so.

Referee's Report and Recommendation

After the hearing, the referee issued a report and recommendation. The report first noted that any delay in Jorgenson's

finding out about his administrative suspension was likely due, in part, to having failed in his obligation under Neb. Ct. R. § 3-803(C) (rev. 2019) to notify the court of any change in address, telephone number, or email. The report also noted Jorgenson's testimony that he had knowledge of the suspension prior to a call with the Counsel for Discipline which occurred before July 6, 2017, meant such knowledge would have predated his filing of pleadings under count I, the sentencing hearing scheduled in count II, and the hearing scheduled in count IV.

The referee's report analyzed the seriousness of Jorgenson's offenses, the history of his previous violations, the needs of his clients, and the effect on the reputation of the bar. The report found the sole mitigating factor which can be recognized was Jorgenson's remorse during the hearing. While the report discussed Jorgenson's experience with depression and abuse of alcohol, it determined that there was insufficient evidence in the record to support the use of such issues for mitigation purposes.

In consideration of such analysis and after comparing these facts to previous, similar disciplinary cases, the report recommended disbarment.

The only question before this court is the appropriate discipline.

STANDARD OF REVIEW

[1] Because attorney discipline cases are original proceedings before this court, we review a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[5]

ANALYSIS

[2] The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so,

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[5] *State ex rel. Counsel for Dis. v. Trembly*, 300 Neb. 195, 912 N.W.2d 764 (2018).

the appropriate discipline evaluated under the particular facts and circumstances of the case.[6] Because Jorgenson admitted the allegations contained within the formal charges and because violations of the disciplinary rules concerning the practice of law are grounds for discipline,[7] we find discipline should be imposed and now turn to the question of the appropriate sanction.

[3,4] Under Neb. Ct. R. § 3-304, this court may impose one or more of the following disciplinary sanctions: disbarment; suspension; probation in lieu of or subsequent to suspension, on such terms as the court may designate; censure and reprimand; or temporary suspension. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[8] For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.[9]

[5] This matter represents the third disciplinary case in Nebraska to which Jorgenson has been a party. A court has the right to examine its own records and take judicial notice of its own proceedings and judgments in a former action.[10] Thus, in addition to the current formal charges, in our de novo review, we consider the relevant facts from Jorgenson's

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[6] *Id.*

[7] See *id.*

[8] *Id.*

[9] *Id.*

[10] *State ex rel. Counsel for Dis. v. Gast*, 298 Neb. 203, 903 N.W.2d 259 (2017).

previous disciplinary proceedings as well as the aggravating nature of his previous disciplinary offenses.[11]

[6] The facts alleged in the formal charges of this case and admitted to by Jorgenson display an ongoing neglect of Jorgenson's duties to his clients and the judiciary. After admitting he received notice that he was administratively suspended, Jorgenson continued to practice law in violation of the suspension, failed to adequately notify clients that he could no longer represent them, failed to assist clients in obtaining new representation, failed to return client funds and provide an accounting thereof, held himself out as a member of a law firm in emails, and made filings on behalf of clients in court. On two specific occasions, under counts II and IV, Jorgenson failed to attend hearings which had been scheduled in his clients' cases. Under count III, he notified his client of the suspension through a simple text message the day of the client's sentencing hearing, with inadequate time to obtain new representation, and under count IV, he completely failed to inform his client of the suspension. Such lack of communication and his continuance to act as a licensed attorney put his clients at a disadvantage in their cases and prevented them from obtaining alternative representation or making other arrangements to address their legal needs. We have generally, but not always, disbarred attorneys who continue to practice law despite their suspensions.[12]

[7,8] In addition, Jorgenson has repeatedly failed to cooperate with the Counsel for Discipline. Repeatedly ignoring requests for information from the Counsel for Discipline indicates a disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and

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[11] See *id.*

[12] See, e.g., *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012); *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 773 N.W.2d 141 (2009). But see *State ex rel. Counsel for Dis. v. Frye*, 278 Neb. 527, 771 N.W.2d 571 (2009).

the administration of justice.[13] We consider an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as an important matter and as a threat to the credibility of attorney disciplinary proceedings.[14]

[9,10] As demonstrated by the admitted facts and the two previous disciplinary cases and administrative suspension, Jorgenson has a history of violating disciplinary rules and a history of failing to communicate with clients, courts, and the Counsel for Discipline. As we explained in Jorgenson's 2018 disciplinary case, this history represents a pattern of noncompliance with our disciplinary rules, and cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[15] Cumulative acts of attorney misconduct can, and often do, lead to disbarment.[16]

[11] We note Jorgenson appeared remorseful during the hearing before the referee and displayed a hope to improve his condition. Such remorse is a mitigating factor when considering the appropriate sanction.[17] However, Jorgenson also admits that at present, he is unfit for the practice of law.

[12,13] We also note Jorgenson testified to depression and alcohol abuse issues arising from his participation in a large criminal trial, his move to Illinois, and marital discord. To establish depression as a mitigating factor, Jorgenson was required to show (1) medical evidence that he is affected by depression, (2) that depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further

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[13] See *Gast, supra* note 10.

[14] See *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[15] See *Jorgenson, supra* note 2.

[16] *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010).

[17] *Id.*

misconduct.[18] We have previously applied the issue of substance abuse as a mitigating factor only after the attorney presented evidence that he or she has acknowledged the condition, voluntarily sought treatment, and terminated use of the substance.[19] Specifically, in *State ex rel. NSBA v. Pullen*,[20] we considered the attorney's substance abuse as a mitigating factor after the attorney presented evidence that he had entered into a contract with the monitoring program of the Nebraska Lawyers Assistance Program whereby he agreed to that program's monitoring of his recovery from alcohol addiction.

Jorgenson did not present any evidence beyond his own testimony that he had depression and alcohol abuse issues and that he participated in group meetings. There was no medical evidence presented that Jorgenson suffered from depression, and there was no evidence presented that the depression was a direct and substantial contributing cause of his misconduct and that its treatment would substantially reduce the risk of further misconduct. Similarly, Jorgenson did not present any supporting evidence to establish that his use of alcohol was a direct and substantial contributing cause of his misconduct and that he is participating in treatment and ceased abusing alcohol so as not to make it an issue going forward.

[14] The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether it is in the public interest that an attorney be permitted to practice, which question includes considerations of the protection of the public.[21] Because Jorgenson did not provide adequate evidence of his depression and substance abuse issues and offered no evidence that the treatment of his alleged conditions is sufficient to protect the public, we do not

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[18] *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

[19] See *State ex rel. NSBA v. Pullen*, 260 Neb. 125, 615 N.W.2d 474 (2000).

[20] *Id.*

[21] See, *Switzer, supra* note 16; *Pullen, supra* note 19.

consider these conditions as mitigating factors in deciding the appropriate sanction.

[15] The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[22] The present action is similar to our opinions in *State ex rel. Counsel for Dis. v. Carbullido*[23] and *State ex rel. Counsel for Dis. v. Switzer*.[24]

In *Carbullido*, the attorney had been a party to previous disciplinary actions, engaged in the unauthorized practice of law after her license was suspended, and was convicted of several driving under the influence and driving with a suspended license offenses. The attorney failed to respond to requests for information from the Counsel for Discipline, failed to respond to the formal charges, and failed to file a brief with this court. Noting the cumulative nature of her offenses, her disregard for previous suspensions, and her nonparticipation with the disciplinary proceedings, we disbarred the attorney.[25]

Similarly, in *Switzer*, the attorney continued to practice law after being suspended for an earlier violation. The attorney had been a party to previous disciplinary actions. During his hearing, the attorney appeared remorseful and explained that part of the cause of his misconduct extended from issues with depression. Although we accepted, "for the sake of argument," the attorney's depression as having satisfied the test for establishing depression as a mitigating factor, we nonetheless disbarred him.[26] In doing so, we stated:

> We previously suspended [the attorney], but he continued to practice, flouting our previous ruling. A suspension order is a command, not a suggestion. The offenses

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[22] See *id*.

[23] *Carbullido, supra* note 12.

[24] *Switzer, supra* note 16.

[25] *Carbullido, supra* note 12.

[26] See *Switzer, supra* note 16, 280 Neb. at 824, 790 N.W.2d at 441, citing *Thompson, supra* note 18.

> admitted are serious, and the need to deter others from this type of conduct weighs heavily. If attorneys ignore our suspension orders without consequence, it undermines the authority of this court.[27]

The reasoning used in these cases is applicable here. Jorgenson's violations undermine the public's confidence in the bar and its members to be dependable and capable in the representation of clients, to provide competent legal advice, and to participate in a judicial system reliant upon respect for the law. Moreover, these violations harm clients by failing to provide adequate representation and advice, leaving those clients without the opportunity to obtain competent representation, failing to use funds for the purposes for which the clients provided them, and failing to account for those funds. These issues are compounded when considering them in conjunction with Jorgenson's previous violations. We determine that the only appropriate discipline is disbarment.

CONCLUSION

We adopt the referee's recommendation. We find that Jorgenson violated his oath of office as an attorney and § 3-316 of the disciplinary rules and §§ 3-501.4, 3-501.16, 3-505.5, 3-508.1, and 3-508.4 of the rules of professional conduct. It is the judgment of this court that Jorgenson be disbarred from the practice of law in the State of Nebraska effective immediately. Jorgenson is directed to comply with § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Jorgenson is further directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

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[27] *Id.* at 825, 790 N.W.2d at 441.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Dallas L. Huston, appellant.

922 N.W.2d 723

Filed February 8, 2019. No. S-18-145.

1. **Postconviction: Evidence: Witnesses: Appeal and Error.** 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. An appellate court upholds the trial court's factual findings unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's conclusion.
4. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. 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. 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.

5. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order.
6. **Evidence: Words and Phrases.** Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.
7. **Rules of Evidence: Police Officers and Sheriffs.** Statements made by law enforcement in the course of interviewing suspects may be admissible for the purpose of providing necessary context to a defendant's statements in the interview which are themselves admissible.
8. ____: ____. In order to determine whether a statement made by law enforcement is admissible to provide context, the probative value of the statements of both the defendant and the officer must be assessed.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Timothy S. Noerrlinger for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Papik, J.

Dallas L. Huston was convicted by a jury of second degree murder and sentenced to 50 years' to life imprisonment. We affirmed his conviction and sentence on direct appeal. See *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013) (*Huston I*). After Huston's motion for postconviction relief was denied without an evidentiary hearing, we affirmed in part. See *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015) (*Huston II*). However, with respect to claims that Huston's trial counsel was ineffective for failing to properly object to the admission of certain portions of recorded interviews between Huston and police, we reversed, and remanded

for an evidentiary hearing. The case returns to us now after the district court held an evidentiary hearing and denied Huston's motion for postconviction relief. We affirm.

BACKGROUND

We provided a full recitation of the facts regarding this case in *Huston I*. We summarize facts relevant to this appeal in the sections below.

Investigation of Ryan Johnson's Death.

Huston and Ryan Johnson "were living together as a couple in a nonsexual relationship" at the time of Johnson's death. *Huston I*, 285 Neb. at 12, 824 N.W.2d at 728. In September 2009, Huston called the 911 emergency dispatch service, claiming that he had walked into the room he and Johnson shared and found Johnson wrapped in a blanket with plastic wrap covering his face. Paramedics performed lifesaving measures but were unable to revive Johnson.

Police later began to investigate whether Huston was responsible for Johnson's death. Police received information that Huston had told Nicholas Berghuis and Christopher Wilson, friends of Johnson and Huston, that one of Huston's "personalities" had played a role in Johnson's death by wrapping Johnson's face in plastic wrap and putting a pillow over Johnson's face as Johnson tried to breathe. *Id.* at 13, 824 N.W.2d at 728. While Huston purported to make statements and to have performed actions as a different personality, he later admitted that he did not have multiple personality disorder, that he made up all of the different personalities as part of a "'social experiment,'" and that "he controlled them completely." *Id.*

Berghuis and Wilson agreed to cooperate with police in an attempt to conduct surveillance on Huston. On October 6 and 7, 2009, Berghuis and Wilson invited Huston to Wilson's apartment, where a camera was concealed. On the first night, Wilson wore a wire, and on the second, Berghuis did. Police

monitored the audio and video surveillance in unmarked cars near the residence. On the second night, Huston, purporting to act as one of his personalities, admitted that on the morning of Johnson's death, he wrapped Johnson in a blanket; wrapped plastic wrap around Johnson's face; and, as Johnson broke through the plastic wrap and opened his mouth, held a pillow over his head and listened to Johnson's last heartbeats "'with enjoyment.'" *Id.* at 14, 824 N.W.2d at 728.

Police questioned Huston later in the evening of October 7, 2009. Huston initially denied involvement in Johnson's death. He then began to discuss a dream he had been having in which one of his personalities sat on top of Johnson, wrapped plastic wrap around Johnson's face, and suffocated Johnson with a pillow after Johnson broke through the plastic wrap. Later in the same interview, Huston admitted that the events were not a dream and that he physically aided in Johnson's death.

In an interview the next day, Huston first tried to retract these statements. Later, however, Huston stated that he was tired of fighting and that Johnson's death had occurred just as Huston had told Berghuis: Johnson was wrapped tightly in a blanket with his hands in his pockets, Huston wrapped Johnson's face with plastic wrap, and Huston covered Johnson's face with a pillow to make sure he died.

In an October 10, 2009, interview, Huston made additional statements about Johnson's death. Huston said that he has a morbid fascination with death, that he has urges to kill those to whom he is sexually attracted, and that Johnson and Wilson helped him deal with those urges by role playing in mock death performances. Huston said that Johnson used Huston's urges against him to convince Huston to help him commit suicide. Huston discussed the way he felt after putting a pillow over Johnson's face as Johnson tried to breathe, explaining that it did not provide the feeling he had expected. Huston also stated that he had fought his urges for most of his life and that he feared he might hurt someone else in the future.

Huston was ultimately arrested and charged with second degree murder. Huston pleaded not guilty, and the case proceeded to trial.

Trial.

At trial, Wilson and Berghuis testified about the statements Huston made to them concerning his role in Johnson's death. Wilson testified that he and Huston engaged in role playing in which Huston, acting as one of his personalities, would pretend to kill Wilson. Wilson also testified that Huston, purporting to act as one of Huston's personalities, had told Wilson approximately 6 months prior to Johnson's death that Johnson might die soon and that Huston would need somebody "to be there for him."

In addition, the State introduced the surveillance video and recordings of numerous interviews between Huston and police. The recordings included the statements from Huston summarized above, as well as several exchanges at issue in this appeal that are discussed further in the analysis section below.

The State also introduced a video found on Huston's computer. The video was filmed several weeks after Johnson had attempted suicide in March 2009. In the video, Huston pretends to kill Johnson by suffocating him with a pillow. The State also called a forensic pathologist who testified to his opinion that the cause of Johnson's death was suffocation.

Huston testified in his own defense. He disavowed his earlier statements admitting to restraining Johnson and suffocating him with a pillow. Huston claimed that he did not remember having any involvement in Johnson's death, but that he came to believe dreams he had been having to that effect. Huston testified that upon having the opportunity to review police reports after his confessions, he determined that he had not done what he had previously admitted doing. He testified that he had no involvement in Johnson's death and that Johnson must have wrapped himself in a blanket and covered his own face with plastic wrap.

The jury found Huston guilty of second degree murder. Huston was sentenced to 50 years' to life imprisonment.

Direct Appeal.

On direct appeal, Huston, represented by new counsel, argued that the court erred in admitting certain evidence and that if the issue was not preserved for appeal, Huston's trial counsel was ineffective for failing to object at trial and thus preserve the issue. See *Huston I*. The evidence at issue was in exhibits 38, 81, and 95, each of which were video recordings of police interviews with Huston.

We held that Huston's trial counsel did not preserve his evidentiary objections for appeal and that the record was not sufficient to adequately review his ineffective assistance of counsel claim. See *Huston I*. As a result, Huston's conviction and sentence were affirmed.

Postconviction Proceedings.

Huston filed a pro se motion for postconviction relief, asserting ineffective assistance of trial and appellate counsel in various respects. The district court denied Huston's motion without an evidentiary hearing, and Huston appealed. See *Huston II*. We affirmed in part. However, we also determined that the district court, with respect to the assertion that Huston's trial counsel was ineffective in not properly objecting to portions of exhibits 38, 81, and 95, erred by denying relief without an evidentiary hearing. We reversed, and remanded with directions to hold an evidentiary hearing on that issue. See *Huston II*.

Upon remand, the district court held an evidentiary hearing. Following the evidentiary hearing, the district court again denied Huston's motion. The district court found that Huston had failed to establish deficient performance or prejudice, as required under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The district court found that trial counsel's performance was not deficient, because

both parties and the court believed that trial counsel had preserved the issues for appeal. The district court also found no prejudice, because either the statements at issue were admissible at trial or, alternatively, their admission would have amounted to only harmless error. Huston appeals.

ASSIGNMENT OF ERROR

Huston assigns that the district court erred in denying his motion for postconviction relief.

STANDARD OF REVIEW

[1] 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. An appellate court upholds the trial court's factual findings unless they are clearly erroneous. *State v. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018).

[2,3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *Id.* When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland*, an appellate court reviews such legal determinations independently of the lower court's conclusion. *McGuire, supra.*

ANALYSIS

[4,5] Huston's postconviction motion alleges that he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel under *Strickland*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Taylor*, 300 Neb. 629, 915 N.W.2d 568 (2018). 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. *Taylor, supra.* A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *Id.* The two prongs of this test may be addressed in either order. See *id.*

With these principles in mind, we turn to Huston's specific claims of ineffective assistance of counsel. Huston asserts that his counsel provided ineffective assistance by failing to preserve an objection to certain portions of exhibits 38, 81, and 95, all of which are recorded interviews of Huston conducted by police.

"Serial Killer" Conversation.

We begin with Huston's claim that his counsel provided ineffective assistance by failing to properly object to a portion of one law enforcement interview of Huston in which Huston expressed fear about his future dangerousness and admitted that he had wondered in the past if he were a serial killer. The portion of the interview at issue was conducted by Sgt. Gregory Sorensen and went as follows:

> [Huston]: . . . [T]his is what I meant though when I've told everybody that I want to get help. I never thought this could happen and now that this has happened, I am so scared that I'm capable of doing it again.
>
> [Sorensen]: Yeah, I think that that's probably really true.
>
> [Huston]: And that scares me to death because, like I said, I have never thought of myself as a violent person and now I don't know what to think of myself.
>
> [Sorensen]: Well especially when you consider that . . . you have urges to kill the people that you're attracted to.
>
> [Huston]: And I've done everything that I could for the last, you know, if . . . you know, the earliest memories

> I have of this are say 9, 10 years old so . . . 18 years I have fought myself.
>
> [Sorensen]: But most serial killers do the same thing at some point in time.
>
> [Huston]: Oh wow.
>
> [Sorensen]: At some point in time, they crossed that line. I mean when you talk about . . .
>
> [Huston]: [Interrupting.] I've asked myself that.
>
> [Sorensen]: Whether you['re] a serial killer?
>
> [Huston]: Uh-hum (yes). I've asked myself that . . . you've asked me if I have been suicidal in the past.
>
> [Sorensen]: Yeah[.]
>
> [Huston]: To be completely honest I lied to you. Because of this, I have been. I have thought about killing myself so I wouldn't hurt anyone.

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

Huston objects to two aspects of the above exchange. He contends that the probative value of his own statements in the exchange are outweighed by the danger of unfair prejudice and thus inadmissible under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016). Additionally, he contends that Sorensen's reference to "serial killers" was not probative of any issue.

With respect to Huston's claim regarding his own statements in the above exchange, we do not believe his counsel performed deficiently. His statements occurred after he had admitted to law enforcement that Johnson died after Huston wrapped plastic wrap around his face and held a pillow over Johnson's head until his heart stopped beating. We find Huston's statement that he was scared he might do this again and his admissions that he has urges to kill people to whom he is attracted and that he had wondered whether he is a serial killer to all be probative of the central issue in the case—whether Huston intentionally caused Johnson's death.

[6] And while such evidence was certainly harmful to Huston's case, most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party. *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016). Rule 403 allows for exclusion only if the probative value of evidence is substantially outweighed by the danger of *unfair prejudice*. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis. *Oldson, supra.* Given Huston's own admissions about his involvement in Johnson's death and the fact that the conversation sheds light on the key issue of whether Huston intentionally caused Johnson's death, we do not consider the probative value of this evidence to be outweighed by the danger of unfair prejudice. Because any objection to Huston's own statements would not have been successful, trial counsel did not perform deficiently by not making such an objection. See *State v. Newman*, 300 Neb. 770, 916 N.W.2d 393 (2018).

[7,8] As for Huston's claim regarding Sorensen's statements in the exchange, we reach the same conclusion. We have recognized that statements made by law enforcement in the course of interviewing suspects may be admissible for the purpose of "providing necessary context to a defendant's statements in the interview which are themselves admissible." *State v. Rocha*, 295 Neb. 716, 740, 890 N.W.2d 178, 199 (2017). In order to determine whether a statement made by law enforcement is admissible to provide context, the probative value of the statements of both the defendant and the officer must be assessed. See *id.*

As we have explained, Huston's admissions were highly probative of the issues in the case, certainly more relevant than mere denials of criminal activity we found relevant in *Rocha*. Additionally, Sorensen's statements are highly relevant, because Huston's statements took place in a conversation and would make little sense without Sorensen as a conversation partner. For similar reasons to those outlined above, we also

do not believe the probative value of Sorensen's statements is outweighed by the danger of unfair prejudice. Because this evidence was admissible, Huston's counsel did not perform deficiently by failing to preserve an objection to them. See *Newman, supra*.

Sorensen's Opinion That Huston Committed Murder.

Next, Huston claims he is entitled to postconviction relief on his claim that his counsel was ineffective for failing to preserve an objection to a portion of an interview in which Sorensen stated a belief that Huston committed murder and not assisted suicide. Huston argues this evidence should have been excluded as inadmissible opinion testimony.

Huston's postconviction motion is not entirely clear as to the specific statement of Sorensen to which he claims his counsel deficiently failed to preserve an objection. Exhibits 81 and 95 do contain several exchanges in which Sorensen made statements about the nature of Huston's involvement with Johnson's death. In an interview conducted on October 7, 2009, the following dialogue took place:

> [Sorensen]: . . . [Y]ou or [one of your personalities] were the person or persons that killed [Johnson]. And, maybe at the time, it started out as a suicide. But it didn't end that way. It just didn't end that way.
>
> [Huston]: See, I don't believe that.
>
> [Sorensen]: You don't believe that it didn't end in a homicide?
>
> [Huston]: No, I don't.
>
> . . . .
>
> [Huston]: . . . [T]hey asked me that. They asked me that. Did he fight? Did he . . .
>
> [Sorensen]: [Interrupting.] He doesn't have to fight. All he had to do was break the seal, all he had to do was try to breathe, and . . . that was his intent to stay alive. He tried to br[eathe].

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

On October 10, 2009, Huston and Sorensen had the following conversation after Huston asserted that he "didn't murder [Johnson]":

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

Huston argues that Sorensen's statements that Huston committed murder were inadmissible, because the statements were not based on Sorensen's personal knowledge and constituted opinion testimony of Huston's guilt. However, for reasons explained below, even assuming this evidence was inadmissible, we do not believe Huston has demonstrated he was prejudiced by his counsel's failure to properly object to it.

Sorensen's statements that Huston killed Johnson or committed murder were based on Huston's admissions. At the time Sorensen made them, Huston had admitted to restraining Johnson, wrapping his face in plastic wrap, and covering his head with a pillow until he stopped breathing. Huston, however, continued to insist that these acts did not amount to murder. Sorensen's statements addressed the question of what crime Huston had committed if Huston had, in fact, done what he had admitted doing. At trial, however, Huston did not take the position that the actions he had admitted taking did not

amount to second degree murder. Rather, he changed course and denied any involvement in Johnson's death.

The basic question before the jury was thus whether to believe Huston's numerous admissions that he wrapped Johnson's face with plastic wrap and placed a pillow over Johnson's head until his heart stopped beating or to believe his later claim made at trial that he did not actually do what he had previously admitted doing. The jury's verdict shows it believed Huston's admissions and not his attempt at trial to disavow them. Huston has not offered and neither can we discern a reason why the outcome would have been different if Sorensen's above statements had been excluded from evidence. Because Huston cannot demonstrate that he was prejudiced by any failure to object to the statements discussed above, the district court did not err in rejecting postconviction relief.

Evidence Regarding Huston's Relationships.

Finally, Huston contends that his counsel provided ineffective assistance by failing to preserve objections to a part of exhibit 38, an interview between Huston and police in which Huston discussed the nature of his relationship with Johnson and what Huston terms a "homosexual encounter" with Wilson. Brief for appellant at 40. In that part of the interview, Huston and an officer had the following discussion:

> [Huston]: Okay. To be completely honest, me and [Wilson] were together once. Only once uhm, it's how it came out to [Johnson] that we might have been interested in each other, but [Wilson] decided he didn't want to do that.
>
> [Police officer]: Okay. And was this early in your relationship with [Johnson]? Or . . .
>
> [Huston]: [Interrupting.] Oh, no no. [Wilson] is only been back around, see [Wilson] has only been back in the picture as a friend of ours for like a month. . . . I believe in being up front, yes, one time and only one time me

> and [Wilson] were together and we, well we went to bed together, and
>
> [Police officer]: [Interrupting.] How long ago was that? . . . .
>
> [Huston]: . . . Three weeks ago.
>
> [Police officer]: So, it was pretty recent then.
>
> [Huston]: Yep. . . . [Y]ou probably don't want to hear this, but me and [Johnson] had kind of a . . . unique relationship. . . . I know it's kind of a weird situation to be in [be]cause in the four years of our relationship, there was never anything sexual uhm, and we allowed ourselves . . . an "open relationship." We allowed ourselves what he'd call "[expletive] buddies." . . . That one and only one time that me and [Wilson] ended up . . . was kind of a heat of the moment, uhm, you know, spur of the moment type thing. . . . [W]e ended up in bed together, we kissed, we, we made out, but it never went anywhere further than that.

Huston argues that the discussion quoted above was not relevant to any issues at trial. He contends that his encounter with Wilson and the open nature of his relationship with Johnson could only have prejudiced him in the eyes of the jury. He argues that evidence of his encounter with Wilson was particularly prejudicial, because the jury also heard that Huston served as Wilson's mentor in a mentoring program several years before. Even though Wilson was 19 years old at the time of the encounter, Huston asserts that the fact that he was formerly Wilson's mentor "feels unsavory." *Id.* at 41.

We are not persuaded that Huston was prejudiced by his counsel's failure to properly object to the evidence at issue. Huston's statements about his encounter with Wilson were a very small part of lengthy interviews between Huston and law enforcement, and the recordings were just a portion of the State's overall case. Furthermore, while Huston may have served as a mentor to Wilson when Wilson was younger, Wilson was 19 years old at the time of the encounter and there

was no suggestion that Huston coerced Wilson at any point to engage in intimate activity with him.

In addition, the jury heard other evidence regarding Huston's relationship with Wilson. In particular, in one interview with police in which Huston was explaining that he engaged in role playing in which he would pretend to kill people to placate his urges to kill, he admitted that Johnson and Wilson were "prime targets for this stuff," because he had urges to kill those to whom he is physically attracted. At trial, Huston also admitted that Wilson helped him placate his urges by pretending to allow Huston to kill him because Huston was attracted to Wilson. The jury also heard another recording in which Huston told an officer, "If there was anyone who [Johnson] intended me to have a relationship with after all this, it would be [Wilson]." Given the other evidence in the record about Huston's attraction to Wilson and about Wilson and Huston's role playing in which Huston would pretend to kill Wilson because of that attraction, evidence of the specific encounter to which Huston claims his counsel should have objected did little to "alter[] the evidentiary picture." See *State v. Newman*, 300 Neb. 770, 783, 916 N.W.2d 393, 407 (2018).

In light of the nature of the evidence at issue, the other evidence in the record regarding Huston's relationship with Wilson, and the overall evidence of Huston's guilt, we find no reasonable probability that the statements noted by Huston altered the outcome. We thus reject this claim of ineffective assistance of counsel for failure to demonstrate prejudice.

CONCLUSION

We find no merit to Huston's claims that his counsel provided ineffective assistance by failing to preserve objections to certain evidence introduced at trial. Accordingly, we affirm the order of the district court denying Huston postconviction relief.

Affirmed.

Freudenberg, J., not participating.

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

Charlene Marie, appellant, v. State of Nebraska, appellee.

922 N.W.2d 733

Filed February 8, 2019. No. S-18-488.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. ____: ____. When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that it plausible on its face.
4. **Judgments: Jurisdiction: Claim Preclusion.** Claim preclusion bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. **Claim Preclusion.** The doctrine of claim preclusion bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
6. ____. The doctrine of claim preclusion rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.

Appeal from the District Court for Sheridan County: Travis P. O'Gorman, Judge. Affirmed.

Daniel H. Friedman and Stephen A. Sael, of Friedman Law Offices, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Danielle Rowley for appellee.

Joshua I. Schwartz, of George Washington University Law School, Sarah P. Newell, of Nebraska Criminal Defense Attorneys Association, and Amy Miller, of American Civil Liberties Union of Nebraska Foundation, for amici curiae Professor Joshua I. Schwartz et al.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Heavican, C.J.

INTRODUCTION

Charlene Marie filed a claim for damages under the Nebraska Claims for Wrongful Conviction and Imprisonment Act (Act).[1] That claim was denied. Marie appeals. At issue on appeal is whether Marie can show that she was innocent of the crimes, as required by § 29-4603(3). We affirm.

FACTUAL BACKGROUND

Marie was convicted in 1999 for use of a deadly weapon to commit a felony and terroristic threats. She was sentenced to 2 to 15 years' imprisonment for the use conviction and 2 to 5 years' imprisonment for the terroristic threats conviction. The alleged victim of her crimes was Marie's husband, Kurt Oldenburg.

Marie appealed her sentences as excessive, and the Nebraska Court of Appeals agreed and resentenced her to 1 year's imprisonment on each conviction.[2] Because Marie had already served 2 years' imprisonment, she was released.[3] Marie was later pardoned by the Nebraska Board of Pardons on October 3, 2016.

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[1] Neb. Rev. Stat. §§ 29-4601 to 29-4608 (Reissue 2016).

[2] *State v. Oldenburg*, 10 Neb. App. 104, 628 N.W.2d 278 (2001).

[3] *Id.*

Marie then filed a petition seeking damages under the Act. In that motion, Marie alleged that she was convicted, sentenced, served part of her sentence, and was pardoned and that she did not commit or suborn perjury, fabricate evidence, or knowingly make a false statement to cause her own conviction or the conviction of others.

Marie alleged that she was "actually innocent of the crimes for which she was wrongfully charged, convicted, sentenced, and imprisoned [and that she] did not threaten to commit any crime of violence with the intent to terrorize." She further alleged that Oldenburg "lunged toward [her] and [as] she attempted to move the gun away[, he] grabbed [her] arm and the gun . . . discharged, injuring . . . Oldenburg [which] forced [her] to take the actions that she did."

The State filed a motion to dismiss. At issue before the district court was whether Marie had, or could, show that she was innocent of the crimes for which she was charged, as required by § 29-4601(3). The Sheridan County District Court concluded that Marie could not prove that she was actually innocent and dismissed her complaint. Marie appeals.

ASSIGNMENTS OF ERROR

Marie alleges that the district court erred in finding that she could not prove "actual innocence" under the Act and accordingly dismissing her complaint.

STANDARD OF REVIEW

[1-3] A district court's grant of a motion to dismiss is reviewed de novo.[4] When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions.[5] To prevail against a motion to dismiss for

[4] *Tryon v. City of North Platte*, 295 Neb. 706, 890 N.W.2d 784 (2017).

[5] *Id.*

failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that it plausible on its face.[6]

ANALYSIS

Before we turn to Marie's arguments on appeal, some background on the Act, and our case law on it, is helpful.

Section 29-4602 sets forth the purpose of the Act:

> The Legislature finds that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been uniquely victimized, have distinct problems reentering society, and have difficulty achieving legal redress due to a variety of substantive and technical obstacles in the law. The Legislature also finds that such persons should have an available avenue of redress. In light of the particular and substantial horror of being imprisoned for a crime one did not commit, the Legislature intends by enactment of the . . . Act that persons who can demonstrate that they were wrongfully convicted shall have a claim against the state as provided in the [A]ct.

Section 29-4603 sets forth the requirements for an individual to recover under the Act:

> In order to recover under the . . . Act, the claimant shall prove each of the following by clear and convincing evidence:
>
> (1) That he or she was convicted of one or more felony crimes and subsequently sentenced to a term of imprisonment for such felony crime or crimes and has served all or any part of the sentence;
>
> (2) With respect to the crime or crimes under subdivision (1) of this section, that the Board of Pardons has pardoned the claimant, that a court has vacated the conviction of the claimant, or that the conviction was

[6] *Id.*

> reversed and remanded for a new trial and no subsequent conviction was obtained;
>
> (3) That he or she was innocent of the crime or crimes under subdivision (1) of this section; and
>
> (4) That he or she did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about such conviction or the conviction of another, with respect to the crime or crimes under subdivision (1) of this section, except that a guilty plea, a confession, or an admission, coerced by law enforcement and later found to be false, does not constitute bringing about his or her own conviction of such crime or crimes.

We examined the Act in *Hess v. State*.[7] There, the claimant argued that he did not have the burden to show that he was innocent, as required by § 29-4603(3), because he was presumed innocent, and that the State was required to prove his guilt. We rejected that claim, noting the difference between legal and actual innocence as set forth by the Act. We observed that § 29-4603(2) addressed legal innocence, while § 29-4603(3) addressed actual innocence, and explained that the presumption of innocence fit with the former. In *Hess*, we also defined actual innocence to mean, in lay terms, that a "defendant did not commit the crime for which he or she is charged."[8]

We also discussed the Act in *Nadeem v. State*.[9] There, we held that the claimant failed to allege an absence of facts which reflected his actual innocence. We noted that a defendant must plead more than a lack of intent to establish actual innocence.

The primary issue on appeal is whether Marie's amended complaint sufficiently alleged that she was actually innocent,

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[7] *Hess v. State*, 287 Neb. 559, 843 N.W.2d 648 (2014).

[8] *Id.* at 563, 843 N.W.2d at 653.

[9] *Nadeem v. State*, 298 Neb. 329, 904 N.W.2d 244 (2017).

and further, whether she could prove that she was actually innocent. The State argued, and the district court agreed, that "there [was] no set of circumstances under which Marie [could] prove she [was] actually innocent of the crimes for which she was convicted of," because "Marie's attempt to relitigate the night of July 30, 1998, is barred by the doctrine of res judicata." The district court further explained that this court had noted in *Nadeem* that res judicata, or claim preclusion, was not a bar to the wrongful conviction claim at issue, because the judgment of conviction had been vacated and deprived of its conclusive character. The district court noted:

> The same cannot be said in Marie's case.
>
> In this case, Marie's convictions were not vacated or deprived of their conclusive character. She received a pardon. . . . [A] pardon does not vacate a conviction or deprive the conviction of its conclusive character. Rather, a pardon eliminates punishment. Marie cannot establish actual innocence.

[4-6] On appeal, Marie argues that claim preclusion is inapplicable to a claim under the Act. Claim preclusion bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[10] The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[11] The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.[12]

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[10] *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

[11] *Id.*

[12] *Id.*

We agree with Marie. The practical effect of the district court's reasoning is that a person whose conviction is reversed or vacated is not confined by the strictures of claim preclusion, while a person who is pardoned is so constrained. Such is inconsistent with the language of the Act. By its terms, the Act is potentially available to anyone who "has [been] pardoned [or] a court has vacated the conviction . . . or . . . the conviction was reversed and remanded for a new trial and no subsequent conviction was obtained."[13] To allow claim preclusion to bar individuals who have been pardoned, but find that claim preclusion has no preclusive effect on the latter categories, reads "has [been] pardoned" right out of the Act.

Moreover, read in connection with its purpose, the Act modified the regular operation of claim preclusion. The point of the Act, after all, is to allow someone to show their innocence after a time when a fact finder has previously established their guilt.

We conclude that the district court's reliance on claim preclusion was erroneous. But we nevertheless find no error in the district court's ultimate dismissal of Marie's complaint. In her complaint, Marie alleges that she was actually innocent of the crime for which she was convicted, because she acted in self-defense and thus had not formed the requisite intent.

As relevant, § 29-4603 requires that a party seeking to recover for a wrongful conviction show both that he or she was pardoned, or that a conviction was vacated or was reversed and remanded for a new trial and no subsequent conviction was obtained, and also that he or she was innocent of the crime or crimes.[14] We explained in *Hess* that § 29-4603(2) deals with legal innocence, while § 29-4603(3) deals with actual innocence. We further defined actual innocence to mean that the "defendant did not commit the crime for which he or she is

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[13] § 29-4603(2).

[14] § 29-4603(2) and (3).

charged."[15] Thus, we concluded in *Hess* that the term "innocent" as used in § 29-4603(3) was synonymous with actual innocence for purposes of the Act.

We discussed self-defense and actual innocence in *Rodriguez v. Nielsen*.[16] In that case, the plaintiff filed a malpractice claim against her criminal defense attorney, alleging that counsel committed malpractice by not arguing that she was not guilty of assault because she acted in self-defense. To prevail on her claim of malpractice, the plaintiff was required to prove that she was actually innocent. We concluded that she could not do so, noting that she

> did not allege that she was absent at the time of the incident or that she did not commit the acts which occurred. Instead, [the plaintiff] alleged she committed the acts but that the acts were in self-defense. In the context of this civil malpractice action, these allegations of fact do not demonstrate actual innocence.[17]

Though in *Rodriguez* we did not explicitly identify it as such, our decision suggests that actual innocence is akin to factual innocence—in other words, where the State has convicted the wrong person.[18] Indeed, this is the prototypical example of actual innocence.[19] Treating these terms as synonymous, at least for purposes of the Act, is consistent with U.S. Supreme Court case law, wherein the Court has observed that actual innocence means factual and not legal innocence.[20] We additionally observe that we have held that a defendant

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[15] *Hess v. State, supra* note 7, 287 Neb. at 563, 843 N.W.2d at 653.

[16] *Rodriguez v. Nielsen*, 264 Neb. 558, 650 N.W.2d 237 (2002).

[17] *Id*. at 562-63, 650 N.W.2d at 241.

[18] See, e.g., *Beavers v. Saffle*, 216 F.3d 918 (10th Cir. 2000).

[19] *Nadeem v. State, supra* note 9. See *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).

[20] See, e.g., *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *Sawyer v. Whitley, supra* note 19.

must plead more than a lack of intent to establish actual innocence.[21]

Here, as in *Rodriguez*, Marie alleges that she acted in self-defense. This defense does not inform her claim of actual innocence, but is relevant to a claim of legal innocence. Moreover, Marie does not allege that someone else shot Oldenburg or that she is otherwise factually innocent, but alleges that she acted in self-defense and that her actions lacked the requisite intent. This is insufficient to allege that she was innocent under § 29-4603(3) of the Act.

Although our reasoning differs from that of the district court, the district court did not err in dismissing Marie's petition, and we accordingly affirm.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Freudenberg, J., not participating.

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[21] *Nadeem v. State, supra* note 9.

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

In re Interest of Kamille C. and Kamiya C., children under 18 years of age. Nateesha B., appellant, v. Samuel C., appellee.

922 N.W.2d 739

Filed February 8, 2019. No. S-18-651.

1. **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 decision made by the lower court.
2. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
3. **Juvenile Courts: Jurisdiction: Child Custody: Parental Rights.** During proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), the juvenile court has broad jurisdiction under Neb. Rev. Stat. § 43-284 (Reissue 2016) regarding placement, but its discretion is governed by the parental preference doctrine that holds that in a child custody controversy between a biological parent and one who is neither a biological nor adoptive parent, the biological parent has a superior right to the custody of the child.
4. **Juvenile Courts: Jurisdiction.** The juvenile court loses jurisdiction to order compliance with dispositional plans once it has terminated jurisdiction over the juvenile and the parties.
5. **Juvenile Courts: Statutes: Legislature: Child Custody.** In enacting Neb. Rev. Stat. § 43-246.02 (Supp. 2017), authorizing bridge orders, the Legislature crafted a solution for temporary continuity when the child is no longer in need of the juvenile court's protection; the juvenile court has made, through a dispositional order, a custody determination in the child's best interests; and the juvenile court does not wish to enter a domestic relations custody decree under the power granted by Neb. Rev. Stat. § 25-2740(3) (Reissue 2016).

6. **Juvenile Courts: Courts: Jurisdiction: Child Custody.** A juvenile court can ensure through a bridge order that during the transfer of jurisdiction to the district court for entry of a custody decree, the custody arrangement that the juvenile court has found to be in the child's best interests remains in place.
7. **Juvenile Courts: Courts: Legislature: Jurisdiction: Child Custody: Time.** The Legislature, through enacting Neb. Rev. Stat. § 43-246.02 (Supp. 2017), bridged the gap that would otherwise occur between the time that the juvenile court terminated its jurisdiction and the district court picked up the case, by avoiding a reversion, before district court proceedings can be commenced, back to whatever custody arrangement controlled before adjudication.
8. **Juvenile Courts: Final Orders: Parental Rights.** 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.
9. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
10. **Final Orders.** It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.
11. **Final Orders: Appeal and Error.** Most fundamentally, an order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.
12. ____: ____. If the right affected would not be significantly undermined by delaying appellate review, then the order falls under the general prohibition of immediate appeals from interlocutory orders. This general prohibition operates to avoid piecemeal appeals arising out of the same set of operative facts, chaos in trial procedure, and a succession of appeals in the same case to secure advisory opinion to govern further actions of the trial court.
13. **Constitutional Law: Child Custody: Parental Rights: Time.** Custody is generally considered an essential legal right implicating a parent's fundamental, constitutional right to raise his or her child, but the duration of a court's order is also relevant to whether an order affects a substantial right.
14. **Child Custody: Jurisdiction: Intent.** A bridge order is designed to preserve the status quo by continuing the placement with the noncustodial parent until the matter can be heard in district court, if either of the parties are dissatisfied with the custody decree that the district court enters in accordance with the bridge order.
15. **Final Orders.** An order merely preserving the status quo pending a further order is not final.

16. **Jurisdiction: Appeal and Error.** Immediate appellate review of a bridge order would undermine the rights affected more than it would vindicate them.
17. **Jurisdiction: Final Orders.** A bridge order is not final for purposes of Neb. Rev. Stat. § 25-1902 (Reissue 2016).

Appeal from the Separate Juvenile Court of Lancaster County: Linda S. Porter, Judge. Appeal dismissed.

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

Megan M. Zobel, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellee.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

This appeal involves a "bridge order," which was created by L.B. 180 in 2017,[1] and is codified in Neb. Rev. Stat. § 43-246.02 (Supp. 2017). Under § 43-246.02(1), a "juvenile court may terminate its jurisdiction under subdivision (3)(a) of section 43-247 by transferring jurisdiction over the juvenile's custody, physical care, and visitation to the district court through a bridge order," if certain criteria are met. A bridge order solely addresses matters of legal and physical custody and parenting time when a juvenile has been placed by the juvenile court with a legal parent.[2] The bridge order in this case was entered after the adjudication of five children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), who had been in the mother's sole legal and physical custody. Two of those children had the same father, with whom they were placed during the ongoing juvenile proceedings. The bridge order gave

[1] 2017 Neb. Laws, L.B. 180, § 1 (eff. Aug. 24, 2017).

[2] See § 43-246.02(1)(c) and (4).

the father legal and physical custody, with substantial visitation by the mother. The mother contests the bridge order, arguing that it was inappropriate under the circumstances, because by the time the bridge order was entered, the Department of Health and Human Services (DHHS) had conceded that the children could safely be placed back in her care and custody. Because we determine that bridge orders are not final for purposes of Neb. Rev. Stat. § 25-1902 (Reissue 2016), we dismiss the appeal for lack of jurisdiction.

BACKGROUND

On July 11, 2017, a petition was filed under § 43-247(3)(a) to adjudicate Kamille C. and Kamiya C., as well as three siblings who are not the subject of this appeal. The children resided with their mother, Nateesha B. In a prior proceeding, Samuel C. had been determined to be the biological father of Kamille and Kamiya and had been ordered to pay child support. The petition alleged that Nateesha had been found in possession of controlled substances after a traffic stop. Kamille and Kamiya were 5 years old at the time.

On July 13, 2017, the juvenile court issued an ex parte order of temporary emergency custody of all five children with DHHS, which, after a hearing on July 19, the court ordered to be continuing.

Nateesha admitted the allegations in the petition, and the children were adjudicated on October 6, 2017. The court ordered that Kamille and Kamiya be physically placed in Samuel's home and that Nateesha be allowed to exercise reasonable rights of supervised parenting time. Samuel's child support payments were suspended during this time.

The dispositional order was issued on November 21, 2017. The court ordered that Kamille and Kamiya, as well as the other adjudicated children, remain in the temporary legal custody of DHHS, while Nateesha worked on a permanency plan for reunification. Kamille and Kamiya's placement was to continue with Samuel.

At a dispositional review hearing on January 10, 2018, the court ruled that the children should remain in the temporary legal custody of DHHS and that Kamille and Kamiya should remain in their placement with Samuel.

On April 24, 2018, pursuant to a motion by DHHS, the court ordered the placement change of one of Kamille and Kamiya's siblings from foster care back into Nateesha's home, subject to further hearing at the request of any party. In the affidavit in support of the motion, DHHS noted that it had also requested that another sibling be placed back with Nateesha, but that a hearing on the request had not yet been held. A DHHS specialist averred that Nateesha had regularly complied with the permanency plan by submitting to drug testing and being negative for any and all substances during the prior 2 months. Additionally, Nateesha had been following the guidelines of her outpatient treatment and was doing well. The DHHS specialist described Nateesha as providing a "safe and stable home."

There are no further orders regarding Kamille and Kamiya's siblings in the appellate record.

Samuel moved for a bridge order under § 43-246.02, which would close the juvenile case as to Kamille and Kamiya and transfer jurisdiction over their physical care, custody, and parenting time to the district court. The motion alleged that the children were safely placed with Samuel, that there was not a district court order for custody in place, that there were no other related pending cases before the juvenile court, and that the juvenile court could safely close the juvenile case as to Kamille and Kamiya once orders for custody, physical care, and parenting time were in place.

The court held a hearing on May 24, 2018, on Samuel's motion for a bridge order. According to testimony at the hearing, approximately 1 month prior, Nateesha had begun having unsupervised visitation with Kamille and Kamiya, with periodic drop-ins, on two week nights a week. She had begun having unsupervised visitation on the weekends, with

periodic drop-ins, approximately 2 weeks prior to the hearing. Transportation for visitation was provided by DHHS.

Evidence submitted at the hearing demonstrated that by March 2018, Nateesha's home was considered to be safe and drug free. However, a child and family services specialist with DHHS who was assigned to Kamille and Kamiya's case testified that she believed it was in the children's best interests for Samuel to have the legal and physical custody of the children, with visitation rights for Nateesha. The specialist testified that the children had been living with Samuel full time for approximately 1 year and had adjusted well and formed a strong bond with Samuel.

On May 29, 2018, the court issued, as to Kamille and Kamiya, a bridge order and an attached parenting plan. The court found that it was in Kamille and Kamiya's best interests to have their legal and physical custody with Samuel and that the juvenile court's jurisdiction over Kamille and Kamiya be transferred to the district court. The parenting plan provided that Samuel have primacy in the choices regarding Kamille and Kamiya's education, religious upbringing, and medical needs. Nateesha was to have visitation with Kamille and Kamiya every Tuesday commencing at 4:30 p.m. and concluding at 7:30 p.m., every Wednesday commencing at 4 p.m. and concluding at 7:30 p.m., and every Friday commencing at 4:30 p.m. and concluding Sunday at 10 a.m.

The court scheduled the next dispositional review hearing for the other three adjudicated children on August 6, 2018.

Nateesha appeals from the bridge order.

ASSIGNMENTS OF ERROR

Nateesha assigns, summarized, that the juvenile court erred by (1) denying her due process right to an impartial decisionmaker by adducing evidence and thereby acting as an advocate for one of the parties, (2) receiving into evidence a report of the Foster Care Review Board over her hearsay objection, (3) finding that the bridge order was necessary, and (4) finding

that the best interests of the children would be served by placing legal and physical custody with Samuel.

STANDARD OF REVIEW

[1] 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 decision made by the lower court.[3]

ANALYSIS

This appeal involves a "bridge order" entered pursuant to § 43-246.02, which was enacted through L.B. 180 in 2017. Specifically, Nateesha challenges the domestic relations custody determination made in the bridge order in this appeal.

Before L.B. 180, there was no provision in the law for bridge orders. This is the first time we have addressed a bridge order under the newly enacted statute. A bridge order is part of the juvenile code governing the juvenile court, but was designed as a "bridge" between juvenile courts and district courts.[4] The unique nature of a bridge order raises the question of whether it is final under § 25-1902. In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] For an appellate court to acquire jurisdiction of an appeal, there must be a judgment or final order entered by the court from which the appeal is taken.[6]

To understand whether a bridge order is final, we must understand what, precisely, it does. We must, therefore, examine the respective roles of juvenile and district courts and the newly enacted statutory scheme.

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[3] *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018).

[4] See Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2016 & Cum. Supp. 2018).

[5] *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

[6] Neb. Rev. Stat. § 25-1911 (Reissue 2016).

[2] Pursuant to Neb. Const. art. V, § 27, the juvenile court is a statutorily created tribunal established by the Legislature "with such . . . powers as the Legislature may provide." Each county, depending on its population, has either a separate juvenile court or a county court with authority to sit as a juvenile court.[7] As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.[8]

[3] Section 43-247 gives the juvenile court jurisdiction as to any juvenile defined in subdivision (3) of that section. The dual purpose of proceedings brought under § 43-247(3)(a), which alleges that the juvenile is homeless, destitute, or without proper support through no fault of the parent, guardian, or custodian, is to protect the welfare of the child and to safeguard the parent's right to properly raise his or her own child.[9] During proceedings under § 43-247(3)(a), the juvenile court has broad jurisdiction under Neb. Rev. Stat. § 43-284 (Reissue 2016) regarding placement, but its discretion is governed by the parental preference doctrine that holds that in a child custody controversy between a biological parent and one who is neither a biological nor adoptive parent, the biological parent has a superior right to the custody of the child.[10] The juvenile court's authority and duty thus includes "to make reasonable efforts to preserve and reunify the family if required under section 43-283.01,"[11] as well as "[t]o promote adoption, guardianship, or other permanent arrangements

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[7] See § 43-2,111 and Neb. Rev. Stat. § 24-517(10) (Reissue 2016).

[8] *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002).

[9] *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995).

[10] See, *In re Interest of Amber G. et. al.*, 250 Neb. 973, 554 N.W.2d 142 (1996), *disapproved on other grounds, In re Interest of Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651 (2017); *In re Interest of Stephanie H. et al.*, 10 Neb. App. 908, 639 N.W.2d 668 (2002).

[11] Neb. Rev. Stat. § 43-246(5) (Reissue 2016).

for children in the custody of [DHHS] who are unable to return home."[12]

The district court traditionally determines custody matters as between unmarried parents when juvenile services are not required.[13] In such cases, the parental preference doctrine is not implicated, because there is no controversy between a biological parent and one who is neither a biological nor adoptive parent.

Neb. Rev. Stat. § 43-245(12) (Reissue 2016) provides in part: "Nothing in the Nebraska Juvenile Code shall be construed to deprive the district courts of their habeas corpus, common-law, or chancery jurisdiction or the county courts and district courts of jurisdiction of domestic relations matters as defined in section 25-2740." Neb. Rev. Stat. § 25-2740(1)(a) (Reissue 2016) includes "custody" within the definition of the term "[d]omestic relations matters." Thus, up until amendments passed by the Legislature in 2008, domestic relations custody determinations between two parents were not within the scope of the juvenile court's jurisdiction under § 43-247(3)(a). They were matters exclusively under the jurisdiction of the district court.

At the same time, district courts were discouraged from making custody or visitation determinations while a juvenile court was exercising its jurisdiction over a child.[14] For example, in *Ponseigo v. Mary W.*,[15] we affirmed the district court's refusal to consider a petition for grandparent visitation while a case involving the juvenile's adjudication under § 43-247(3) continued in juvenile court. We noted the relative specificity of the relevant statutes as well as the need to avoid the possibility of conflicting orders from different courts.[16]

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[12] § 43-246(6).

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

[14] Compare *Ponseigo v. Mary W.*, 267 Neb. 72, 672 N.W.2d 36 (2003), with *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979).

[15] *Ponseigo v. Mary W., supra* note 14.

[16] See *id.*

As explained by the Nebraska Court of Appeals in *In re Interest of Ethan M.*,[17] through amendments to § 25-2740(3) in 2008, the Legislature expanded the juvenile court's subject matter jurisdiction so that it could enter domestic relations custody orders for children over whom the juvenile court already had jurisdiction for another purpose. Section 25-2740(3) refers to subsection (2), which describes domestic relations matters that shall be filed with the district court, and states that "a county court or separate juvenile court which already has jurisdiction over the child whose paternity or custody is to be determined has jurisdiction over such paternity or custody determination." Before the 2008 amendments, this language referred only to paternity determinations. The express intent of the amendments was to remedy the problem that arose because the juvenile court lacked jurisdiction over domestic relations custody determinations and the district court would not make domestic relations custody determinations over a child while under the juvenile court's jurisdiction.[18]

However, the procedures for making domestic relations custody determinations were not changed by the 2008 amendments and needed to be followed by the juvenile court in order to make a custody determination as between two parents.[19] These procedures differ depending upon whether there is a prior custody decree, but include the filing of a petition or a complaint[20] and the development of a parenting plan as provided in the Parenting Act.[21]

[4] In *In re Interest of Ethan M.*, the Court of Appeals noted that when the juvenile court does not enter a final custody order under the appropriate procedures for domestic relations

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[17] *In re Interest of Ethan M., supra* note 13.

[18] See *id.* See, also, *Ponseigo v. Mary W., supra* note 14.

[19] See *In re Interest of Ethan M., supra* note 13.

[20] See § 25-2740(2).

[21] See Neb. Rev. Stat. § 42-364 (Reissue 2016).

matters, but merely enters a dispositional order placing the child with the noncustodial parent, such order can no longer be enforced once the court terminates its jurisdiction over the juvenile case.[22] Under § 43-247(12), the juvenile court retains jurisdiction as to any individual adjudicated under various subsections, including subsection (3)(a), only "until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction." Thus, the juvenile court loses jurisdiction to order compliance with dispositional plans once it has terminated jurisdiction over the juvenile and the parties.[23]

One of the reasons the juvenile court may terminate its jurisdiction over a juvenile is that the child is no longer in need of protection.[24] And § 43-246.02(1)(d) indicates that a bridge order is appropriate only when the juvenile case can safely be closed. Section 43-246.02(1)(d) states that one of the necessary criteria for a bridge order is that the juvenile court has determined "its jurisdiction under subdivision (3)(a) of section 43-247 should properly end once orders for custody, physical care, and visitation are entered by the district court." Section 43-246.02(3)(a) provides that any motion for a bridge order shall allege that "the juvenile court action filed under subdivision (3)(a) of section 43-247 may safely be closed once orders for custody, physical care, and visitation have been entered by the district court." The Introducer's Statement of Intent was to authorize the creation of "'Bridge Orders' to transfer a case from juvenile court to district court when a noncustodial parent has been deemed fit to safely care for a child, and close the unnecessary juvenile case."[25]

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[22] See *id.*

[23] See *In re Interest of Lisa V.*, 3 Neb. App. 559, 529 N.W.2d 805 (1995).

[24] *In Interest of Amanda H.*, 4 Neb. App. 293, 542 N.W.2d 79 (1996).

[25] Introducer's Statement of Intent, L.B. 180, Judiciary Committee, 105th Leg., 1st Sess. (Jan. 26, 2017).

A bridge order "shall only address matters of legal and physical custody and parenting time,"[26] but it is not a domestic relations custody decree. As such, the procedural requirements leading up to the bridge order of custody are significantly less onerous than for a domestic relations custody decree under § 25-2740(3). The Legislature noted in enacting L.B. 180 that juvenile courts do not always have the time on their dockets to determine domestic relations custody matters.[27] Accordingly, § 43-246.02(4) specifically states that "[t]he Parenting Act shall not apply to the entry of the bridge order in juvenile or district court" and that "[n]o mediation or specialized alternative dispute resolution under section 42-364 shall be required . . . ."

[5] In enacting § 43-246.02, authorizing bridge orders, the Legislature crafted a solution for temporary continuity when the child is no longer in need of the juvenile court's protection; the juvenile court has made, through a dispositional order, a custody determination in the child's best interests; and the juvenile court does not wish to enter a domestic relations custody decree under the power granted by § 25-2740(3). Such custody decree is instead entered by the district court after the transfer of jurisdiction over the child from juvenile court to district court, which transfer is inherent to the bridge order. Section 43-246.02(1) states that "[a] juvenile court may terminate its jurisdiction under subdivision (3)(a) of section 43-247 by transferring jurisdiction over the juvenile's custody, physical care, and visitation to the district court through a bridge order . . . ." Section 43-246.02(5) states that "[u]pon transferring jurisdiction from a juvenile court to a district court, the clerk of the district court shall docket the case under either a new docket or any previous docket establishing custody or paternity of a child."

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[26] § 43-246.02(4).

[27] Judiciary Committee Hearing, L.B. 180, 105th Leg., 1st Sess. 79 (Jan. 26, 2017).

Upon transfer, the district court shall "give full force and effect to the juvenile court bridge order as to custody and parenting time."[28] However, either party may "file a petition in district court for modification of the bridge order" and, if filed within 1 year after the filing date of the bridge order, "the party requesting modification shall not be required to demonstrate a substantial change of circumstance but instead shall demonstrate that such modification is in the best interests of the child."[29] In such modification proceedings, the statutory scheme requires no deference to the juvenile court's judgment of the child's best interests. Further, § 43-246.02(6) now provides that "[t]he transfer of jurisdiction shall not result in new filing fees and other court costs being assessed against the parties."[30] In other words, the custody determination made by the juvenile court has no legally preclusive effect and will be made anew by the district court if either parent is discontent with the custody arrangement originally set forth by the bridge order. And § 43-246.02(6) ensures that there will be no new filing costs when seeking what in effect is a de novo review of the best interests of the child.

[6,7] To summarize the statutory scheme, a bridge order is a tool for juvenile courts to temporarily ensure continuity for the child without endeavoring to issue a final custody decree. A juvenile court can ensure through a bridge order that during the transfer of jurisdiction to the district court for entry of a custody decree, the custody arrangement that the juvenile court has found to be in the child's best interests remains in place. The Legislature, through enacting § 43-246.02, bridged the gap that would otherwise occur between the time that the juvenile court terminated its jurisdiction and the district court picked up the case, by avoiding a reversion, before district court

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[28] § 43-246.02(6) (now found at § 43-246.02(7) (Cum. Supp. 2018)).

[29] § 43-246.02(8) (now found at § 43-246.02(9) (Cum. Supp. 2018)).

[30] See 2018 Neb. Laws, L.B. 708, § 1 (eff. July 19, 2018).

proceedings can be commenced, back to whatever custody arrangement controlled before adjudication.

[8-10] The unique nature of the bridge order does not place it squarely within our final order jurisprudence. 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.[31] A substantial right is an essential legal right, not a mere technical right.[32] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[33]

[11,12] "Most fundamentally, an order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review."[34] If the right affected would not be significantly undermined by delaying appellate review, then the order falls under the general prohibition of immediate appeals from interlocutory orders. This general prohibition operates to avoid piecemeal appeals arising out of the same set of operative facts, chaos in trial procedure, and a succession of appeals in the same case to secure advisory opinion to govern further actions of the trial court.[35]

As stated, a bridge order is an order transferring jurisdiction over the child from the juvenile court to the district court. We held in *In re Interest of Sandrino T.*[36] that the transfer from juvenile court to county court of juvenile cases brought under Neb. Rev. Stat. § 43-246.01 (Reissue 2016) was not a final order. We held that the court in which the case would proceed

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[31] *Id.*

[32] *In re Estate of Abbott-Ochsner*, 299 Neb. 596, 910 N.W.2d 504 (2018).

[33] *Id.*

[34] *Tilson v. Tilson, supra* note 3, 299 Neb. at 71, 907 N.W.2d at 37.

[35] See *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[36] Compare, e.g., *In re Interest of Sandrino T.*, 295 Neb. 270, 888 N.W.2d 371 (2016), with *In re Interest of L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992).

for the delinquency proceedings was a mere technical right and not a substantial right and that the right affected by the transfer order could be effectively vindicated in an appeal at the conclusion of the criminal proceedings.[37]

[13] A bridge order does more than simply transfer the case to district court. It orders a change in custody as between two parents. Still, such order is merely temporary until given "full force and effect"[38] by the district court, and it has no legally preclusive effect in the event that either parent wishes to challenge it in district court. Custody is generally considered an essential legal right implicating a parent's fundamental, constitutional right to raise his or her child, but the duration of a court's order is also relevant to whether an order affects a substantial right.[39]

We have held that certain orders affecting custody or other parental rights had a substantial effect on those rights and were, therefore, final, despite being of limited duration. Such cases generally involve either (1) a change in permanency plan or (2) orders of substantial or uncertain duration.[40] Further, such cases involve the State's taking significant parenting contact or parental prerogatives away from a parent and, thus, implicate the parental preference doctrine.[41] In contrast, in

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[37] *In re Interest of Sandrino T., supra* note 36.

[38] § 43-246.02(6) (now found at § 43-246.02(7) (Cum. Supp. 2018)).

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

[40] See, *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016); *In re Interest of Octavio B. et al., supra* note 5; *In re Interest of Mya C. & Sunday C.*, 286 Neb. 1008, 840 N.W.2d 493 (2013). See, also, *In re Interest of Karlie D., supra* note 39.

[41] Compare *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017), and *In Interest of Loomis*, 195 Neb. 552, 239 N.W.2d 266 (1976), with *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013), *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997), and *In re Interest of Stephanie H. et al., supra* note 10. But see *In re Interest of Jaydon W. & Ethan W.*, 25 Neb. App. 562, 909 N.W.2d 385 (2018).

several other juvenile court cases, we have found that orders temporarily affecting a parent's custodial, visitation, or educational rights were not final. This has generally been when it was clear that the orders will be for a very limited duration.[42] Despite the importance of the rights affected, we held that such orders of limited duration failed to have a substantial effect on those rights.[43]

The temporary custody orders that we have held to be final are distinguishable from bridge orders inasmuch as bridge orders do not change the requirements for reunification and they are not orders determining a child custody controversy between a biological parent and one who is neither a biological nor adoptive parent. The constitutional right at issue in a domestic relations custody decree is usually the right of visitation.[44] And, when the custody-related rights have been affected by orders entered in the context of domestic relations between two parents, such orders have been held not to be final, and thus not immediately appealable, when the court has yet to decide pending matters such as child support.[45] Even an order depriving a parent of all visitation in an underlying custody dispute between two parents has been held not to be final, when the order was temporary.[46] We have implicitly determined that the parent's rights affected by the order can be effectively vindicated even when the parent must wait to appeal until all pending matters are resolved.

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[42] See, *In re Interest of Danaisha W. et al., supra* note 41; *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984); *In re Interest of Angeleah M. & Ava M.*, 23 Neb. App. 324, 871 N.W.2d 49 (2015), *disapproved on other grounds, In re Estate of Abbott-Ochsner, supra* note 32; *In re Interest of Nathaniel P.*, 22 Neb. App. 46, 846 N.W.2d 681 (2014).

[43] *Tilson v. Tilson, supra* note 3.

[44] See *Koch v. Koch*, 219 Neb. 195, 361 N.W.2d 548 (1985).

[45] See *Schepers v. Schepers*, 236 Neb. 406, 461 N.W.2d 413 (1990).

[46] See *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009). See, also, *Tilson v. Tilson, supra* note 3.

Furthermore, in a somewhat different domestic relations context of a custody order during military deployment,[47] we held, in *Huskey v. Huskey*,[48] that an order changing sole legal and physical custody from the mother to the father while the mother was deployed for 8 months was not a final order because it was temporary. The temporary custody order during deployment that was addressed in *Huskey* is similar to a bridge order insofar as it automatically continues to be in effect until one of the parties files a motion. Section 43-2929.01(5) provided that upon the return of the military parent from mobilization or deployment, either parent may request a rehearing or reinstatement of a prior order. If the temporary order was the initial order, the court is required to rehear the matter and make a new determination. And if the temporary order was a modification, the court is required to reinstate the original order unless the best interests of the child or child support guidelines require otherwise. It thus contemplates further action without issue preclusion as to the best interests determination made in relation to the temporary order. Such an order is considered temporary and without a substantial effect on important custody rights.[49]

[14,15] A bridge order is designed to preserve the status quo by continuing the placement with the noncustodial parent until the matter can be heard in district court, if either of the parties are dissatisfied with the custody decree that the district court enters in accordance with the bridge order. The initial placement with Samuel occurred during a dispositional order, which would have been final under § 25-1902,[50] and

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[47] Neb. Rev. Stat. § 43-2929.01(4)(a) (Cum. Supp. 2012) (see, currently, Neb. Rev. Stat. § 43-4601 et seq. (Reissue 2016)).

[48] *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014). See, also, *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010).

[49] See *id.*

[50] See *In re Interest of Karlie D., supra* note 39. See, also, *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

Nateesha did not appeal that dispositional order. We have said in similar contexts that an order merely preserving the status quo pending a further order is not final.[51]

Granted, placement while working toward reunification is not the same as a domestic relations custody order. Nevertheless, because Nateesha can immediately move for a de novo reevaluation in district court of whether the custody decree is in Kamille and Kamiya's best interests—without a showing of a change of circumstances or incurring additional filing fees or costs—we ultimately conclude that any rights affected by the bridge order would not be significantly undermined or irrevocably lost if not immediately appealable to our appellate courts.

We recognize that some things will change due to the transfer. If Nateesha moves to modify the custody decree that gives full force and effect to the bridge order, she will have to demonstrate that the child's best interests are served by a different arrangement and she will no longer have the right to appointment of counsel. Still, parties generally do not have a right to counsel in domestic relations matters and the provision for modification in district court without demonstrating a change of circumstances operates as a form of review that can be accessed more quickly and with less cost than a direct appeal.

Even if we were to review the bridge order, such review would serve no purpose other than to extend its duration. Any determination upon direct review of the juvenile court's bridge order would have little meaning, because under the statutory scheme, the best interests determination could be made anew by the district court regardless.

[16,17] Immediate appellate review of a bridge order would undermine the rights affected more than it would vindicate them. The goal of quickly resolving domestic relations

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[51] See *Tilson v. Tilson, supra* note 3.

custody disputes would be hindered, not assisted, by permitting interlocutory appeals of bridge orders.[52] For this reason, we hold that a bridge order is not final for purposes of § 25-1902.

CONCLUSION

Because we lack appellate jurisdiction, the appeal is dismissed.

Appeal dismissed.

Heavican, C.J., participating on briefs.

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[52] See *Steven S. v. Mary S., supra* note 46.

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

State of Nebraska, appellee, v. Steven F. Shiffermiller, appellant.

922 N.W.2d 763

Filed February 15, 2019. No. S-17-675.

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: 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 the trial and from the hearings on the motion to suppress.
3. **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.
4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Appeal and Error.** To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), which describes the three levels, or tiers, of police-citizen encounters.
5. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type

of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection.

6. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Words and Phrases.** The second category of police-citizen encounters, the investigatory stop, as defined by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime.
7. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Arrests: Search and Seizure: Probable Cause.** The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
8. **Investigative Stops: Arrests: Time.** A detention may evolve into a de facto arrest if unreasonable force is used or if a stop lasts for an unreasonable amount of time.
9. **Police Officers and Sheriffs: Investigative Stops.** Whether a detention is reasonable under the circumstances depends on a multitude of factors, including the number of officers and police cars involved, the nature of the crime and whether there is reason to believe the suspect might be armed, the strength of the officers' articulable, objective suspicions, the erratic behavior of or suspicious movements by the persons under observation, and the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.
10. ____: ____. The use of handcuffs has been approved when it was reasonably necessary to protect officer safety during an investigatory stop, but the use of handcuffs is not warranted when the facts do not justify a belief that the suspect may be dangerous.
11. **Investigative Stops: Time.** An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop.
12. **Police Officers and Sheriffs: Investigative Stops.** In an investigative stop, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

13. **Constitutional Law: Police Officers and Sheriffs: Motor Vehicles: Public Health and Welfare: Evidence: Words and Phrases.** The community caretaking exception to the Fourth Amendment provides that local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.
14. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Search and Seizure.** In order to determine whether the community caretaking exception to the Fourth Amendment applies, the court should assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction. If, based on the totality of the circumstances, the seizing officer had a reasonable basis to believe his assistance was necessary, the stop is not unconstitutional.
15. **Constitutional Law: Search and Seizure.** A search or seizure under the community caretaking exception to the Fourth Amendment, like any other search or seizure, is subject to the standard test of reasonableness. It must be justified at its inception, based on specific articulable facts which reasonably warrant the intrusion into the individual's liberty, and it must be reasonably related in scope to the circumstances which justified the interference in the first place.
16. **Constitutional Law: Police Officers and Sheriffs: Motor Vehicles.** As the community caretaking exception to the Fourth Amendment requires in general, transportation may be warranted and justified under the community caretaking exception when there is an objectively reasonable basis for exercising the community caretaking function.
17. **Constitutional Law: Police Officers and Sheriffs: Intoxication: Public Health and Welfare.** Depending on the particular facts presented, the community caretaking exception to the Fourth Amendment may be appropriate when a defendant is visibly intoxicated and presenting a danger to himself and the general public.
18. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
19. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden

of showing the applicability of one or more of the exceptions to the warrant requirement.

20. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Weapons: Public Health and Welfare.** During a second-tier stop as described in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer is entitled, for the protection of himself or herself and others in the area, to conduct a carefully limited search of outer clothing to discover weapons that might be used to assault the officer.
21. **Police Officers and Sheriffs: Search and Seizure: Weapons: Public Health and Welfare.** The purpose of a pat-down search for weapons is the protection of the officer and other persons nearby.
22. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Public Health and Welfare.** The protection of the officer justification applies equally to a second-tier encounter as described in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), that is warranted by the community caretaking exception to the Fourth Amendment.
23. **Constitutional Law: Criminal Law: Arrests: Search and Seizure: Probable Cause.** A valid arrest based on probable cause that a person is engaged in criminal activity is allowed by the Fourth Amendment, and if an arrest is made based upon probable cause, a full search of the person may be made incident to that arrest.
24. **Search and Seizure: Arrests: Search Warrants: Warrants: Probable Cause.** A search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search.
25. **Police Officers and Sheriffs: Arrests: Search and Seizure: Weapons: Evidence.** A search incident to arrest is not limited to searching the arrested person for weapons only; an officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Arterburn, Judges, on appeal thereto from the District Court for Lancaster County, Robert R. Otte, Judge. Judgment of Court of Appeals affirmed.

Matthew K. Kosmicki for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

I. NATURE OF CASE

Defendant was arrested after law enforcement stopped and searched his person and belongings, including the inside of a flashlight, and ultimately found illegal drugs and brass knuckles. Following denial of his motion to suppress and a stipulated bench trial, defendant was convicted of three counts of possession of a controlled substance, a Class IV felony, and one count of possession of a deadly weapon by a prohibited person, a Class III felony. Defendant appealed his convictions to the Nebraska Court of Appeals, and the court, applying the narrow community caretaking exception, affirmed. We granted defendant's petition for further review.

II. BACKGROUND

On September 15, 2016, Steven F. Shiffermiller was charged with three counts of possession of a controlled substance, each count a Class IV felony, and one count of possession of a deadly weapon, a Class III felony. Shiffermiller entered a plea of not guilty and filed a motion to suppress the evidence obtained during his detention and subsequent arrest. A hearing on the motion to suppress was held on March 8, 2017, and the following evidence was adduced.

At approximately 4:30 a.m. on June 6, 2016, the Lincoln Police Department received a report that two individuals were fighting near the intersection of South 31st Street and Sequoia Drive. When an officer arrived on the scene, Shiffermiller was walking toward a parked car with its trunk open on the north side of Sequoia Drive. Shiffermiller appeared to have a torn shirt and blood on his face, arm, and knuckles. Wearing camouflaged printed pants and a tank top, Shiffermiller matched the description of one of the individuals from the police report.

An officer approached Shiffermiller, asking whether he was injured and stating that there had been a reported altercation

at that location. Shiffermiller appeared to be angry, agitated, and under the influence of drugs or alcohol. According to the officer, he claimed that he had been "boxing trees" in a nearby park and was not involved in a fight. The officer then asked Shiffermiller to sit down, as he appeared to be unable to stand. A few minutes later, three more officers arrived on the scene.

Shiffermiller stated that he wanted to leave, but was told that he was not free to leave and that he would stay until the situation was investigated. Because Shiffermiller was acting uncooperative, he was placed in handcuffs and was seated on the curb while officers searched for the other party involved in the reported fight. Shiffermiller's cell phone was lying in the middle of the intersection. A "ball cap" was also found in the intersection; Shiffermiller denied that it belonged to him. No other party was found, so, after approximately 30 to 40 minutes, the officers discontinued their investigation of the potential assault.

The officers determined that Shiffermiller should be transported somewhere both for his safety and to avoid any further disturbances or issues. Shiffermiller rejected medical attention and indicated that he wanted to walk home. The officers did not want to leave Shiffermiller alone, in fear that he may cause further disturbances or attempt to operate his car. Because he appeared to be under the influence of alcohol or drugs, they were worried about his ability to care for himself and were concerned for the safety of the public if he chose to drive. Eventually, the officers found contact information for Shiffermiller's father, who agreed that Shiffermiller could be brought to his home.

In preparing to transport Shiffermiller to his father's home, two police officers patted Shiffermiller down to make sure he did not have any weapons before placing him in a police cruiser. The officers testified that the pat-down was conducted for officer safety reasons, because Shiffermiller had potentially been in a fight and it was unclear whether weapons had been

involved. During the pat-down, an officer felt an object in Shiffermiller's pocket that he "immediately recognized" to be brass knuckles. The officer extracted the brass knuckles from Shiffermiller's pocket and noticed that there was a small trace of blood on them. He seized the object, and Shiffermiller was placed under arrest.

A search of the police database conducted in one of the officer's cruisers revealed that Shiffermiller had a previous felony conviction, which meant that the arrest related to the brass knuckles became a felony arrest as opposed to a misdemeanor. The officers then determined that Shiffermiller would be transported to jail and informed Shiffermiller's father of the change in circumstances.

Shortly after or nearly contemporaneous to the discovery of the brass knuckles, the officers conducted a complete search of Shiffermiller's person, finding keys and a flashlight in Shiffermiller's right pocket. The officer who found the flashlight noticed that it "rattle[d]" and that he "could just feel there weren't batteries inside." He opened the flashlight and found several pills and a small baggie of marijuana. Shiffermiller did not produce a prescription for the pills. The officers checked the pills, which had identifying markings, and confirmed that they were controlled substances. At that time, Shiffermiller was also placed under arrest for possession of a controlled substance. According to the officers present at the scene of the arrest and Shiffermiller's father, approximately 45 minutes to 1 hour passed between the initial stop and Shiffermiller's arrest. The district court overruled Shiffermiller's motion to suppress.

On April 25, 2017, a stipulated bench trial was held. At this trial, Shiffermiller renewed his motion to suppress, which was again overruled by the district court. The State offered two exhibits that were accepted into evidence, one a complete set of police reports and a laboratory report regarding the June 6, 2016, arrest and the other a certified copy of Shiffermiller's prior felony conviction. The parties stipulated that if witnesses

were called to testify in this matter, they would testify consistently with the information contained in those exhibits. The parties also stipulated as to the necessary foundation for the first exhibit which established venue and the chain of custody for the brass knuckles and the narcotics seized at the time of the arrest.

The district court found Shiffermiller guilty on each count alleged. On June 1, 2017, Shiffermiller was sentenced to jail for a period of 50 days on each count and ordered credit for 117 days already served in jail. The court then placed Shiffermiller on probation for a period of 1 year on count I, 2 years on count II, 3 years on count III, and 4 years on count IV, to run concurrently.

Shiffermiller appealed to the Nebraska Court of Appeals, asserting that the district court erred in overruling his motion to suppress the evidence obtained on June 6, 2017. The Court of Appeals affirmed the district court's decision, applying the "community caretaking" exception to the Fourth Amendment to justify Shiffermiller's continued detention after officers completed their initial investigation related to the reported altercation.[1] Shiffermiller petitioned this court for further review of the Court of Appeals' decision, alleging it erred in concluding that evidence found on Shiffermiller's person was properly admitted.

III. ASSIGNMENTS OF ERROR

Shiffermiller assigns that the district court erred in failing to suppress evidence because (1) the government exceeded the permissible scope and duration of a stop pursuant to *Terry v. Ohio*[2] and (2) the warrantless search of Shiffermiller violated the Fourth Amendment because law enforcement did not have a reasonable suspicion that Shiffermiller was armed and dangerous and there was no basis in law to justify the search of his flashlight.

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[1] *State v. Shiffermiller*, 26 Neb. App. 250, 264, 919 N.W.2d 163, 176 (2018).

[2] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

IV. 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, we apply a two-part standard of review.[3] Regarding historical facts, we review the trial court's findings for clear error.[4] 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.[5] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from the trial and from the hearings on the motion to suppress.[6]

[3] 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.[7]

V. ANALYSIS

Shiffermiller asserts that the district court and Court of Appeals erred in finding that the stop did not exceed the permissible scope and duration of a *Terry* stop and in determining the search of Shiffermiller, including the inside of his flashlight, was proper under the Fourth Amendment.[8] In sum, he argues that the court erred in concluding that Shiffermiller's rights were not violated in such a manner that required the suppression of the evidence gathered during the stop and subsequent search. Because we also find that Shiffermiller's Fourth Amendment rights were not violated, we affirm.

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[3] *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

[4] *Id.*

[5] *Id.*

[6] *State v. Rivera*, 297 Neb. 709, 901 N.W.2d 272 (2017).

[7] *State v. Botts*, 299 Neb. 806, 910 N.W.2d 779 (2018).

[8] See *Terry v. Ohio, supra* note 2.

1. Initial Detention

Shiffermiller first contends that the district court erred in overruling his motion to suppress because the police officers exceeded the permissible scope and duration of a second-tier *Terry* stop. He argues that the stop in this case falls within the third tier described in *State v. Van Ackeren*,[9] an arrest, because of its highly intrusive and lengthy nature. And, as a result, the officers did not have the requisite probable cause to justify Shiffermiller's detention, necessitating suppression of the evidence collected during the illegal stop. We disagree.

[4-7] To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *Van Ackeren*, which describes the three levels, or tiers, of police-citizen encounters. The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning.[10] This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. The second category, the investigatory stop, as defined by the U.S. Supreme Court in *Terry*,[11] is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[12] This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or

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[9] *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[10] *Id.*

[11] *Terry v. Ohio, supra* note 2.

[12] *State v. Van Ackeren, supra* note 9.

detention.[13] The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.[14] As noted, only the second and third tiers of police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[15]

[8,9] A detention may evolve into a de facto arrest if unreasonable force is used or if a stop lasts for an unreasonable amount of time.[16] We have noted that there is often a gray area between investigatory detentions and arrests.[17] In *State v. Wells*,[18] we stated that whether a detention is reasonable under the circumstances depends on a multitude of factors, including the factors set forth in *United States v. Jones*[19] by the Eighth Circuit. These factors include

> "the number of officers and police cars involved, the nature of the crime and whether there is reason to believe the suspect might be armed, the strength of the officers' articulable, objective suspicions, the erratic behavior of or suspicious movements by the persons under observation, and the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances."[20]

[10] In *Wells*, this court considered the circumstances under which the use of handcuffs could transform a detention into a custodial arrest. Considering U.S. Supreme Court precedent, we found that the use of handcuffs has been approved when

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[13] See *id.*

[14] *Id.*

[15] *State v. Gilliam*, 292 Neb. 770, 874 N.W.2d 48 (2016); *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

[16] See *State v. Wells, supra* note 15.

[17] See *id.*

[18] *Id.*

[19] *United States v. Jones*, 759 F.2d 633 (8th Cir. 1985).

[20] *State v. Wells, supra* note 15, 290 Neb. at 197, 859 N.W.2d at 327.

it was reasonably necessary to protect officer safety during an investigatory stop, but the use of handcuffs is not warranted when the facts do not justify a belief that the suspect may be dangerous.[21]

Shiffermiller argues that the police's use of handcuffs as well as a number of the above factors weighing in his favor shows that the detention was a tier-three stop. He states that there was a significant showing of police presence, through the number of both police officers and cruisers present at the scene of the stop. He argues that there was no reason for the officers to believe he was armed. Shiffermiller also asserts that he was compliant throughout the stop, despite his communicated desire to go home.

The evidence indicates that the first 30 to 40 minutes of the stop were utilized to investigate a reported physical altercation at 4:30 a.m. Shiffermiller matched the description of one of the men involved, and he was observed to have a ripped shirt with blood on his face, arms, and knuckles. When approaching, officers noted that Shiffermiller was unable to stand and appeared to be under the influence of drugs or alcohol. Shiffermiller appeared to be agitated and angry and expressed a desire to leave. An officer even testified that Shiffermiller was attempting to leave during the investigation at one point. Though the officers may not have had a concrete indication that Shiffermiller was armed, these facts supported the use of some form of control to maintain the status quo and ensure that Shiffermiller did not attempt to leave during the investigation. In addition, Shiffermiller's anger and agitation in conjunction with the evidence of blood on his person would indicate that his detention would be reasonable to ensure that Shiffermiller was not a danger to himself or others throughout the investigation. These facts provided ample justification for the manner of detention.

Shiffermiller also argues that, considering the nature of the crime and the fact that Shiffermiller was alone, the officers

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[21] *State v. Wells, supra* note 15.

lacked a sense of urgency in their investigation and should have completed the investigation quickly. In other words, he contends that the continued detention was unreasonable in terms of its scope and length. This contention has no merit.

[11,12] An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop.[22] Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.[23] The initial portion of the stop used to investigate the reported altercation lasted approximately 30 to 40 minutes. By finding items lying in the middle of the intersection, including Shiffermiller's cell phone and an unclaimed hat, the officers acted reasonably in continuing their investigation in order to search the area to determine if anyone else was present and injured as indicated in the original report the officers had received. There is nothing in the record to indicate any lack of diligence or urgency or an abuse of discretion on the part of the investigating officers. The initial detention was not unreasonable, highly intrusive, or excessive in length. As a result, we find that the initial detention and investigation, consisting of the first 30 to 40 minutes of the stop used to investigate the reported assault, were reasonable and did not amount to a de facto arrest.

2. Continued Detention

Shiffermiller, citing *U.S. v. Maltais*[24] as authority, argues that an investigative detention may turn into an arrest if it "'lasts for an unreasonably long time.'"[25] He asserts that although the officers testified that they believed that Shiffermiller may have been under the influence of drugs, nothing was done to determine whether he was actually impaired. Therefore, his continued detention after the initial investigation of the

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[22] *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

[23] *Id.*

[24] *U.S. v. Maltais*, 403 F.3d 550 (8th Cir. 2005).

[25] Brief for appellant at 14.

reported altercation was improper and unconstitutional under the Fourth Amendment.

Here, there was a valid indication that a crime had been committed when the officers initially contacted Shiffermiller after a fight had been reported. Above we found that the officers engaged in a reasonable investigation of that crime that did not violate Shiffermiller's Fourth Amendment rights. However, after the initial investigation into the reported physical altercation yielded no further evidence of a crime's having been committed, the officers continued to detain Shiffermiller for "safety purposes."

[13] Based on the absence of any evidence that a crime had been or was being committed after the initial criminal investigation was completed, this court must determine whether any exceptions to the Fourth Amendment apply to justify Shiffermiller's continued detention for the remainder of the stop.[26] One such exception is the community caretaking exception, first recognized by the U.S. Supreme Court in *Cady v. Dombrowski*[27] and later adopted by this court in *State v. Bakewell*.[28] The exception provides that

> "[l]ocal police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[29]

[14,15] In *Bakewell*, we adopted and applied the community caretaking exception to determine whether the stop of a

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[26] See *State v. Rohde*, 22 Neb. App. 926, 864 N.W.2d 704 (2015).

[27] *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

[28] *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007).

[29] *Id*. at 376, 730 N.W.2d at 338 (quoting *Cady v. Dombrowski, supra* note 27).

vehicle was reasonable when an officer stopped its driver at 3:15 a.m. after the officer observed the vehicle stop and decelerate considerably five times within approximately 90 seconds while traveling down the highway, with the vehicle eventually pulling off onto the shoulder of the road. In that case, we held that in order to determine whether the community caretaking exception applies, the court should assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction.[30] If, based on the totality of the circumstances, the seizing officer had a reasonable basis to believe his assistance was necessary, the stop is not unconstitutional.[31] Thus, a search or seizure under the community caretaking exception, like any other search or seizure, is subject to the standard test of reasonableness. It must be justified at its inception, based on specific articulable facts which reasonably warrant the intrusion into the individual's liberty, and it must be reasonably related in scope to the circumstances which justified the interference in the first place.[32]

The community caretaking exception should be narrowly and carefully applied to avoid its abuse.[33] The Court of Appeals has applied the exception in cases involving an exigency or need to protect or assist an occupant of a vehicle, mirroring our application in *Bakewell*.[34]

Insofar as Shiffermiller was not occupying a vehicle at the time of the stop, the facts of this case are different from those of prior cases in which we have applied the community caretaking exception. Our courts have never addressed whether the

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[30] *State v. Bakewell, supra* note 28.

[31] See, *State v. Rohde, supra* note 26; *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995).

[32] *U.S. v. King*, 990 F.2d 1552 (10th Cir. 1993).

[33] *State v. Bakewell, supra* note 28.

[34] See, e.g., *State v. Rohde, supra* note 26; *State v. Smith, supra* note 31.

community caretaking exception applies when those needing protection are located outside a vehicle. In *Dombrowski*, the Supreme Court clearly stated that the community caretaking exception was manifested in contemplation of the "extensive regulation of motor vehicles and traffic" and the frequency of local police officers' investigations that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[35]

Nonetheless, it was the general public that the Supreme Court sought to protect when first applying this exception.[36] A number of federal courts have applied the community caretaking exception to apparently intoxicated individuals who were not occupants of vehicles.[37]

For example, the Fifth Circuit in *U.S. v. Rideau*[38] applied the community caretaking exception when officers stopped an individual who was wearing dark clothing and was standing and stumbling in the road at approximately 10:30 p.m.[39] The court held that the officers were justified in detaining the individual, even without suspicion of criminal activity, because they were engaging in local community caretaking functions.[40] The court explained that intoxicated people in public streets pose a hazard to themselves and others.[41]

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[35] *Cady v. Dombrowski, supra* note 27, 413 U.S. at 441.

[36] See, generally, *Cady v. Dombrowski, supra* note 27.

[37] *U.S. v. Rideau*, 949 F.2d 718 (5th Cir. 1991), *reversed on rehearing on other grounds* 969 F.2d 1572 (5th Cir. 1992); *Samuelson v. City of New Ulm*, 455 F.3d 871 (8th Cir. 2006); *Winters v. Adams*, 254 F.3d 758 (8th Cir. 2001); *Novitsky v. City of Aurora*, 491 F.3d 1244 (10th Cir. 2007).

[38] *U.S. v. Rideau, supra* note 37.

[39] See, also, *U.S. v. Rideau*, 969 F.2d 1572 (5th Cir. 1992) (recognizing that community caretaking exception serves as justification for police removing intoxicated people from public streets where they pose hazard to themselves and others).

[40] See, *U.S. v. Rideau, supra* note 39; *U.S. v. Rideau, supra* note 37.

[41] *U.S. v. Rideau, supra* note 37.

In *Winters v. Adams*,[42] officers stopped and searched an apparently intoxicated individual when the individual was observed exiting and reentering a vehicle that was parked on a dead-end street. The Eighth Circuit Court of Appeals found that the officers "'would have been derelict in their duties'" had they not detained the individual.[43] In addition, in later cases, the Eighth Circuit has continuously recognized that the "'community caretaking'" exception may justify noninvestigatory searches and seizures in certain limited situations, including when law enforcement officers are seeking to help those in danger.[44]

[16] Courts have also justified the transport in a police cruiser of potentially intoxicated individuals for their safety under the community caretaking exception.[45] For example, the Wisconsin Supreme Court in *State v. Blatterman*[46] held that, under the community caretaking exception, a police officer was justified in transporting a defendant to a hospital when the officer observed the defendant exhibiting erratic and disoriented behavior, complaining of chest pain, and wearing only a short-sleeved shirt and jeans in very cold weather.[47] The officer stated that he had concerns about alcohol use and the defendant's mental health.[48] The court found the community caretaking exception justified the detention necessary to transport the defendant to the hospital even when the defendant refused medical treatment.[49] We find that transportation may

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[42] *Winters v. Adams, supra* note 37.

[43] *Id*. at 764 (citing *U.S. v. Rideau, supra* note 37).

[44] *U.S. v. Harris*, 747 F.3d 1013, 1017 (8th Cir. 2014) (compiling cases that have applied community caretaking doctrine to noninvestigatory seizures). See, also, *U.S. v. Quezada*, 448 F.3d 1005 (8th Cir. 2006).

[45] See, e.g., *State v. Blatterman*, 362 Wis. 2d 138, 864 N.W.2d 26 (2015).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

be warranted and justified under the community caretaking exception when there is an objectively reasonable basis for exercising such community caretaking function.

[17] Shiffermiller, while conceding that the community caretaking exception allows an officer to seize an individual when that officer reasonably believes that the individual is a danger to himself or others, argues that applying the community caretaking exception to this case would be an improper expansion of the exception, as Nebraska courts have construed the exception only in cases involving vehicle stops. We disagree. We conclude that, depending on the particular facts presented, the community caretaking exception may be appropriate when a defendant is visibly intoxicated and presenting a danger to himself and the general public.

In the present case, the evidence shows that Shiffermiller was walking toward a parked car with the trunk open. The car was determined to belong to him. He communicated his desire to go home during the investigation, and although at one point he stated that he wanted to walk, the officers reasonably believed it likely he would drive. The officers testified that Shiffermiller seemed to be agitated and under the influence of drugs or alcohol. One of the officers also stated that he felt that if someone is exhibiting signs of being under the influence, it is the responsibility of the officers to find him or her a safe place to go.

The evidence shows that the continued detention was based upon the officers' observations that Shiffermiller appeared to be under the influence of drugs or alcohol and was potentially unable to care for himself, as well as the officers' duty to protect the community from a hazard created by a person who may attempt to operate a motor vehicle while under the influence. The evidence additionally shows that after the initial investigation into the reported assault, the officers held Shiffermiller only long enough to determine where the best place would be to transport him.

Shiffermiller's intoxication, agitated state, proximity to his vehicle, and apparent inability to care for himself at the

location of the officer contact provided sufficient justification for the officers to detain Shiffermiller in order to engage in community caretaking functions. The officers had a legitimate purpose in carrying out an important noninvestigatory function by recognizing and resolving a potential threat to Shiffermiller's safety and that of the public at large.

We reiterate that the community caretaking exception is to be narrowly and carefully applied, but in view of the totality of the circumstances here presented, we find Shiffermiller's continued detention following the initial investigation of the reported assault was reasonable. Therefore, the detention was not a violation of Shiffermiller's constitutional rights.

3. Warrantless Search

Shiffermiller next contends that the warrantless search of his person violated the Fourth Amendment because (1) law enforcement did not have a reasonable suspicion that Shiffermiller was armed and dangerous to warrant the pat-down search and (2) there was no basis in law to justify the search of the interior of his flashlight.

[18,19] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.[50] The search here was conducted without a warrant. Thus, to be valid, it must fall within one of the warrantless search exceptions recognized by this court.[51] The State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.[52]

(a) Pat-Down

We find that the pat-down, like Shiffermiller's continued detention, was lawful under the community caretaking

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[50] *State v. Perry*, 292 Neb. 708, 874 N.W.2d 36 (2016).

[51] *Id.*

[52] *Id.*

exception. Several state courts have upheld various types of searches under the community caretaking exception, including pat-down searches of an individual before being transported, for noncriminal reasons, in a police cruiser.[53] The rationale, as the Michigan Court of Appeals explained in *People v Hannaford*,[54] is that

> [t]he Fourth Amendment was surely not intended to stand for the proposition that police officers must either abandon civilians on highways at night or transport them at the risk of personal safety, rather than transport them at reduced risk of personal safety by first subjecting them to a frisk for weapons.

The Supreme Court of Wisconsin in *State v. Kelsey C.R.*,[55] when discussing in a concurrence case law relevant to pat-down searches conducted absent an arrest under the community caretaking exception, similarly reasoned:

> [P]olice officers are sometimes called upon in the course of their duties to transport individuals who are not under arrest. Not all of those individuals will behave in such a way as to give rise to a reasonable suspicion that they are armed and dangerous. Yet they may be. And the risk to the officer's safety is considerably greater during a squad car transport than an investigative stop because the officer cannot watch the passenger's hands and cannot defend against an attack while driving the squad car. Therefore,

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[53] See, e.g., *People v. Tobin*, 219 Cal. App. 3d 634, 269 Cal. Rptr. 81 (1990); *People v Hannaford*, 167 Mich. App. 147, 421 N.W.2d 608 (1988); *People v Otto*, 91 Mich. App. 444, 284 N.W.2d 273 (1979); *State v. Diloreto*, 362 N.J. Super. 600, 829 A.2d 1123 (2003); *Com. v. Rehmeyer*, 349 Pa. Super. 176, 502 A.2d 1332 (1985); *State v. Lombardi*, 727 A.2d 670 (R.I. 1999); *State v. Acrey*, 148 Wash. 2d 738, 64 P.3d 594 (2003); *State v. Kelsey C.R.*, 243 Wis. 2d 422, 626 N.W.2d 777 (2001).

[54] *People v Hannaford, supra* note 53, 167 Mich. App. at 152, 421 N.W.2d at 610.

[55] *State v. Kelsey C.R., supra* note 53, 243 Wis. 2d at 464, 626 N.W.2d at 797 (Sykes, J., concurring; Prosser, J., joins).

> where . . . an officer has an objectively reasonable basis to transport a person in a squad car, it is not unreasonable to allow him to protect himself from assault during the transport by conducting a minimally intrusive protective frisk for weapons.

[20-22] We agree with this reasoning. It is well established that during a second-tier *Terry* stop, an officer is entitled, for the protection of himself or herself and others in the area, to conduct a carefully limited search of outer clothing to discover weapons that might be used to assault the officer.[56] The purpose of a pat-down search for weapons is the protection of the officer and other persons nearby.[57] And, in order to justify a pat-down, an officer must provide "specific [and] articulable facts [that] support an inference that the suspect might be armed and dangerous."[58] This justification applies equally to a second-tier encounter that is warranted by the community caretaking exception.

The officers did not act unreasonably when they patted Shiffermiller down to ensure he was not carrying any weapons that would endanger the officers while they transported him to his father's home. The search was reasonable under the circumstances, given that Shiffermiller matched the description of one of the men who was reported to have been in a fight, and he appeared to have a ripped shirt and blood on his person. In addition, Shiffermiller was agitated, uncooperative, hostile toward the officers, and seemingly under the influence of drugs or alcohol. One of the officers conducting the pat-down explicitly testified that he simply "wanted to make sure before [Shiffermiller] was placed into [the officer's] cruiser that there were no weapons on [Shiffermiller] in the back of [the officer's cruiser]." Shiffermiller does not assert that the

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[56] See *Terry v. Ohio, supra* note 2. See, also, *State v. Vasquez-Arenivar*, 18 Neb. App. 265, 779 N.W.2d 117 (2010).

[57] See *Terry v. Ohio, supra* note 2.

[58] *United States v. Cole*, 628 F.2d 897, 899 (1980).

pat-down conducted was more than a minimally intrusive protective frisk for weapons.

During the pat-down search, one of the officers felt an object in Shiffermiller's left front pocket that the officer "immediately recognized . . . to be . . . brass knuckles." Under the plain feel doctrine, the findings of a lawful pat-down can establish probable cause to extend the scope of a search.[59] The legality of the remainder of the search depends upon the incriminating character of the object's being immediately apparent.[60] If a police officer lawfully pats down a suspect's outer clothing and feels an object's whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.[61]

When the officer removed the object, he confirmed that it was brass knuckles. After a search of Shiffermiller's criminal record, it was discovered that he was a convicted felon. At that point, the brass knuckles were seized and Shiffermiller was placed under arrest for possession of a deadly weapon by a prohibited person. The court did not err in overruling Shiffermiller's motion to suppress as it related to the pat-down search and the subsequent discovery of the brass knuckles.

(b) Search of Flashlight

[23] We agree with the State that the search of the flashlight was a valid search incident to arrest. A valid arrest based on probable cause that a person is engaged in criminal activity is allowed by the Fourth Amendment, and if an arrest is made

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[59] *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[60] See *id*.

[61] *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); *State v. Smith, supra* note 59; *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997).

based upon probable cause, a full search of the person may be made incident to that arrest.[62]

Shiffermiller asserts that the search incident to arrest exception does not apply, because the officers found the flashlight and searched its interior within seconds of finding the brass knuckles. He reasons that because the search of the interior of the flashlight was only seconds after the discovery of the brass knuckles, he was not "'officially'" under arrest yet and the search could not be incident to arrest.[63] We disagree.

[24] It is well settled under Nebraska law that a search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search.[64] Both requirements were met here. Before the flashlight was discovered on Shiffermiller's person, the officers arrested Shiffermiller with probable cause due to the discovery of brass knuckles.

[25] A search incident to arrest is not limited to searching the arrested person for weapons only; an officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence.[65] The flashlight was on Shiffermiller's person; thus, it can be considered to be a valid product of a search incident to arrest.

So too were the contents of the flashlight. In *United States v. Robinson*,[66] the U.S. Supreme Court upheld the search of a crumpled cigarette package containing gelatin capsules filled with heroin. In that case, an officer testified that he felt an

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[62] *State v. Perry, supra* note 50.

[63] Brief for appellant at 21.

[64] *State v. Perry, supra* note 50.

[65] *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994).

[66] *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

object in a pocket of the respondent's coat, but could not tell what the item was.[67] The officer testified that he then removed the object and found a "'crumpled up cigarette package.'"[68] The officer testified that though he did not know what was in the package, he could feel that the objects inside "'"weren't cigarettes."'"[69] The Court ultimately held that based on his coming upon the crumpled package of cigarettes in the course of a lawful search, the officer was entitled to inspect the contents of the package.[70] And, because the inspection revealed heroin capsules, the officer was entitled to "seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct."[71]

The facts of this case mirror those of *Robinson*. The officer shook the flashlight and testified that it rattled as if something was inside. He noted that the weight of the flashlight was unusual and that it felt as though there were no batteries inside. Applying the U.S. Supreme Court's reasoning utilized in *Robinson*, the search of the interior of the flashlight was reasonable and lawful under the circumstances as a search incident to arrest.

We find that the search of the flashlight was a lawful search incident to arrest and, as a result, that the trial court did not err in overruling Shiffermiller's motion to suppress the evidence found in the flashlight.

VI. CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals affirming that of the district court.

Affirmed.

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[67] *Id.*

[68] *Id.*, 414 U.S. at 223.

[69] *Id.*

[70] See *United States v. Robinson, supra* note 66.

[71] *Id.*, 414 U.S. at 236.

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

Edward St. John, appellee, James L. Zimmerman, appellant, and Brenda L. Bartels and Monte L. Neilan, appellees, v. Gering Public Schools and NASB Workers Compensation Pool, its workers' compensation carrier, appellees.

923 N.W.2d 68

Filed February 15, 2019. No. S-17-898.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. **Contracts: Attorney Fees.** While a lawyer with a valid fee agreement is entitled to recover what a fee agreement allows to the extent that amount is reasonable, a lawyer is not entitled to recover more than a fee agreement allows.
4. **Contracts: Intent.** A court should avoid interpreting contract provisions in a manner that leads to unreasonable or absurd results that are obviously inconsistent with the parties' intent.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Arterburn, Judges, on appeal thereto from the Workers' Compensation Court: John R.

Hoffert, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James L. Zimmerman, of Zimmerman Law Firm, P.C., L.L.O., pro se.

Monte L. Neilan, pro se.

Brenda L. Bartels, of Hanes & Bartels, L.L.C., pro se.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

During the course of his workers' compensation action against Gering Public Schools, Edward St. John switched lawyers. St. John eventually settled his claim, but a dispute remained as to how much St. John owed his lawyers. The Workers' Compensation Court held a hearing regarding the attorney fee issue. After the hearing, the compensation court entered an order directing that the lawyers that St. John discharged, Brenda L. Bartels and Monte L. Neilan, receive $82,500 and that the lawyer who represented St. John through the settlement, James L. Zimmerman, receive $82,500. The compensation court evaluated the attorneys' representation of St. John and found that one set of attorneys did not contribute more to the end result than the other. The compensation court did not analyze the attorneys' entitlement to fees under their written fee agreements with St. John. Zimmerman appealed, and the Nebraska Court of Appeals affirmed.

We granted Zimmerman's petition for further review. We find that because Bartels and Neilan were entitled to less than the amount awarded by the Workers' Compensation Court under the terms of their fee agreement with St. John, the order splitting the fee evenly was erroneous. Accordingly, we reverse, and remand with directions.

I. BACKGROUND

1. St. John's Workers' Compensation Action

After suffering an injury in the course of his employment, St. John retained Zimmerman in March 2013 by signing a contingent fee agreement. Under the terms of that agreement, St. John agreed to pay to Zimmerman one-third of any amounts collected after suit.

St. John later moved to Colorado. Apparently desiring a Colorado lawyer, St. John discharged Zimmerman and retained Bartels, a Nebraska-licensed attorney based in Colorado. Bartels, in turn, hired Neilan to assist her with St. John's claim.

In January 2014, St. John executed a single contingent fee agreement with the respective law firms of Bartels and Neilan. Like his agreement with Zimmerman, St. John agreed to pay Bartels and Neilan one-third of any amounts recovered from Gering Public Schools. Paragraph 8 of the agreement, however, also included the following language:

> Should **CLIENT** choose to discharge **ATTORNEYS** prior to final settlement or judgment, **CLIENT** agrees to pay **ATTORNEYS** a fee equal to [one-third] of the "*gross amount recovered*", OR on an hourly basis of $175.00 per hour for his/her time and, in addition, $75 per hour for paralegal time from the date of this Agreement to the date of discharge, or the above percentage of **ATTORNEYS'** fee from any settlement offer made prior to discharge, whichever is greater.

(Emphasis in original.)

Bartels and Neilan thereafter filed a workers' compensation claim against Gering Public Schools on St. John's behalf. They continued to represent him until later in 2014, when St. John became dissatisfied with their representation and discharged them and again retained Zimmerman. At that time, St. John re-signed his original contingent fee agreement with Zimmerman. In December 2014, Zimmerman entered his

appearance and Bartels and Neilan filed a notice of attorney's lien in the workers' compensation case.

Over 2 years later, the parties to the workers' compensation claim, with St. John now represented by Zimmerman, filed an application for approval of a final lump-sum settlement. The parties asked that the compensation court approve a settlement whereby St. John's claim would be settled for $500,000, with $335,000 being paid to St. John and the remaining $165,000 being held in trust for subsequent distribution to his attorneys. The application provided that Bartels and Neilan and Zimmerman all agreed that the $165,000 satisfied any attorney liens in the case.

In an order, the compensation court approved the lump-sum settlement. The court noted the existence of the dispute involving claimed attorney liens and ordered that any of the attorneys claiming entitlement to attorney fees could petition the court for a hearing to address distribution of the funds placed in trust. Zimmerman filed a motion, requesting that the court determine the amount necessary to satisfy the attorney lien of Bartels and Neilan.

2. Workers' Compensation Court's Resolution of Fee Dispute

The compensation court convened a hearing on the dispute regarding the fees due to attorneys. The court heard testimony and received various exhibits. St. John and his ex-wife generally testified that they were dissatisfied with the services of Bartels and Neilan. The exhibits included the fee agreement between St. John and Zimmerman and the fee agreement between St. John and Bartels and Neilan, along with documentary evidence of legal services provided.

The compensation court entered an order dividing the $165,000 equally between Zimmerman, on the one hand, and Bartels and Neilan on the other. The compensation court explained that the factors for determining the reasonableness of attorney fees set forth in Neb. Ct. R. of Prof. Cond. § 3-501.5

guided its analysis. In applying those factors, the compensation court found that both Bartels and Neilan and Zimmerman "played a role of importance" in representing St. John and that it could not conclude that either Bartels and Neilan or Zimmerman contributed more than the other.

3. Court of Appeals

Zimmerman appealed. In his appeal, Zimmerman argued that the compensation court erred by admitting an affidavit of an expert witness offered by Bartels and Neilan and by ordering that Bartels and Neilan and Zimmerman each receive the same fee. Zimmerman argued that the compensation court's order splitting the fees evenly was erroneous, because the court should have relied on the provision in the written fee agreement with Bartels and Neilan regarding payment due when the attorneys are discharged prior to final settlement or judgment.

The Court of Appeals affirmed. In its memorandum opinion, the Court of Appeals did not analyze the provision in the written fee agreement between St. John and Bartels and Neilan regarding payment due upon an early discharge. It did state that Bartels and Neilan's "contingent fee contract . . . provided a basis for determining Bartels and Neilan's fee in the event of their discharge prior to conclusion of the case," that "[t]here was sufficient evidence in the record for the compensation court to make a determination as to the reasonableness of that fee," and that the compensation court's findings as to what was a reasonable fee were not clearly erroneous. *St. John v. Gering Public Schools*, No. A-17-898, 2018 WL 1831068 at *7 (Neb. App. Apr. 17, 2018) (selected for posting to court website). We granted Zimmerman's petition for further review.

II. ASSIGNMENTS OF ERROR

Zimmerman assigns error to the Court of Appeals' determination that Bartels and Neilan and Zimmerman should each receive $82,500 for their representation of St. John.

Zimmerman also claims that the Court of Appeals erred when it rejected his assignment of error regarding the admission of the expert witness affidavit. We find no error in the Court of Appeals' admission of the affidavit and see no need to further comment on the issue. Our analysis is thus limited to the compensation court's ultimate disposition of the fee dispute.

III. STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), 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. *Gimple v. Student Transp. of America*, 300 Neb. 708, 915 N.W.2d 606 (2018). 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.*

IV. ANALYSIS

1. Jurisdiction of Workers' Compensation Court to Decide Fee Dispute

We begin with the question of whether the Workers' Compensation Court had the authority to resolve the fee dispute. As we often say, the Workers' Compensation Court is "a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute." *In re Estate of Evertson*, 295 Neb. 301, 311, 889 N.W.2d 73, 81 (2016). Given the limits on the compensation court's authority, one might reasonably question whether it has the authority to resolve competing attorneys' claims to fees after the approval of a lump-sum settlement, as the compensation court did in

this case. In fact, at one point, the Court of Appeals concluded that the compensation court lacked jurisdiction to resolve such a dispute. See *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005), *disapproved in part, Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007).

We settled any question as to whether the Workers' Compensation Court has jurisdiction to resolve such a dispute in *Foster, supra*. In *Foster*, much like this case, a workers' compensation plaintiff discharged her attorney in the middle of the case. After the plaintiff, represented by a new attorney, was awarded benefits from her employer, the discharged attorney filed a motion to establish the amount of his attorney's lien. The Court of Appeals, citing *Wells, supra*, held that the compensation court lacked jurisdiction to resolve the discharged attorney's motion.

On further review, we reversed. We explained that Neb. Rev. Stat. § 48-108 (Reissue 2010) provides the compensation court with authority to determine "fees payable to an attorney for the services rendered while representing the claimant before the Workers' Compensation Court" and that the authority extended to fees claimed by attorneys who are discharged prior to the conclusion of the case. *Foster*, 272 Neb. at 922, 725 N.W.2d at 844. We observed that the compensation court is "the most sensible venue for such determinations," given its familiarity with the efforts of each attorney involved in the dispute. *Id.* at 923, 725 N.W.2d at 844. We also recognized that under the circumstances in *Foster*, "as in most instances, the fee dispute with former counsel is inextricably related to the issue of fees for the claimant's current counsel." 272 Neb. at 922, 725 N.W.2d at 844.

Under *Foster*, the Workers' Compensation Court had authority to resolve the competing attorney liens asserted in this case. See, also, *Stueve v. Valmont Indus.*, 277 Neb. 292, 297, 761 N.W.2d 544, 549 (2009) ("[i]n *Foster*, we stated that the Workers' Compensation Court was an appropriate forum

for determining fees payable to a claimant's current or prior attorney for services that the attorney rendered while representing the claimant before the court"). We thus proceed to consider Zimmerman's claim that the compensation court erred in doing so.

2. Merits of Fee Dispute

Zimmerman's primary contention on appeal is that the compensation court erred by focusing solely on the respective contributions of the attorneys under the factors set out in the Nebraska Rules of Professional Conduct for determining whether a fee is unreasonable. Zimmerman contends that to determine the attorneys' entitlement to fees, the compensation court was required to begin with the terms of the respective fee agreements with St. John. Specifically, Zimmerman urges that Bartels and Neilan's recovery must be limited to that allowed by the terms of the provision in their fee agreement addressing the amount they were to receive if St. John discharged them before the case was over. In order to address this argument, we begin by setting forth the general principles that govern an action by an attorney to recover a fee.

(a) General Principles Regarding Actions for Attorney Fees

As we have previously observed, attorney fee agreements are different from ordinary commercial contracts. See, e.g., *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 735 N.W.2d 368 (2007). The difference arises from the fact that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility. *Id.* Because of that principle and because professional responsibility rules prohibit a lawyer from charging or collecting an unreasonable fee, in an action to recover a fee, an attorney can recover only a reasonable fee, as determined by "'the extent and value of the lawyer's services.'" *Id.* at 931, 735 N.W.2d at 374. The burden is on the lawyer to

introduce evidence as to the extent and value of the services provided. *Id.* We have said that the eight factors listed in § 3-501.5 of the professional conduct rules are to be considered as guides in determining the reasonableness of a fee. See *Stueve, supra*.

But while the reasonable value of an attorney's services is relevant in an action to recover attorney fees, it is not the only relevant factor. In an action to recover a fee, a lawyer has the burden of proving not only the extent and value of the services provided, but also "'the existence and terms of any fee contract.'" *Hauptman, O'Brien*, 273 Neb. at 931, 735 N.W.2d at 374. This is because when an attorney and a client enter into a valid fee agreement, the attorney is not automatically entitled to the reasonable value of the services provided. The attorney's recovery is limited by the terms of the fee agreement.

[3] As the U.S. Court of Appeals for the Seventh Circuit has helpfully explained the issue, a lawyer working under a valid fee agreement does not have a quantum meruit cause of action for whatever the reasonable value of the services provided happened to be; rather, the quantum meruit principle functions as a "ceiling on contractual recovery." *Maksym v. Loesch*, 937 F.2d 1237, 1247 (7th Cir. 1991). See, also, *McNamee, Lochner, Titus & Williams v. Higher Educ.*, 50 F.3d 120 (2d Cir. 1995) (holding that attorney was not entitled to quantum meruit recovery when contract addressed compensation); *Hamilton v. Ford Motor Co.*, 636 F.2d 745, 748 (D.C. Cir. 1980) ("[i]t is elementary that an attorney may not seek compensation from the client in addition to that provided in the contract between the attorney and the client"). Put another way, while a lawyer with a valid fee agreement is entitled to recover from a client what a fee agreement allows to the extent that amount is reasonable, a lawyer is not entitled to recover from a client more than a fee agreement allows. Having set forth the principles governing an attorney's claim to an unpaid fee, we proceed to consider how those principles should be applied in this case.

(b) Application of Principles in This Case

As explained above, where an attorney and client have a valid fee agreement, the terms of that agreement are essential to determining the amount to which the attorney is entitled. In this case, however, even though the fee agreements with both sets of lawyers were received at the hearing, the compensation court did not analyze them. Rather, it focused solely on the respective value of the services provided by the lawyers. Bartels and Neilan contend the compensation court was correct to do so because of an agreement between the parties and because this approach was consistent with our precedent. As explained below, we disagree with both arguments.

First, Bartels and Neilan argue that the parties effectively stipulated to trying the fee dispute on the basis of the value of the attorney's respective contributions alone in the application for approval of the lump-sum settlement. That application stated that "[i]t is also agreed to by all necessary parties and attorneys that the amount of $165,000.00, however later distributed, satisfies any attorney liens owed by [St. John]." We do not believe that this language demonstrates an agreement to withdraw the fee agreements from the compensation court's consideration. By its terms, the parties agreed only that $165,000, however distributed, would satisfy St. John's obligations to his attorneys. We understand this language to merely set an upper limit of the amount St. John was required to pay the attorneys.

Neither was the compensation court's decision to limit its consideration to the reasonable value of the services provided justified by *Baker v. Zikas*, 176 Neb. 290, 125 N.W.2d 715 (1964), and *Stueve v. Valmont Indus.*, 277 Neb. 292, 761 N.W.2d 544 (2009), as Bartels and Neilan contend. In those cases, attorneys who were working under a contingent fee agreement, which agreement did not address what the attorneys were to receive if discharged prior to recovery, were discharged prior to recovery. In those circumstances, we allowed

the attorney to recover based on the reasonable value of the services provided, on the grounds that the original contingent fee contract was no longer in effect following the client's termination of the lawyer's services.

Unlike the fee agreements in *Baker* and *Stueve*, Bartels and Neilan's fee agreement explicitly addressed what they were entitled to be paid in the event of an early discharge. In this respect, this case is more like another case decided by the Court of Appeals, *Byrne v. Hauptman, O'Brien*, 9 Neb. App. 77, 608 N.W.2d 208 (2000). In that case, like this one, an attorney's contingent fee agreement explicitly provided a method for calculating the fee owed in the event the attorney was discharged before the end of the case. The Court of Appeals distinguished the fee agreement from the one at issue in *Baker* and held that the attorney could recover the amount allowed by the contract, subject to the attorney's burden to show that the amount was reasonable.

We believe the Court of Appeals' opinion in *Byrne* correctly applied the principles governing actions for recovery of attorney fees in circumstances such as this. Accordingly, to determine the amount to which the attorneys are entitled, we must first determine the amount the attorneys are allowed under their fee agreements and then determine if that amount is reasonable. We proceed to that analysis below, beginning with Bartels and Neilan.

(c) Bartels and Neilan's Recovery

As mentioned above, paragraph 8 of Bartels and Neilan's fee agreement governs the amount they are entitled to receive from St. John because they were discharged prior to final settlement or judgment. That provision directs that Bartels and Neilan receive the highest of three potential amounts: (1) "[one-third] of the '*gross amount recovered*,'" (2) a recovery based on the hours they expended at specified rates, or (3) a percentage of any settlement offer made prior to discharge. Bartels and Neilan concede that there was no settlement

offer made prior to discharge, and thus that provision is inapplicable.

Bartels and Neilan contend that under the terms of the fee agreement, they are entitled to receive one-third of the $500,000 lump-sum settlement, subject to some minor adjustments for costs. Although they do not specifically tie this argument to the language of paragraph 8 of their fee agreement, we presume that they are contending that they are entitled to this amount because $500,000 is the "gross amount recovered." This argument, however, rests on the premise that for purposes of paragraph 8, "gross amount recovered" refers to the amount ultimately recovered at the conclusion of the case. For reasons explained below, we reject that premise.

Bartels and Neilan's fee agreement defines "gross amount recovered" to include "the amount recovered before any subtraction of expenses and disbursements [and] specially awarded attorneys' fees and costs awarded to **CLIENT**." (Emphasis in original.) But it does not specifically indicate whether the "gross amount recovered" referred to in paragraph 8 is the amount eventually recovered at the end of the case or the amount recovered as of the attorney's discharge. The fact that "gross amount recovered" appears in a provision concerning early discharge, however, suggests that in that context, it refers to the amount recovered as of the discharge.

[4] Furthermore, it strikes us as unreasonable and highly unlikely that a client would agree to pay a lawyer one-third of his or her recovery if the lawyer represented the client through the entirety of the case but also agree to pay a lawyer the same percentage of the total amount recovered if that lawyer is discharged and another lawyer ultimately secures the recovery for the client. On the other hand, it would be quite reasonable for a contractual provision regarding payment to a discharged attorney to allow the attorney to recover a percentage of any amounts already recovered on behalf of the client through partial settlement as of the date of discharge. A court should avoid interpreting contract provisions in a manner that leads to

unreasonable or absurd results that are obviously inconsistent with the parties' intent. *Timberlake v. Douglas County*, 291 Neb. 387, 865 N.W.2d 788 (2015). With that principle in mind, we find that, the "gross amount recovered" in paragraph 8 of Bartels and Neilan's fee agreement refers to the amount recovered as of the attorney's discharge.

Having interpreted paragraph 8 of the Bartels and Neilan contingent fee agreement, we find that Bartels and Neilan are entitled to a fee based on the hourly calculation set forth in the paragraph. Bartels and Neilan make no argument that they are entitled to a fee based on amounts recovered prior to their discharge; their arguments are exclusively focused on a right to recovery arising out of the $500,000 lump-sum settlement. That settlement, however, was agreed to well after their discharge. And, as noted above, they concede there was no settlement offer prior to discharge.

Evidence in the record does show that Bartels documented 79.9 hours of work, Neilan documented 81 hours of work, and paralegals working under their direction recorded 25.6 hours of work. Applying those hours to the rates set forth in the agreement, we find that Bartels and Neilan were entitled to receive $30,077.50 under the terms of their agreement with St. John. Given the hourly rates and their representation of St. John in the context of this case, we also find this amount to be a reasonable fee. In addition, Bartels and Neilan claim a right to be reimbursed for $2,500 paid in costs on behalf of St. John, and there appears to be no dispute on this issue. Accordingly, we find that Bartels and Neilan were entitled to receive $32,577.50 to satisfy their lien.

(d) Zimmerman's Recovery

This leaves the calculation of Zimmerman's fee. We apply the same analysis to his claim, and so we must begin with his contingent fee agreement. Zimmerman's contingent fee agreement entitled him to one-third of any lump-sum settlement. In this case, that amounts to $166,666.67. As mentioned above,

however, the attorneys agreed that St. John would have to pay no more than $165,000 to satisfy the attorneys' liens. Given that agreement and our finding that Bartels and Neilan are entitled to receive $32,577.50, the most Zimmerman is entitled to receive is $132,422.50.

In addition, we find this figure to be a reasonable fee. As the compensation court observed, "the ultimate settlement figure secured by . . . Zimmerman for [St. John] did exceed the settlement value provided by attorney Neilan to [St. John] several years prior. In so doing, attorney Zimmerman obviously persuaded the defendants that a significant permanent disability had befallen . . . St. John." Under these circumstances, we find $132,422.50 to be a reasonable fee.

V. CONCLUSION

As explained above, we find that Bartels and Neilan were entitled to receive $32,577.50 and Zimmerman was entitled to receive $132,422.50. Accordingly, we reverse the judgment of the Court of Appeals and remand the cause with directions to reverse the order of the Workers' Compensation Court and remand the cause to that court with directions to enter judgment in conformity with this opinion.

Reversed and remanded with directions.

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

U.S. Specialty Insurance Company,
a corporation, appellee, v.
D S Avionics Unlimited
LLC, appellant.

923 N.W.2d 367

Filed February 15, 2019. No. S-17-1101.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Supplemental opinion: Former opinion modified. Motions for rehearing overruled.

Thomas M. Locher, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant.

Robert E. O'Connor, Jr., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Johnson, District Judge.

Per Curiam.

This case is before us on motions for rehearing filed by the appellant, D S Avionics Unlimited LLC, and the appellee, U.S. Specialty Insurance Company, concerning our opinion in *U.S. Specialty Ins. Co. v. D S Avionics*.[1] We overrule the motions, but we modify the opinion as follows:

[1] *U.S. Specialty Ins. Co. v. D S Avionics*, 301 Neb. 388, 918 N.W.2d 589 (2018).

In the "Declaratory Judgment Was Premature" subsection, we strike the third sentence of the first paragraph, including footnote 14.[2] Also in the same subsection, after the fourth sentence of the second paragraph,[3] we insert the following sentence: "'This rule embraces not only cases where the identical issues between the same parties are *sub judice*, but also possibly cases in which the issues only are identical but not the parties.'"[4]

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motions for rehearing overruled.

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[2] *Id*. at 398, 918 N.W.2d at 596.

[3] *Id*. at 399, 918 N.W.2d at 596.

[4] *Strawn v. County of Sarpy*, 146 Neb. 783, 788, 21 N.W.2d 597, 600 (1946).



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Ross W. Spang, appellant.

923 N.W.2d 59

Filed February 15, 2019. Nos. S-18-450, S-18-451.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel's performance was deficient and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
3. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
4. **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 in order to preserve such claim. Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.
5. **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.

6. **Effectiveness of Counsel: Records: Appeal and Error.** The trial record reviewed on appeal is devoted to issues of guilt or innocence; as such, it does not usually address issues of counsel's performance and is often insufficient to review on direct appeal an ineffective assistance of counsel claim.
7. **Effectiveness of Counsel: Records: Proof: Appeal and Error.** An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice.
8. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant has the burden to show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
9. ____: ____. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
10. ____: ____. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
11. **Issue Preclusion: Words and Phrases.** Issue preclusion means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
12. **Issue Preclusion.** There are four conditions that must exist before issue preclusion may apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privy with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
13. **Issue Preclusion: Prior Convictions.** Issue preclusion does not apply to determinations of whether prior convictions can be used to enhance the classification of or sentence imposed on a subsequent conviction.
14. **Judgments: Appeal and Error.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
15. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as

well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.

16. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeals from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

These consolidated cases present direct appeals by the defendant of his convictions for driving under the influence (DUI), fifth offense, a Class IIA felony, and aggravated DUI, fifth offense, a Class II felony. The defendant's convictions arise out of a no-contest plea agreement involving two separate criminal cases. The central issue raised by the defendant on appeal is whether his trial counsel was ineffective by failing to offer at the enhancement hearing available evidence that allegedly would have established that the State was precluded from relitigating a Wisconsin court's determination that a prior conviction was invalid for enhancement purposes. The defendant also asserts that his sentences are excessive.

FACTS

DUI Incidents

Ross W. Spang's DUI convictions that are challenged on appeal are based on the following facts occurring in May and August 2016 respectively.

In May 2016, an officer witnessed Spang turn the wrong way driving down a one-way street. The officer initiated a traffic stop and immediately noticed that Spang was intoxicated based on his slurred speech; red, watery eyes; and a strong odor of alcohol coming from him. The officer ordered Spang to exit his vehicle, and Spang fell down while exiting. The officer testified that Spang showed signs of impairment during his field sobriety test and that he failed his preliminary breath test. After being arrested and transported to jail, Spang completed a Breathalyzer test with a result of 0.190 grams of alcohol per 0.210 liters of his breath.

In August 2016, a state trooper pulled Spang's vehicle over after observing it traveling 82 miles per hour in a 60-mile-per-hour zone. The trooper initiated a traffic stop. The vehicle was being driven by Spang and had two passengers. When he made contact with Spang, the trooper could detect a strong odor of alcohol.

When prompted for his identification, Spang identified himself as "Reid Alan Spang." The trooper eventually learned that Spang had given a false name and that his true identity was "Ross Wayne Spang" with an address in Wisconsin.

The trooper later isolated the alcohol odor to Spang and had him submit to a field sobriety test and a preliminary breath test. During the field sobriety test, the trooper saw signs of impairment. In addition, the preliminary breath test showed a result of 0.128. Based on these circumstances, the trooper informed Spang that he was under arrest. However, when the trooper attempted to handcuff Spang, Spang ran from the trooper and escaped arrest. The trooper was unable to locate Spang and put him into custody at that time.

Plea Agreement and Verdict

Spang was charged in two separate cases. In case No. S-18-450, Spang was originally charged with aggravated DUI (in excess of 0.15) with four or more prior convictions, a Class II felony. In case No. S-18-451, Spang was originally

charged with DUI with four or more prior convictions, a Class IIA felony, and felony escape.

A plea agreement was eventually reached between Spang and the State wherein Spang agreed to plead no contest to the DUI charges in exchange for dismissal of the felony escape charge. The district court advised Spang of the rights he was waiving by entering his pleas, and a factual basis was provided. The district court accepted the pleas and found Spang guilty of both DUI charges.

Enhancement Hearing and Sentencing

An enhancement hearing was held, and the State offered certified copies of Spang's four prior DUI convictions from Wisconsin in 2004, 2006, 2007, and 2012. Spang's trial counsel did not object to the introduction or receipt of the evidence of the prior convictions. However, Spang's trial counsel argued that the 2006 conviction was invalid for enhancement purposes, because it did not reflect that Spang had effectively waived counsel in that case. Spang's counsel pointed out that this deficient waiver led to a subsequent Wisconsin decision in 2012, for an offense committed in 2011, holding that this prior 2006 conviction was not valid for enhancement purposes in Wisconsin. And counsel asserted that the State was precluded from relitigating the Wisconsin court's determination.

Spang's trial counsel offered into evidence, and the court received, a copy of the Wisconsin circuit court's 2012 judgment of conviction and docket entries for Spang's 2011 offense. These 2011-12 records reflect that the Wisconsin circuit court granted Spang's motion to preclude the use of a 2006 prior conviction for enhancement purposes in that case and that Spang's 2012 conviction was amended to a third offense rather than a fourth offense based on that preclusion. However, these records did not reflect on what basis the prior conviction was found invalid for enhancement purposes.

At the enhancement hearing, the State did not dispute that the 2006 conviction was the same conviction found defective and invalid for enhancement purposes in Wisconsin. However,

the State argued that such fact alone did not render it invalid in Nebraska for enhancement purposes. The State noted that there were different requirements for effective waiver of counsel between the two states and that the 2006 conviction document entered into evidence by the State reflected that Spang was advised of his rights and affirmatively waived his right to counsel in relation to the 2006 conviction. The State then argued that any attempt by Spang to challenge the validity of the waiver of counsel that occurred in the 2006 Wisconsin case would be an impermissible collateral attack under Nebraska law.

The district court found that the 2006 conviction, as well as the three other prior convictions, were valid prior convictions for enhancement purposes in Nebraska. The court found that the records entered into evidence by the State reflected that the defendant had counsel in three of his four convictions and that the State had demonstrated a sufficiently clear waiver under Nebraska law of his right to counsel in relation to the 2006 conviction.

In case No. S-18-451, the district court sentenced Spang to 5 to 10 years' imprisonment and a 15-year license revocation for DUI, fifth offense. In case No. S-18-450, the aggravated DUI, fifth offense conviction, Spang was sentenced 10 to 15 years' imprisonment and a 15-year license revocation. The sentences were ordered to run consecutively, resulting in an aggregate sentence of 15 to 25 years' imprisonment.

Postconviction Relief

Spang's trial counsel did not file a direct appeal for this matter. Following his sentencing, Spang initiated a timely postconviction action challenging trial counsel as ineffective for failing to object to the introduction and receipt of the 2006 conviction, offer necessary evidence regarding the 2006 conviction, and file a direct appeal.

The district court concluded that Spang's trial counsel was ineffective for not advising Spang about his right to appeal and the 30-day time limit for filing an appeal. The district

court found this warranted a reinstatement of Spang's direct appeal right but declined to address the remaining postconviction claims.

ASSIGNMENTS OF ERROR

Spang assigns that (1) he was denied due process and the effective assistance of counsel when his trial counsel failed to offer at the enhancement hearing a Wisconsin motion to preclude the consideration of a prior conviction and (2) the district court erred in imposing excessive sentences.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[1] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[2] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[3] an appellate court reviews such legal determinations independently of the lower court's decision.[4]

[2] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel's performance was deficient and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[5]

[3] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a

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[1] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[2] *Id.*

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

[4] *State v. Filholm, supra* note 1.

[5] See, *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.[6]

ANALYSIS

Ineffective Assistance of Counsel

On direct appeal, Spang argues that he was denied due process and the effective assistance of counsel at trial as a result of trial counsel's failure to offer certain evidence at the enhancement hearing. Specifically, Spang argues that his trial counsel was ineffective in failing to offer his motion to preclude from the 2011-12 Wisconsin case, which allegedly would have explained in sufficient detail the grounds for the Wisconsin court's order for purposes of issue preclusion, sometimes referred to as collateral estoppel.

[4-7] 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 in order to preserve such claim.[7] Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.[8] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[9] The trial record reviewed on appeal is devoted to issues of guilt or innocence; as such, it does not usually address issues of counsel's performance and is often insufficient to review on direct appeal an ineffective assistance of counsel claim.[10]

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[6] *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

[7] See, *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). See, also, *State v. Filholm, supra* note 1.

[8] *State v. Abdullah, supra* note 7.

[9] *Id.*

[10] See, *id.*; *State v. Filholm, supra* note 1. See, also, *State v. Williams, supra* note 7.

However, 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.[11]

[8-10] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[12] the defendant has the burden to show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[13] An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[14] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[15] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[16]

The record on appeal does not contain the 2011 motion to preclude, which Spang argues would have established for the purpose of issue preclusion that the Wisconsin court decided an identical issue to the one before the trial court in the enhancement hearing. Nevertheless, we are able to determine that trial counsel's performance in failing to offer the Wisconsin motion to preclude did not prejudice Spang, because issue preclusion does not apply in sentence enhancement proceedings.[17]

[11,12] Issue preclusion means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same

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[11] See *State v. Filholm, supra* note 1.

[12] *Strickland v. Washington, supra* note 3.

[13] See *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013).

[14] *State v. Filholm, supra* note 1.

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

[16] *Id.*

[17] See *State v. Bruckner*, 287 Neb. 280, 842 N.W.2d 597 (2014).

parties or their privies in any future lawsuit.[18] There are four conditions that must exist before issue preclusion may apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privy with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[19]

[13] In *State v. Bruckner*,[20] we held that regardless of whether these four conditions are met, issue preclusion does not apply to determinations of whether prior convictions can be used to enhance the classification of or sentence imposed on a subsequent conviction. Indeed, noting prior decisions by our court in which we were less than clear as to whether our holding was fact dependent, we stated that we were conclusively determining the "broader question of whether [issue preclusion] could *ever* apply in a sentence enhancement proceeding."[21]

In the criminal context, issue preclusion is a component of the Double Jeopardy Clause, and double jeopardy does not bar the use of prior convictions for enhancement purposes.[22] While we said this did not conclusively determine the applicability of issue preclusion, we were also persuaded by the public policy expressed by other jurisdictions similarly holding that issue preclusion does not apply to sentence enhancement proceedings.[23]

We were persuaded that concerns of public safety and reaching the right result, which are peculiar to the criminal process, outweigh the efficiency concerns that might otherwise favor application of issue preclusion.[24] Further, applying issue

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 284, 842 N.W.2d at 600 (emphasis supplied).

[22] See *id.*

[23] See *id.*

[24] *Id.*

preclusion to prevent retrial of the validity of a prior conviction would undermine public confidence in the ability of the system to apply statutes prescribing increased punishment for repeat offenders.[25] Finally, allowing retrial of the validity of a prior conviction for purposes of enhancement only increases the accuracy of the sentencing proceeding for both the State and the defendant.[26]

In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. In light of our broad holding in *Bruckner* that issue preclusion does not apply to sentence enhancement proceedings, no amount of proof establishing the four conditions of issue preclusion would have made a difference. Thus, upon the record, we can conclude that Spang was not prejudiced by his trial counsel's failure to offer into evidence at the enhancement hearing the Wisconsin motion to preclude.

Excessive Sentences

Spang next assigns that the district court erred by imposing excessive sentences. When a trial court's sentence is within the statutory guidelines, the sentence will be disturbed by an appellate court only when an abuse of discretion is shown.[27]

DUI, fifth offense, is a Class IIA felony punishable by 2 to 20 years' imprisonment and a mandatory 15-year license revocation.[28] Spang was sentenced to 5 to 10 years' imprisonment and a 15-year license revocation for this conviction. Aggravated DUI, fifth offense, is a Class II felony punishable by 2 to 50 years' imprisonment and a mandatory 15-year license revocation.[29] Spang was sentenced to 10 to 15 years'

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[25] *Id.*

[26] See *id.*

[27] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[28] See Neb. Rev. Stat. §§ 60-6,197.03(9) (Cum. Supp. 2018) and 28-105 (Reissue 2016).

[29] See §§ 60-6,197.03(10) and 28-105.

imprisonment and a 15-year license revocation for this conviction. Because each of these sentences is within the statutory limitations, Spang's sentences will be disturbed only upon a finding of abuse of discretion.

[14-16] 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.[30] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[31] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[32]

We find that the sentencing court did not consider any inappropriate or unreasonable factors in determining Spang's sentences. Further, having reviewed the 2006 conviction and the evidence offered at the sentencing hearing, we find that the court did not make its decision based upon reasons that are untenable or unreasonable, nor was its action clearly against justice or conscience, reason, and evidence.

CONCLUSION

Based on the findings above, we affirm the district court's decision.

Affirmed.

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[30] *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

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

[32] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

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

Pinnacle Enterprises, Inc., appellant, v. City of Papillion, Nebraska, appellee.

923 N.W.2d 372

Filed February 22, 2019. No. S-18-365.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which 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. **Trial: Appeal and Error.** The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
4. **Actions: Waiver: Appeal and Error.** Under the law-of-the-case doctrine, a well-recognized waiver rule has emerged: A decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.
5. **Actions: Appeal and Error.** When an appellate court remands a case to an inferior tribunal, the law-of-the-case doctrine prevents that court from taking action inconsistent with the judgment of the appellate court.
6. **Trial: Judgments: Pleadings.** A trial court, in its discretion, may permit the renewal and resubmission of a motion which has previously been overruled.
7. **Courts: Judgments: Time.** No court is required to persist in error, and, if the court concludes that a former ruling was wrong, the court may correct it at any time while the case is still in the court's control.
8. **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.
9. **Eminent Domain: Jurisdiction: Notice: Appeal and Error.** In a condemnation action, only the filing of the notice of appeal and, by extension, service of this notice is jurisdictional.

10. **Courts: Judgments: Pleadings: Appeal and Error.** Under Neb. Rev. Stat. § 76-717 (Reissue 2018), only where it becomes necessary for a district court to order an appealing party to file a petition on appeal does it also become necessary for the court to impose such sanctions as are reasonable. In crafting a reasonable sanction, a court should consider the circumstances and any resulting prejudice to other parties.
11. **Actions: Attorney Fees: Words and Phrases.** Under Neb. Rev. Stat. § 25-824(4) (Reissue 2016), the term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.

Appeal from the District Court for Sarpy County: George A. Thompson, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

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

Daniel J. Fischer and Julie A. Ward, of Koley Jessen, P.C., L.L.O., and Karla R. Rupiper, Papillion City Attorney, and Amber L. Rupiper for appellee.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

The City of Papillion, Nebraska (Papillion), condemned land owned by Pinnacle Enterprises, Inc. (Pinnacle). Pinnacle appealed the award to district court. After 4½ years and one judicial recusal, the court dismissed the appeal for lack of jurisdiction. Because the plain language of Neb. Rev. Stat. § 76-717 (Reissue 2018) confers jurisdiction once a notice of appeal is filed, the court erred in dismissing the appeal and we reverse that dismissal. But the court did not abuse its discretion in denying Pinnacle's motion for sanctions relating to Papillion's motion for summary judgment, and we affirm that denial.

BACKGROUND

Because much of this appeal centers upon the meaning of § 76-717, we quote it in full:

> Within thirty days after the filing of such notice of appeal, the county judge shall prepare and transmit to the clerk of the district court a duly certified transcript of all proceedings had concerning the parcel or parcels of land as to which the particular condemnee takes the appeal upon payment of the fees provided by law for preparation thereof. When notice of appeal is filed by both the condemner and the condemnee, such transcript shall be prepared only in response to the first notice of appeal. The transcript prepared in response to the second notice of appeal shall contain only a copy of such notice and the proceedings shall be filed in the district court as a single cause of action.
>
> The filing of the notice of appeal shall confer jurisdiction on the district court. The first party to perfect an appeal shall file a petition on appeal in the district court within fifty days after the filing of the notice of appeal. If no petition is filed, the court shall direct the first party to perfect an appeal to file a petition and impose such sanctions as are reasonable. The appeal shall be tried de novo in the district court. Such appeal shall not delay the acquisition of the property and placing of same to a public use if the condemner shall first deposit with the county judge the amount assessed by the appraisers.

Although § 76-717 was amended in 2018,[1] the amendment did not change any of the language relevant to this appeal and for convenience, we quote the current statute.

Papillion initiated condemnation proceedings in the county court. An amended return of the appraisers' award was entered on July 23, 2013. On August 13, Pinnacle filed its notice of appeal.

On October 15, 2013, 13 days after the 50-day time period for filing the petition on appeal,[2] Papillion filed a motion

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[1] 2018 Neb. Laws, L.B. 193, § 89.

[2] See § 76-717.

to dismiss the appeal, which was scheduled for hearing in November. Two days later, on October 17, Pinnacle filed its petition on appeal. At the time Pinnacle did so, no order had been entered by the district court addressing the filing of a petition on appeal. In due course, the court held a hearing on Papillion's motion to dismiss, which the original district court judge summarily denied.

Pinnacle later filed a motion in limine, which sought to preclude Papillion from introducing evidence that would diminish the taking. The court granted the motion in limine. That ruling relates to the arguments asserted now regarding the denial of Pinnacle's motion for sanctions.

After 3 years of discovery and settlement discussions, the original judge informed the parties that he had a close personal friendship with one of Pinnacle's appraisers. Papillion moved for recusal. The original judge sustained the motion, and the court reassigned the case to the second judge.

In September 2017, Papillion moved for partial summary judgment. Papillion asserted summary judgment on the following issues: (1) Papillion took a limited permanent easement; (2) Papillion took a permanent easement for the purpose of constructing, relocating, and maintaining 84th Street in Papillion as part of a larger project; (3) Papillion's permanent easement does not include a taking of Pinnacle's right of access to and from 84th Street; and (4) the easement does not prohibit or restrict Pinnacle's right of access to 84th Street. A few days later, Pinnacle moved for sanctions, asserting that Papillion's motion was "legally frivolous."

At the sanctions hearing, the court addressed its concern with its jurisdiction. The court appears to have been concerned that "under [§ 76-717], [the first judge was] supposed to take certain actions. And the [first judge] did not take those actions, [make] specific[] findings, and it says shall." The court denied Pinnacle's motion for sanctions and ordered the parties to "brief [the] jurisdictional issue[] and/or enter [into] a stipulation to [that] issue[]." After the hearing

on partial summary judgment, the court took the matters under advisement.

In March 2018, the court issued an order solely determining jurisdiction. The court reasoned that the 50-day requirement under § 76-717 was mandatory and jurisdictional as opposed to directory. Even though the appeal was timely filed and perfected, the court reasoned that Pinnacle failed to show good cause to justify filing its petition on appeal past the time it was due. The court elucidated that Pinnacle failed to explain why there was a delay in retaining new counsel and it failed to provide a timeline for the court to consider. The court noted that by the time Pinnacle took action, the 50-day limit had run, and Papillion had already filed a motion to dismiss. The court dismissed the condemnation appeal for lack of jurisdiction.

Pinnacle filed a timely appeal, which we moved to our docket.[3]

ASSIGNMENTS OF ERROR

Pinnacle assigns, consolidated and restated, that the district court erred in (1) sua sponte reversing its previous denial of Papillion's motion to dismiss and in dismissing the condemnation on the grounds that timely filing a petition on appeal was jurisdictional and that good cause did not exist for Pinnacle's late filing and (2) denying Pinnacle's motion for sanctions.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law.[4] Determination of a jurisdictional issue which 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.[5]

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[3] Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[4] *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

[5] *Sandoval v. Ricketts, ante* p. 138, 922 N.W.2d 222 (2019).

[3] The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion.[6]

ANALYSIS

Dismissal of Condemnation Appeal

On appeal, Pinnacle argues that the district court erred in sua sponte reversing its earlier denial of Papillion's motion to dismiss, dismissing the condemnation appeal for lack of jurisdiction, determining that good cause was necessary to file a petition on appeal out of time, and finding that Pinnacle did not have good cause.

[4,5] Pinnacle contends that the law-of-the-case doctrine prohibited the second district court judge from reconsidering the motion to dismiss. We disagree. Under the law-of-the-case doctrine, a well-recognized waiver rule has emerged: A decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.[7] When an appellate court remands a case to an inferior tribunal, the law-of-the-case doctrine prevents that court from taking action inconsistent with the judgment of the appellate court.[8]

Here, both decisions were made in the same case and at the same level of Nebraska's court system. A second district court judge merely reconsidered an earlier, purely interlocutory order of his predecessor in the same proceeding and without any intervening opportunity for appellate review. The law-of-the-case waiver rule simply does not apply here.

[6,7] Pinnacle more broadly contends that it was error for the court to reconsider the denial of the motion to dismiss. Again, we disagree. A trial court, in its discretion, may permit

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[6] *LeRette v. Howard*, 300 Neb. 128, 912 N.W.2d 706 (2018).

[7] *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (2019).

[8] *New Tek Mfg. v. Beehner*, 275 Neb. 951, 751 N.W.2d 135 (2008).

the renewal and resubmission of a motion which has previously been overruled.[9] "No court is required to persist in error, and, if [the court] concludes that a former ruling was wrong, [the court] may correct it at any time while the case is still in [the court's] control."[10] Contrary to Pinnacle's contention, the district court had the power to review its previous interlocutory orders if it believed there had been an error. On appeal to this court, we must consider whether the district court's ultimate decision was correct. We now turn to its merits.

Pinnacle relies on the plain language of § 76-717 for several arguments. First, it argues that § 76-717 explicitly states that the district court's jurisdiction is conferred when the notice of appeal is filed in the county court. Second, it contends that this language directly contradicts the district court's dismissal for lack of jurisdiction. Third, it argues that amendments to § 76-717 erased the court's discretionary authority to review the late filing of a petition on appeal for good cause. Pinnacle also argues that because the 15-day delay did not cause any prejudice to Papillion, the court erred in dismissing the appeal and that regardless of jurisdiction, Pinnacle did show good cause for filing out of time.

[8,9] On the question of jurisdiction, the plain language of § 76-717 is conclusive. 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.[11] The second paragraph of § 76-717 begins, "The filing of the notice of appeal shall confer jurisdiction on the district court." In a condemnation action, only the filing of the notice of appeal and, by extension, service of this notice is jurisdictional.[12]

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[9] See *Bringewatt v. Mueller*, 201 Neb. 736, 272 N.W.2d 37 (1978).

[10] *Tady v. Warta*, 111 Neb. 521, 526, 196 N.W. 901, 903 (1924).

[11] *Leon V. v. Nebraska Dept. of Health & Human Servs., ante* p. 81, 921 N.W.2d 584 (2019).

[12] See *Wooden v. County of Douglas*, 275 Neb. 971, 751 N.W.2d 151 (2008).

Because there is no dispute of fact that Pinnacle filed its notice of appeal within 30 days of the return of appraisers, the district court acquired jurisdiction.

Although the court acquired jurisdiction, Papillion argues that the dismissal should be upheld as a reasonable sanction under § 76-717. Although § 76-717 required Pinnacle to file a petition on appeal within 50 days after the filing of the notice of appeal, it goes on to state, "If no petition is filed, the court shall direct the first party to perfect an appeal to file a petition and impose such sanctions as are reasonable." This, Papillion argues, justified dismissal as a sanction. We disagree.

[10] Clearly, the purpose of the quoted language is to keep cases moving and to ensure their orderly progression. By the time the district court first considered Papillion's motion to dismiss, Pinnacle had already filed its petition on appeal. At that point, it was no longer a situation where "no petition is filed." The provision requiring imposition of "sanctions" was conditioned on the absence of a filed petition. Thus, we hold that under § 76-717, only where it becomes necessary for a district court to order an appealing party to file a petition on appeal does it also become necessary for the court to impose such sanctions as are reasonable. In crafting a reasonable sanction, a court should consider the circumstances and any resulting prejudice to other parties.

Because the court had no cause to issue an order directing Pinnacle to file a petition on appeal, the court lacked statutory authority to impose sanctions. Under other circumstances, a failure to file the petition on appeal required by § 76-717 in violation of a court order might justify dismissal as a sanction.

But even if sanctions had been permissible here, Pinnacle's filing of the petition on appeal 15 days after the 50-day limit ran did not so prejudice Papillion as to warrant dismissal. Papillion received additional time to file an answer, and the court oversaw the case for nearly 4½ years. Clearly, the initial untimeliness was a minor matter in the distant past.

Moreover, when the court employed a good cause analysis as to the propriety of allowing the filing, rather than as a sanction for having failed to file the petition before being ordered to do so, the court deviated from the statutory procedure. In other words, the court employed a good cause analysis in order to determine retroactively whether the late filing should have been accepted. The district court cited to *Pettit v. Nebraska Dept. of Corr. Servs.*[13] for a definition of good cause. But in *Pettit*, the controlling statute specified an analysis for good cause. Section 76-717 does not.

The district court may have been misled by our previous case law under § 76-717, examining a late filing for good cause.[14] Those cases were decided before the 1983 amendment.[15] Between 1951, when the statute was enacted, and 1973, prior to an amendment, § 76-717 directed a party appealing a condemnation award to take his or her appeal in the same manner in which someone appeals from county court to district court.[16] During that time, the statute controlling an appeal from county court to district court instructed that if the plaintiff failed to timely file his or her petition on appeal within 50 days of the rendition of judgment, good cause must be shown or the plaintiff shall become nonsuited.[17] Because the pre-1983 version of § 76-717 specifically referred to the manner of

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[13] *Pettit v. Nebraska Dept. of Corr. Servs.*, 291 Neb 513, 867 N.W.2d 553 (2015).

[14] See, *Singleton v. South Platte Nat. Resources Dist.*, 215 Neb. 504, 339 N.W.2d 751 (1983); *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975); *Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972); *Jensen v. Omaha Public Power Dist.*, 159 Neb. 277, 66 N.W.2d 591 (1954); *City of Seward v. Gruntorad*, 158 Neb. 143, 62 N.W.2d 537 (1954).

[15] See 1983 Neb. Laws, L.B. 270, § 1.

[16] See, § 76-717 (Reissue 1971); 1973 Neb. Laws, L.B. 226, § 29 (eff. May 3, 1973).

[17] See Neb. Rev. Stat. § 27-1307 (Reissue 1964) (repealed 1972 Neb. Laws, L.B. 1032, § 287).

appeal being the same as from county court to district court, it was proper before 1983 for a district court to employ a good cause analysis regarding a condemnation petition on appeal filed out of time.[18] Because the current version of § 76-717 does not specify a good cause standard (either explicitly or by incorporation of another statute), our earlier cases have been superseded by the legislative amendments to § 76-717.

In summary, the district court incorrectly concluded that it lacked jurisdiction. To the extent that Papillion argues the dismissal should be sustained as a sanction for Pinnacle's late filing, we reject its argument. We therefore reverse the dismissal and remand the cause for further proceedings.

Sanctions

Pinnacle argues that the district court abused its discretion in denying Pinnacle's motion for sanctions, which asserted that Papillion's motion for summary judgment was legally frivolous. Pinnacle contends that Papillion was merely repackaging its motion to reconsider the motion in limine in the form of a motion for partial summary judgment. It follows, Pinnacle argues, that because the original judge granted the motion in limine and denied the motion to reconsider, the issues Papillion reasserted were legally frivolous.

[11] Pinnacle's motion for sanctions was based upon Neb. Rev. Stat. § 25-824(4) (Reissue 2016), which permits a court to assess attorney fees and costs if "the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment." The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[19]

Although the court did not explain why it denied Pinnacle's motion for sanctions, we do not find that the court abused

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[18] See *Singleton v. South Platte Nat. Resources Dist., supra* note 14.

[19] *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013).

its discretion. The district court might well have concluded that Papillion's motion did not meet the legal standard under § 25-824(4). However, we are mindful that but for this appeal resulting from the court's erroneous dismissal for lack of jurisdiction, the court's order would have remained interlocutory. Upon remand, the court remains free to reassess the situation in the light of subsequent developments. We simply determine that based upon the state of the record at the time of the court's denial of Pinnacle's motion for sanctions, the court did not abuse its discretion in doing so.

CONCLUSION

We conclude that the district erred in dismissing the condemnation appeal for lack of jurisdiction. Therefore, we reverse the court's dismissal and remand the cause for further proceedings. The district court did not abuse its discretion when it denied Pinnacle's motion for sanctions. We affirm the district court's denial of Pinnacle's motion for sanctions.

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

Miller-Lerman, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. Angok B. Wal, appellant.

923 N.W.2d 367

Filed February 22, 2019. No. S-18-446.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. ____: ____. 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.
3. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
4. **Sentences: Probation and Parole.** Under the plain language of Neb. Rev. Stat. § 29-2268(2) (Reissue 2016), a trial court has only one option upon revoking a term of post-release supervision for noncompliance: imposing a term of incarceration up to the remaining period of post-release supervision.
5. ____: ____. When a court has revoked post-release supervision, the maximum term of imprisonment that can be imposed is governed exclusively by Neb. Rev. Stat. § 29-2268(2) (Reissue 2016) and does not depend on the maximum sentence of initial imprisonment authorized under Neb. Rev. Stat. § 28-105 (Reissue 2016).
6. **Sentences: Probation and Parole: Appeal and Error.** Upon revocation of post-release supervision, a sentencing court has discretion under Neb. Rev. Stat. § 29-2268(2) (Reissue 2016) to impose any term of imprisonment up to the remaining period of post-release supervision, and an appellate court will not disturb the court's decision absent an abuse of discretion.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed.

Jeffrey S. Leuschen and Liam K. Meehan, of Schirber & Wagner, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

Angok B. Wal pled guilty to a Class IV felony and was sentenced to 20 months' imprisonment followed by 12 months' post-release supervision. Shortly after the period of post-release supervision began, the State moved to revoke, alleging Wal had violated several conditions. Wal admitted the violations, after which the district court revoked the post-release supervision and imposed a term of 8 months' imprisonment in the county jail.

Wal appeals. He argues that because he has completed a 20-month prison sentence, the district court's imposition of an 8-month jail term upon revoking post-release supervision resulted in imprisonment for a total of 28 months for a Class IV felony, and therefore exceeded the maximum sentence of 24 months' imprisonment authorized by law.[1] Wal's position fundamentally misconstrues the applicable statutory scheme, and we reject it as meritless. Finding no abuse of discretion in the imposition of an 8-month jail term, we affirm.

BACKGROUND

In June 2016, Wal was charged with one count of criminal mischief, one count of obstructing a peace officer, and one

[1] See Neb. Rev. Stat. § 28-105 (Reissue 2016).

count of obstructing government operations. In November, he entered a guilty plea to an amended information charging only criminal mischief (a Class IV felony) and obstruction of government operations (a Class I misdemeanor). The maximum sentence for a Class IV felony is 24 months' imprisonment and 12 months' post-release supervision.[2] The maximum sentence for a Class I misdemeanor is 12 months' imprisonment and a fine of $1,000.[3]

Wal was sentenced to 20 months' imprisonment and 12 months' post-release supervision on the felony conviction and to a concurrent term of 12 months' imprisonment on the misdemeanor. The order of post-release supervision included conditions requiring Wal to report regularly as directed by his probation officer, provide proof of employment, abstain from the use of alcohol, obtain a chemical dependency or mental health examination, submit to regular drug and alcohol testing, and perform 60 hours of community service.

On July 3, 2017, Wal was released from prison and began his period of post-release supervision. Almost immediately, he failed to comply with the conditions of that supervision. On October 5, the State filed a motion seeking to revoke his post-release supervision. When Wal failed to appear in court on the motion, a warrant was issued for his arrest.

On April 2, 2018, Wal was arrested on the warrant. Thereafter, he was arraigned on the motion to revoke and admitted violating the conditions of his post-release supervision. The State's factual basis indicated that after being released from prison, Wal failed to report for mandatory probation appointments, failed to recharge the global positioning system monitor on his ankle, did not attend required appointments or drug and alcohol testing, did not obtain a chemical dependency evaluation, did not attend drug treatment, did not

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[2] *Id.*

[3] Neb. Rev. Stat. § 28-106 (Reissue 2016).

complete any community service hours, and did not pay his probation enrollment fees.

The court found that Wal's period of post-release supervision began on July 3, 2017, and the parties eventually stipulated that Wal absconded from that supervision after just 14 days. The court accepted Wal's admission, found he had violated the conditions of his post-release supervision, and set the matter for further disposition.

At the dispositional hearing on April 25, 2018, the court revoked Wal's post-release supervision and imposed a term of 8 months' imprisonment in the county jail. Wal filed this timely appeal, and we moved the case to our docket on our own motion.

ASSIGNMENT OF ERROR

Wal assigns, restated, that after revoking his post-release supervision, it was error for the trial court to impose 8 months' imprisonment because doing so resulted in a total term of imprisonment that exceeded the statutory maximum for Class IV felonies.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[4]

ANALYSIS

Wal does not challenge either the finding that he violated his post-release supervision or the court's decision to revoke his post-release supervision and impose a term of imprisonment. He challenges only the length of that imprisonment, arguing that when it is added to the prison sentence he already served, he will serve a total of 28 months' imprisonment for a Class IV felony, when the maximum term of imprisonment authorized by § 28-105 is 24 months.

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[4] *State v. Ralios*, 301 Neb. 1027, 921 N.W.2d 362 (2019).

[2,3] In considering Wal's arguments, we are guided by familiar rules of statutory construction. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[5] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[6]

Post-release supervision remains a relatively new concept in Nebraska sentencing law.[7] As defined by the Legislature:

> Post-release supervision means the portion of a split sentence following a period of incarceration under which a person found guilty of a crime upon verdict or plea is released by a court subject to conditions imposed by the court and subject to supervision by the [Office of Probation Administration].[8]

Revocation of post-release supervision is governed by Neb. Rev. Stat. § 29-2268(2) (Reissue 2016), which provides:

> If the court finds that a probationer serving a term of post-release supervision did violate a condition of his or her post-release supervision, it may revoke the post-release supervision and impose on the offender a term of imprisonment up to the remaining period of post-release supervision. The term shall be served in an institution under the jurisdiction of the Department of Correctional Services or in county jail subject to subsection (2) of section 28-105.

[4] Under the plain language of § 29-2268(2), a trial court has only one option upon revoking a term of post-release

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[5] *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

[6] *Id.*

[7] *State v. Kennedy*, 299 Neb. 362, 908 N.W.2d 69 (2018).

[8] Neb. Rev. Stat. § 29-2246(13) (Reissue 2016); *Kennedy, supra* note 7.

supervision for noncompliance: imposing a term of incarceration up to the remaining period of post-release supervision.[9] Without this option, a defendant would be able to frustrate the goals of post-release supervision—and avoid serving the second portion of his or her split sentence—simply by refusing to comply with the terms of supervision.

Here, Wal completed the first portion of his split sentence by serving 20 months' imprisonment. But he failed to comply with the second portion of his split sentence, his post-release supervision, and the court revoked it. Wal contends that when a court revokes post-release supervision and imposes a term of imprisonment, it is constrained not only by the time remaining on post-release supervision, but, also, by the maximum term of imprisonment authorized by § 28-105 for the first portion of the split sentence. We reject this contention as inconsistent with the statutory scheme and the plain language of § 29-2268(2).

[5] We hold that when a court has revoked post-release supervision, the maximum term of imprisonment that can be imposed is governed exclusively by § 29-2268(2) and does not depend on the maximum sentence of initial imprisonment authorized under § 28-105. Upon revoking Wal's post-release supervision, the district court was statutorily authorized to impose a term of imprisonment up to the remaining period of his post-release supervision, without regard to the amount of imprisonment ordered on the first portion of his split sentence.

[6] Because a sentencing court has discretion under § 29-2268(2) to impose, upon revocation, any term of imprisonment up to the remaining period of post-release supervision, an appellate court will not disturb that decision absent an abuse of discretion. At the dispositional hearing in this case, the parties did not dispute the period of time remaining on Wal's post-release supervision. Wal had been sentenced

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[9] See *Kennedy, supra* note 7.

to 12 months' post-release supervision, and the parties stipulated he had served only 14 days of that supervision before absconding. Thus, on the day revocation was ordered, Wal had considerably more than 8 months remaining on his term of post-release supervision. The district court's order imposing a term of 8 months' imprisonment was within the maximum term authorized by § 29-2268(2) and was not an abuse of discretion. The order of the district court is affirmed.

Affirmed.

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

Nicole Brinkman, appellant, v. Seth Michael Brinkman and Kimberly Millus, Personal Representative of the Estate of Michael R. Brinkman and as parent and next best friend of Seth Michael Brinkman, a minor, appellees.

923 N.W.2d 380

Filed February 22, 2019. No. S-18-476.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Courts: Jurisdiction.** Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court.
3. **Jurisdiction.** The rule of jurisdictional priority does not apply unless there are two cases pending at the same time.
4. **Jurisdiction: Dismissal and Nonsuit.** The doctrine of jurisdictional priority does not apply if the first action terminates, is resolved, or is disposed of before the second action commences.
5. **Jurisdiction.** Two pending cases fall under the doctrine of jurisdictional priority only when they involve the same "whole issue." In other words, the two actions must be materially the same, involving the substantially same subject matter and the same parties.
6. **Constitutional Law: Courts: Jurisdiction.** Because a district court's general jurisdiction emanates from the Nebraska Constitution, it cannot be legislatively limited or controlled.
7. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** The county courts have concurrent original jurisdiction with the district courts in common-law and equity actions relating to decedents' estates.
8. **Decedents' Estates: Wills: Declaratory Judgments: Courts.** The district court has the power in a declaratory judgment action to

construe a will and make a determination of interests of beneficiaries in the estate.

9. **Wills: Courts.** The county court has the limited power to construe a will for the benefit of the executor in carrying out the terms of the will.
10. **Courts: Jurisdiction.** County courts can acquire jurisdiction only through legislative enactment.
11. **Decedents' Estates: Wills: Courts: Jurisdiction.** A county court has complete equity powers as to all matters within its probate jurisdiction. This includes the authority to construe a will when necessary to enable the settlement of an estate properly.
12. **Courts: Jurisdiction.** While jurisdictional priority is not a matter of subject matter or personal jurisdiction, courts should enforce the jurisdictional priority doctrine to promote judicial comity and avoid the confusion and delay of justice that would result if courts issued conflicting decisions in the same controversy.
13. **Actions: Courts: Jurisdiction: Public Policy.** The rule of jurisdictional priority is based on the public policies of avoiding conflicts between courts and preventing vexatious litigation and a multiplicity of suits.
14. **Courts: Jurisdiction.** When a subsequent court decides a case already pending in another court with concurrent subject matter jurisdiction, it errs in the exercise of its jurisdiction.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Reversed and remanded with directions.

Ryan P. Watson and Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellant.

Joseph D. Thornton, of Smith Peterson Law Firm, L.L.P., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

The daughter of a testator sought a declaration of her rights under her father's will as an alleged devisee, claiming to be entitled to one-half of the residual share of her father's

testamentary estate under a residuary clause in the decedent's will. The estate asserted that the decedent unambiguously disinherited the daughter by excluding her name in the definition of "'children'" or "'issue,'" while expressly including the decedent's younger son's name and "all children of mine born or adopted after the execution hereof." After both parties moved for summary judgment, the district court found that the terms of the will were clear and unambiguous and that the daughter was expressly disinherited by the will's provisions. Based on these findings, the court granted the estate's motion for summary judgment. The daughter appeals.

BACKGROUND

The testator, Michael R. Brinkman, died on December 23, 2016, leaving two known children, Nicole Brinkman and Seth Michael Brinkman. The testator's will was admitted for probate, naming Kimberly Millus as personal representative. Millus is Seth's mother, but not Nicole's mother. Nicole is the older of the two children.

The relevant portions of the will are as follows:

> **ARTICLE I.**
>
> The references in this Will to my "son" refer to my son, SETH MICHAEL BRINKMAN. *The references in this Will to my "children" and/or my "issue" shall include my son, SETH MICHAEL BRINKMAN, and all children of mine born or adopted after the execution hereof.*"
>
> . . . .
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> **ARTICLE IV.**
>
> I give and bequeath all right, title and interest I may own at the time of my death, if any, in any automobile, furniture and furnishings, including pictures and works of art, articles of domestic use or adornment of every kind and character, recreational equipment, personal effects used by me about my person or home, and any collections or memorabilia, wheresoever located as provided in the last dated writing in existence at the time of my death

> signed by me which describes such item and distributee with reasonable certainty. To the extent any of said items are not so disposed of, I give said property to my son. To the extent any of such items are not so distributed, I direct my personal representative to sell or dispose of such items by such method and manner as my personal representative deems to be in the best interests of my estate, and any proceeds realized therefrom shall become a part of the residue of my estate.
>
> **ARTICLE V.**
>
> *I give the residue of my estate to my issue, per stirpes*."

(Emphasis supplied.)

Nicole is not mentioned by name within the will.

Nicole filed the present action seeking a declaration that she was entitled to an undivided one-half interest in the estate, less personal effects. She argued that though article I provided the term "'issue'" to "*include*" Seth, it did not expressly exclude Nicole as "'issue.'" (Emphasis supplied.) She later moved for summary judgment, asserting that she was not expressly disinherited or disinherited by implication.

Seth and Millus, on behalf of the estate, filed a resistance and counter-motion for summary judgment, arguing that the will was not subject to interpretation because it was not ambiguous. Alternatively, Seth and Millus argued that if the will was ambiguous, Nicole was nonetheless expressly disinherited from taking under the testator's will.

The district court granted the estate's motion for summary judgment. The court found that the language of the will was clear and unambiguous. The district court further found that it was clear that "issue" as used in article V was to be given the meaning set forth in article I and that article I defined "'issue'" to mean Seth and any children born or adopted after the execution of the will. Because no children were born or adopted after the execution of the will, the court read "issue" in article V to mean only Seth. The court further found that Nicole was expressly disinherited by these provisions of the

will. The court concluded that based on the clear terms of the will, the entire residue of the estate passed to only Seth and that Nicole was not entitled to a one-half interest in the residue of the estate.

ASSIGNMENTS OF ERROR

Nicole assigns that the district court erred in finding that (1) the will was not ambiguous and (2) she was expressly disinherited from her father's will.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[1]

ANALYSIS

[2] Though not originally raised by the parties, following their submission of supplemental briefing at our request, an issue of jurisdictional priority was identified. We do not reach the merits of Nicole's assignments of error, because we conclude that the county court had jurisdictional priority over the district court in this matter. It is undisputed that a probate action pertaining to the will at issue was brought in county court before Nicole brought her declaratory judgment action in district court seeking interpretation of the same will, and that probate action is still pending in county court. Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court.[2]

[3-5] This rule of jurisdictional priority does not apply unless there are two cases pending at the same time.[3] The

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[1] *Jesse B. v. Tylee H.*, 293 Neb. 973, 883 N.W.2d 1 (2016).

[2] *Charleen J. v. Blake O.*, 289 Neb. 454, 855 N.W.2d 587 (2014).

[3] *Id.*

doctrine further does not apply if the first action terminates, is resolved, or is disposed of before the second action commences.[4] Additionally, two pending cases fall under this doctrine only when they involve the same "'"whole issue."'"[5] In other words, the two actions must be materially the same, involving the substantially same subject matter and the same parties.[6]

Nicole conceded during oral argument that the probate of the will began in the county court and remained pending when Nicole brought her declaratory judgment action regarding the construction of the will in district court. Both the probate and the declaratory judgment actions involve the construction of the same will and a determination of the rights of the parties based on the will's meaning. The cases involve substantially the same parties.

Thus, there were two pending cases involving substantially the same subject matter and parties in two different courts. The only dispute presented by the parties concerning the elements of jurisdictional priority is whether the county and the district courts have concurrent original jurisdiction.

The estate argues that the county court has exclusive original jurisdiction over the construction of the will and that the district court lacks subject matter jurisdiction over such matters. We disagree.

The estate relies on Neb. Rev. Stat. §§ 24-517(1) and 30-2211 (Reissue 2016). Section 24-517 provides in pertinent part: "Each county court shall have the following jurisdiction: (1) Exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof . . . ." Section 30-2211(a) provides in part: "To the full extent permitted by the Constitution of Nebraska, the [county] court has jurisdiction over all subject matter

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[4] *Id.*

[5] *Id.* at 464, 855 N.W.2d at 596.

[6] *Id.*

relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons . . . ."

We have held, however, that the Legislature's purported grant of exclusive original jurisdiction to the county court in matters relating to decedents' estates "'is of suspect constitutionality insofar as it relates to matters that would involve either the chancery or common-law jurisdiction of the district courts.'"[7] This is because the district court's jurisdiction over such matters emanates from the Nebraska Constitution.

[6,7] Neb. Const. art. V, § 9, states: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ." We have held that because a district court's general jurisdiction emanates from the Nebraska Constitution, it cannot be legislatively limited or controlled.[8] Thus, in a long line of cases, we found that the county courts have concurrent original jurisdiction with the district courts in common-law and equity actions relating to decedents' estates.[9]

[8] In this case, Nicole filed her complaint in district court seeking declaratory relief. Specifically, she sought a declaration of her rights under the decedent's will. Neb. Rev. Stat. § 25-21,150 (Reissue 2016) specifically allows such an action, providing in pertinent part: "Any person . . . under a . . . will . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder." And we have held that the district court has the power in a declaratory

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[7] *Ptak v. Swanson*, 271 Neb. 57, 63, 709 N.W.2d 337, 341 (2006) (quoting *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985)).

[8] *Id*. (citing *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999), and *In re Estate of Steppuhn, supra* note 7).

[9] See *id.* (citing *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999), and *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991)). See, also, *In re Estate of Steppuhn, supra* note 7.

judgment action to construe a will and make a determination of interests of beneficiaries in the estate.[10]

Nicole argues that the district court had exclusive original jurisdiction over her declaratory judgment action and that the county court lacks subject matter jurisdiction over the interpretation of the decedent's will. We likewise find no merit to this contention.

[9] Nicole relies on cases wherein we have said that district courts have exclusive jurisdiction to construe wills. While this court has held the district courts of this state have the exclusive power to construe wills, we have also held that the county court has the limited power to construe a will for the benefit of the executor in carrying out the terms of the will.[11]

[10,11] There is nothing in the Nebraska Constitution that limits the Legislature's ability to grant to the county courts jurisdiction over the construction of wills. Article V, § 1, of the Nebraska Constitution provides in part:

> The judicial power of the state shall be vested in a Supreme Court, an appellate court, district courts, county courts, in and for each county, with one or more judges for each county or with one judge for two or more counties, as the Legislature shall provide, and such other courts inferior to the Supreme Court as may be created by law.

County courts can acquire jurisdiction only through legislative enactment.[12] As already set forth, the Legislature has provided through §§ 24-517(1) and 30-2211 that county courts have the power to construe wills. And it is well settled that the county court has been given complete equity powers as to all matters within its probate jurisdiction.[13] This has long included

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[10] See *Father Flanagan's Boys' Home v. Graybill*, 178 Neb. 79, 132 N.W.2d 304 (1964).

[11] See *id.*

[12] *Iodence v. Potmesil, supra* note 9; *In re Estate of Steppuhn, supra* note 7.

[13] See *Youngson v. Bond*, 69 Neb. 356, 95 N.W. 700 (1903).

the authority to construe a will when necessary to enable the settlement of an estate properly.[14]

We find that the county court and the district court had exercisable concurrent jurisdiction over the construction of this will. All of the elements of jurisdictional priority are present in this case. Thus, the county court, as the first court to acquire jurisdiction, retained it to the exclusion of the district court unless it deferred to the district court.[15] Neb. Rev. Stat. § 30-2429.01 (Reissue 2016) provides that the district court may determine whether a decedent left a valid will if there is an objection to the probate of the will in county court and certain transfer procedures are followed. But this case was not transferred to the district court pursuant to this section, nor does it involve the validity of a will, but, rather, its construction.[16]

[12-14] While jurisdictional priority is not a matter of subject matter or personal jurisdiction, courts should enforce the jurisdictional priority doctrine to promote judicial comity and avoid the confusion and delay of justice that would result if courts issued conflicting decisions in the same controversy.[17] The rule of jurisdictional priority is based on the public policies of avoiding conflicts between courts and preventing vexatious litigation and a multiplicity of suits.[18] A pragmatic justification for the rule is efficiency in that proceedings earlier begun may be expected to be earlier concluded.[19] When a subsequent court decides a case already pending in another court with concurrent subject matter jurisdiction, it errs in the exercise of its jurisdiction.[20]

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[14] See *id.*

[15] See *Charleen J. v. Blake O., supra* note 2.

[16] See § 30-2429.01.

[17] See *Charleen J. v. Blake O., supra* note 2.

[18] *Id.*

[19] *Id.*

[20] See *id.*

Because the county court did not transfer the case or otherwise relinquish its jurisdictional priority, the district court improperly impinged on the county court's jurisdictional priority in construing the will in this matter. The district court erred in its exercise of jurisdiction, and we reverse the order and remand this matter to the district court with directions to dismiss the complaint without prejudice.

CONCLUSION

We reverse, because we conclude that the county court has jurisdictional priority over the district court in construing the will in this matter.

Reversed and remanded with directions.

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

State of Nebraska, appellee, v. David J. Hibler, Jr., appellant.

923 N.W.2d 398

Filed March 1, 2019. No. S-18-005.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute presents a question of law, which an appellate court independently reviews.
2. **Rules of Evidence: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on relevance, whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and the sufficiency of a party's foundation for admitting evidence.
3. **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.
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. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
5. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.

6. **Constitutional Law: Statutes: Waiver.** The proper procedure for raising a facial constitutional challenge to a criminal statute is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
7. **Constitutional Law: Statutes: Standing: Proof.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
8. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. The Equal Protection Clause requires the government to treat similarly situated people alike.
9. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
10. **Legislature: Equal Protection.** If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny.
11. **Equal Protection: Words and Phrases.** A suspect class is one that has been saddled with such disabilities or subjected to such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process.
12. **Equal Protection.** Age itself is not a suspect classification for equal protection purposes.
13. ____. When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
14. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
15. **Equal Protection.** Under the rational basis test, the Equal Protection Clause is satisfied as long as (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.
16. **Constitutional Law: Criminal Law: Sentences: Legislature: Courts.** The Legislature is clothed with the power of defining crimes and

misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.

17. **Constitutional Law: Criminal Law: Sentences.** With regard to the mandatory minimum sentence, the guarantees of due process and equal protection, as well as the prohibition against cruel and unusual punishment, do not require individual sentencing in noncapital cases.
18. **Witnesses: Impeachment.** As a general rule, a witness makes an inconsistent or contradictory statement if the witness refuses to either deny or affirm that he or she made the prior statement, or if the witness answers that he or she does not remember whether he or she made the prior statement.
19. **Evidence: Hearsay.** Prior extrajudicial statements of a witness may be received into evidence for the limited purpose of assisting the jury in ascertaining the credibility of the witness, but unless they are otherwise admissible, they may not be considered as substantive evidence of the facts declared in the statements.
20. **Trial: Witnesses: Impeachment.** It is sometimes difficult to determine whether a question attempts impeachment or rises to the level of a charge of recent fabrication, and it is not an abuse of discretion to allow the question where the impeachment is susceptible to either interpretation.
21. **Hearsay: Time.** A declarant's consistent out-of-court statements are permitted to rebut a charge of recent fabrication, improper influence, or improper motive when those statements were made before the charge of recent fabrication, improper influence, or improper motive.
22. **Sexual Assault: Proof: Words and Phrases.** The slightest intrusion into the genital opening is sufficient to constitute penetration, and such element may be proved by either direct or circumstantial evidence.
23. **Effectiveness of Counsel: Postconviction: 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 in a subsequent postconviction proceeding.
24. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court.

25. **Effectiveness of Counsel: Records: Appeal and Error.** On direct appeal, allegations of how the defendant was prejudiced by trial counsel's allegedly deficient conduct are unnecessary in an appellate court determination of whether the trial record supports the assigned error.
26. ____: ____: ____. 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.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

I. NATURE OF CASE

David J. Hibler, Jr., appeals his convictions and sentences in the district court for Lancaster County, following a jury trial, for first degree sexual assault of a child, incest with a person under 18 years of age, and third degree sexual assault of a child. On appeal, Hibler argues that first degree sexual assault of a child under Neb. Rev. Stat. § 28-319.01(1)(a) and (2) (Reissue 2016) is unconstitutional, because the statute subjects the defendant to a mandatory minimum sentence based solely on the ages of the victim and perpetrator. We conclude that the age classifications defining sexual assault of a child in § 28-319.01(1)(a) and associated mandatory sentence in § 28-319.01(2) are not unconstitutional. We also determine that the district court did not abuse its discretion when it made various evidentiary rulings and that the evidence was sufficient to support Hibler's convictions. We reject several of Hibler's claims of ineffectiveness of trial counsel but do not reach the merits of various other ineffectiveness claims. For the reasons explained below, we affirm.

II. STATEMENT OF FACTS

The State charged Hibler by information with one count of first degree sexual assault of a child, § 28-319.01(2); one count of incest with a person under 18 years of age, Neb. Rev. Stat. § 28-703 (Reissue 2016); and one count of third degree sexual assault of a child, Neb. Rev. Stat. § 28-320.01(3) (Reissue 2016). Before trial, Hibler filed a motion to quash based on his claim that the provisions of § 28-319.01(2) "violate [Hibler's] constitutional rights under the Fifth, Fourteenth and Eighth Amendment[s] to the United States Constitution and the correlative provisions of the Nebraska Constitution." At a hearing on the motion to quash, Hibler's counsel noted the motion was being filed pursuant to *State v. Stone*, 298 Neb. 53, 902 N.W.2d 197 (2017), which states that to preserve a constitutional challenge to the mandatory minimum sentence which could be imposed, a motion to quash must be filed. The motion was overruled.

1. Trial

(a) Testimony of J.H.

J.H., the victim, was 13 years old when she testified as the State's first witness. J.H. is the oldest of the three biological children of Hibler and his former wife, A.H. J.H. testified that she was 11 years old during the events alleged in the information. She testified that her parents were still married in 2015, but she thought they were now divorced.

J.H. testified that Hibler began giving her massages when she was 11 years old, following a Soap Box Derby win in 2015. Hibler would massage her when they would run and bike together. Initially, Hibler touched only J.H.'s back and legs when he massaged her.

J.H. stated that one night when she was 11 years old, Hibler began to massage her "butt" during a massage in A.H. and Hibler's bedroom. J.H. testified that beginning in October 2015 and continuing through January 2016, Hibler touched her inappropriately more than one time, but less than 10 times. J.H. believed the inappropriate touching occurred about four or

five times. J.H. testified specifically that one incident occurred at her grandfather's home, one incident occurred in J.H.'s bedroom, and the other incidents were in the bedroom Hibler shared with A.H., J.H.'s mother.

The evidence showed that one of J.H.'s brothers has cancer and that A.H. would take him out of state once a month for treatment. J.H. stated A.H. and her brother were out of town when Hibler massaged her backside. J.H. was lying on her stomach on Hibler's bed, and she was not wearing any clothes, but had a towel over her body.

J.H. testified that another incident occurred during the morning in J.H.'s room. J.H. had a pain in her chest and Hibler told her to let him give her a massage. He told her to remove her bra so he could massage her chest. J.H. indicated that she stated no but that Hibler stated it "would make it better," so J.H. removed her bra. Hibler then massaged her breasts for possibly 5 or 10 minutes. J.H. was sitting on her bed, and Hibler was sitting next to her.

J.H. also testified that Hibler touched her genitals multiple times. Sometime in 2015, J.H. and Hibler were spending the night at her grandfather's home in Omaha, Nebraska; J.H. believed A.H. and her brother were not at the home. J.H. stated that she was lying on her side while Hibler was massaging her from behind and that at some point, he put his hand in her underwear "and started touching [her] vagina." J.H. described that it felt like a "swiping motion" and compared it to "when a girl goes to the bathroom and she takes the toilet paper, she wipes. She doesn't like stick it up her vagina, doesn't like just . . . pat it. She swipes it and then puts it in the toilet." J.H. testified that she could feel his fingers "moving up and down [her] vagina" and that it lasted a long time. She testified that she did not tell anyone, because she was scared.

J.H. testified that Hibler also touched her genitals with the "swiping motion" at the family home in Lincoln, Nebraska. J.H. thought that it occurred about three times and that it happened when A.H. and her brothers were out of town for her brother's treatment. J.H. described the swiping episodes as

follows: she would be half asleep but still aware of her surroundings, then Hibler would put his hand under her underwear and start touching her vagina in a swiping motion.

J.H. described an incident which occurred with Hibler in his bedroom during which Hibler asked J.H. to wear a pair of A.H.'s purple underwear, which tied on the sides. According to J.H., Hibler was massaging her and then had her put on the underwear that tied and began massaging her legs. At one point, Hibler untied the sides of the underwear and massaged her legs right next to her vagina. Hibler looked at her vagina, though he did not touch her vagina at that time. J.H. testified that when Hibler told her to put the underwear on, he had stated something about them making it "easier."

J.H. also testified about another incident which occurred in Hibler's bedroom in the early morning. J.H. believed that just she and Hibler were home and that A.H. and her brothers were probably out of state. During this incident, J.H. was asleep when Hibler began to massage her. When Hibler touched her, he performed the swiping motion and also put his hand over her vagina "like as if his hand were a bowl and he were putting it over [her] vagina." J.H. testified that Hibler "touched [her] vagina" and did so "more towards the top of [her] vagina where there is this thing." J.H. stated that during the previous episodes when Hibler was swiping, he would touch the labia, but "this time it was more towards the top of that" area but that she did not know the name of the area. When it was just the swiping motion, J.H. usually could feel just Hibler's fingers, but "this time [she] felt his whole hand." He "touched the top of [her] vagina" with "maybe two or three fingers," and "[h]is fingers were moving." This continued for between 15 to 30 minutes. J.H. stated that her eyes were closed but that she was not asleep. J.H. stated that this was the last incident and that it occurred around December or January. She knew that the incident did not happen in February.

J.H. testified that, initially, she did not tell anyone about this last incident, because she was scared and did not know what would happen to her and her family. However, after

her friends realized something was wrong, she met them at the school playground and told them in February. J.H. asked her friends not to tell anybody, but the mother of one of her friends learned of the alleged assaults and called the school. The principal asked J.H. to come to the office and asked her some questions. J.H. did not tell A.H. prior to when the police became involved, because she stated, "I wasn't sure if she would believe me or - I actually wanted to wait until we got a new house, because then I thought at the time, I thought it would be easier . . . ." She stated that she "tried to tell [A.H.] There were times, you know, that I would say, let's go for a ride, and I would want to tell her. Then I would chicken out because it is not something that you can walk up to somebody and say this happened."

(b) Testimony of A.H.

A.H. testified that Hibler was born in November 1980. A.H. married Hibler in 2002 and had three biological children with him. A.H. testified that there were times she went with her son for his treatments out of state between October 2015 and March 2016. The day visits occurred about once a month and often on Fridays. In addition, A.H. recalled that there were two or three other times when she took her son out of state for treatment and that they spent the night out of state. On those occasions, Hibler stayed home with J.H. and their other son.

A.H. testified that J.H. "loved to give pedicures" and that she liked to give massages and receive them. A.H. testified it would not have been unusual for Hibler to massage J.H. after running or stretching. A.H. stated that before the police came to her workplace on March 31, 2016, to tell her that J.H. had been interviewed, J.H. had not told her anything regarding Hibler's actions.

A.H. testified that she spoke with Hibler in person on several occasions about J.H.'s accusations. They also discussed the trouble in their marriage. According to A.H., Hibler wanted A.H. to convey to J.H. that Hibler believed J.H.'s recollection

was a misunderstanding of what had occurred. According to A.H., Hibler initially admitted touching J.H. on just one occasion. A.H. testified that Hibler stated this event occurred when he took J.H. home one night; she was asleep, and he did not want to carry J.H. up the stairs, so he took J.H. to A.H. and Hibler's bed. Hibler told A.H. that "he took some melatonin and rolled over and thought [J.H. was A.H.] and he touched her." Hibler stated that "by the time he realized what he had done, the damage was done," but that it was only one time and wondered if A.H. could forgive him and try to make their marriage work.

A.H. testified that Hibler wanted A.H. to encourage J.H. to change her story and tell the police that she took melatonin and had some "really bad dreams." If this became J.H.'s story, people would believe her, they could still buy the house they wanted, they could have more children, and they could try to start over. He urged A.H. to tell J.H. that "it was just a little mistake and it didn't have to ruin everything."

A.H. testified regarding another conversation she had with Hibler on April 26, 2016, when she and Hibler sat in a truck and spoke for a "[c]ouple hours maybe." Hibler initially stated that they could possibly record the conversation, but then changed his mind, so A.H. was only able to record about 7 seconds.

In this conversation, Hibler repeated to A.H. what he had said the night before to the effect that he was sorry and ashamed, that there was no good excuse for what he had done, and that there was nothing that he could say or do that would excuse what had happened. A.H. testified that at this point, Hibler indicated there had been several episodes which started around October 2014, when A.H. was at the hospital with their son. A.H. testified that Hibler told her the first episode occurred at his father's home, sometime in October 2014. Hibler indicated that when J.H. had complained of pain in her hip flexor, he had rubbed her thighs and her hip, and she then fell asleep. Hibler described that there was a "little gap" between J.H.'s underwear and skin and that he put his fingers

in the gap and felt that "she was wet" and it was "arousing for him." A.H. stated Hibler told her he then pulled his hand back, resumed massaging her thigh and hip but then repeatedly slipped his fingers under her underwear while J.H. slept. A.H. testified that Hibler told her that at one point, he gave J.H. a frontal massage, but that it was really innocent, and that J.H. was having panic attacks or shortness of breath and would get a really sharp pain on her side, in response to which Hibler offered to rub her ribs. Hibler told her that J.H. had taken off her shirt, but the pain was in the area covered by her sports bra, so Hibler told her to take the sports bra off, and he just rubbed her muscles there, but that it was not sexual.

In connection with another incident, Hibler told A.H. that he and J.H. were home and J.H. asked to sleep in Hibler and A.H.'s bed, which was not uncommon. J.H. indicated she was scared and crying, so she slept in their room. A.H. testified that Hibler stated that either he or J.H. asked for a hug, and Hibler rolled J.H. on top of him and gave her a hug. Hibler became aroused, so he put J.H. back on the bed. A.H. testified that Hibler stated, "He thought something was wrong with him and he did not know what to do about it." A.H. stated Hibler told her he tried watching pornography, including "fake daddy-daughter porn," to cure the problem, but that did not help and in fact made things worse. Hibler stated that J.H. would sometimes ask for a foot massage, Hibler would work his way up to the hip, and Hibler would become aroused; he knew it was wrong. Hibler stated that this pattern became compulsive for him.

A.H. testified that when she asked Hibler how many episodes had happened, Hibler told her "probably a handful." He said that the last time was probably in January and that it was different. Regarding this episode, Hibler told A.H. that J.H. was in A.H. and Hibler's bedroom and that when Hibler asked J.H. if she wanted a massage, she said she did. Hibler described this episode to A.H. as follows: Hibler had J.H. take her clothes off, "handed her a thong to put on," and had her lie down on the bed and put a sheet over her like at a massage parlor. At

some point after J.H. fell asleep, Hibler put his fingers under her underwear, but she "wasn't wet"; he grabbed some "lotion or goop or lube or something" and put it on her, stroked her and cupped her genital area, touched her and massaged "the hole," and then massaged her clitoris. Hibler indicated to A.H. that he knew his actions "would make [A.H.] wet, so he was wondering if that would work" for J.H. Hibler indicated that he did not know how long his actions lasted, but that ultimately he "jacked off" and then immediately vomited in a garbage can. He stated that he realized he had made a "really bad mistake." He stated that he did not know what to do, that he tried to talk to J.H. the next day but that she was not talking to him, and that he knew something was wrong but did not know how to approach the subject.

A.H. testified that Hibler asked her to explain to J.H. the consequences of telling her therapist what Hibler had done, including what could happen financially to A.H. if Hibler were to go to jail; that Hibler was not going to get any "help" in prison; and that if A.H. did go to the police, Hibler "would never admit to anything, ever." A.H. testified that she told Hibler to take a plea so that he could still retain a relationship with their sons and that Hibler told her he would never admit to the allegations involving J.H. and that he would try to prove his innocence.

A.H. stated that sometime in April 2016, she was sorting laundry with J.H., and that when J.H. saw a pair of A.H.'s underwear which tied at the sides, J.H. was upset and wanted to get rid of them.

(c) Testimony of Other Witnesses

The State called several witnesses: police officers, investigators, a teacher, the principal from J.H.'s school, a psychologist, and a friend of J.H. The friend testified that J.H. "told us one of her family members touched her inappropriately and we asked who and she said she could not say." She also testified that J.H. later "whispered in our ears one time during class that it was her dad." Trial counsel did not object to this testimony.

Although J.H. told her friends not to tell anyone, the friend told her mother, who told the principal of their school.

(d) Hibler's Defense

Hibler's defense at trial was generally that A.H. may have implanted memories of sexual assault in J.H. at a time when J.H. was vulnerable, because she was experiencing problems at school, bullying, mental health issues, and estrangement from A.H. In addition, her brother, who had cancer, had become the center of attention. There was evidence that A.H. and J.H. watched a movie about child sexual abuse, and Hibler claimed that A.H. used this viewing as a vehicle to plant the idea in J.H.'s mind that she, too, had been sexually assaulted.

Hibler highlighted the fact that J.H. did not initially come forward on her own about the alleged assaults and told her friends not to tell anybody. Hibler told the jury that A.H. and Hibler were having trouble in their marriage and that A.H. had filed for divorce, claiming Hibler had confessed to her. Hibler believes that this purported confession would be used by A.H. as leverage to gain custody of the children and overcome negative facts about A.H.'s life.

Hibler's father testified on Hibler's behalf. He testified that Hibler and J.H. never stayed at his home alone in the entire time he lived at the house and that "[i]t's always been the whole family."

2. Verdict and Sentencing

On October 27, 2017, a jury found Hibler guilty of first degree sexual assault of a child, incest with a person under 18 years of age, and third degree sexual assault of a child. The district court imposed sentences on December 20. As to the conviction of first degree sexual assault of a child, a Class IB felony, Hibler received a sentence of 20 to 25 years' imprisonment. With regard to the conviction of incest with a person under 18 years of age, a Class IIA felony, Hibler received a sentence of 18 to 20 years' imprisonment. With regard to the conviction of third degree sexual assault of a child, a

Class IIIA felony, Hibler received a sentence of 2 to 3 years' imprisonment.

The district court ordered that Hibler serve the sentences concurrently with one another, and Hibler received 53 days' credit toward his sentences.

Hibler appealed, and gave notice under Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) that his appeal includes a challenge to the constitutionality of § 28-319.01.

III. ASSIGNMENTS OF ERROR

Hibler claims, summarized and restated, that the district court erred when it rejected his constitutional challenge to § 28-319.01. He also claims that the district court made several erroneous evidentiary rulings, including admitting diary entries of J.H.; excluding certain text messages; and preventing Hibler from examining A.H. concerning her military discharge, employment, and mental health history. Hibler claims that the State did not present sufficient evidence to support the convictions of first degree sexual assault of a child and incest, because evidence of the element of penetration was lacking. Hibler claims his trial counsel was ineffective. With regard to sentencing, as noted, Hibler claims that the mandatory minimum sentence regarding first degree sexual assault of a child where the victim is under 12 years old pursuant to § 28-319.01(2) is unconstitutional.

IV. STANDARDS OF REVIEW

[1] The constitutionality of a statute presents a question of law, which we independently review. *State v. Stone*, 298 Neb. 53, 902 N.W.2d 197 (2017).

[2] An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on relevance, whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and the sufficiency of a party's foundation for admitting evidence. *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018).

[3] 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. *Id*.

[4] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Golyar*, 301 Neb. 488, 919 N.W.2d 133 (2018). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance. *Id*.

V. ANALYSIS

[5] We must first consider Hibler's facial constitutional challenge focused on the statutory elements of first degree sexual assault of a child under which he was convicted, § 28-319.01(1)(a), and, in particular, the associated mandatory minimum sentence, § 28-319.01(2). A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

1. Constitutional Framework

[6] We have held that the proper procedure for raising a facial constitutional challenge to a criminal statute is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. *Stone, supra*. Hibler filed a motion to quash that alleged that § 28-319.01(2) violates his "constitutional rights under the Fifth, Fourteenth and Eighth Amendment[s] to the United States Constitution and the correlative provisions of the Nebraska Constitution." His motion was overruled.

2. Constitutional Challenge: Equal Protection

Hibler argues that § 28-319.01 is unconstitutional on its face because its violation imposes a substantially harsher sentence than a violation of other first degree sexual assault statutes solely based on the ages of the victim and the offender. Our analysis of this age classification focuses on the propriety of the age of the victim because that analysis is dispositive of Hibler's claim.

Section 28-319.01 provides:

> (1) A person commits sexual assault of a child in the first degree:
>
> (a) When he or she subjects another person under twelve years of age to sexual penetration and the actor is at least nineteen years of age or older; or
>
> (b) When he or she subjects another person who is at least twelve years of age but less than sixteen years of age to sexual penetration and the actor is twenty-five years of age or older.
>
> (2) Sexual assault of a child in the first degree is a Class IB felony with a mandatory minimum sentence of fifteen years in prison for the first offense.

Hibler's primary constitutional challenge to § 28-319.01 is that its age classifications violate the Equal Protection Clause of the 14th Amendment and article I, § 3, of the Nebraska Constitution. Hibler maintains that the ages provided in § 28-319.01(1)(a) are arbitrary and not supported by a plausible policy reason or rational basis.

[7] Although Hibler addresses other provisions of § 28-319.01 containing age classifications, we consider only his challenge to § 28-319.01(1)(a), and in particular, the age of the victim, because he has standing to challenge only the statute that was relevant to the prosecution of his case. Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence

of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

[8,9] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. *Lingenfelter v. Lower Elkhorn NRD*, 294 Neb. 46, 881 N.W.2d 892 (2016). The Equal Protection Clause requires the government to treat similarly situated people alike. *Lingenfelter, supra.* It does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Id*.

In support of his equal protection challenge, Hibler refers us to other sexual assault statutes. However, he identifies no other sexual assault statute where the victim is under 12 years of age. Thus, for example, Hibler compares first degree sexual assault of a child under § 28-319.01 to first degree sexual assault under § 28-319(1)(c), the latter of which does not carry a mandatory minimum sentence. But because first degree sexual assault under § 28-319(1)(c) is defined in part as subjecting a victim to sexual penetration when the victim is at least 12 years of age but less than 16 years of age, a violation of § 28-319(1)(c) is simply a different crime from the one of which Hibler stands convicted. Hibler's reference to other statutes does not inform our analysis.

[10-12] If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny. *Lingenfelter, supra*. A suspect class is one that has been saddled with such disabilities or subjected to such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process. *Id*. Hibler does not contend he is a member of a suspect class. The classifications Hibler challenges are based on age, and age itself is not a suspect classification for equal protection purposes. See *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005).

[13] When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize

because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *Lingenfelter, supra*.

[14,15] Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification. *Id*. Under this most relaxed and tolerant form of judicial scrutiny of equal protection claims, the Equal Protection Clause is satisfied as long as (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Lingenfelter, supra.*

With these three considerations in mind, we review the legislative history of § 28-319.01. The legislative history shows that the bill's sponsor was concerned about the lasting harm to victims of sexual assault in situations where the victim is very young. The introducing senator testified before the Committee on Judiciary that

> [i]n 2005, of the 97 people in prison for first-degree sexual assault, 23 of them had assaulted a child under the age of 12. Nine years is the average length of their incarceration. By creating the new offenses, we are able to enhance the penalties for the most heinous crimes.

Judiciary Committee Hearing, L.B. 1199, 99th Leg., 2d Sess. 2-3 (Feb. 16, 2006). Another senator speaking during the floor debate stated that "[i]f you offend against a child, it should put you in a secure environment, away from the rest of your community, for a very long time, and that is the part of the reform that makes sense." Floor Debate, L.B. 1199, Judiciary Committee, 99th Leg., 2d Sess. 11590 (Mar. 27, 2006). It is reasonable to conclude that harsher punishments for those who commit first degree sexual assault against young children would further the policy and goal of protecting a

vulnerable group by preventing convicted perpetrators from reoffending.

In 2009, the Legislature amended § 28-319.01 to add a provision that an individual over the age of 25 who subjected a person at least 12 years of age but less than 16 years of age to sexual penetration was guilty of first degree sexual assault of a child and subject to a mandatory minimum sentence. See § 28-319.01(1)(b). Although this amendment did not affect Hibler, whose victim was under age 12, we note that statements by legislators again demonstrated, inter alia, a concern to protect young people under age 16. See Judiciary Committee Hearing, L.B. 15, 101st Leg., 1st Sess. 3 (Mar. 11, 2009).

[16] Although the age-based classifications defining first degree sexual assault of a child could have been drawn differently, the Legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts. *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985). Our review of the legislative history shows that the age classifications to which Hibler is subject in § 28-319.01(1)(a) are rationally related to plausible policy reasons considered by lawmakers and that the relationship of the classifications to their goals is not so attenuated as to render the distinction arbitrary or irrational. Hibler has not carried his burden to eliminate any reasonably conceivable state of facts that could provide a rational basis for the age classification in § 28-319.01(1)(a) and its logically associated mandatory minimum sentence in § 28-319.01(2). See *Lingenfelter v. Lower Elkhorn NRD*, 294 Neb. 46, 881 N.W.2d 892 (2016).

3. Constitutional Challenges: Due Process and Cruel and Unusual Punishment

Although Hibler frames his constitutional challenge as a violation of equal protection, his motion to quash cites other constitutional provisions, and for completeness, we briefly

comment on them. Hibler's motion to quash asserted that § 28-319.01 violates the Due Process Clause of the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution, as well as the Cruel and Unusual Punishment Clause of the 8th Amendment to the U.S. Constitution, as incorporated and applied to the states through the 14th Amendment. See *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). We find these challenges to be without merit.

[17] As the legislative history showed, based on the policy, goals, and facts evinced therein, the Legislature required more severe punishments for first degree sexual assault of a young child, because it concluded it was a more serious crime. As noted above, the Legislature is empowered to define crimes, and in fixing their punishments, it need not select the least severe penalties. *Stratton, supra*. With regard to the mandatory minimum sentence, it is well settled that the guarantees of due process and equal protection, as well as the prohibition against cruel and unusual punishment, do not require individual sentencing in noncapital cases. See, e.g., *State v. Ferman-Velasco*, 333 Or. 422, 41 P.3d 404 (2002); *Campbell v. State*, 268 Ga. 44, 485 S.E.2d 185 (1997); *People v Hall*, 396 Mich. 650, 242 N.W.2d 377 (1976).

It is not unconstitutional to prescribe a more severe punishment for a defendant who perpetrates sexual assault against a child under the age of 12. The age classifications in § 28-319.01(1)(a) and the associated mandatory minimum sentence in § 28-319.01(2) are not unconstitutional.

4. Evidentiary Rulings

We next consider Hibler's assignments of error regarding evidentiary rulings made by the district court.

(a) A.H.'s Military Discharge, Previous Employment as an Exotic Dancer, and Mental Health History

Hibler claims that the district court abused its discretion when it sustained the State's motion in limine which prevented

Hibler from questioning A.H. about the facts of her life, including her other than honorable discharge from the military, mental health history, substance abuse, and previous employment as an exotic dancer. The district court found this line of questioning was not relevant and lacked any probative value. Hibler argues that cross-examination of A.H. on these matters was relevant, because it would have revealed that she was an unfit parent. He contends that her testimony would have strengthened his defense theory that she desired to win sole custody of their children in a future divorce proceeding by planting the sexual assault story in J.H.'s mind.

The personal issues excluded by the district court were not relevant to A.H.'s testimony about Hibler's confession, nor did the ruling hinder Hibler's defense. Hibler called A.H.'s credibility into question at trial and was able to pursue his defense by questioning her about the movie she watched with J.H., featuring a child struggling to report a sexual assault; about the "curious tim[ing]" of her filing for divorce just before she alleged Hibler confessed the sexual assaults; and about other parts of her life that he felt made him a stronger candidate for sole custody of their children. Hibler has not shown that the district court abused its discretion when it sustained the State's motion in limine regarding cross-examination of A.H.

(b) Text Messages From A.H.

Hibler claims the district court erred when it sustained the State's objection to exhibit 29 on the basis of hearsay and unfair prejudice. Exhibit 29 contained copies of text messages between A.H. and Hibler dated May 8, 2016. The data included a string of messages between A.H. and Hibler which were exchanged approximately 10 days after Hibler had allegedly admitted his conduct with J.H. Hibler contends that because the messages failed to refer to a confession, the messages are inconsistent with A.H.'s testimony that Hibler had previously confessed. Hibler asserts that the messages or portions thereof should have been admissible as impeachment of A.H. We reject Hibler's argument.

Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 2016). Hearsay is not admissible unless a specific exception to the hearsay rule applies. Neb. Rev. Stat. § 27-802 (Reissue 2016).

[18,19] Hibler argues that the statements were not offered for the truth of the matters asserted but instead were properly proffered to attack the credibility of A.H. by showing an inconsistency between her testimony at trial and her text messages. As a general rule, a witness makes an inconsistent or contradictory statement if the witness refuses to either deny or affirm that he or she made the prior statement, or if the witness answers that he or she does not remember whether he or she made the prior statement. *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015). We have indicated that prior extrajudicial statements of a witness may be received into evidence for the limited purpose of assisting the jury in ascertaining the credibility of the witness, but unless they are otherwise admissible, they may not be considered as substantive evidence of the facts declared in the statements. See *id*.

In sustaining the State's objection based on hearsay, the district court stated it did not see anything in A.H.'s responses that would be appropriate for impeachment purposes and, in addition, found them to be more prejudicial than probative. We have reviewed the record, and it shows that the messages were not inconsistent with A.H.'s trial testimony. Some of the messages in question from A.H. to Hibler include: "Just [t]ell the truth"; "Stop trying to save your own skin"; "Trust is earned but not by lies and secrets"; "You did this, you made the choices"; and "Stop playing the victim and tell the truth." Contrary to Hibler's characterization, the messages did not serve to impeach or rebut A.H.'s testimony regarding Hibler's purported admission. The messages are hearsay, and the trial court did not err when it sustained the State's hearsay exception to exhibit 29 and excluded the text messages in their entirety.

(c) Diary of J.H.

Hibler claims that the district court erred when, following cross-examination of J.H., it admitted certain of J.H.'s diary entries written before she disclosed the alleged abuse at a child advocacy center interview. The district court reasoned that the diary entries were admissible to rebut a charge of recent fabrication. Hibler contends that because he did not charge J.H. with recent fabrication or improper influence or motive, the diary entries were hearsay and not within an exception to the hearsay rule. We reject this assignment of error.

As discussed above, hearsay is not admissible unless a specific exception to the hearsay rule applies. See § 27-802. However, statements are not hearsay if they are consistent with the declarant's testimony and are offered to rebut an express or implied charge against the declarant of recent fabrication, improper influence, or improper motive under § 27-801(4)(a)(ii).

[20] Here, Hibler contends that although he sought to impeach J.H.'s testimony by attacking her credibility, such approach did not rise to an implied or express charge of recent fabrication. We have recognized that it is sometimes difficult to determine whether a question attempts impeachment or rises to the level of a charge of recent fabrication and that it is not an abuse of discretion to allow the question where the impeachment is susceptible to either interpretation. See *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). Here, the district court believed there had been an express or implied charge of recent fabrication, improper influence or motive, such that some of the statements as redacted were admissible hearsay. We do not find this determination to be an abuse of discretion.

[21] We have reviewed the record and are mindful of the dates attributed to the diary entries vis-a-vis Hibler's theory of events. We permit a declarant's consistent out-of-court statements to rebut a charge of recent fabrication, improper influence, or improper motive when those statements were made before the charge of recent fabrication, improper influence,

or improper motive. See *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). Hibler's defense at trial was generally that A.H. had suggested the sexual abuse claim to J.H. as a story J.H. would tell to her friends to gain attention. The entries from J.H.'s diary located on her tablet computer pertained to her state of mind regarding her approach to disclosing the alleged abuse to people around her. They were made before A.H.'s alleged suggestions. The diary rebutted Hibler's argument that J.H.'s report of sexual assault was recently fabricated.

The trial court did not abuse its discretion when it admitted portions of J.H.'s diary to rebut an express or implied charge of recent fabrication. See § 27-801(4)(a)(ii).

5. Sufficiency of the Evidence

Hibler claims the evidence was not sufficient at trial to prove that he committed sexual assault of a child in the first degree or incest with a person under 18 years of age. Penetration is an element of the offense of sexual assault of a child in the first degree and incest. §§ 28-319.01 and 28-703. Hibler notes that J.H. did not explicitly state that Hibler's fingers or hand "penetrated" her labia or vagina. However, taken in the light most favorable to the State, the evidence is sufficient to establish that penetration, as understood in the law, occurred.

[22] We have stated that the slightest intrusion into the genital opening is sufficient to constitute penetration, and such element may be proved by either direct or circumstantial evidence. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient. *Id.*

J.H. did not use the word "penetration" when she testified at trial, but described acts by Hibler in detail sufficient to show penetration had occurred. J.H.'s testimony was consistent with the more anatomically informed testimony of A.H. summarizing J.H.'s reports of the sexual assaults. We have refused to require that a youthful victim testify about sexual acts "in vocabulary used by a gynecologist." *State v. Hirsch*,

245 Neb. 31, 47, 511 N.W.2d 69, 80 (1994). A rational jury could conclude that Hibler's actions described above in our statement of facts section were sufficient to prove penetration. The evidence was sufficient to support the conviction for first degree sexual assault of a child and incest with a person under 18 years of age.

6. Ineffective Assistance of Counsel

[23,24] Hibler claims that his trial counsel provided ineffective assistance in several respects. He is represented on direct appeal by different counsel from the counsel who represented him during trial. 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 in a subsequent postconviction proceeding. *State v. Golyar*, 301 Neb. 488, 919 N.W.2d 133 (2018). An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. *Id*.

[25,26] On direct appeal, allegations of how the defendant was prejudiced by trial counsel's allegedly deficient conduct are unnecessary in our determination of whether the trial record supports the assigned error. *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014), citing *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Golyar, supra*. The determining factor is whether the record is sufficient to adequately review the question. *Id*.

Hibler alleges, restated and consolidated, that his trial counsel was ineffective in the following ways:

(1) failing to object to the testimony of J.H.'s friend regarding what J.H. told her when they met at the school playground;

(2) failing to impeach and cross-examine three members of law enforcement, A.H., and J.H. regarding differences in trial testimony concerning the processing of J.H.'s tablet computer and the testimony of some of the law enforcement officers in their depositions and a police report;

(3) failing to subpoena or move to compel the State to turn over a Cellebrite report generated during data extraction of the tablet computer;

(4) failing to engage an independent forensic computer examiner to review the reports and data extractions performed on the tablet computer;

(5) failing to mount a foundational challenge to the diary entries based on a broken chain of custody of the tablet computer, because officers gave conflicting deposition testimony concerning the tablet;

(6) failing to move for a continuance when the State produced an approximately 18,000-page Cellebrite report containing the contents of A.H.'s cell phone on the first day of trial;

(7) failing to investigate or obtain bank records or cross-examine A.H. on her removal of $2,300 from a joint account with Hibler just prior to the time A.H. testified that Hibler made confessions to her;

(8) failing to cross-examine A.H. and J.H. and present evidence of the family's account with a media service provider concerning the movie they testified to watching in March 2016 that would show they watched a movie about child sexual assault prior to J.H.'s disclosure to her friends;

(9) failing to introduce evidence of an episode of a television show concerning victims of crimes which the family had watched and, instead of introducing this evidence or cross-examining J.H., only asking J.H. if it was one of her favorite shows, to which she responded, "No";

(10) failing to cross-examine A.H. or investigate the facts that the purple underwear which tied on the sides and was

entered as an exhibit was clothing A.H. wore as an exotic dancer, that it was stored in a suitcase in a storage room, and that A.H. would have noticed if Hibler had searched through the suitcase and brought out the underwear;

(11) failing to cross-examine A.H. and present evidence that A.H. was discharged from military service because she lied about her mental health diagnosis on her enlistment forms;

(12) failing to investigate the online relationship A.H. had with a man she described as living in Hawaii, where such investigation would have revealed the relationship was significant and ongoing;

(13) failing to investigate or adequately cross-examine A.H. concerning previous efforts to take custody of their children from Hibler;

(14) failing to investigate and present evidence that J.H. made a false allegation against A.H.'s uncle in Arizona;

(15) failing to thoroughly investigate or cross-examine witnesses concerning the fact that the father of one of J.H.'s friends to whom she disclosed the abuse at the playground said the disclosure happened in March, not February, which information was revealed in the Cellebrite report provided to Hibler on the first day of trial;

(16) failing to subpoena or otherwise obtain records from the Ronald McDonald House in Kansas City, Missouri, which would have demonstrated the sexual assaults could not have occurred as J.H. testified, because A.H. was not in Kansas City at the times asserted by A.H. and J.H. at trial;

(17) failing to subpoena or investigate witnesses and failing to cross-examine Hibler's father when he testified at trial concerning the fact that Hibler almost never drank alcohol;

(18) failing to examine two law enforcement officers regarding the police report that was generated after J.H.'s deposition in which she testified that the tablet computer had been returned to her possession and that she agreed not to do anything with it until the completion of the trial;

(19) failing to recall A.H. and J.H. during trial to rebut the State's case on matters discussed above;

(20) representing to the jury during closing arguments that Hibler might have committed some of the alleged acts even though Hibler specifically told trial counsel he did not engage in any sexual touching of J.H.;

(21) advising Hibler not to testify when Hibler informed trial counsel he did not engage in any sexual touching of J.H.;

(22) failing to cross-examine any of the police officers who testified as to the reasons for the delay of at least 1 year of the interviews of the children who were present at the playground where J.H. initially disclosed the sexual assaults;

(23) failing to cross-examine J.H.'s friend and the principal regarding who walked J.H. back to her classroom following her interview with the principal and teacher where police reports contradict the principal's testimony concerning who J.H. interacted with in the minutes following the interview; and

(24) failing to subpoena witnesses from the school who would have testified that J.H. had been caught lying to school officials about unrelated matters in the time prior to her allegations against Hibler.

We have reviewed the record and have determined that the record on appeal is sufficient to review and reject claims Nos. 1, 11, 19, and 20 on direct appeal. The remaining claims of ineffectiveness of trial counsel cannot be resolved on direct appeal because they implicate matters outside the record, such as information known or not known to trial counsel and conversations between Hibler and trial counsel.

In ineffectiveness claim No. 1, Hibler asserts that his trial counsel should have objected to testimony by one of J.H.'s friends to the effect that J.H. disclosed to her and some other friends at the school playground that someone in her family was touching her inappropriately. He contends that such objection would have been sustained and that if the testimony had been excluded, it would have resulted in a reasonable probability of a different outcome in his case. We do not agree. J.H. had already testified that she told her friends at school what was happening. Hibler was not prejudiced by any failure of his trial counsel to object to this cumulative testimony.

In ineffectiveness claim No. 11, Hibler asserts his counsel was ineffective for failing to cross-examine A.H. and present evidence that A.H. was discharged from military service because she lied about her mental health diagnosis on her enlistment forms. The record refutes this claim. During the foundational examination of A.H., the district court heard testimony from A.H. that she did not tell the military about her mental health history and that she later informed the military about it to get discharged. After hearing the testimony, the district court ruled the information was inadmissible. Hibler's trial counsel was not ineffective for refraining from examining A.H. regarding her mental health and the military where the district court had ruled such evidence was inadmissible.

In ineffectiveness claim No. 19, Hibler asserts his trial counsel was deficient for not recalling A.H. and J.H. to testify during trial to rebut the State's case. He does not offer what he believes the testimony of A.H. and J.H. would have been and why it was deficient to not recall them. This claim has not been stated with sufficient particularity.

In ineffectiveness claim No. 20, Hibler asserts that his trial counsel represented to the jury that Hibler might have committed some of the alleged acts even though Hibler had told his counsel that he did not engage in any sexual touching of J.H. Hibler does not direct us to any examples of trial counsel's purportedly making "admissions" on Hibler's behalf, and we find none. This claim is refuted by the record.

VI. CONCLUSION

For the reasons stated above, in this direct appeal from a jury trial, we reject Hibler's facial state and federal constitutional challenges to the age classifications defining first degree sexual assault of a child and the corresponding mandatory sentence in § 28-319.01(1)(a) and (2). We conclude that the district court did not abuse its discretion with regard to the evidentiary rulings challenged by Hibler. The evidence at trial was sufficient to establish the element of sexual penetration to support Hibler's convictions for sexual assault of a child in

the first degree and incest with a person under 18 years of age. See §§ 28-319.01 and 28-703. Finally, the record is insufficient to resolve the majority of Hibler's claims of ineffectiveness of trial counsel on direct appeal. However, we review and reject certain of these claims as described above. We affirm Hibler's convictions and sentences for first degree sexual assault of a child, incest with a person under 18 years of age, and third degree sexual assault of a child.

Affirmed.

Stacy, J., concurring.

I agree with the majority's analysis and holding, including its careful application of rational basis scrutiny to analyze the equal protection challenge presented here. I write separately to emphasize something the majority opinion does not do: apply a threshold "similarly situated" test.

That is significant, because many of our prior opinions describe a threshold showing that a litigant must satisfy before a court will engage in constitutional scrutiny of an equal protection claim.[1] As recently as 2015, we described the threshold showing this way:

> The initial inquiry in an equal protection analysis is whether the challenger is similarly situated to another group for the purpose of the challenged government action. Absent this threshold showing, there is not a

[1] See, *State v. Loyuk*, 289 Neb. 967, 857 N.W.2d 833 (2015); *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013); *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009); *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009); *Henly v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006); *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006), *disapproved in part on other grounds, In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001); *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998); *Gramercy Hill Enters. v. State*, 255 Neb. 717, 587 N.W.2d 378 (1998); *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998); *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996).

> viable equal protection claim. In other words, dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.[2]

This court first applied the threshold "similarly situated" test in the 1996 case of *State v. Atkins*.[3] There, this court was considering whether the Equal Protection Clause was violated by the different statutory methods used to calculate good time for inmates housed in state prisons[4] as compared to those housed in county jails.[5] This court began its analysis by reciting a principle recognized by the U.S. Supreme Court: "As a general matter, the Equal Protection Clause requires the government to treat similarly situated people alike."[6] We then adopted a new principle articulated by the U.S. Eighth Circuit Court of Appeals in *Klinger v. Department of Corrections*[7]: "[T]he dissimilar treatment of dissimilarly situated persons does not violate equal protection rights."[8] We also adopted the threshold test applied by the majority in *Klinger* and announced:

> [T]he initial inquiry in an equal protection analysis focuses on whether one has demonstrated that one was treated differently than others similarly situated. Absent this threshold showing, one lacks a viable equal protection claim. . . .
>
> If one can make this threshold showing, the inquiry then shifts to whether the legislation at issue can survive judicial scrutiny.[9]

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[2] *Loyuk, supra* note 1, 289 Neb. at 978, 857 N.W.2d at 844.

[3] *Atkins, supra* note 1.

[4] See Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 2018).

[5] See Neb. Rev. Stat. § 47-502 (Reissue 2010).

[6] *Atkins, supra* note 1, 250 Neb. at 320, 549 N.W.2d at 163, citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

[7] *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994).

[8] *Atkins, supra* note 1, 250 Neb. at 320, 549 N.W.2d at 163.

[9] *Id*. at 320-21, 549 N.W.2d at 163 (citation omitted).

In *Atkins*, we concluded it was unnecessary to reach the merits of the equal protection claim because we determined, as a threshold matter, that inmates in state prisons were not similarly situated to inmates in county jails.

Although the adoption in *Klinger* of a threshold similarly situated test has been criticized by judges[10] and commentators[11] as undercutting meaningful equal protection analysis, this court has continued to apply the test to equal protection claims in a variety of contexts.[12] In many of those cases, we found the threshold "similarly situated" showing was not met, and denied the equal protection claim without reaching the merits or engaging in constitutional analysis.[13] In doing so, our application of the threshold "similarly situated" test effectively foreclosed meaningful equal protection review altogether by relying on nothing more than factual differences between two groups. This is not to suggest that factual differences are irrelevant to the equal protection analysis, but as the U.S. Supreme Court's holding in *Cleburne v. Cleburne Living*

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[10] See, e.g., *Women Prisoners of D.C. Correct. v. D.C.*, 93 F.3d 910 (D.C. Cir. 1996) (Rogers, Circuit Judge, concurring in part, and in part dissenting); *Klinger, supra* note 7 (McMillian, Circuit Judge, dissenting); *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) ("[i]n considering whether two classes are similarly situated, a court cannot simply look at the trait used by the legislature to define a classification under a statute and conclude a person without that trait is not similarly situated to persons with the trait").

[11] See, Angie Baker, Note, *Leapfrogging over Equal Protection Analysis: The Eighth Circuit Sanctions Separate and Unequal Facilities for Males and Females in* Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994), 76 Neb. L. Rev. 371 (1997); Giovanna Shay, *Similarly Situated*, 18 Geo. Mason L. Rev. 581 (2011).

[12] See cases cited *supra* note 1.

[13] See, e.g., *In re Interest of Phoenix L., supra* note 1 (parents of Indian children not similarly situated to parents of non-Indian children); *Benitez, supra* note 1 (those with unsubstantiated reports of child abuse not similarly situated to those with court-substantiated reports of child abuse); *Gramercy Hill Enters., supra* note 1 (two nursing homes not similarly situated); *Atkins, supra* note 1 (county jail inmates and state prison inmates not similarly situated).

Center, Inc.[14] illustrates, the mere fact that two groups are different from one another does not mean the State can show a rational basis for treating them differently under the law.

The legal conclusion that two groups are not "similarly situated" is not one courts should be making as a threshold matter, as doing so serves only to insulate the challenged classification from any meaningful equal protection review. If two groups are not similarly situated, the proper constitutional analysis will bear that out. The majority opinion illustrates this point.

After reciting the overarching principle that "[t]he Equal Protection Clause requires the government to treat similarly situated people alike" the majority proceeds to analyze the equal protection claim by applying rational basis scrutiny to the age-based classification being challenged here. Only after completing this analysis does the majority conclude that Hibler's equal protection claim lacks merit.

A threshold "similarly situated" inquiry is a poor substitute for careful judicial scrutiny of the fit between the State's interest and the challenged classification. I would like to see this court expressly disapprove of our prior cases that have recognized a threshold "similarly situated" inquiry in equal protection cases. But I am encouraged by the fact that the majority opinion neither cites to nor endorses a threshold "similarly situated" test, and I therefore concur in all respects.

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[14] *Cleburne, supra* note 6.

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

In re Estate of Mark Anthony Helms, deceased. Christopher Helms, Personal Representative of the Estate of Mark Anthony Helms, deceased, appellant, v. Gregory L. Turek et al., appellees.

923 N.W.2d 423

Filed March 1, 2019. No. S-18-283.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Issue Preclusion: Appeal and Error.** The applicability of issue preclusion is a question of law. On a question of law, an appellate court reaches a conclusion independent of the court below.
4. **Judgments: Issue Preclusion.** Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
5. **Decedents' Estates: Venue.** Under Neb. Rev. Stat. § 30-2410(a) (Reissue 2016), venue for probate is proper in the county where the decedent was domiciled or, if the decedent was not domiciled in Nebraska, in any county where property of the decedent was located at the time of his or her death.

Appeal from the County Court for Butler County: C. Jo Petersen, Judge. Affirmed.

Lindsay E. Pedersen and Katherine R. Hall for appellant.

Gregory M. Neuhaus and Joseph D. Neuhaus, of Neuhaus Law Offices, for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

Decades after the tragic death of Mark Anthony Helms in a terrorist bombing, his estate obtained a federal court wrongful death judgment determining that Helms had been domiciled in North Carolina and that damages would be shared according to that state's law. After funds were collected on that judgment, his estate applied to the county court for Butler County, Nebraska, to distribute them instead under a Nebraska wrongful death statute.[1] The county court entered summary judgment, declaring that the proceeds were to be distributed equally to Helms' parents—being his heirs "as existed at the time of his death." We conclude that because of the binding effect of the federal court judgment, the Nebraska wrongful death statute does not apply and the county court properly ordered distribution pursuant to the federal court judgment applying North Carolina law. We affirm the court's entry of summary judgment.

BACKGROUND

Wrongful Death and Judgment

On October 23, 1983, the Islamic Republic of Iran bombed a U.S. Marine barracks in Beirut, Lebanon. The bombing killed 241 American servicemen, including Helms. Helms, who died intestate, was survived by his parents and two siblings.

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[1] Neb. Rev. Stat. § 30-810 (Reissue 2016).

In 1996, an amendment[2] to the Foreign Sovereign Immunities Act of 1976[3] allowed victims of state-sponsored terrorism to bring claims against foreign sovereigns that would otherwise be immune from civil litigation. In 2001, a claim for the wrongful death of Helms and other servicemen was brought in a case filed in the U.S. District Court for the District of Columbia. The federal court's subsequent memorandum opinion does not name Helms' personal representative, but recites that his estate was a party to the wrongful death action in federal court. At no time did a personal representative of Helms file an action for wrongful death in Nebraska.

In 2007, the U.S. District Court for the District of Columbia rendered judgment against the Islamic Republic of Iran.[4] According to the court's opinion, of the 128 deceased servicemen whose personal representatives and estates brought wrongful death claims, 123 were domiciled in North Carolina and none were domiciled in Nebraska.

The federal court's opinion specifically stated: "[E]ach of the deceased servicemen has made out a valid claim for wrongful death under North Carolina law. Accordingly, those valid heirs and beneficiaries under North Carolina's intestate statute are entitled to share in the recovery of the damages awarded as a result of each serviceman's untimely death."[5] The court allocated $1,028,509 of the judgment to the wrongful death claim brought by the personal representative of Helms' estate. Helms' mother died approximately 5 months prior to the entry of this judgment.

In 2010, assets belonging to Iran that had been frozen by the U.S. government were discovered. A federal court allowed access to the assets, a decision which the U.S. Supreme Court

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[2] See Pub. L. No. 104-132, § 221(a), 110 Stat. 1241.

[3] 28 U.S.C. § 1602 et seq. (2012 & Supp. IV 2016).

[4] *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007).

[5] *Id.* at 40.

later affirmed.[6] In 2016, distribution of the assets commenced. The amount paid to the estate, after payment of attorney fees and expenses, amounted to $222,925.77. The disbursement check was drawn as follows:

> **PAY TO THE ORDER OF:**
> ESTATE OF MARK A HELMS
> CHRISTOPHER T HELMS, PERSONAL REPRESENTATIVE

Petition for Distribution

On March 30, 2017, the successor personal representative of the estate filed in an existing probate case in the county court for Butler County a petition to authorize distribution of the judgment proceeds under § 30-810. The petition alleged that Helms was domiciled in Butler County at the time of his death and that his next of kin were his parents and siblings.

According to the petition, Helms' mother left any interest in the wrongful death claim to her spouse. Her spouse died in 2012, leaving all of his assets to his children, Gregory L. Turek, Pamela Joekel, and Deborah Michel (collectively the interested parties). The petition requested that the court hold a hearing and determine under § 30-810 the amount of the judgment proceeds that should be distributed to each next of kin who sustained damages.

Summary Judgment

The interested parties moved for summary judgment, and the county court sustained the motion. The court found "there exists no genuine issue as to any material fact regarding to whom said proceeds are to be distributed, that being the heirs of . . . Helms as existed at the time of his death, which by law are his parents equally." The court ordered that the personal representative of the estate distribute one-half of the wrongful death proceeds to the estate of Helms' mother and one-half to Helms' father.

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[6] *Bank Markazi v. Peterson*, 578 U.S. 212, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

The estate filed a timely appeal, which we moved to our docket.[7]

ASSIGNMENTS OF ERROR

The estate assigns eight errors, which we consolidate and restate to three: The court erred in (1) granting the interested parties' motion for summary judgment relating to the distribution of wrongful death proceeds, (2) failing to comply with the provisions of § 30-810, and (3) finding that the wrongful death proceeds are to be distributed to Helms' heirs as existed at the time of his death.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[8] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[9]

[3] The applicability of issue preclusion is a question of law. On a question of law, an appellate court reaches a conclusion independent of the court below.[10]

ANALYSIS

The crux of the estate's appeal is its contention that § 30-810 applies to the distribution of the federal court wrongful death judgment. Section 30-810 provides that "[t]he avails [of a

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[7] Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[8] *In re Estate of Fuchs*, 297 Neb. 667, 900 N.W.2d 896 (2017).

[9] *Id.*

[10] See *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

wrongful death verdict or judgment] shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons." This statute further requires that the court distribute any such proceeds "to the persons entitled thereto after a hearing thereon . . . ."[11] However, we agree with the interested parties that § 30-810 has no application in the situation before us.

The estate's argument based on § 30-810 fails, because we are not presented with a Nebraska wrongful death claim. No wrongful death action was brought and no judgment has been recovered pursuant to that statute for that death. The wrongful death judgment proceeds that the estate seeks to distribute were awarded in an action brought in the U.S. District Court for the District of Columbia under the wrongful death and intestate succession laws of North Carolina.[12]

[4] In distributing the proceeds of the federal court wrongful death action, the estate is barred from now asserting that Nebraska was Helms' domicile at the time of his death. The federal court case determined that North Carolina was Helms' domicile. Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[13] Here, all of those elements are satisfied. Helms' domicile in North Carolina and his wrongful death pursuant to North Carolina law were decided in the federal court case,[14] and that action resulted in a final judgment on the merits. Counsel for the

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[11] § 30-810.

[12] See *Peterson v. Islamic Republic of Iran, supra* note 4.

[13] *In re Interest of Noah B. et al., supra* note 10.

[14] See *Peterson v. Islamic Republic of Iran, supra* note 4.

estate conceded at oral arguments that Helms' personal representative was a party in the federal court case, which implicitly concedes that Helms' successor personal representative here is in privity with that party. Finally, there was an opportunity to fully and fairly litigate Helms' domicile in the prior action. Thus, the estate is bound by the federal court's determination that North Carolina was Helms' domicile.

It necessarily follows that the distribution of the wrongful death proceeds is governed by North Carolina law. Under that state's wrongful death statute,[15] any amount recovered is applied to certain expenses and attorney fees and is then distributed "as provided in the [North Carolina] Intestate Succession Act." North Carolina's Intestate Succession Act,[16] in turn, states that "[i]f the intestate [decedent] is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by both parents, they shall take in equal shares, or if either parent is dead, the surviving parent shall take the entire share[.]"[17] And the persons who, under that Intestate Succession Act, are entitled to recovery in a wrongful death action are to be determined as of the time of the decedent's death.[18] Because Helms was survived by his parents at the time of his death, North Carolina law dictates that they share equally in any wrongful death proceeds.

[5] The estate argues that because a probate case has been pending in Nebraska since 2001, "Helms must have been domiciled in Nebraska at the time of his death."[19] But that premise is flawed. Under Nebraska law, venue for probate is proper in the county where the decedent was domiciled or, if the decedent was not domiciled in Nebraska, in any county

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[15] N.C. Gen. Stat. § 28A-18-2(a) (2007).

[16] N.C. Gen. Stat. §§ 29-1 through 29-30 (2007).

[17] § 29-15(3).

[18] *Bank v. Hackney*, 266 N.C. 17, 145 S.E.2d 352 (1965).

[19] Reply brief for appellant at 3.

where property of the decedent was located at the time of his or her death.[20] Thus, commencement of a probate case in Nebraska did not, in and of itself, preclude Helms from having been domiciled in North Carolina.

The estate instead may be implicitly arguing that the Nebraska probate case was commenced on the basis that Helms was domiciled in Nebraska. Assuming without deciding that the earlier pleadings in the probate case are properly before us and that these pleadings asserted that Helms was domiciled in Nebraska, any such allegation was immaterial here. Regarding distribution of proceeds of the federal court wrongful death judgment, the estate is collaterally estopped from asserting that Helms' domicile is anywhere other than North Carolina. Likewise, the federal court judgment precludes the estate from distributing the proceeds other than in accordance with that judgment.

The county court properly entered summary judgment, because there is no genuine issue of material fact in this case. We agree with the court that the proper distribution of the proceeds is one-half to Helms' father and one-half to the estate of Helms' mother.

CONCLUSION

Because there is no genuine issue of material fact as to whom the wrongful death judgment proceeds should be distributed, we affirm the county court's entry of summary judgment.

Affirmed.

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[20] Neb. Rev. Stat. § 30-2410(a) (Reissue 2016).

Nebraska Supreme Court
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In re Interest of Maximus B., a child under 18 years of age. State of Nebraska, appellant, v. Maximus B., appellee.

923 N.W.2d 387

Filed March 1, 2019. No. S-18-410.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which 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.
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. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), 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.
4. **Juvenile Courts: Final Orders: 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. It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.
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 substantial right of the State in a juvenile proceeding is derived from its parens patriae interest, and the State has a right to protect the welfare of its resident children.

Appeal from the Separate Juvenile Court of Douglas County: Douglas F. Johnson, Judge. Appeal dismissed.

Donald W. Kleine, Douglas County Attorney, Elizabeth McClelland, Mark P. Hanna, and Joseph Fabian, Senior Certified Law Student, for appellant.

No appearance for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

The State of Nebraska appeals the order of the separate juvenile court of Douglas County which vacated a previous adjudication order based on acceptance of a "plea of no contest" to allegations made by the State against Maximus B. in an amended petition filed under Neb. Rev. Stat. § 43-247 (Reissue 2016). Specifically, the juvenile court determined that a "plea of no contest" is not a permitted answer under Neb. Rev. Stat. § 43-279 (Reissue 2016), where the petition alleges that the child is a juvenile violator under § 43-247. We conclude that the juvenile court's order which vacated its previous order of adjudication and set the matter for further proceedings was not a final order appealable by the State, and we therefore dismiss this appeal for lack of jurisdiction.

STATEMENT OF FACTS

On October 6, 2017, the State filed a petition in the juvenile court alleging that Maximus, born in August 2002, was within § 43-247, because in May, he had committed sexual assault in the first degree, a Class II felony under Neb. Rev.

Stat. § 28-319(1)(a) (Reissue 2016). On November 1, Maximus appeared in court and entered a denial to the allegations in the State's petition. On November 16, the juvenile court filed a pretrial order in which it, inter alia, set a date for an adjudication hearing.

On January 25, 2018, the date the juvenile court had set for adjudication, the State filed an amended petition in which it alleged that Maximus was a juvenile violator under § 43-247, because in May 2017, he had committed the offense of disturbing the peace, a Class III misdemeanor under Neb. Rev. Stat. § 28-1322 (Reissue 2016). Maximus and his parents appeared before the juvenile court. It should be noted that the juvenile court judge who presided at the January 25 adjudication was not the same judge who had presided at Maximus' first appearance at which a pretrial order had been filed and who subsequently vacated the adjudication order.

At the adjudication hearing, Maximus stated that he wished to enter a "plea of no contest" to the allegations in the amended petition. After questioning Maximus and his parents and after determining that the State had presented a sufficient factual basis, the juvenile court accepted Maximus' "plea of no contest" and found him to be under its jurisdiction. The court set a date for a disposition hearing. The court filed an order that same day setting forth its findings and orders.

The disposition hearing was held on March 22, 2018. The juvenile court heard arguments regarding disposition and took the matter under advisement. On March 27, the juvenile court filed an order in which it stated that it had reviewed the case procedural history and noted that Maximus had entered a "no contest plea" to the allegations in the amended petition. The court noted that although Neb. Rev. Stat. § 43-279.01(3) (Reissue 2016) allowed the court in an abuse or neglect case to "accept an in-court admission, an answer of no contest, or a denial from any parent, custodian, or guardian," § 43-279 did not allow an alleged juvenile violator to enter a no contest plea. The court noted that § 43-279 limited the juvenile violator to

an admission or denial. See § 43-279(1) and (2). The court therefore vacated the January 25 adjudicatory finding and order. As a result of its ruling which vacated the previous order of adjudication, the court stated that the disposition hearing was moot, and it set a date for a formal pretrial hearing.

The State appeals the March 27, 2018, order which vacated the January 25 adjudication order.

ASSIGNMENT OF ERROR

The State claims, consolidated and restated, that the juvenile court erred when it determined that a plea of no contest is not permitted under § 43-279 and vacated the order of adjudication.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which 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. *Sandoval v. Ricketts, ante* p. 138, 922 N.W.2d 222 (2019).

ANALYSIS

[2] 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 Paxton H.*, 300 Neb. 446, 915 N.W.2d 45 (2018). We conclude that the March 27, 2018, order from which this case arises is not a final order appealable by the State, and we therefore dismiss this appeal.

Neb. Rev. Stat. § 43-2,106.01 (Reissue 2016), which governs appellate jurisdiction for orders of the juvenile courts, is applicable to this case. Section 43-2,106.01(1) provides in part that "[a]ny final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals." And § 43-2,106.01(2) provides that "[a]n appeal may be taken by

. . . (d) The county attorney or petitioner, except that in any case determining delinquency issues in which the juvenile has been placed legally in jeopardy, an appeal of such issues may only be taken by exception proceedings pursuant to sections 29-2317 to 29-2319." Reading these subsections together, it is clear that whether the State seeks appellate review by appeal—as in this case—or by exception proceedings, the order or judgment must be final as required under the introductory language of § 43-2,106.01(1). We therefore consider whether the juvenile court's order which vacated its earlier order was a final order that was appealable by the State, and we need not consider whether the appropriate path was by appeal or exception proceedings.

[3,4] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), 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 Zachary B.*, 299 Neb. 187, 907 N.W.2d 311 (2018). Neither the first nor third category applies here, and therefore, we examine whether under the second category, the juvenile court's order is an order affecting a substantial right made during a special proceeding. A proceeding before a juvenile court is a "special proceeding" for appellate purposes, see *id.*, and therefore, in order to determine whether the March 27, 2018, order is a final order, we must determine whether the order affected a substantial right of the State.

[5,6] Numerous factors determine when an order affects a substantial right for purposes of appeal. *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017). 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*.

[7] We have recognized that the substantial right of the State in a juvenile proceeding is derived from its parens patriae interest and that the State has a right to protect the welfare of its resident children. See *id*. So, the inquiry in the present case is whether the March 27, 2018, order substantially diminished the right of the State to pursue its obligations regarding Maximus.

We recently considered appealability in *In re Interest of Noah B. et al., supra*. In that case, the State sought to appeal an order in which the juvenile court had dismissed a supplemental petition seeking adjudication under § 43-247(3)(a) based on allegations that a parent had subjected his children to sexual abuse. We determined that the order affected a substantial right of the State and was a final, appealable order, because the "order dismissed the supplemental petition in its entirety with no leave to amend, thus foreclosing the State from pursuing adjudication and disposition on grounds of sexual abuse, and preventing the State from seeking to protect the children from such abuse." *In re Interest of Noah B. et al.*, 295 Neb. at 775, 891 N.W.2d at 119-20.

By contrast, the March 27, 2018, order in this case vacated the prior order of adjudication, but it did not dismiss the operative petition for adjudication, and instead, it set a date for further proceedings in the case. In the instant matter, the terms of the March 27 order did not foreclose the State from pursuing adjudication and disposition based on the allegations regarding Maximus, and consequently, it did not affect with finality the rights of the State.

CONCLUSION

We conclude that the juvenile court's order vacating its previous order of adjudication and setting a date for further

proceedings in the case was not a final order appealable by the State. We therefore dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

Freudenberg, J., concurring.

I write separately only to note concern regarding a juvenile court's acceptance of a nolo contendere or no contest plea in certain proceedings. Statutorily, there are limited responses available to juveniles after petitions are filed in juvenile court alleging violations under Neb. Rev. Stat. § 43-247(1), (2), (3)(b), or (4) (Reissue 2016). Neb. Rev. Stat. § 43-279(1) (Reissue 2016) allows a juvenile to enter an admission to all or part of the allegations made in the petition. Section 43-279(2) sets forth the juvenile court procedures when juveniles deny the allegations contained in the petition or stand mute. However, the Legislature has not established the option for a juvenile to enter a nolo contendere or no contest response under this statute. This statutory absence is further highlighted by the Legislature's decision in Neb. Rev. Stat. § 43-279.01 (Reissue 2016) to make no contest pleas available to parents, custodians, or guardians in § 43-247(3)(a) and (6) proceedings.

While such issue is not reached in the majority opinion, I felt it important to highlight the relevant statutory language which would have been considered had the issue been reached.

Nebraska Supreme Court
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State of Nebraska, appellant and cross-appellee, v. Jedo J. Jerke, appellee and cross-appellant.

923 N.W.2d 78

Filed March 1, 2019. No. S-18-426.

1. **Constitutional Law: Postconviction: Pleas.** The common-law procedure for withdrawing a plea after conviction recognized in *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013), is available only when (1) the Nebraska Postconviction Act is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea and (2) a constitutional right is at issue.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Postconviction: Pleas.** Whether the common-law procedure for withdrawing a plea after conviction recognized in *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013), is available presents a question of law.
4. **Effectiveness of Counsel: Proof: Time.** The factual predicate for a claim of ineffectiveness of counsel concerns whether the important objective facts could reasonably have been discovered, not when the claimant should have discovered the legal significance of those facts.
5. **Effectiveness of Counsel: Proof.** When considering the factual predicate of a claim of ineffective assistance of counsel based on the failure to advise of deportation consequences, the important objective facts are (1) knowledge of what trial counsel did and did not advise the defendant and (2) the existence of the applicable deportation law.
6. **Postconviction: Pleas: Proof.** The unavailability of the Nebraska Postconviction Act is not an affirmative defense; it is a material element that must be pled and proved by a defendant seeking to use the procedure for withdrawing a plea after conviction recognized in *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013).

Appeal from the District Court for Hall County: Teresa K. Luther, Judge. Reversed and remanded with directions.

Douglas J. Peterson, Attorney General, and James D. Smith, and Martin R. Klein, and Katherine J. Doering, Deputy Hall County Attorneys, for appellant.

Mark Porto, of Porto Law Office, for appellee.

Kevin Ruser, of University of Nebraska College of Law Immigration Clinic, and David Shea and Damon Hudson, Senior Certified Law Students, for amicus curiae University of Nebraska College of Law Immigration Clinic.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

In 2012, Jedo J. Jerke entered a no contest plea to a charge of second degree assault. He was convicted and sentenced to a term of 4 to 6 years' imprisonment. After completing his sentence, Jerke moved to vacate the sentence and withdraw the plea pursuant to the common-law procedure recognized in *State v. Gonzalez*,[1] arguing his trial counsel was ineffective for failing to advise him before he entered his plea that second degree assault was a deportable offense. The district court granted Jerke's motion, and the State appeals. Because we conclude the common-law procedure is not available to Jerke as a matter of law, we reverse the district court's order and remand the cause with directions to dismiss.

FACTS

Jerke is from South Sudan, Africa, and came to the United States in 2006 as a political refugee. He is not, and never has been, a U.S. citizen.

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

In March 2012, Jerke was charged with two counts of assault in the second degree and one count of criminal impersonation. At the time, the assault charges were Class III felonies carrying a sentence of 1 to 20 years' imprisonment. Jerke informed his appointed counsel of his immigration status when counsel originally visited him in jail. Under federal law, a crime of violence for which a sentence of 1 year or more is imposed is an "aggravated felony" and a deportable offense.[2] Counsel did not advise Jerke of this at any time.

Jerke originally entered not guilty pleas to each of the charges, and a bench trial began August 6, 2012. After the State called its first witness, who described an intoxicated Jerke striking him in the mouth with a glass tequila bottle and knocking out several of his teeth, Jerke informed the court he wished to accept the State's plea offer and enter a no contest plea to one count of second degree assault. The plea colloquy included an advisement pursuant to Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2016), which provides:

> Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:
>
> IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.

The court accepted Jerke's no contest plea, and subsequently sentenced him to imprisonment for a term of 4 to 6 years.

While Jerke was serving his sentence, he learned he did not qualify for community work release, because he had an

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[2] 8 U.S.C. §§ 1101(a)(43)(F) and 1227(a)(2)(A)(iii) (2012).

"immigration hold." Jerke did not investigate the nature of the immigration hold during the term of his incarceration or upon his release from prison in 2015.

[1] In November 2017, Jerke learned from immigration authorities that he would be deported based on his assault conviction. He then moved to vacate his conviction and withdraw his plea pursuant to this court's holding in *Gonzalez*.[3] That case recognized a common-law procedure under which a defendant may, in very limited circumstances, move to vacate a conviction and withdraw a plea after the conviction has become final. According to *Gonzalez*:

> This procedure is available only when (1) the [Nebraska Postconviction] Act[4] is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea and (2) a constitutional right is at issue. In sum, this common-law procedure exists to safeguard a defendant's rights in the very rare circumstance where due process principles require a forum for the vindication of a constitutional right and no other forum is provided by Nebraska law.[5]

In his motion, Jerke alleged his Sixth Amendment right to counsel was violated when his trial counsel failed to advise him of the deportation consequences of his plea-based conviction. Jerke alleged this constituted ineffective assistance of counsel pursuant to the U.S. Supreme Court's opinion in *Padilla v. Kentucky*.[6]

After conducting an evidentiary hearing, the district court granted Jerke's motion. In opposing the motion, the State had argued that Jerke could have raised his claims under the Nebraska Postconviction Act during the period of his

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[3] *Gonzalez, supra* note 1.

[4] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016).

[5] *Gonzalez, supra* note 1, 285 Neb. at 949-50, 830 N.W.2d at 511.

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

incarceration, and thus could not bring a common-law claim under *Gonzalez*. But the court found the State had waived this argument by not filing a motion to dismiss.

The court entered an order that vacated the judgment of conviction and sentence, allowed Jerke to withdraw his plea, and set the matter for further hearing. The State filed this appeal, and Jerke cross-appealed. We granted Jerke's motion to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court erred in (1) granting Jerke's common-law motion, because Jerke had a remedy under the Nebraska Postconviction Act, and (2) finding trial counsel rendered ineffective assistance.

On cross-appeal, Jerke asks this court to overrule *State v. Mamer*[7] and hold instead that the factual predicate of an ineffective assistance of counsel claim based on *Padilla* does not arise until a reasonable defendant learns the actual immigration consequences of his or her plea-based conviction.

STANDARD OF REVIEW

[2] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[8]

ANALYSIS

[3] Whether the common-law procedure recognized in *Gonzalez* is available to Jerke presents a question of law. We begin our analysis with an overview of the *Gonzalez* holding.

State v. Gonzalez

Our 2013 decision in *Gonzalez* recognized that in Nebraska, there are two statutory avenues available to a defendant seeking

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[7] *State v. Mamer*, 289 Neb. 92, 853 N.W.2d 517 (2014).

[8] *State v. Zlomke*, 268 Neb. 891, 689 N.W.2d 181 (2004).

to withdraw a plea after his or her conviction has become final. The first is found in § 29-1819.02. That statute requires that before accepting a plea of guilty or nolo contendere, a court must give the defendant a statutory advisement regarding the possible immigration consequences of conviction.[9] If the required advisement is not given, the statute allows the defendant to move to vacate the judgment, withdraw the plea, and enter a plea of not guilty.[10] This statutory remedy is available even after the defendant has served his or her sentence.[11] Here, the record shows a § 29-1819.02 advisory was given to Jerke, and no one contends the remedy of § 29-1819.02(2) is available to him.

The second statutory avenue is the Nebraska Postconviction Act.[12] Enacted to protect constitutional rights, this act allows a defendant "in custody under sentence" claiming a right to be released due to denial or infringement of a constitutional right to move to have his or her conviction and sentence vacated or set aside.[13] A postconviction motion is not intended to be concurrent with any other remedy existing in the courts of this state, so if a postconviction motion states facts which, if true, would constitute grounds for relief under another remedy, the motion will be dismissed without prejudice.[14] A postconviction motion must be filed within 1 year of the triggering events set out in § 29-3001(4).[15]

After *Gonzalez* recognized these two statutory means of collaterally attacking a final criminal conviction, it specifically addressed whether a "common-law procedure also authorize[s]

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[9] § 29-1819.02(1).

[10] § 29-1819.02(2).

[11] *State v. Garcia*, 301 Neb. 912, 920 N.W.2d 708 (2018).

[12] §§ 29-3001 to 29-3004.

[13] See § 29-3001(1).

[14] See, § 29-3003; *Gonzalez, supra* note 1.

[15] See *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018).

[a] motion to withdraw [a] plea after [the] conviction ha[s] become final."[16] The court in *Gonzalez* framed the issue as "whether a court has jurisdiction to consider" a common-law motion to withdraw a plea "when the motion is filed after the underlying conviction is final."[17]

Gonzalez recognized that on at least two prior occasions, this court had refused to recognize a nonstatutory procedure whereby defendants could raise claims related to criminal cases.[18] In *State v. El-Tabech*,[19] we held there was no procedure by which a defendant convicted of murder could seek state-funded DNA testing when the time period for filing a motion for new trial based on newly discovered evidence had passed, and therefore, we affirmed the district court's dismissal of the defendant's motion seeking such. And in *State v. Louthan*,[20] we held a defendant could not, in a separate proceeding, challenge the validity of a prior conviction for purposes of sentence enhancement, in part because no statute authorized the defendant to do so. For the sake of completeness, we note that after our decision in *Gonzalez*, we held in *State v. Smith*[21] that the district court correctly dismissed for lack of jurisdiction a defendant's motion to vacate his sentence based on an allegation it was unconstitutional, reasoning the motion was not authorized by law, because the Nebraska Postconviction Act was the defendant's sole remedy to collaterally attack his conviction and sentence.

Gonzalez distinguished the procedures at issue in *El-Tabech* and *Louthan* by reasoning they were not constitutionally

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[16] *Gonzalez, supra* note 1, 285 Neb. at 946, 830 N.W.2d at 509.

[17] *Id.* at 944, 830 N.W.2d at 507.

[18] See, *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000); *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

[19] *El-Tabech, supra* note 18.

[20] *Louthan, supra* note 18.

[21] *State v. Smith*, 288 Neb. 797, 851 N.W.2d 665 (2014).

mandated. In contrast, *Gonzalez* reasoned that in certain circumstances, a common-law procedure for a conviction to be vacated and a plea withdrawn was constitutionally mandated. *Gonzalez* then proceeded to identify those circumstances and articulate the limiting principles that govern that common-law procedure.

Gonzalez explained the common-law procedure is civil in nature and is available in only extremely limited circumstances. It emphasized that the Nebraska Postconviction Act is the primary procedure for bringing collateral attacks on final criminal convictions and made clear that where a "defendant has a collateral attack that could be asserted under the [a]ct, that [a]ct is his or her sole remedy."[22] Notably, *Gonzalez* held that "[o]nly if a defendant does not and never could have asserted the basis of his or her collateral attack under the [a]ct may he or she invoke the common-law procedure and move to withdraw a plea after the conviction has become final."[23]

Since our holding in *Gonzalez*, this court has considered several cases in which a defendant sought to use the common-law procedure.[24] Because Jerke urges us to reconsider our holding in one of those cases, we address it next.

State v. Mamer

In *Mamer*,[25] a defendant pled guilty to a felony charge and was convicted and sentenced. Due to credit for time served, he was incarcerated only for a few weeks following the conviction. Several months after he was released, he filed a motion seeking to vacate his plea and set aside his conviction pursuant to the procedure set forth in *Gonzalez*. The motion alleged that he was not a U.S. citizen and that his trial counsel

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[22] *Gonzalez, supra* note 1, 285 Neb. at 949, 830 N.W.2d at 510.

[23] *Id.*

[24] See, *State v. Merheb*, 290 Neb. 83, 858 N.W.2d 226 (2015); *Mamer, supra* note 7; *State v. Yuma*, 286 Neb. 244, 835 N.W.2d 679 (2013).

[25] *Mamer, supra* note 7.

provided ineffective assistance of counsel under *Padilla*[26] by not advising him before he entered his plea that the conviction was a deportable offense. The motion did not address why the defendant had not raised the *Padilla* claim via a motion for postconviction relief during the time he was incarcerated.

The State moved to dismiss the motion, and we treated that motion as one to dismiss for failure to state a claim on which relief could be granted. We then addressed the question whether, assuming all the allegations in the motion were true, the defendant had stated a common-law claim to withdraw his plea and vacate his sentence. Part of our analysis focused on whether the defendant had alleged facts, or could allege facts, showing the Nebraska Postconviction Act was never available to vindicate his ineffective assistance of counsel claim.

This analysis involved determining when the "factual predicate" of the defendant's ineffective assistance of counsel claim "could have been discovered through the exercise of due diligence."[27] We framed the question as when, in the exercise of due diligence, the defendant "could have discovered the important objective facts concerning both trial counsel's deficient conduct and the resulting prejudice."[28]

[4,5] The factual predicate for a claim concerns whether the important objective facts could reasonably have been discovered, not when the claimant should have discovered the legal significance of those facts.[29] And when considering the factual predicate of a claim of ineffective assistance of counsel based on the failure to advise of deportation consequences, we found the important objective facts are (1) knowledge of what trial counsel did and did not advise the defendant and (2) the existence of the applicable deportation law.[30]

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[26] *Padilla, supra* note 6.

[27] See § 29-3001(4)(b).

[28] *Mamer, supra* note 7, 289 Neb. at 99, 853 N.W.2d at 524.

[29] *Id.*

[30] See *id.*

We rejected the suggestion that the defendant could not have discovered the factual predicate of his ineffective assistance claim until he learned the actual immigration consequences of his plea. Instead, we found that because the district court had given the § 29-1918.02 advisement before accepting the plea, the defendant could have, in the exercise of reasonable diligence, discovered the consequences of the applicable deportation law while he was incarcerated. As such, we found he was unable to "demonstrate an essential element of his [common-law] claim: that he had no other means to vindicate the constitutional right at issue."[31] We thus held the district court properly granted the State's motion to dismiss.

Unavailability of Nebraska Postconviction Act Cannot Be Waived

Jerke's motion seeking to vacate his sentence and withdraw his plea, like the motion at issue in *Mamer*, did not allege he was unable to bring his ineffective assistance of counsel claim via the Nebraska Postconviction Act during the time he was incarcerated. But unlike *Mamer*, the State here did not move to dismiss the motion on that basis. Instead, the State argued to the district court that Jerke was "procedurally barred" from bringing a common-law claim under *Gonzalez*, because he could have brought an ineffective assistance of counsel claim under the Nebraska Postconviction Act while he was in custody. The district court, relying on *Mamer*, found the State had waived this argument by not filing a motion to dismiss. The State assigns this as error, and we agree.

In *Mamer*, we addressed the applicability of the Nebraska Postconviction Act in the context of the State's motion to dismiss, because that is how the issue was framed by the parties. But properly understood, the applicability of the act is not an affirmative defense to a *Gonzalez* common-law motion

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[31] *Id.* at 101, 853 N.W.2d at 525.

seeking to vacate a conviction and withdraw a plea. Rather, it is something the defendant must plead and prove in order to utilize the common-law procedure at all.

As our case law suggests, there is a hierarchy of sorts in the available remedies for defendants seeking to vacate a conviction and withdraw a plea based on a *Padilla*-type claim. A defendant who has not been given the statutory advisement required by § 29-1819.02 must seek relief under that statute. When the advisement was given and the statutory relief of § 29-1819.02 is unavailable, a defendant must seek relief under the Nebraska Postconviction Act. And only when the act is not, and never was, available, is the common-law procedure under *Gonzalez* available.

[6] Here, the trial court's reasoning effectively construed the availability of postconviction relief as an affirmative defense to be raised by the State. But the unavailability of the Nebraska Postconviction Act is not an affirmative defense; it is a material element that must be pled and proved by a defendant seeking to use the *Gonzalez* procedure. This error of law prevented the trial court from considering an essential element of Jerke's common-law claim under *Gonzalez*.

Nebraska Postconviction Act Was Available to Jerke

Jerke contends the Nebraska Postconviction Act was not available to him as a means of pursuing his ineffective assistance of counsel claim, because he did not learn he was being deported based on his conviction until after he was released from custody. This argument requires analysis of when Jerke could have discovered the factual predicate of his constitutional claim.

The Nebraska Postconviction Act contains a 1-year limitations period, which runs from the later of

> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;

> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or
>
> (e) August 27, 2011.[32]

In his cross-appeal, Jerke asks us to overrule *Mamer* and reexamine what constitutes the factual predicate of an ineffective assistance of counsel claim based on *Padilla*. He specifically asks us to find that the factual predicate of his claim should be (1) knowledge of what his trial counsel advised him and (2) knowledge that he would be deported based on his plea-based conviction. He acknowledges this is inconsistent with *Mamer*, but suggests the *Mamer* analysis is generally unfair because it expects a defendant

> to not only act as a more effective attorney than the one he had by maneuvering through the federal immigration statutes and correctly analyzing the impact of his criminal conviction on his immigration status, but . . . to do so at a time when he ha[s] no reason to suspect there was a problem because deportation proceedings had not been initiated.[33]

Jerke argues that the "logical effect" of *Mamer* is "to place an obligation on an untrained defendant to generate the wherewithal to perform as a more competent attorney than his

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[32] § 29-3001(4).

[33] Brief for appellee on cross-appeal at 17.

actual attorney, and to do so from within the confines of prison at a time when he has no reason to suspect a problem to begin with."[34]

Jerke's argument mischaracterizes our holding in *Mamer*. Most notably, *Mamer* did not hold that the factual predicate of an ineffective assistance of counsel claim exists at a time when a defendant has "no reason to suspect there was a problem." To the contrary, *Mamer* held that the factual predicate could have been discovered through the exercise of reasonable diligence once the defendant was advised by the trial court, pursuant to § 29-1819.02(1), that a conviction may result in immigration consequences. *Mamer* reasoned that from and after the time of that advisement, the defendant knew of a possible problem with his immigration status and, with the exercise of due diligence, could have discovered and raised the ineffective assistance of trial counsel argument during the period of incarceration.

With the exception of *Mamer*, we have not directly analyzed the factual predicate language of § 29-3001(4)(b) in the context of an ineffective assistance of counsel claim. It is notable, however, that language in two related federal statutes is nearly identical. First, 28 U.S.C. § 2255(f)(4) (2012) states the 1-year limitations period for a motion to vacate a criminal conviction starts to run from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." And 28 U.S.C. § 2244(d)(1)(D) (2012) requires a state prisoner who wants collateral relief from a federal court to file a petition within 1 year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

Contrary to Jerke's argument, federal case law in this area is generally consistent with the analysis we employed in *Mamer*.[35]

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[34] *Id*. at 18.

[35] See, *Clarke v. U.S.*, 703 F.3d 1098 (7th Cir. 2013); *Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001).

In fact, the Seventh Circuit has applied a similar analysis in a similar situation. In *Clarke v. U.S.*,[36] a litigant filed a § 2255 motion asking that her conviction be set aside on the ground she was not advised that she could be removed or deported if convicted based on her plea. The motion was filed more than 1 year after her conviction became final, and it was untimely unless filed within 1 year of the date the facts supporting her claim could have been discovered through the exercise of reasonable diligence.[37] The litigant admitted her lawyer had told her there might be "'immigration consequences'" if she entered a guilty plea,[38] but claimed he did not tell her directly that the result of the conviction would be deportation. She argued the 1-year statute of limitations did not begin to run until she actually discovered she would be deported.

But the Seventh Circuit explained that the "dependence of the statute of limitations on the petitioner's exercise of due diligence is equivalent to a rule of 'inquiry notice.'"[39] Reasoning that the factual predicate of the litigant's claim included the lawyer's failure to advise of a critical consequence of the conviction, the court found the litigant had inquiry notice of that factual predicate at the time of the plea, when the lawyer told her there might be "immigration consequences." Having received such inquiry notice, she should have at that point exercised due diligence to discover the facts supporting her claim, and the statute of limitations began to run.

Contrary to the argument made to this court, Jerke was not unaware of possible immigration consequences resulting from his conviction until he was informed that deportation proceedings had been initiated. Rather, the record affirmatively shows that before he entered his plea, he was advised that if he was not a U.S. citizen, conviction of the offense for which he was

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[36] *Clarke, supra* note 35.

[37] § 2255(f)(4).

[38] *Clarke, supra* note 35, 703 F.3d at 1099.

[39] *Id.* at 1100.

charged could result in his removal from the United States. The record also affirmatively shows that while incarcerated, Jerke learned an "immigration hold" had been placed on him. These facts, whether alone or in combination, put him on inquiry notice of a possible problem with his immigration status related to his conviction, and in the exercise of due diligence, he could have discovered the factual predicate of his ineffective assistance of counsel claim during the time he was incarcerated. The Nebraska Postconviction Act was thus available to Jerke as a remedy for his ineffective assistance of counsel claim. And because the act was available, the procedure under *Gonzalez* was not.

CONCLUSION

Under *Gonzalez*, the common-law procedure for withdrawing a plea is available only when the Nebraska Postconviction Act is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea and a constitutional right is at issue. As such, the unavailability of the Nebraska Postconviction Act is a material element that must be pled and proved by a defendant seeking to use the *Gonzalez* procedure. The act was available to Jerke during the time he was in custody, because he could have discovered the factual predicate of his ineffective assistance of counsel claim through the exercise of reasonable diligence.

Because the common-law procedure is not available to Jerke as a matter of law, we reverse the district court's order and remand the cause with directions to dismiss.

Reversed and remanded with directions.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Scott William Smith, individually and on behalf of Aiden James Smith and Kayleigh-Ann Marie Smith, minor children, appellant, v. Brandy Leigh Wedekind and Zach Wedekind, a married couple, appellees.

923 N.W.2d 392

Filed March 1, 2019. No. S-18-516.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Constitutional Law: Rules of the Supreme Court: Statutes: Notice: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) requires that a party presenting a case involving the constitutionality of a statute must file and serve notice with the Supreme Court Clerk at the time of filing the party's brief.
3. **Constitutional Law: Statutes: Notice: Appeal and Error.** A notice to the Supreme Court Clerk assists the clerk and the Nebraska Supreme Court in ensuring that an appeal involving the constitutionality of a statute is heard by the full court, as required by article V, § 2, of the Nebraska Constitution.
4. ____: ____: ____: ____. When the issue of the constitutionality of a statute is merely contained in an ordinary pleading, the Supreme Court Clerk is not put on notice that the appeal should be specially processed.
5. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** The constitutionality of a statute for purposes of article V, § 2, of the Nebraska Constitution and Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) includes both facial and as-applied challenges.
6. ____: ____: ____: ____. Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.

7. ____: ____: ____: ____. If a party fails to observe Neb. Ct. R. App. P. § 2-109(E) (rev. 2014), the Nebraska Supreme Court will not consider the constitutionality of the statute under attack.
8. **Constitutional Law: Statutes: Legislature: Appeal and Error.** Whether or not a constitutional challenge is characterized by an appellant as a challenge to a statute, when the appeal challenges the constitutionality of an act explicitly permitted by a statute, it is a case "involving the constitutionality of an act of the Legislature," as described in article V, § 2, of the Nebraska Constitution.
9. **Constitutional Law: Rules of the Supreme Court: Notice: Statutes: Appeal and Error.** The Nebraska Supreme Court must have notice under Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) of an implicit challenge to a statute that explicitly authorizes the alleged unconstitutional act in order to ensure that the issue of the constitutionality of the statute is heard by a full court.
10. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** A litigant cannot avoid the requirements of Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) and the concurrent requisite scrutiny for invalidating statutory provisions merely by failing to cite to the statute that authorizes the constitutionally challenged act.

Appeal from the District Court for Cass County: Michael A. Smith, Judge. Affirmed.

Scott William Smith, pro se.

No appearance for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

The plaintiff in a declaratory judgment action appeals from the district court's sua sponte denial, without a hearing, of his application to proceed in forma pauperis. The court did so under its authority conferred by Neb. Rev. Stat. § 25-2301.02 (Reissue 2016). The plaintiff does not challenge the statute directly, but argues that the lack of a hearing was

unconstitutional. The plaintiff did not file a notice under Neb. Ct. R. App. P. § 2-109(E) (rev. 2014), which is required whenever a party is "presenting a case involving the federal or state constitutionality of a statute." We affirm.

BACKGROUND

Scott William Smith, representing himself pro se, filed a complaint individually and on behalf of his children for declaratory judgment under Neb. Rev. Stat. § 25-21,159 (Reissue 2016), seeking "[d]eclaratory relief from" three orders under different dockets. The first order was a name change of Smith's children. The second order was a protection order. The third order was a divorce decree between himself and Brandy Leigh Wedekind, the mother of the children. Wedekind and her current husband were named as defendants in the action.

Smith asked in his complaint for an immediate injunction under Neb. Rev. Stat. § 25-21,156 (Reissue 2016) against the enforcement of the protection order. Smith also asked for court-appointed counsel for himself and his children. Finally, Smith requested that the court declare the validity of 16 allegations pertaining to the alleged unconstitutionality of the three orders challenged in his complaint.

Smith applied to proceed in forma pauperis, submitting an affidavit demonstrating that he was unable to pay the costs of litigation. Citing to § 25-2301.02, the court denied the order sua sponte and without a hearing. The court reasoned that the complaint asserted a legally frivolous position, because it constituted an impermissible collateral attack on the dissolution decree, protection order, and name change order. Smith appeals.

ASSIGNMENTS OF ERROR

Smith assigns that the district court abused its discretion and committed plain error by failing to conduct a hearing on his motion to proceed in forma pauperis before making its decision.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[1]

ANALYSIS

Smith appeals from an order denying his application to proceed in forma pauperis. Section 25-2301.02 provides a statutory right of interlocutory appellate review of a decision denying in forma pauperis eligibility.[2] Smith's sole argument on appeal is that because the court failed to hold a hearing before determining the merits of his application to proceed in forma pauperis, he was deprived of open access to the courts as guaranteed by article I, § 13, of the Nebraska Constitution and due process under the Nebraska and federal Constitutions. Despite the district court's explicit reference to § 25-2301.02, Smith does not refer to the statute in his appellate brief.

Section 25-2301.02 authorizes the court to deny an application to proceed in forma pauperis, without a hearing, under the circumstances presented in this case. Section 25-2301.02 states in relevant part:

> An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding.

Thus, Smith's constitutional challenge to the act of the district court in denying his application without a hearing implicitly

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[1] *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

[2] See, *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

challenges the constitutionality of § 25-2301.02 that explicitly authorizes the district court to deny, without a hearing, an application to proceed in forma pauperis.

Smith failed to file a separate written notice with this court of a constitutional question and failed to serve upon the Attorney General, who is not a party to this action, a copy of his brief. Such notice is required under § 2-109(E) whenever a party is "presenting a case involving the federal or state constitutionality of a statute."

[2] Section 2-109(E) requires that a party presenting a case involving the constitutionality of a statute must file and serve notice with the Supreme Court Clerk at the time of filing the party's brief.[3] Section 2-109(E) also provides that if the Attorney General is not already a party to the action, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Supreme Court Clerk. Section 2-109(E) states in full:

> Cases Involving Constitutional Questions. A party presenting a case involving the federal or state constitutionality of a statute must file and serve notice thereof with the Supreme Court Clerk by a separate written notice or by notice in a Petition to Bypass at the time of filing such party's brief. If the Attorney General is not already a party to an action where the constitutionality of the statute is in issue, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Supreme Court Clerk; proof of such service shall be filed with the Supreme Court Clerk.

The rule corresponds to the mandate of article V, § 2, of the Nebraska Constitution, which provides in pertinent part:

> A majority of the members [of the Supreme Court] sitting shall have authority to pronounce a decision except

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[3] See, *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006); *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005).

> in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges. . . . The judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute and all appeals involving capital cases and may review any decision rendered by a division of the court. In such cases, in the event of the disability or disqualification by interest or otherwise of any of the judges of the Supreme Court, the court may appoint judges of the district court or the appellate court to sit temporarily as judges of the Supreme Court, sufficient to constitute a full court of seven judges.

[3,4] A notice to the Supreme Court Clerk assists the clerk and this court in ensuring that an appeal involving the constitutionality of a statute is heard by the full court, as required by article V, § 2, of the Nebraska Constitution.[4] When the issue of the constitutionality of a statute is merely contained in an ordinary pleading, the Supreme Court Clerk is not put on notice that the appeal should be specially processed.[5]

[5-7] In *State v. Boche*,[6] we held that the constitutionality of a statute for purposes of article V, § 2, of the Nebraska Constitution and § 2-109(E) includes both facial and as-applied challenges. This court has repeatedly held that strict compliance with § 2-109(E) is required for the court to address a constitutional claim.[7] In *Boche*, we clarified that "strict compliance with § 2-109(E) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized."[8] If a party fails

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[4] *State v. Boche*, *supra* note 1; *State v. Johnson, supra* note 3.

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

[6] *State v. Boche, supra* note 1.

[7] *Ptak v. Swanson, supra* note 3.

[8] *State v. Boche, supra* note 1, 294 Neb. at 918, 885 N.W.2d at 529.

to observe § 2-109(E), this court will not consider the constitutionality of the statute under attack.[9]

The question presented by this appeal is whether a litigant must file a notice under § 2-109(E) whenever the litigant implicitly challenges the constitutionality of a statute that, while not addressed in the appellate brief, explicitly authorizes the very act the litigant claims is unconstitutional. We hold that notice under § 2-109(E) is required under such circumstances.

[8] In such circumstances, a declaration by this court that the act complained of on appeal is unconstitutional would necessarily render unconstitutional the statute that explicitly authorizes the act. Whether or not a constitutional challenge is characterized by an appellant as a challenge to a statute, when the appeal challenges the constitutionality of an act explicitly permitted by a statute, it is a case "involving the constitutionality of an act of the Legislature," as described in article V, § 2, of the Nebraska Constitution.

[9,10] Accordingly, this court must have notice under § 2-109(E) of an implicit challenge to a statute that explicitly authorizes the alleged unconstitutional act in order to ensure that the issue of the constitutionality of the statute is heard by a full court. Further, the Attorney General has a right to notice that the constitutionality of a statute is being implicitly challenged in order to decide whether to file a brief of amicus curiae in the case. A litigant cannot avoid the requirements of § 2-109(E) and the concurrent requisite scrutiny for invalidating statutory provisions merely by failing to cite to the statute that authorizes the constitutionally challenged act.

The district court's action in this case of denying the application to proceed in forma pauperis was authorized by § 25-2301.02. The objection to in forma pauperis status was on the court's own motion on the ground that Smith was asserting legal positions that were frivolous. The court provided a

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[9] *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

written statement of its reasons, findings, and conclusions for denial of Smith's application to proceed in forma pauperis in its order denying the application.

Because Smith did not file a notice compliant with § 2-109(E), we do not address his arguments on appeal concerning the constitutionality of the district court's decision to deny without a hearing his application to proceed in forma pauperis, expressly permitted by § 25-2301.02. The constitutionality of not providing a hearing before denying Smith's application was the only issue adequately assigned and argued on appeal.[10] Smith does not assign and argue that the court erred in its determination that his complaint asserted a frivolous legal position. Therefore, we affirm the district court's order.

CONCLUSION

For the foregoing reasons, we affirm the order below denying Smith's application to proceed in forma pauperis.

Affirmed.

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[10] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

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

Chase County, a political subdivision of the State of Nebraska, appellee, v. City of Imperial, a political subdivision of the State of Nebraska, appellant.

923 N.W.2d 428

Filed March 8, 2019. No. S-17-813.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the court below.
3. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Declaratory Judgments: Justiciable Issues.** Declaratory judgments are available when a present actual controversy exists, all interested persons are parties to the proceedings, and a justiciable issue exists for resolution.
5. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
6. **Declaratory Judgments: Justiciable Issues.** At the time that the declaration is sought, there must be an actual justiciable issue from which the court can declare law as it applies to a given set of facts.
7. **Declaratory Judgments.** A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy.

Petition for further review from the Court of Appeals, Pirtle, Riedmann, and Bishop, Judges, on appeal thereto from the District Court for Chase County, David W. Urbom, Judge. Judgment of Court of Appeals reversed with directions.

Joshua J. Wendell, of McQuillan & Wendell, P.C., L.L.O., for appellant.

Arlan G. Wine, Chase County Attorney, for appellee.

Andre R. Barry and Nathan D. Clark, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for amicus curiae League of Nebraska Municipalities.

Katharine L. Gatewood, Deputy Sarpy County Attorney, for amicus curiae Sarpy County.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Freudenberg, JJ.

Funke, J.

The issue presented is which governmental agency, under Nebraska's statutory scheme, is financially responsible for medical services received by a person who is arrested, detained, taken into custody, or incarcerated. The district court found that the City of Imperial, Nebraska (Imperial), was responsible for the payment of $436 in medical costs incurred by an arrestee. The Nebraska Court of Appeals reversed the district court's decision and determined Chase County, Nebraska (Chase), to be the responsible party. Upon further review, we determine that declaratory judgment is not available, because the record does not show the existence of a justiciable controversy. The judgment of the Court of Appeals is reversed with directions to reverse and vacate the judgment of the district court.

BACKGROUND

At approximately 10:30 p.m. on December 24, 2016, an Imperial police officer arrested an individual for disturbing

the peace and transported him to the Chase County jail for booking. Because the arrestee was heavily intoxicated and belligerent and was unable to answer questions during the booking process, the jail personnel requested that the arrestee be medically cleared before he was admitted into the jail facility. The arresting officer transported the arrestee to the Chase County hospital for a physical examination, which indicated that the arrestee had no medical conditions that would endanger another person or himself if placed in the jail. Shortly after midnight, the arresting officer returned the arrestee to the jail with a medical authorization form, the arrestee cooperated with the booking process, the agencies completed a custody authorization form, and the admission process was finalized.

Following these events, the hospital submitted a medical bill in the amount of $436 to Chase, and later to Imperial. Each party declined payment and contended that the other party was responsible for the payment.

District Court

Chase filed an action for declaratory judgment in district court and moved for summary judgment, seeking a determination that Imperial was solely responsible for the medical charges. The district court granted the motion based on its interpretation of Nebraska's statutory scheme governing the payment of medical services for persons who are arrested, detained, taken into custody, or incarcerated.[1] The court also based its decision on the "Standards for Jail Facilities" regulations.[2]

The court's order laid out the relevant statutory provisions, beginning with § 47-701(1), which provides: "Notwithstanding any other provision of law, sections 47-701 to 47-705 shall govern responsibility for payment of the costs of medical services for any person ill, wounded, injured, or otherwise in need

[1] Neb. Rev. Stat. §§ 47-701 to 47-705 (Reissue 2010 & Cum. Supp. 2016).

[2] See 81 Neb. Admin. Code, chs. 1 (2014) and 4 (2012).

of such services at the time such person is arrested, detained, taken into custody, or incarcerated." Section 47-702 sets forth that the recipient of the medical services, or the individual's insurer or another available source, is primarily responsible for the payment of medical services. Upon a showing that the recipient or its insurer cannot pay the medical provider in whole or in part, § 47-703(1) provides that "the costs of medical services shall be paid by the appropriate governmental agency." The district court proceeded to determine whether Chase or Imperial was "the appropriate governmental agency" to be held responsible for the medical costs.

The first sentence of § 47-703(2) provides that medical services necessitated by injuries or wounds suffered during the course of apprehension or arrest shall be paid by "the apprehending or arresting agency and not the agency responsible for operation of the institution or facility in which the recipient of the services is lodged." The second sentence of § 47-703(2) provides that "[i]n all other cases, the appropriate governmental agency shall be the agency responsible for operation of the institution or facility in which the recipient of the services is lodged . . . ."

The court determined that the medical charges were not for injuries suffered during the arrest and were not for medical services required for an individual confined in jail. The court articulated that "[t]he determining factor to transfer the obligation from the arresting agency to the facility receiving the prisoner rests on the term 'lodged.'"

The court relied on a dictionary to define the word "'lodged' as (a) to provide temporary quarters for; [or] (b) to establish or settle in place." The court also considered 81 Neb. Admin. Code, ch. 1, § 002.26, which defines "inmate" as "[a]ny individual confined or residing in any jail facility," as well as 81 Neb. Admin. Code, ch. 4, § 002.01B, which provides:

> Persons who are unconscious, seriously injured or those persons who appear to present a substantial risk of serious harm to another person or a substantial risk of serious

> harm to themselves within the near future as defined by the Nebraska Mental Health Commitment Act shall not be admitted to the jail facility unless examined and approved for admission by a medical authority or a licensed mental health authority.

The court found that "a person is not 'lodged' in jail until such person has been accepted by the facility after the person and the arresting officer have complied with all requirements for acceptance, including any medical examination of the arrested person." The court therefore concluded that Imperial was responsible for paying the $436 medical bill to the hospital. Imperial appealed.

Court of Appeals

On appeal, Imperial assigned that the district court erred, restated and reordered, in (1) determining that the arresting agency is responsible for the arrestee's medical costs when the jailing agency required that the arrestee receive the care prior to lodging the arrestee in the jail and (2) considering the Nebraska jail standards regulations.

The Court of Appeals determined that the language of § 47-703(2) was clear and unambiguous and that therefore, it was precluded from looking beyond the words of the statute to construe its meaning.[3] As a result, the court determined that consideration of and reference to the Nebraska jail standards regulations was unnecessary and prohibited.[4]

The court interpreted the language of § 47-703(2) and found the first sentence of that section inapplicable, because the arrestee did not require medical services as a result of an injury or wound suffered during the course of the arrest. The court then construed the second sentence of § 47-703(2) and found that sentence applied in this case. The court did so

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[3] See *Chase County v. City of Imperial*, 26 Neb. App. 219, 918 N.W.2d 631 (2018).

[4] *Id.*

by emphasizing the phrase "[i]n all other cases." The court reasoned that based upon the clear language of § 47-703(2), "the costs of medical services are chargeable to the agency responsible for operation of the correctional facility where the recipient is lodged in all cases where medical services were not necessitated by injuries or wounds suffered during the course of apprehension or arrest."[5]

The Court of Appeals rejected Chase's contention that Imperial was responsible for the medical costs due to the fact that the services were rendered before the arrestee was admitted into the jail. The court stated that the application of §§ 47-701 and 47-702 "is not limited to only those arrestees who are ultimately lodged into a correctional facility."[6] Under its interpretation, the court did "not read § 47-703(2) to require lodging the arrestee into the facility as a condition precedent to holding [Chase] responsible for medical costs."[7] Rather, the court viewed "the phrase 'facility in which the recipient of the services is lodged' to describe the governmental agency that operates the facility rather than to limit its responsibility for payment."[8] The court supported its statutory interpretation by reasoning that Chase's position would allow a county "to circumvent payment for medical services for any person who is arrested, detained, or taken into custody by requiring medical services for that individual prior to completing the booking process."[9]

Petition for Further Review

In its petition for further review, Chase assigns, restated, that the Court of Appeals erred in (1) concluding that a jailing agency's obligation to pay the incurred medical costs begins

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[5] *Id.* at 224, 918 N.W.2d at 635.

[6] *Id.* at 225, 918 N.W.2d at 636.

[7] *Id.*

[8] *Id.* at 226, 918 N.W.2d at 636.

[9] *Id.*

"'at the time such person is arrested, detained, taken into custody, or incarcerated'" and (2) concluding that the phrase "'in all other cases'" means that medical services are chargeable to the jailing agency even when an arrestee receives medical services prior to being lodged in the jail facility.

Imperial contends that the Court of Appeals was correct in determining that § 47-703(2) is clear and unambiguous. Imperial agrees with the Court of Appeals' reasoning that the statute creates two discrete categories of circumstances regarding the payment of medical services for an arrestee: (1) when an arrestee requires medical care as the result of an injury sustained during the course of apprehension or arrest, in which event the arresting agency must provide payment, or (2) "all other cases," in which event the lodging agency must provide payment. Imperial argues that preexisting intoxication falls into the category of "all other cases." Imperial further argues that Chase is financially responsible, because Chase made the request for the medical services.

We granted Chase's petition for further review. Sarpy County filed a brief as amicus curiae in which it stated that it currently is in receipt of a hospital payment demand under circumstances factually similar to this case. Sarpy County argues that the Court of Appeals' interpretation failed to recognize that there is "an evident statutory gap in § 47-703(2) for situations where 1) an arrestee is not lodged in a facility and 2) the cause of [the] wound or injury did not occur as the result of the arrest or apprehension."[10] Sarpy County argues that § 47-703(2) is silent regarding an agency's financial responsibility for medical services in those two situations and that the Court of Appeals erred by filling the gap rather than leaving the matter for the Legislature.

ASSIGNMENTS OF ERROR

Chase assigns on petition for further review, restated, that the Court of Appeals erred in (1) concluding that Chase's

[10] Brief for amicus curiae Sarpy County at 7.

obligation to pay the incurred medical costs began "'at the time such person is arrested, detained, taken into custody, or incarcerated'" and (2) concluding that the phrase "'in all other cases'" means that medical services are chargeable to the jailing agency even when the recipient of the medical services was not then lodged in the jail.

STANDARD OF REVIEW

[1-3] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[11] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the court below.[12] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[13]

ANALYSIS

[4-6] Declaratory judgments are available when a present actual controversy exists, all interested persons are parties to the proceedings, and a justiciable issue exists for resolution.[14] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[15] A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future,

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[11] *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018).

[12] See *id.*

[13] *Woodmen of the World v. Nebraska Dept. of Rev.*, 299 Neb. 43, 907 N.W.2d 1 (2018).

[14] *Board of Trustees v. City of Omaha*, 289 Neb. 993, 858 N.W.2d 186 (2015).

[15] *Id.*

contingent, or uncertain.[16] At the time that the declaration is sought, there must be an actual justiciable issue from which the court can declare law as it applies to a given set of facts.[17] Declaratory relief cannot be used to obtain a judgment which is merely advisory.[18]

[7] This court has consistently recognized that a declaratory judgment action should not be entertained where another equally serviceable remedy is available.[19] A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy.[20]

In this matter, Chase sought a declaration as to which of the parties under this set of facts is the "appropriate governmental agency" responsible for the costs of medical services under § 47-703(2). However, as explained above, the statutory scheme the parties ask this court to interpret places primary responsibility on the recipient or the recipient's insurer.[21] Neither the parties, the district court, nor the Court of Appeals considered whether, under § 47-702, the arrestee or his insurer, if any, could pay the medical provider in whole or in part.

Section 47-703(1) provides that "[u]pon a showing that reimbursement from the sources enumerated in section 47-702 is not available, in whole or in part, the costs of medical services shall be paid by the appropriate governmental agency." The parties made no showing that the recipient or his insurer could not pay for the medical costs, and as a result, the analysis cannot proceed to declare the parties' rights under § 47-703(2).

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[16] *Id.*

[17] *Id.*

[18] *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018).

[19] See, *Mansuetta v. Mansuetta*, 295 Neb. 667, 890 N.W.2d 485 (2017); *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998).

[20] *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

[21] See §§ 47-702 and 47-703(1).

The required showing under § 47-703(1) is not onerous. Section 47-703(1) indicates that the provider of services shall submit an affidavit to the agency stating:

> (a) in the case of an insurer, health maintenance organization, preferred provider organization, or other similar source, a written denial of payment has been issued or (b) in all other cases, efforts have been made to identify sources and to collect from those sources and more than one hundred eighty days have passed or the normal collection efforts are exhausted since the medical services were rendered but full payment has not been received.

Section 47-703(1) indicates there is a low threshold regarding the adequacy of the affidavit by stating that "[i]n no event shall the provider of medical services be required to file a suit in a court of law or retain the services of a collection agency to satisfy the requirement of showing that reimbursement is not available pursuant to this section."

No allegations within Chase's complaint or any of the evidence adduced on the motion for summary judgment make the necessary showing under § 47-703(1). At argument before this court, Chase admitted that it did not make a showing to the district court that the recipient lacked the ability to pay and Imperial admitted that it knew Chase did not fulfill this requirement and did not raise an argument based on § 47-703(1) as a defense in district court. Because the requirements of § 47-703(1) were not satisfied, there was no showing that the "appropriate governmental agency" is liable for medical costs under § 47-703(2).

Though we appreciate the importance of this case to the parties and the far-reaching effects it may have on other governmental agencies, no justiciable controversy presently exists regarding the parties' rights under § 47-703(2). A determination of responsibility under § 47-703(2), absent the necessary showing under § 47-703(1), would be purely advisory. In addition, based on the record, we must conclude that there remains for the parties an adequate statutory

remedy under §§ 47-702 and 47-703(1). Declaratory judgment is not available.

We are aware that this may be a case of last impression regarding the parties' competing positions under § 47-703(2). There are two different bills to amend § 47-703 currently before the Legislature[22]; one of which identifies the very factual scenario now before us.

CONCLUSION

We conclude that declaratory judgment is unavailable due to the lack of a justiciable controversy between the parties. In addition, declaratory judgment cannot provide the parties a remedy, because a statutory remedy is available. We reverse the judgment of the Court of Appeals with directions to reverse and vacate the judgment of the district court.

Reversed with directions.

Papik, J., not participating.

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[22] See 2019 Neb. Laws, L.B. 216, § 1, and L.B. 455, § 2.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Carlos A. Garcia, appellant.

923 N.W.2d 725

Filed March 8, 2019. No. S-17-1202.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When 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. **Mental Competency: Appeal and Error.** The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
3. **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.
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. **Effectiveness of Counsel: Appeal and Error.** An appellate court determines 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.

6. **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.
7. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
8. ____: ____. Under the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, the ultimate touchstone is one of reasonableness.
9. **Constitutional Law: Search and Seizure: Warrantless Searches.** Pursuant to the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, searches and seizures must not be unreasonable, and searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.
10. **Constitutional Law: Investigative Stops: Search and Seizure: Probable Cause.** The Fourth Amendment guarantee of the right to be free of unreasonable searches and seizures requires that an arrest be based upon probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity.
11. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account.
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, which would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.
13. **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.
14. **Police Officers and Sheriffs: Search and Seizure: Arrests.** After an arrest is made, the arresting officer may search an arrestee's person to remove any weapons that he or she might use to resist arrest or to effect his or her escape, or to seize any evidence on the arrestee's person in order to prevent the concealment or destruction of such evidence.

15. **Arrests: Search and Seizure.** The justification for a search incident to a lawful arrest is absent if a search is remote in time or place from the arrest.
16. ____: ____. Inventory searches after an arrest are permissible.
17. **Search and Seizure.** The propriety of an inventory search is judged by a standard of reasonableness, and such search must be performed in accordance with standard operating procedures.
18. ____. Inventory searches must be conducted pursuant to an established routine, because an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.
19. **Search and Seizure: Police Officers and Sheriffs.** Inventory searches are considered reasonable because they serve at least three needs unrelated to criminal investigation: (1) to protect the owner's property while it remains in police custody, (2) to protect police against claims that they lost or stole the property, and (3) to protect police from potential danger.
20. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on a renewed objection, an appellate court considers all evidence, both from the trial and from the hearing on the motion to suppress.
21. **Trial: Testimony: Police Officers and Sheriffs: Search and Seizure.** Testimony of police officers may be used to establish the existence of a standard procedure and that an inventory search was conducted in accordance with that procedure.
22. **Search and Seizure: Evidence.** Evidence which would have been discovered in the course of a lawful inventory search can be admissible under the inevitable discovery doctrine.
23. **Mental Competency: Trial: Sentences: Time.** A trial court can determine a defendant's competency after trial but prior to sentencing, and it is the obligation of the court to do so.
24. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.
25. **Courts: Trial: Mental Competency.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court.
26. **Robbery: Words and Phrases.** To find the element of taking "by putting in fear" under the robbery statute, Neb. Rev. Stat. § 28-324 (Reissue 2016), the finder of fact must determine from the context established by the evidence whether the defendant's conduct would have placed a reasonable person in fear.

27. **Effectiveness of Counsel: Postconviction: 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 in a subsequent postconviction proceeding.
28. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court.
29. **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.
30. **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 a 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.
31. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
32. ____. 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 Douglas County: Shelly R. Stratman, Judge. Affirmed.

Peder Bartling, of Bartling Law Offices, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, Nathan A. Liss, and, on brief, Joe Meyer for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Carlos A. Garcia was convicted and sentenced for robbery in the district court for Douglas County. Garcia appeals and claims that the district court erred when it admitted into evidence a note that was found in what he asserts was an improper search of his person and when it determined that he was competent to stand trial and for sentencing. He also claims that there was not sufficient evidence to support his conviction, that his trial counsel provided ineffective assistance, and that the court imposed an excessive sentence. We affirm Garcia's conviction and sentence.

STATEMENT OF FACTS

In the mid-afternoon of October 27, 2015, Brandon Ruser was working as a teller at a bank in Omaha, Nebraska, when a man Ruser would identify at trial as Garcia approached him. Garcia handed Ruser a note that read, "THIS IS A ROBBERY PUT THE MONEY ON THE COUNTER." Ruser testified at trial that when he saw the note, he "[f]roze" out of "[f]ear, panic." Ruser reread the note to be sure he had read it correctly. Thereafter, in accordance with the protocol he had learned in training, Ruser collected the cash that was in his drawer, placed it on the counter, and backed away. After Ruser put the cash on the counter, Garcia picked up the note, put it in his pocket, and left the bank with the cash. It was later determined that $3,579 had been taken from the bank.

After Garcia left the bank, Ruser reported to his coworkers what had happened. Ruser looked outside and saw Garcia get into the front passenger seat of a black Toyota RAV4 that was parked in the bank's parking lot. Ruser could not see the driver well, but he testified the driver "appeared to be a woman. I just saw longer hair." The vehicle slowly backed up and drove

away in a manner that Ruser described as "pretty much as if nothing had happened."

Police officers investigating the robbery learned from witnesses the license plate number for the black Toyota in which Garcia was seen leaving the bank. Using the license plate number, officers learned that the vehicle was registered to Kelli Allison. They went to the address listed for Allison on vehicle license records, and there, they spoke with Allison. Garcia was the father of Allison's two children, and she had had an "on-again-off-again" relationship with him over the years. In October 2015, they were not in an intimate relationship and were not living together, but they were friends, and she was helping him by paying the rent for a motel where he was staying.

Allison told police that earlier in the day on October 27, 2015, she had helped Garcia by driving him to run some errands. As the final errand, Garcia asked Allison to take him to a local bank to cash a check. Allison waited in the parking lot while Garcia went into the bank. He was inside for 5 to 10 minutes before he came back out and got into the car. Allison then drove Garcia back to the motel where he was staying.

Police officers thereafter applied for a warrant to search Garcia's motel room. Preliminary to our discussion of the application for the search warrant, we note that throughout both the application and the search warrant itself, the suspect is sometimes referred to as "Carlos Garcia," but roughly in an equal number of times, he is referred to as "Carlos Gomez." In the discussion below, for the sake of clarity, we refer to "Garcia," but for completeness, it should be noted that in at least some of the instances discussed below, the application or the search warrant actually refers to "Carlos Gomez" rather than to "Carlos Garcia." Alfred S. Orsi, the police officer who prepared the application for the search warrant, explained that this was a typographical error.

As grounds for issuance of the search warrant, Orsi noted, inter alia, information obtained from Allison to the effect that

she had taken Garcia to the bank and thereafter to his motel room. Orsi also noted that officers had gone to the motel and confirmed with the manager that the room identified by Allison was being rented in Allison's name. The manager also stated that in the recent past, he had observed a man fitting Garcia's description going into the room; after being shown a picture of the robbery suspect taken from the bank surveillance video, the manager identified the man in the photograph as the man he had seen going into the room. Orsi further noted in the application that officers had shown Ruser, the bank teller, a photographic lineup that included a picture of Garcia and that Ruser had identified Garcia as the robber.

In the application, Orsi listed various items that were the intended targets of the search. These items included, inter alia, cash, clothing that the robber was described as having worn, and, notably for this appeal, a robbery note "stating something to the effect of 'This is a robbery, put the money on the counter.'" Orsi asserted that the listed items were "concealed or kept in, on, or about the following described place or person." Orsi thereafter gave the address and room number for the motel room and stated that the search location was to include, inter alia, vehicles at the location that were connected to or under the control of the suspect. The application further stated that "said property is under the control or custody of: Carlos GARCIA," and gave a physical description of Garcia. Orsi further requested authorization for a night-time search and a no-knock, no-announce search warrant. Orsi asserted that although no weapon had been shown during the robbery, Garcia had a history of violence which included a prior conviction and incarceration for manslaughter.

Based on Orsi's application, the Douglas County Court issued a search warrant on October 27, 2015. The court set forth the items listed in the application and found that there was probable cause to believe that the items were concealed in the motel room, in vehicles under the control of the suspect, or, inter alia, on "the person of Carlos GARCIA." The search

warrant gave Orsi, "with the necessary and proper assistance," authority "to search the afore described location and/or person, for the purpose of seizing the before described property." The search warrant further gave authority to execute a nighttime search and to enter the premises without knocking or announcing. The warrant required Orsi to make return of the warrant within 10 days.

Orsi conducted a search of the motel room "an hour or two after the warrant and affidavit were signed by the judge." Orsi did not search any vehicles as part of the search of the motel room, because he was "unaware of any vehicles that were associated with [Garcia] at that location." Orsi did not conduct a search of Garcia's person at the time of the search of the motel room or at any other time. Although Orsi interviewed Garcia on October 28, 2015, that interview occurred "[w]ell after the search" of the motel room. After completing the search, Orsi filed in the county court a return and inventory stating that he had served the warrant on October 27. The return and inventory listed various items that were seized pursuant to the warrant, but notably, the items listed did not include a robbery note.

At approximately 1:15 a.m. on October 28, 2015, Derrick Kreikemeier, an Omaha police officer, passed "a blue older model . . . Chevy Suburban or Tahoe" coming from the opposite direction and noted that it was being driven without a front license plate. Kreikemeier was a passenger in a patrol cruiser driven by his partner. As they passed the vehicle, Kreikemeier observed the driver enough to gather a general description of the driver. Kreikemeier and his partner turned around to follow the vehicle and observed that there was also no rear license plate. They then initiated a traffic stop of the vehicle. The vehicle initially stopped, but as Kreikemeier approached the vehicle on foot, the vehicle took off at a high rate of speed. As he was approaching the vehicle, Kreikemeier had seen an in-transit sign in the rear window, but he was not able to read the full date before the vehicle took off. Kreikemeier and his

partner did not attempt to chase the vehicle, because the stop was "just for a traffic offense." However, Kreikemier notified dispatch to put out a broadcast describing the vehicle, stating that it had fled from a traffic stop, and giving its direction of travel.

Later that morning, at approximately 4 a.m., Kreikemier and his partner were notified that officers had seen the described vehicle, and they went to the location where the vehicle had been seen. They spotted the vehicle traveling down a street and began to follow it. Thereafter, the driver parked the vehicle, and Kreikemeier saw a man get out of the driver's-side door and begin to run south. Kreikemeier yelled for the man to stop and began a pursuit on foot. When the man was approximately 20 to 25 feet from the vehicle, he tripped and fell, and Kreikemeier was able to catch the man. After learning that the man was named "Carlos Garcia," Kreikemeier ran a data check and learned that Garcia had a suspended driver's license and that the police robbery unit had issued a "locate" for Garcia for questioning in connection with a robbery.

Kreikemeier observed that the vehicle was the same vehicle he had stopped earlier. Kreiekemeier could not say for certain that Garcia was the same man who was driving the vehicle in the earlier traffic stop, but he observed that Garcia "fit the description" of the driver in the earlier stop. Kreikemeier looked inside the vehicle in order to determine its ownership; he found a bill of sale which indicated that Garcia had purchased the vehicle for $3,100 on October 27, 2015, the day prior to the stop. Kreikemeier and his partner arrested Garcia for driving under suspension and for fleeing the earlier traffic stop, and they took him to police headquarters for questioning by the robbery unit. At the scene of the stop and arrest, Kreikemeier conducted a pat-down search of Garcia for weapons but did not perform a further search at that time.

After they arrived at police headquarters but just prior to an interview of Garcia, Kreikemeier "removed all of . . . Garcia's property from his person." The items that Kreikemeier

removed from Garcia's person included "$348 cash[,] . . . an envelope addressed to [Garcia, and] [i]nside the envelope was a piece of paper with the writing '[T]his is a robbery. Put the money on the counter.'"

Garcia was thereafter arrested in connection with the bank robbery, and on November 16, 2015, he was charged with robbery. Prior to trial, on February 4, 2016, the State filed a motion to determine whether Garcia was competent to stand trial, and on that same day, the court ordered Garcia to submit to a psychiatric evaluation to determine his mental competency to stand trial. After the evaluation was completed, the court held a hearing at which it received into evidence a report dated May 13, 2016, and prepared by a forensic psychiatrist who opined "with a reasonable degree of medical certainty" that "Garcia at this point is competent to stand trial and he can cooperate in a reasonable manner with the court proceedings in his upcoming trial." Based on the report, the court on June 16 found Garcia to be competent to stand trial. In December, shortly before trial was set to begin, Garcia's counsel moved for a new competency evaluation. Based on interactions the court had had with Garcia and interactions the court had observed between Garcia and his counsel, the court overruled the motion. The court determined that the conclusions from the May 13, 2016, evaluation were still valid and that "while [Garcia] has been defiant and uncooperative with his attorney," such behavior did not rise "to the level to warrant an additional competency evaluation."

Also prior to trial, on June 16, 2016, Garcia filed a motion to suppress evidence seized as a result of searches of his person, his residence, his motel room, and his vehicle. Garcia challenged, inter alia, both stops, the issuance and execution of the search warrant, and the search of his person at police headquarters. Both Kreikemeier and Orsi testified at the hearing. Kreikemeier testified, inter alia, that the search of Garcia's person at police headquarters was done because: "When we place them in the interview room, we want to make sure that

they don't have any type of contraband or weapons that they could take in there with them and possibly even destroy or hurt the officer that's going in." Kreikemeier testified that in addition to being sent in for an interview, Garcia was being arrested for driving under suspension and for fleeing to avoid arrest and that when a person is being booked, officers have to take all property off of the person. Kreikemeier testified on cross-examination that the note was folded inside the envelope and that he took the note out of the envelope, unfolded it, and read it. Orsi also testified at the suppression hearing, and on cross-examination, he acknowledged that the application and the search warrant made references to "Carlos Gomez," but he testified that such references were "typographical error" and that any references to "Gomez" were facts related to Garcia.

In an order filed November 22, 2016, the district court overruled Garcia's motion to suppress. With regard to the stops, the court found that the first stop of the vehicle was justified by the lack of license plates and the failure to plainly display the in-transit sign and that the second stop was justified by a reasonable and articulable suspicion that the driver of the vehicle may be involved in criminal activity due to the fact that the vehicle had fled from the first stop.

With regard to the search warrant, the court found that "[a]lthough there were clearly mistakes made in the affidavit and application," the statements were typographical errors and not a false statement made knowingly and intentionally or with reckless disregard for the truth. The court further found that facts and evidence set forth in the affidavit supported a finding of probable cause to search Garcia's person and his motel room.

With regard to the search of Garcia's person at police headquarters, the court noted that the search took place the morning after the search warrant was obtained by Orsi and that Garcia matched the physical description of the person in the search warrant. The court found that "officers had probable cause to arrest [Garcia] for driving under suspension and flight to avoid

arrest" and that the search of Garcia's person was incident to his arrest and "was valid in that the officers had probable cause to arrest him." The court also made reference to the search warrant in connection with its determination that the search of Garcia's person was proper.

Garcia's trial began on January 9, 2017. The State's witnesses at trial included Ruser, the bank teller. Ruser testified, inter alia, that after Garcia handed him the note, he felt:

> Scared. Very panicked. Not knowing if this was where it was going to go. I mean, you hear stories and things. You just never, you know, want it to be one of those horror stories. You just hope that it would go the way you're trained and taught it would go if you follow the procedures properly.

Ruser also testified that he avoided making eye contact with Garcia, because he wanted "to avoid escalation, not sure if that would prompt a reaction" and "[n]ot knowing if the person is dangerous or not . . . if so, eye contact could provoke an attack or an assault." Ruser further testified that after Garcia left the bank, "[t]hat is when the nerves really kicked in. You know, shaking, shortness of breath, those kinds of things."

During Ruser's testimony, the State showed Ruser the note that had been seized in the search of Garcia's person, and Ruser identified it as the note that he was given in the robbery. The State offered the note into evidence, and Garcia objected and renewed his motion to suppress the evidence. The court overruled Garcia's objection and received the robbery note into evidence.

Kreikemeier and Orsi also testified at trial. During his testimony, Kreikemeier identified the note as the one that he found inside an envelope when he searched Garcia's person at police headquarters. Kreikemeier testified that persons going into an interview room were usually searched and items taken out of their pockets before they were placed in the interview room. Orsi testified that he interviewed Garcia at police headquarters and that he had not personally searched Garcia

but that Garcia had been searched by the time Orsi got to the interview room. Orsi further testified: "That's our policy. Anytime before anybody goes into our interview rooms, they need to be thoroughly searched for contraband." Orsi testified he saw the note that was found on Garcia's person and that the wording of the note "precisely matched the wording that was described to me from the clerk."

During a recess in the State's presentation of evidence, outside the jury's presence, Garcia spoke directly to the court rather than through counsel and stated, "I would like to declare a mistrial. I'm not being represented to the best of my ability." After some discussion with the court regarding procedure, Garcia asserted that he was "asking [counsel] to do things, and she's not doing them." The court overruled the motion for mistrial, and the trial proceeded.

At the close of the State's case, Garcia moved to dismiss and the court overruled the motion. Thereafter, Garcia chose to testify. When Garcia took the stand, counsel asked him to give his side of the story in response to the testimony of the State's witnesses regarding the events of October 27 and 28, 2015. Garcia generally refused to respond to the State's evidence and instead stated that he wished to declare a mistrial and that his constitutional rights had been violated. The defense rested without presenting other evidence, and the court overruled Garcia's renewed motion to dismiss.

The jury found Garcia guilty of robbery, and the court accepted the verdict. Prior to sentencing, the court sustained Garcia's motion for a new evaluation to determine Garcia's competency to stand for sentencing. At the sentencing hearing, the court received into evidence a report dated September 29, 2017, in which a forensic psychiatrist opined with a reasonable degree of medical certainty that Garcia was competent to go through sentencing. The court found Garcia competent to be sentenced, and it thereafter sentenced Garcia to imprisonment for 6 to 10 years with credit for time served of 727 days.

Garcia appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Garcia claims that the district court erred when it (1) admitted the note into evidence and (2) determined that he was competent to stand trial and for sentencing. Garcia also claims that there was insufficient evidence to support his conviction for robbery. Garcia, who has new counsel on appeal, claims that his trial counsel provided ineffective assistance in certain respects that are set forth in greater detail in our analysis. Garcia claims that even if any one of the above-claimed errors standing alone does not require reversal of his conviction, the accumulation of errors does. Garcia finally claims that the district court imposed an excessive sentence.

STANDARDS OF REVIEW

[1] When 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. Brown, ante* p. 53, 921 N.W.2d 804 (2019). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *Id*.

[2] The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding. *State v. Martinez*, 295 Neb. 1, 886 N.W.2d 256 (2016).

[3] 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. McCurdy*, 301 Neb. 343, 918 N.W.2d 292 (2018).

[4,5] 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. *State v. Hood*, 301 Neb. 207, 917 N.W.2d 880 (2018). 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*.

[6] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

ANALYSIS

Admission of Note, Fourth Amendment, and Inventory Search.

Garcia first claims that the district court erred when it admitted "specific physical evidence" at trial. Garcia's argument makes clear that his assignment of error relates specifically to the note and his objection to admission of the note based on an alleged violation of his Fourth Amendment rights. Because we conclude the search of Garcia's person that resulted in discovery of the note was not an unconstitutionally unreasonable search, we determine that the court did not err when it admitted the note.

[7-9] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. *State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018). The ultimate touchstone is one of reasonableness. *Id*. Searches and seizures must not be unreasonable, and searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. *Id*.

We note first that much of the argument by both Garcia and the State centers on the validity of the search warrant and

in particular the fact that both the application and the warrant sometimes refer to "Carlos Gomez" rather than "Carlos Garcia." The warrant focused on a search of the room in which Garcia was staying. Police executed that warrant and filed a return and inventory, and the note was not among the items that was found in the search. Because the note was not found in the search conducted pursuant to the warrant, the validity of the warrant is not relevant to the question whether the note found later on Garcia's person was obtained in violation of Garcia's Fourth Amendment rights.

As noted, Garcia's argument on appeal focuses exclusively on admission of the note, and the note was not obtained in the search that was conducted pursuant to the warrant. Instead, the note was found in a search of Garcia's person that was conducted after he was taken to police headquarters and before he was put into an interview room to be questioned by Orsi regarding the robbery. Therefore, our analysis focuses on Garcia's relevant arguments concerning the events that led to the discovery of the note. Garcia contends that the investigatory stops that led to his arrest and the search of his person at police headquarters were invalid. We reject these arguments.

[10,11] The Fourth Amendment guarantee of the right to be free of unreasonable searches and seizures requires that an arrest be based upon probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity. *State v. Rodriguez*, 288 Neb. 878, 852 N.W.2d 705 (2014). In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account. *Id*.

We note that according to the evidence presented at the suppression hearing, the police made two investigatory stops before eventually arresting Garcia. The first was a traffic stop in which the police stopped a vehicle because it did not appear to have license plates or in-transit tags. The vehicle initially stopped but drove away as police were approaching the vehicle. The second stop occurred a few hours later when the police

again saw what they testified was the same vehicle. The police followed the vehicle but did not initiate a traffic stop. Instead, the driver of the vehicle, Garcia, pulled over of his own accord and parked the vehicle. He ran from the vehicle, and the police thereafter seized him. While not a "traffic stop," this was an investigatory stop of Garcia and is analyzed as such.

Garcia argues on appeal that "the traffic stop" was not valid, but it is not entirely clear whether he is taking issue with the first or second stop, or both. As explained below, we treat the first stop as a "traffic stop," and the second encounter as an "investigation stop," and determine that both stops were constitutionally valid. Regarding the first stop, Garcia cites *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993), in which we held that police did not have reasonable suspicion of criminal activity when they stopped a vehicle to check whether visible in-transit tags were valid, because they did not see anything suspicious or out of the ordinary about the tags. However, after *Childs*, in *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996), we held that police had reasonable suspicion to conduct an investigatory traffic stop of a car's being operated without license plates or in-transit tags. We reasoned in *Bowers* that "[w]hen an officer observes a vehicle without license plates or in-transit tags, a particularized and objective basis exists to justify a reasonable, articulable suspicion that the driver may be criminally avoiding the motor vehicle registration statutes." 250 Neb. at 161, 548 N.W.2d at 731.

The first stop in this case was based on a reasonable suspicion, because before they made the stop, the police officers did not see license plates or visible in-transit tags. The fact that in-transit tags became visible as the police approached the vehicle on foot does not invalidate the reasonable suspicion that justified the initial traffic stop. This traffic stop was investigatory in nature, and it did not become invalid simply because investigation dispelled the initial suspicion.

The second stop occurred after the officers saw the vehicle a second time. They followed the vehicle but did not initiate a

traffic stop. Instead, the driver pulled the vehicle over and ran from the vehicle, and the officers then initiated an investigatory stop. At that time, the officers had reasonable suspicion based on their belief that the vehicle was the same vehicle they had stopped earlier and that had been driven off before they could contact the driver. At the time of the second stop, the police had reason to suspect that the driver associated with the first stop had violated Neb. Rev. Stat. § 28-905(1) (Reissue 2016), which provides: "Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation commits the offense of operation of a motor vehicle to avoid arrest." Garcia argues that at the time of the second stop, the officers were not certain that he had been driving the vehicle at the time of the first stop. However, the police did not need definitive proof that he had been driving; they needed only an articulable suspicion. In this case, Kreikemeier testified that the vehicle was the same vehicle that had fled the first stop. He could not say for certain that Garcia was the same man who had been driving the vehicle at the time of the earlier traffic stop, but he observed that Garcia "fit the description" of that driver. This was sufficient to establish an articulable suspicion of criminal activity.

[12] After the second stop, police learned that Garcia's driver's license was suspended. They therefore arrested Garcia for driving under suspension and fleeing the earlier traffic stop. 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, which would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime. *State v. Petsch*, 300 Neb. 401, 914 N.W.2d 448 (2018). Garcia does not explicitly argue on appeal that the police did not have probable cause to arrest him for driving under suspension. He argues that there was not probable cause to arrest him for fleeing the earlier stop, because the police could not say with certainty that he had been driving the vehicle at the earlier time.

However, Kreikemeier's testimony that Garcia "fit the description" of that driver, combined with knowledge obtained in connection with the second stop—particularly the fact that Garcia was driving on a suspended license and that he attempted to run from the police after stopping the second time—gave sufficient reason to suspect he had committed the crime of fleeing to avoid arrest.

Having determined that the stops and the arrest were valid, we consider whether the search of Garcia's person during which the note was discovered was valid. As we discussed earlier, the note was not discovered as part of the search that was conducted in execution of the search warrant. The search of Garcia's person at police headquarters was therefore a search without a warrant. We determine that the search which led to the discovery of the note was valid.

[13] As noted above, to be constitutional, searches and seizures must not be unreasonable, and searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. *State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018). The warrantless search exceptions we have recognized 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. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). The district court's order which overruled Garcia's motion to suppress and the State on appeal indicate that we should approve the search by which the note was discovered as a search incident to a valid arrest. However, as explained below, we believe the controlling framework is the inventory search exception to the warrant requirement and we determine the search was valid on this basis.

[14,15] Regarding a search incident to arrest, we have stated that a valid arrest based on probable cause that a person is engaged in criminal activity is allowed by the Fourth Amendment, and if an arrest is made based upon probable

cause, a full search of the person may be made incident to that arrest. *State v. Perry*, 292 Neb. 708, 874 N.W.2d 36 (2016). As we determined above, the police in this case made a valid arrest of Garcia. After an arrest is made, the arresting officer may search an arrestee's person to remove any weapons that he or she might use to resist arrest or to effect his or her escape, or to seize any evidence on the arrestee's person in order to prevent the concealment or destruction of such evidence. See *State v. Wells, supra*. However, we have noted that the justification for a search incident to a lawful arrest is absent if a search is remote in time or place from the arrest. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001). As Garcia notes, in this case, the police conducted a pat-down search at the time they arrested Garcia, but that search did not disclose the note. The search that disclosed the note did not occur until Garcia had been taken to police headquarters and was being prepared to go into an interview, arguably remote in time and place from the arrest.

[16-18] We need not resolve the propriety of the search as incident to an arrest, because another recognized exception to the warrant requirement is an inventory search, and we believe that the search was valid as an inventory search. In our recent case law, we have more frequently analyzed the inventory search exception in connection with the search of a vehicle. See, e.g., *State v. Nunez*, 299 Neb. 340, 907 N.W.2d 913 (2018). But we have recognized that searches of an arrestee's person and effects may be justified as inventory searches. In *State v. Newman*, 250 Neb. 226, 237-38, 548 N.W.2d 739, 749 (1996), we noted that both this court and the U.S. Supreme Court, in *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983), had "consistently held that inventory searches after an arrest are permissible." In *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993), we held that police had performed a permissible inventory search of the defendant's purse after her arrest. We further stated in *Filkin* that "the propriety of inventory searches is judged by a standard

of reasonableness" and that "such searches must be performed in accordance with standard operating procedures." 242 Neb. at 279, 494 N.W.2d at 547. We stated that inventory searches must be conducted pursuant to an established routine, because "'"an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."'" *Id.* at 282, 494 N.W.2d at 549.

[19] Similarly, in connection with an inventory search of a vehicle, we recently stated that "inventory searches conducted according to established policy are reasonable" and that

> [i]nventory searches are considered reasonable because they serve at least three needs unrelated to criminal investigation: (1) to protect the owner's property while it remains in police custody, (2) to protect police against claims that they lost or stole the property, and (3) to protect police from potential danger.

State v. Nunez, 299 Neb. at 346, 907 N.W.2d at 917.

[20] In the present case, we consider the testimony of the police officers at the suppression hearing and at the trial. See *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017) (instructing that when motion to suppress is denied pretrial and again during trial on renewed objection, appellate court considers all evidence, both from trial and from hearing on motion to suppress). A review of all such testimony indicates that the search of Garcia's person that uncovered the note was conducted after he was taken to police headquarters and before he was put into a room to be interviewed by an officer investigating the robbery. Kreikemeier, the officer who conducted the search, testified about the purposes for which the search was done. He testified that before placing a person into an interview room, police search the person "to make sure that they don't have any type of contraband or weapons that they could take in there with them and possibly even destroy or hurt the officer that's going in." He testified that Garcia was being arrested and that when a person was being booked, officers would take all property off the person. Orsi, the officer who

conducted the interview, testified that police policy in particular was that "before anybody goes into out interview rooms, they need to be thoroughly searched for contraband."

[21] Such testimony by the police officers indicates that the search of Garcia's person was conducted pursuant to police policy. In *Filkin*, we indicated that the Fourth Amendment requires that "the State bears the burden of proving that a law enforcement agency's search was made pursuant to a standardized criteria or established routine" and that the testimony of police officers may be used to "establish the existence of a standard procedure and that the search was conducted in accordance with that procedure." 242 Neb. at 284-85, 494 N.W.2d at 550.

[22] For completeness, we note that even if Garcia was not in the process of being booked at the moment of the search, the evidence shows that he had been arrested and was eventually going to be booked. The testimony established that an inventory search was standard procedure upon booking, and so the note would have been discovered in that search. We have recognized that "evidence which would have been discovered in the course of a lawful inventory search can be admissible under the inevitable discovery doctrine." *State v. Ball*, 271 Neb. 140, 152, 710 N.W.2d 592, 603 (2006).

We conclude that the search of Garcia's person that uncovered the note was justified as an inventory search. Because we determine that the note was not obtained as the result of an unconstitutional search or seizure, we conclude that the court did not err when it admitted the note into evidence. We reject Garcia's assignment of error.

Competency Determinations.

Garcia next claims that the district court erred when it determined that he was "competent to proceed legally to trial and to sentencing." We conclude that the court did not err in these two rulings. And for completeness, we also reject Garcia's argument that his courtroom behavior should have separately and additionally led to a finding of incompetence.

[23] Neb. Rev. Stat. § 29-1823(1) (Cum. Supp. 2018) states in part that "[i]f at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district or county court by the county attorney or city attorney, by the accused, or by any person for the accused." We have also recognized that a trial court can determine a defendant's competency after trial but prior to sentencing and that it is the obligation of the court to do so. See *State v. Martinez*, 295 Neb. 1, 886 N.W.2d 256 (2016). In the present case, the court twice found Garcia to be competent—on the State's motion prior to trial and on Garcia's motion after conviction but before sentencing.

[24,25] A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense. *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018), *disapproved on other grounds, State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018). The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. *State v. Fox*, 282 Neb. 957, 806 N.W.2d 883 (2011). The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding. *State v. Martinez, supra*; *State v. Fox, supra*.

The court in this case first determined that Garcia was competent prior to trial in response to the State's motion. The record shows that the court ordered a psychiatric evaluation. An evaluation was completed, and a report dated May 13, 2016, by a forensic psychiatrist was received into evidence. The court found Garcia to be competent to stand trial based on the report of the forensic psychiatrist who performed the evaluation. In the report, the forensic psychiatrist opined "with a reasonable degree of medical certainty" that "Garcia at this point is competent to stand trial and he can cooperate in a reasonable manner with the court proceedings in his upcoming

trial." The report noted that Garcia had been diagnosed with "Antisocial Personality Disorder." However, the psychiatrist noted that Garcia was "able to tell me that he could very well understand the nature of the alleged charges against him"; that Garcia was familiar with the people who would be involved in the upcoming court proceedings, including the judge, the State's attorney, and the public defender, and the roles each would play in the proceeding; and that he understood procedural aspects of a trial including the need to work with his attorney to prepare for trial, the process of plea bargaining, the difference between a bench trial and a jury trial, and the role and composition of a jury.

After he was convicted but prior to sentencing, Garcia filed a motion for a new evaluation to determine his competency to stand for sentencing. The court sustained the motion, and at the sentencing hearing, the court received into evidence a report dated September 29, 2017, which was prepared by the same forensic psychiatrist who had performed the evaluation prior to trial. The psychiatrist opined with a reasonable degree of medical certainty that Garcia was not suffering from any psychotic disorder and was competent to go through the process of sentencing. The psychiatrist noted that Garcia's current diagnosis was "malingering as well as antisocial personality disorder." The psychiatrist further noted that although Garcia had "reported some delusional thinking," Garcia had refused "to take any psychotropic medication" or to participate in "non-intrusive psychological testing." The psychiatrist opined that Garcia "knows well that taking any psychological testing, as it was the case in the past, will reveal his malingering and his efforts of avoiding punishment for the crime that he has committed." Based on the forensic psychiatrist's report, the court found Garcia competent to be sentenced.

We conclude that there was sufficient evidence to support the court's findings of competency prior to trial and prior to sentencing. At the competency hearing prior to trial, Garcia did not present any evidence or argument to dispute the forensic

psychiatrist's May 13, 2016, report. Instead, defense counsel stated that Garcia "pretty much agrees with most of the observations and conclusions" in the report and that he had "no disagreement with the conclusion that at the current time he is able to assist in his defense and is competent to stand trial." At the sentencing hearing, after the State offered the forensic psychiatrist's September 29, 2017, report into evidence, Garcia had no objection and presented no evidence or argument to dispute the substance of the report. In view of the foregoing, we believe the record shows that the State presented evidence which established Garcia's competency to stand trial and for sentencing, that Garcia presented no evidence to dispute the State's evidence, and that the court's findings of competency are based on sufficient evidence. We therefore conclude that the court did not err when it found Garcia competent to stand trial and for sentencing.

For completeness, we note that much of Garcia's argument in his brief focuses on a contention that during trial, Garcia "exhibited signs of mental instability consistent with suffering the negative consequences of an active mental illness." Brief for appellant at 22. Garcia asserts that such signs consisted mainly of "numerous incoherent outbursts during in-court proceedings." *Id.*

Garcia's argument is outside the scope of his assigned error addressed to the court's two rulings discussed above, but we note that in December 2016, shortly before trial was set to begin, Garcia's counsel moved for a new competency evaluation. In response, the court overruled the motion based on its own interactions with Garcia and interactions the court had observed between Garcia and his counsel. The court determined that the conclusions from the May 13, 2016, evaluation were still valid and that "while [Garcia] has been defiant and uncooperative with his attorney," such behavior did not rise "to the level to warrant an additional competency evaluation."

We have stated that "[a] defendant's derangement . . . is not sufficient to prove incompetence to stand trial." *State v.*

Grant, 293 Neb. 163, 195, 876 N.W.2d 639, 664-65 (2016). In *Grant*, we determined that the defendant's "mere impulsive behavior during trial [was] not sufficient to raise the issue of incompetence" when an evaluation conducted prior to trial had shown him to be competent to stand trial. 293 Neb. at 195, 876 N.W.2d at 665. The behavior of the defendant in *Grant* included "outburst[s]" as well as an incident in which he allegedly "hit one of the court deputies" and another incident in which he "struck his defense attorney in the presence of the jury." 293 Neb. at 174-75, 876 N.W.2d at 653. Based on *Grant*, we determine that to the extent Garcia complains of error, the court did not err when it overruled Garcia's December 2016 motion to determine competency.

Sufficiency of the Evidence.

Garcia next claims that there was insufficient evidence to support his conviction for robbery. We conclude that the evidence was sufficient to sustain the conviction.

Garcia was convicted of robbery in violation of Neb. Rev. Stat. § 28-324 (Reissue 2016), which provides that one "commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." Garcia argues that there was no evidence that he used force or violence. However, § 28-324 provides that robbery may be committed "forcibly and by violence" or "by putting in fear." In the present case, we conclude that there was evidence that Garcia took money from the person of another "by putting [the victim] in fear."

The evidence showed that Garcia walked into a bank and handed a teller a note that read, "THIS IS A ROBBERY PUT THE MONEY ON THE COUNTER." The teller testified that upon reading the note, he "[f]roze" out of "[f]ear, panic." The teller further described his reaction as being "[s]cared" and "[v]ery panicked" and that he was uncertain whether Garcia was dangerous and whether making eye contact with Garcia

"could provoke an attack or an assault." The teller testified that he collected the cash that was in his drawer, then placed it on the counter and backed away, and that Garcia picked up the note and left the bank with the cash.

Nebraska's robbery statute, § 28-324, includes the element of taking by "putting [the victim] in fear." Whether to apply an objective test to the "putting in fear" aspect of robbery has long been discussed. See Wayne R. LaFave, Criminal Law § 20.3(d)(2) (6th ed. 2017). Florida has a robbery statute which, like Nebraska's statute, includes an element of "putting in fear." See Fla. Stat. Ann. § 812.13(1) (West 2016). In *Delgado v. State*, 105 So. 3d 612, 613 (Fla. App. 2013), the Florida appellate court stated that "for there to be a 'fear'-based robbery within the meaning of the statute, the trier of fact must determine whether the defendant's conduct would have placed a reasonable person, not just the actual victim, in fear." This analysis gives due regard to whether "the defendant's behavior [was] calculated to produce" fear. See LaFave, § 20.3(d)(2) at 1325. In *Delgado*, the court specifically determined that the defendant put a bank teller "in fear" when he handed her a note stating "'this is a robbery'" and demanded money. 105 So. 3d at 613.

Other jurisdictions have statutory provisions similar to Nebraska's "putting in fear" element but phrased in terms of a "threat of force" or "intimidation." Regardless of the specific statutory language, when there is evidence of a robbery note, the context surrounding the incident will be taken into account. In *Washington v. Farnsworth*, 185 Wash. 2d 768, 374 P.3d 1152 (2016), the court determined that a handwritten note demanding money from a bank teller contained an implied threat of force. In *Farnsworth*, the court reasoned a threat was present in the context of that case, because the demand for money was "'unsupported by even the pretext of any lawful entitlement to the funds.'" 185 Wash. 2d at 779, 374 P.3d at 1158 (quoting *State v. Collinsworth*, 90 Wash. App. 546, 966 P.2d 905 (1997)). See, also, *United States v. Hopkins*, 703 F.2d 1102,

1103 (9th Cir. 1983) (finding sufficient "intimidation" for robbery when defendant presented teller note stating "'[t]his is a robbery'" and demanding money). See, also, LaFave, *supra*.

[26] We agree with the reasoning of the foregoing authorities. Merging the principles just recited, we hold that to find the element of taking "by putting in fear" under the robbery statute, § 28-324, the finder of fact must determine from the context established by the evidence, whether the defendant's conduct would have placed a reasonable person in fear. In the present case, the context includes a robbery note.

We apply the foregoing legal standard to the evidence in this case. The evidence showed that Garcia walked into a bank and handed the teller a note that stated, "THIS IS A ROBBERY PUT THE MONEY ON THE COUNTER." The teller described the incident in detail in addition to his reaction. We determine that the evidence was sufficient to establish the statutory requirement that Garcia committed robbery by "putting [the victim] in fear." See § 28-324.

The evidence in this case was sufficient to support a conviction for robbery in violation of § 28-324. We therefore reject Garcia's claim that his conviction was not supported by sufficient evidence.

Ineffective Assistance Claims.

[27] Garcia, who has new counsel on appeal, claims that his trial counsel provided ineffective assistance in certain respects. 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 in a subsequent postconviction proceeding. *State v. Golyar*, 301 Neb. 488, 919 N.W.2d 133 (2018). Garcia specifically claims he was provided ineffective assistance when trial counsel (1) failed to obtain a second opinion regarding his mental illness, (2) failed to move for a mistrial when his mental illness disrupted trial

proceedings, (3) failed to present a meaningful defense, and (4) failed to seek a dismissal prior to trial based on a violation of Neb. Rev. Stat. § 29-1207 (Reissue 2016), the speedy trial statute. We determine that the record on direct appeal is insufficient to consider the first two claims, that the third claim is not sufficiently stated, and that the record shows that the fourth claim is without merit.

[28,29] An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. *State v. Golyar, supra*. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id*. The determining factor is whether the record is sufficient to adequately review the question. *Id*.

In his first two claims of ineffective assistance, Garcia asserts that trial counsel failed to obtain a second opinion regarding his mental illness and failed to move for a mistrial when his mental illness disrupted trial proceedings. He alleges that counsel had firsthand knowledge of Garcia's mental illness and how manifestations of such illness interfered with attorney-client communications and Garcia's ability to assist in preparations for trial. He claims that counsel relied on mental health evaluations requested by the State and failed to obtain an independent second opinion that would have shown that Garcia's mental illness undermined his ability to meaningfully participate in his defense. He further claims that counsel should have moved for a mistrial. The State in its response does not dispute that Garcia set forth these claims with sufficient particularity, but it asserts that the record on appeal is not sufficient to consider the claims.

We agree that the record on appeal is not sufficient to consider these first two claims. As we discussed above in

connection with Garcia's claim that the court erred when it found him to be competent to stand trial and for sentencing, the court based such determinations on mental health evaluations obtained by the State. Garcia's first two claims of ineffective assistance would require Garcia to show that counsel could have obtained a second opinion that would have called the State's evaluations into doubt. These claims also involve consideration of trial strategy, which cannot be done on direct appeal. Although we determine the claims cannot be reviewed on direct appeal, we determine that Garcia alleged deficient performance with sufficient particularity for purposes of direct appeal.

In his third claim of ineffective assistance, Garcia asserts that trial counsel "failed to present a meaningful defense case-in-chief." He argues that the defense was limited to adducing testimony from Garcia in his own defense, and he criticizes counsel for "putting Garcia's mental illness on full display for a jury" when counsel was not pursuing a defense of not guilty by reason of insanity. Brief for appellant at 32. Garcia argues that the defense presented by counsel, "including counsel's failure to pursue a defense rooted in a theory of not guilty by reason of insanity," was not a reasonable strategic choice but instead was ineffective assistance evident on the face of the record. *Id*. The State asserts in response that Garcia did not raise this claim with sufficient particularity; the State argues that Garcia does not specify what evidence should have been presented or what defense theory counsel should have pursued.

We agree with the State that Garcia did not state his third claim with sufficient particularity. Garcia does not specify any additional evidence that should have been presented by defense counsel or that would have supported an insanity defense. Instead, he argues that ineffectiveness for failure to present such defense is evident from the record on appeal. As we have discussed above with regard to Garcia's assignment of error regarding the court's competency evaluation, the record

supports the district court's determination that Garcia was competent to stand trial and for sentencing. Because the record supports a competency determination, a fortiori the record does not clearly show that counsel should have pursued an insanity defense. In order to support a claim that counsel was ineffective for failing to pursue such a defense, Garcia cannot rely on the record on appeal and instead would need to allege with specificity what evidence would support such defense. He failed to do so, and we therefore conclude that the record on appeal does not support this third claim, and Garcia did not state the claim with sufficient particularity to preserve it for postconviction review.

In his fourth and final claim of ineffective assistance, Garcia asserts that counsel was ineffective for failing to seek a dismissal prior to trial based on a violation of the speedy trial statute. Nebraska's speedy trial statute, § 29-1207(1), provides that a person "indicted or informed against for any offense shall be brought to trial within six months" as calculated under the statute; § 29-1207(2) generally provides that the 6-month period shall commence on the date the information is filed; and § 29-1207(4) provides for certain periods of time that shall be excluded in calculating the time for trial. Garcia states that the State filed the information against him on November 16, 2015, and proceeded to trial on January 9, 2017. Garcia argues that this period of time, "including exceptions pursuant to § 29-1207(4)," is greater than the 6 months allowed under the statute. Brief for appellant at 33. Although his argument appears to recognize there were periods of time that were excludable under § 29-1207(4), Garcia does not specify any such periods and does not specify or dispute any periods that the court or the State may have characterized as excludable.

The State argues in its response that there were at least two excludable periods that extended the 6-month period such that the statute was not violated. The State agrees that the information was filed on November 16, 2015, and that Garcia was

brought to trial on January 9, 2017. But, the State asserts, the record shows that "from February 4, 2016, until June 16, 2016, Garcia's competency was at issue" and that "from June 16, 2016, until November 22, 2016, there was a pending motion to suppress for the district court to rule on." Brief for appellee at 22. The State asserts that such periods total 292 days; that the periods are excludable under § 29-1207(4); that excluding such periods extended the deadline to bring Garcia to trial to March 4, 2017; and that therefore, Garcia was timely brought to trial on January 9, 2017.

The record on appeal is consistent with the State's recitation of events. The record shows that the information was filed on November 16, 2015, and that the trial started on January 9, 2017. The record also shows that on February 4, 2016, the State filed a motion for an order to require Garcia to submit to a psychiatric examination in order to determine his competency to stand trial. On that same day, the court filed an order requiring the examination. On June 16, the court filed an order finding Garcia to be competent. Also on June 16, Garcia filed a motion to suppress evidence obtained as a result of searches of his person and his property. The court filed an order on November 22 overruling Garcia's motion to suppress.

Section 29-1207(4)(a) provides that the time periods that shall be excluded in computing the time for trial include, inter alia, "[t]he period of delay resulting from . . . an examination and hearing on competency" and "the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence." Therefore, under § 29-1207(4), both the time period from February 4, 2016, when the State moved for and the court ordered an examination to determine competency, through June 16, when the court found Garcia to be competent, and the time period from June 16, when Garcia filed his motion to suppress, through November 22, when the court overruled the motion, are to be excluded in computing the time for trial.

Furthermore, although the State does not rely on it, we note that the record indicates that the court filed an order on December 7, 2016, in which it stated that this matter had come on for jury trial on December 5, but that Garcia had moved to continue the trial. After advising Garcia that if continuance were granted the time until trial would not count against the State for speedy trial purposes, the court continued the trial to January 9, 2017. Section 29-1207(4)(b) provides that the time periods that shall be excluded in computing the time for trial include "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel."

We agree with the State that the two periods identified by the State were to be excluded under § 29-1207(4) and that excluding such periods, even without considering the continuance requested by Garcia, Garcia was brought to trial within the 6 months allowed under § 29-1207. Therefore, the record on appeal refutes Garcia's fourth claim of ineffective assistance of counsel.

In sum, we conclude that Garcia's first two claims of ineffective assistance of trial counsel cannot be reviewed on direct appeal but that they were stated with sufficient particularity to be preserved for postconviction review. We further conclude that Garcia's third claim of ineffective assistance of trial counsel was not stated with sufficient particularity to be considered on direct appeal or to be preserved for postconviction review. We finally conclude that the record on appeal shows that Garcia's fourth claim of ineffective assistance of trial counsel is without merit.

Cumulative Error.

Garcia claims that even if none of the alleged errors discussed above was in itself sufficient to warrant reversal of his conviction, the cumulative effect of such alleged errors requires reversal. We have recognized that although one or more trial errors might not, standing alone, constitute prejudicial error, their cumulative effect may be to deprive the

defendant of his constitutional right to a public trial by an impartial jury. *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016). However, as discussed above, we find no error and therefore Garcia's argument that cumulative error deprived him of his right to a fair trial is without merit.

Excessive Sentence.

Garcia finally claims that the district court imposed an excessive sentence. We conclude that the district court did not abuse its discretion in sentencing Garcia.

Robbery is a Class II felony under § 28-324(2). Under Neb. Rev. Stat. § 28-105 (Reissue 2016), a Class II felony is subject to a sentence of imprisonment for a minimum of 1 year and a maximum of 50 years. Therefore, Garcia's sentence of imprisonment for 6 to 10 years was within statutory limits, and we review his sentencing for an abuse of discretion by the district court.

[30-32] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a 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. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018). In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

Garcia generally argues that the district court did not place sufficient emphasis on mitigating factors such as "the mild nature of the robbery" and Garcia's "unaddressed mental health

issues." Brief for appellant at 36. Garcia argues that the court did not explicitly address certain relevant factors identified in our case law and set forth above, such as his age, education and experience, and social and cultural background.

Garcia also argues that the court failed to explicitly analyze the factors set forth in Neb. Rev. Stat. § 29-2260 (Reissue 2016) and that therefore the court "unfairly deprived Garcia of a just sentence." Brief for appellant at 37. Although Garcia's argument appears to focus on the length of his sentence, we note that § 29-2260(2) and (3) set forth factors a court should consider when deciding whether to withhold a sentence of imprisonment and instead impose a sentence of probation. We further note that we have said that § 29-2260 is a directive to the trial court as to the factors to be considered in imposing the sentence but that it contains no requirement that the court make specific findings. *State v. Hunt*, 214 Neb. 214, 333 N.W.2d 405 (1983). Therefore, the court's alleged failure to explicitly analyze the § 29-2260 factors is not in itself error or grounds for reversal; however, we do consider the applicable factors from § 29-2260 and from case law in reviewing whether the court abused its discretion in sentencing.

At the sentencing hearing in this case, the court set forth various factors it had considered in determining Garcia's sentence, including his age and the nature of the current offense. With regard to the current offense, the court specifically noted the testimony of witnesses at the bank regarding "the fear that they experienced." The court also noted Garcia's prior criminal history, which the court noted included violent offenses and showed that Garcia had not "gone for very lengthy periods of time without having entries on [his] record." The court particularly noted that Garcia had been convicted of manslaughter, for which he had been sentenced to imprisonment for 15 to 20 years, and that after he was paroled on that conviction, his parole was revoked. The court also noted Garcia's mental health issues and stated that such issues needed to be addressed. The court stated that Garcia had a

"need for rehabilitation" but had been resistant to past rehabilitation efforts; the court expressed hope that while serving the sentence imposed in this case, Garcia would make himself available to "what programs are offered through the Nebraska Department of Correctional Services."

Our review of the record in this case indicates that the court considered relevant factors, and the record does not indicate that the court considered any improper factors. We further note that Garcia's sentence of imprisonment for 6 to 10 years is at the lower end of the statutory range of 1 to 50 years. We determine the sentence imposed by the court was within its discretion, and there is no indication in the record that the court abused its discretion. We therefore reject this assignment of error.

CONCLUSION

We conclude that the district court did not err when it admitted the note into evidence or when it determined that Garcia was competent to stand trial and for sentencing. We further conclude that there was sufficient evidence to support Garcia's conviction for robbery and that the district court did not abuse its discretion in sentencing Garcia. We finally conclude with regard to each of Garcia's claims of ineffective assistance of trial counsel that the claim either is without merit or is not sufficiently stated or that although the claim is sufficiently stated for postconviction review, it cannot be reviewed on direct appeal. We therefore affirm Garcia's conviction and sentence for robbery.

Affirmed.

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

Beverly Patterson, appellant, v. Metropolitan Utilities District, appellee.

923 N.W.2d 717

Filed March 8, 2019. No. S-18-158.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Tort Claims Act: Actions: Time.** If a claimant brings his or her claim before a claims board under Neb. Rev. Stat. § 81-8,227(1) (Reissue 2014) of the State Tort Claims Act and elects to await final disposition instead of withdrawing the claim to file suit, a 6-month extension from the mailing of a denial applies regardless of whether final disposition was made before or after the 2-year limitation for suits.
4. **Political Subdivisions Tort Claims Act: Actions: Time.** There are only two exceptions which extend the 2-year limitation for filing suit by 6 months under Neb. Rev. Stat. § 13-919(1) (Reissue 2012): (1) where the governmental subdivision takes some action on the claim before the 2 years have expired but at a time when less than 6 months remain for filing suit and (2) if the claimant withdraws the claim within the 2-year period but at a time when less than 6 months to file suit remain.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Daniel Wasson, of High & Younes, L.L.C., for appellant.

Joseph J. Kehm, of Metropolitan Utilities District of Omaha, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Beverly Patterson appeals the district court's order dismissing her claim against Metropolitan Utilities District (MUD) with prejudice. Patterson challenges the court's determination that her claim is time barred under the Political Subdivisions Tort Claims Act (PSTCA).[1] Patterson contends that § 13-919(1) provides a 6-month extension to the 2-year limitation for suits arising under PSTCA if the claimant brings the claim before a political subdivision and its governing body issues a final disposition denying the claim after the 2-year period has lapsed. Because Patterson's argument is contrary to long-settled precedent and is based upon a flawed premise, we affirm.

BACKGROUND

On June 30, 2015, Patterson was visiting her sister in Omaha, Nebraska. After parking across the street from her sister's home, Patterson stepped onto the road verge and onto a manhole cover. The cover slipped from underneath Patterson's feet, and she fell into the manhole, injuring her right ankle and knee. Patterson alleges this was caused by the negligence of an MUD worker who had previously removed the cover for meter-reading purposes and who failed to properly secure the cover upon completion of his or her work.

On July 17, 2015, Patterson filed a notice of tort claim with MUD. Patterson sent a demand to MUD pursuant to this action in June 2016 and a revised demand in April 2017. On September 13, MUD denied Patterson's claim.

Patterson filed a complaint with the district court on November 3, 2017. In the complaint, Patterson asserts MUD

[1] Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012 & Cum. Supp. 2018).

owed Patterson a nondelegable duty to exercise due care in maintaining the manhole covers which MUD's workers access. Patterson contends that the meter reader's actions created an unreasonable risk of harm in failing to secure the cover. Specifically, Patterson alleges MUD was negligent in the following actions: (1) failure to use due care to inspect, discover, and cure the dangerous conditions of a loose manhole cover when MUD had actual or constructive knowledge of the cover's being loose in that MUD's employee created the condition; (2) failure to keep the road verge safe for pedestrians on a public walkway; (3) failure to train and instruct employees to regularly monitor and maintain the manhole covers they access to perform their duties; and (4) failure to warn pedestrians of the dangerous condition, or guard or cordon off the area. Due to this negligence, Patterson alleges she sustained injuries.

MUD filed a motion to dismiss Patterson's complaint for failure to state a claim upon which relief could be granted. In its motion, MUD contends the complaint was not filed within the statute of limitations proscribed by PSTCA. MUD argues § 13-919(1) requires that a suit be filed under PSTCA within 2 years of the accrual of the claim unless, before the expiration of that 2-year period, the governing body which hears the initial claim issues its final disposition or the claimant files a written withdrawal of the claim before the governing body. In that case, MUD argues, the claimant would have 6 additional months in which to file suit. Here, because Patterson did not voluntarily withdraw her claim before MUD and because MUD did not issue a final disposition until after the running of the 2-year period, MUD asserts Patterson's claim is time barred as outside the statute of limitations without satisfying the conditions precedent necessary for the 6-month extension.

The district court granted MUD's motion. The court's order notes that § 13-906 allows a claimant to withdraw his or her claim if the governing body has not made a final disposition of the claim within 6 months after it is filed and that § 13-919(1)

bars any lawsuit arising out of a tort claim unless it is begun within 2 years after such claim accrued. Applying these statutes to Patterson's claim, the court stated its findings that "[t]here is no evidence nor is there an allegation that [Patterson] ever withdrew her claim in writing which is a condition precedent to filing suit. In addition, suit was filed more than two years after [Patterson's] claim accrued and therefore is barred pursuant to . . . § 13-919 (1)." The court dismissed Patterson's claim with prejudice.

ASSIGNMENTS OF ERROR

Patterson assigns, restated, that the district court erred in dismissing Patterson's claim and determining that Patterson's complaint was time barred under § 13-919(1) and that Patterson failed to satisfy a condition precedent to filing suit when she did not voluntarily withdraw her claim.

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.[2]

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

ANALYSIS

Patterson's assignments center on the question of whether § 13-919(1) provides an additional 6-month period in which to file suit if the claimant does not withdraw his or her claim from the political subdivision's governing board before the expiration of the 2-year limitation on commencement of a suit

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[2] *Salem Grain Co. v. Consolidated Grain & Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017).

[3] *Id.*

and the governing board thereafter issues a denial of the claim. Long ago, we settled the meaning of § 13-919(1). But before turning to that case law, we recall basic claim filing procedures and consequences under PSTCA.

Before filing suit under PSTCA, a claimant is required to first bring his or her claim before the governing body of the political subdivision at issue.[4] The claim must be in writing and must set forth the time and place of the occurrence giving rise to the claim and other known facts pertinent to the claim.[5] The primary purpose of notice provisions in connection with actions against political subdivisions 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.[6]

After the filing of a claim with the governing body, PSTCA prohibits filing suit unless (1) the governing body has finally disposed of the claim or (2) the governing body has not taken final action within 6 months after the claim was filed and the claimant thereafter gives notice to withdraw the claim in order to commence suit.[7] The statute specifically states that "if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit."[8] PSTCA does not impose a time limit on the governing body's opportunity to take action on a claim, other than by allowing a claimant to withdraw the claim if not disposed of within 6 months after it was filed. With this

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[4] §§ 13-905 and 13-906.

[5] See § 13-905.

[6] *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003).

[7] See § 13-906.

[8] *Id.*

claim processing framework in mind, we turn to the specific statute at issue.

Section 13-919 outlines the timing requirements for claims under PSTCA and states, in relevant part:

> (1) Every claim against a political subdivision permitted under [PSTCA] shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the act shall be forever barred unless begun within two years after such claim accrued. The time to begin a suit shall be extended for a period of six months from the date of mailing of notice to the claimant by the governing body as to the final disposition of the claim or from the date of withdrawal of the claim from the governing body under section 13-906 *if the time to begin suit would otherwise expire before the end of such period*.

(Emphasis supplied.) Although Patterson focuses on the last quoted sentence, the two preceding sentences are critical to our analysis.

The first sentence of § 13-919(1) "forever bar[s]" a claim unless the written claim has been *submitted to the governing body* within 1 year after the claim accrued. Here, the claim accrued on June 30, 2015—the date the accident occurred. Patterson filed the claim with MUD on July 17, 2015. The claim satisfied the first sentence of § 13-919(1). With the filing of Patterson's claim, the 6-month period before Patterson could have withdrawn her claim began to run.[9]

But the second sentence of § 13-919(1) is even more significant to the situation here. It "forever bar[s]" all suits under PSTCA unless a *suit is begun* within 2 years "after such claim accrued."[10] Here, because the claim accrued on June 30, 2015, the second sentence of § 13-919(1) required that Patterson file

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[9] See § 13-906.

[10] § 13-919(1).

suit by June 30, 2017. Because Patterson did not file her suit until November 3, the second sentence of § 13-919(1) barred her action.

Patterson, however, points to the third sentence of § 13-919(1), which she claims extended the time for her to commence suit until March 13, 2018—6 months after MUD denied her claim on September 13, 2017. According to Patterson, a claimant would have an additional 6 months after mailing of the final disposition even if the disposition occurs after the 2-year date barring all suits.

Such an interpretation of § 13-919(1) is at odds with our holding in *Ragland v. Norris P. P. Dist.*[11] In that case, we considered the parameters of the 6-month extension under § 13-919(1), formerly codified as Neb. Rev. Stat. § 23-2416 (Reissue 1977).[12] Specifically, we explained that there are only two exceptions to the 2-year limitation on suits and stated:

> One is where the governmental subdivision takes some action on the claim before the 2 years has expired but at a time when less than 6 months remains for filing suit. The second occurs if the claimant withdraws his claim within the 2-year period but at a time when less than 6 months to file suit remains.[13]

The claimant in *Ragland* argued the language of § 13-919(1) should be construed so that failure to withdraw a claim and failure of the governmental subdivision to deny the claim within the 2-year period constitute an action which would trigger the 6-month extension.[14] In contrast, we held that the language in § 13-919(1) is clear and that the inaction of the parties does not amount to the conditions statutorily required for the 6-month extension.[15] Again, we stated:

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[11] *Ragland v. Norris P. P. Dist.*, 208 Neb. 492, 304 N.W.2d 55 (1981).

[12] *Id.*

[13] *Id.* at 495, 304 N.W.2d at 57.

[14] *Id.*

[15] *Id.*

> Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by [PSTCA] are barred and the additional 6-month period granted under particular circumstances does not apply.[16]

Explicit in our opinion in *Ragland* is the requirement that the governing body act on the claims before it within the 2-year period in order for its action to trigger the 6-month extension.[17]

Three important principles underlie the *Ragland* court's reasoning. First, as we have repeatedly proclaimed, 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.[18] Second, in determining the meaning of statutory language, its ordinary and grammatical construction is to be followed, unless an intent appears to the contrary or unless, by following such construction, the intended effect of the provisions would apparently be impaired.[19] Finally, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[20]

Patterson's interpretation violates two of those principles. First, the condition specified in the third sentence ("if the time to begin suit would otherwise expire before the end of such period") is stated in the future tense.[21] But by the date MUD denied the claim, the 2-year period to begin suit had already expired. Thus, the 2-year period to begin suit did not expire at any time during the 6-month period following MUD's denial.

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[16] *Id*. at 497-98, 304 N.W.2d at 58.

[17] *Id.*

[18] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

[19] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[20] *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018).

[21] § 13-919(1).

Second, and perhaps more important, Patterson's interpretation fails to give any meaning to the word "otherwise." Here, the time to begin suit had already expired; thus, it would not "otherwise" expire after MUD's denial. Our ordinary rules of statutory interpretation dictate that the *Ragland* court's interpretation of § 13-919(1) was correct and compelled by the statutory language. And *Ragland* did not prompt any legislative response, which raises the presumption that we correctly discerned the Legislature's intent.[22]

Instead of following our precedent from *Ragland*, Patterson asks this court to adopt an alternative interpretation in line with a similar provision under the State Tort Claims Act (STCA).[23] Before addressing the merits of her argument, we explain her reasoning.

Patterson focuses on the second sentence of § 81-8,227(1), in which STCA uses language essentially identical to the third sentence of § 13-919(1) under PSTCA. Section 81-8,227(1) states, in relevant part:

> Except as provided in subsection (2) of this section, every tort claim permitted under [STCA] shall be forever barred unless within two years after such claim accrued the claim is made in writing to the Risk Manager in the manner provided by such act. *The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the Risk Manager or State Claims Board as to the final disposition of the claim or from the date of withdrawal of the claim under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.*

(Emphasis supplied.) She relies upon our interpretation of this language in the context of STCA and argues that we should import the same interpretation into PSTCA.

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[22] See *Estate of Schluntz v. Lower Republican NRD*, 300 Neb. 582, 915 N.W.2d 427 (2018).

[23] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014). See *Komar v. State*, 299 Neb. 301, 908 N.W.2d 610 (2018).

[3] In *Collins v. State*,[24] we interpreted this language and held that if a claimant brings his or her claim before a claims board under STCA and elects to await final disposition instead of withdrawing the claim to file suit, a 6-month extension from the mailing of a denial applies regardless of whether final disposition was made before or after the 2-year limitation for suits.

While similar, § 81-8,227(1) is distinguishable from § 13-919(1). As we noted in *Collins*[25] and the cases preceding it,[26] there is a possibility under § 81-8,227(1) that a claimant could bring a claim before the claims board under STCA within the 2-year period but with less than 6-months before the running of that period. As such, there is a chance that the claims board could retain a claim under STCA until after the 2 years and the claimant would be unable to withdraw the claim prior to the end of the 2 years to bring suit.

However, under § 13-919(1), the period to bring a claim before the governing board is 1 year and the period to file suit is 2 years after accrual of the claim. Unlike § 81-8,227, there is no possibility that a claim could be appropriately brought within the 1-year period before the governing board, the governing board could wait until after the end of the 2-year period to issue its final disposition, and the claimant would be unable to withdraw the claim prior to the end of the 2-year period. Accordingly, the reasoning of our interpretation of § 81-8,227 is inapplicable to the timing requirements of § 13-919(1) and we decline to modify our holding in *Ragland*.[27]

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[24] *Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002), *disapproved on other grounds, Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007).

[25] *Id.*

[26] See, *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), *overruled, Collins, supra* note 24; *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), *overruled, Collins, supra* note 24. See, also, *Komar, supra* note 23.

[27] *Ragland, supra* note 11.

In essence, Patterson argues that PSTCA and STCA must be read in pari materia. But PSTCA was initially created by one act[28] of the Legislature, and STCA was created by a totally separate act.[29] Patterson's argument exceeds the limits of the in pari materia canon. Here, this canon must be applied only to the statutes within PSTCA. More significantly, her argument violates an important rule of construction applicable to PSTCA: 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.[30] While her argument seems attractive at first blush, because a snippet of nearly identical language must be applied one way under PSTCA and a different way under STCA, that outcome is dictated by the overall language chosen by the Legislature in each respective act. If the Legislature believes that the time limitations and procedures of PSTCA and STCA should be identical, it can establish a uniform procedure. It is not this court's function to do so in the guise of statutory interpretation.

[4] As detailed above, § 13-919(1) requires that a claimant bring a claim before the governing board of a political subdivision prior to filing suit and that suits be filed within 2 years of the date the claim accrued. There are only two exceptions which extend the 2-year limitation for filing suit by 6 months under § 13-919(1): (1) where the governmental subdivision takes some action on the claim before the 2 years have expired but at a time when less than 6 months remain for filing suit and (2) if the claimant withdraws the claim within the 2-year period but at a time when less than 6 months to file suit remain.[31] Neither ground for exception occurred here. The board did not deny Patterson's claim until after the

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[28] 1969 Neb. Laws, ch. 138, § 20, p. 634.

[29] 1969 Neb. Laws, ch. 756, § 1, p. 2845.

[30] *Geddes, supra* note 24.

[31] *Id*.

2-year period, and Patterson did not withdraw her claim. Thus, the district court did not err in dismissing Patterson's claim against MUD with prejudice.

CONCLUSION

For the reasons stated above, we conclude Patterson's petition was filed outside of the timing requirements of § 13-919(1). Accordingly, the district court did not err in dismissing Patterson's claim.

Affirmed.

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

Lee Larsen and Amy Larsen, husband and wife, and Plattsmouth Chiropractic Center, Inc., a Nebraska corporation, appellants, v. 401 Main Street, Inc., a Nebraska corporation, doing business as Quart House Pub, and H. & C., Inc., a Nebraska corporation, appellees.

923 N.W.2d 710

Filed March 8, 2019. No. S-18-168.

1. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.
2. ____: ____: ____. An appellate court reviews for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.
3. **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.
4. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
5. **Courts: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
6. **Trial: Expert Witnesses.** Under the framework established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), if an expert's opinion involves scientific or

specialized knowledge, a trial court must determine whether the reasoning or methodology underlying the testimony is valid (reliable). It must also determine whether that reasoning or methodology can be properly applied to the facts in issue.

Appeal from the District Court for Cass County: Michael A. Smith, Judge. Affirmed.

Thomas A. Grennan, and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellants.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

A fire broke out in the basement of the Quart House Pub, a bar in Plattsmouth, Nebraska. The fire spread and damaged nearby real and personal property belonging to Lee Larsen and Amy Larsen and Plattsmouth Chiropractic Center, Inc. (collectively Plattsmouth Chiropractic). Plattsmouth Chiropractic sued the entities that owned the bar and its premises (collectively Quart House), alleging that equipment located in the basement of the bar had been negligently maintained. The district court did not allow testimony from Plattsmouth Chiropractic's expert on the cause of the fire and sustained Quart House's motion for summary judgment. Plattsmouth Chiropractic now appeals those rulings.

We find that the district court did not abuse its discretion in striking the testimony of Plattsmouth Chiropractic's expert as to the cause of the fire. And without that testimony, Plattsmouth Chiropractic could not present evidence that would allow a finder of fact to reasonably conclude that Quart House's negligence caused the fire and resulting damage. For this reason, summary judgment was proper. Finding no error, we affirm.

BACKGROUND

Pleadings, Motions to Strike, and Motion for Summary Judgment.

On January 2, 2014, a fire broke out in the basement of the Quart House Pub. The fire spread to Plattsmouth Chiropractic's neighboring office, resulting in property damage. Plattsmouth Chiropractic sued Quart House, alleging negligent maintenance of the property. More specifically, it claimed that Quart House failed to adequately service and maintain the mechanical equipment in the basement, including but not limited to the boiler and water heater. Plattsmouth Chiropractic alleged that this failure proximately caused damages to its property. Quart House's answer denied the allegations in the petition pertaining to the origin and cause of the fire.

Plattsmouth Chiropractic designated Duane Wolf as an expert witness concerning the origin and cause of the fire. Quart House moved to strike and exclude Wolf's testimony. Quart House asserted that Wolf's testimony did not provide an admissible causation opinion, was based solely on unreliable assumptions and/or methodology, and failed to meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). Plattsmouth Chiropractic filed its own motion to strike and exclude the opinion testimony of Quart House's expert.

Quart House also moved for summary judgment. The parties subsequently addressed the motions to exclude expert testimony and the motion for summary judgment at the same hearing.

Hearing on Motions to Strike and for Summary Judgment.

At the hearing, the district court received evidence that on the date of the fire, the bartender on the main floor observed smoke emanating from some cabinets. The bartender called

the 911 emergency dispatch service and left the building. Within minutes, volunteer fire department personnel arrived and observed flames in the cabinets, apparently coming from the basement. Despite the efforts of the volunteer firefighters and firefighters from other area fire departments, the fire eventually overtook the building. Due to the unsafe conditions that resulted from extensive damage, fire investigators were not allowed to inspect the scene and the building was demolished.

Both parties agree that the fire originated in the basement of the bar. The basement housed a walk-in cooler, several air compressors used for coolers, an old natural gas boiler, and a water heater. The parties presented evidence concerning the condition, inspection, and maintenance of the boiler, which was at least 50 years old. From approximately 1980 to 2010, the boiler was inspected annually by service professionals, who performed maintenance as needed. In the 3 to 4 years prior to the fire, however, no maintenance or inspection of the boiler had occurred. Neither the cooler nor the water heater ever received regular inspections.

Plattsmouth Chiropractic presented the opinions and testimony of Wolf concerning the origin and cause of the fire. Wolf, a mechanical engineer with a background in fire and explosion investigation, based his opinion upon a reasonable degree of "engineering certainty" after reviewing 27 documents related to the fire at the bar. Wolf admitted in his deposition that he was unable to determine a "root cause" of the fire, but testified that it was his belief that the fire originated "in the vicinity of the boiler." Wolf believed the fire most likely originated in the boiler, but he could not eliminate the possibility that the fire started in the nearby water heater. Additionally, Wolf acknowledged a possibility that the fire originated in one of several compressors. When Wolf was asked if he was able to rule out electrical wiring as the cause of the fire, he responded that the building's electrical service was "outside my area of expertise."

Wolf believed that the fire originated from a failure of one of the items of mechanical equipment in the area of the boiler. Wolf opined that, because the fire most likely originated due to the failure of mechanical equipment in the basement, the fire most likely would not have occurred if the mechanical equipment "had been regularly serviced and replaced as needed."

Wolf was critical of Quart House's maintenance of the boiler. He stated that boilers require annual maintenance by qualified service technicians. Wolf testified that because the boiler lacked certain modern safety features, more monitoring and maintenance were required, but he did not specify what those measures entailed. In opposition to the opinions expressed by Wolf, Quart House presented evidence that yearly inspections were not warranted for such a boiler unless problems developed and that the bar's owner had not observed any problems since leasing the property in 2010.

While Wolf testified to his beliefs that the fire originated in the vicinity of the boiler and that the fire most likely originated in the boiler itself, he admitted that he could not with reasonable certainty identify a specific way in which the boiler caused the fire. He did testify that the boiler lacked a "low water cutoff" and that the absence of this feature posed the risk of a "dry fire." Even so, he could not offer an opinion that the fire was caused by a dry fire. He testified that if he could have inspected the boiler, he would have looked for evidence of a dry fire. He also conceded that a dry fire could result from a progressive loss of water or a sudden one, the latter of which could not have been prevented by an inspection the month before the fire.

As for the water heater, Wolf testified that he did not know the maintenance requirements for that piece of equipment. When asked to assume the fire started in the water heater, Wolf could not identify the most likely failure mode of the water heater.

Wolf conceded that his report was not consistent with the National Fire Protection Association's publication No. 921

(NFPA 921), which requires ruling out other possible causes of a fire before adopting a particular hypothesis, and he testified that a postfire forensic inspection was typically required to rule out possible causes of a fire. Wolf testified that his analysis did not determine the root cause of the fire, because the information available limited his investigation.

Quart House retained Kenneth Ward, a fire investigator, as an expert in the area of fire origin and cause. In Ward's opinion, because no fire investigators or experts were allowed inside the building before it was demolished, no adequate scientific or professional basis existed for any fire investigator or expert to render an opinion as to the cause or origin of the fire.

According to Ward, NFPA 921 was the generally accepted guideline for proper scientific methodology in "origin and cause" fire investigations. He stated that Wolf's methodology did not comply with NFPA 921 methodology. Ward explained that NFPA 921 does not allow an investigator to determine the cause of a fire without first pinpointing the origin of the fire, and in this instance, Ward named 26 possibilities that could not be eliminated. Furthermore, Ward testified that Wolf's opinion that the fire originated in a particular part of the basement was not based upon acceptable scientific methodology, because it was based on observations rather than interpretation of burn patterns and area mapping procedures. Ward was not aware of guidelines or standards for fire investigation that would support Wolf's methodology.

District Court's Rulings.

The district court overruled the motion to strike Ward's testimony and sustained the motion to strike Wolf's testimony. The district court reasoned that although Wolf was well qualified as an expert in mechanical engineering, his testimony regarding causation did not meet the *Daubert*/*Schafersman* threshold, because the methodology could not be properly applied to the facts at issue. See *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). The district court pointed to the fact that Wolf could not offer an opinion as to the cause of the fire. The district court emphasized that, at best, Wolf could testify only that the cause of the fire was consistent with boiler failure, but he could not testify that a failure of the boiler caused the fire. The district court also noted that Wolf could not determine whether the boiler ignited due to a progressive loss of water or a sudden one and that, by Wolf's own admission, a recent inspection would not have prevented a sudden loss of water in the boiler. Given these concessions by Wolf, the district court stated that it was mere speculation that the fire could have been prevented by regular inspections and maintenance of the mechanical equipment.

The district court also sustained Quart House's motion for summary judgment. It found that Plattsmouth Chiropractic could not show that, but for the alleged failure to maintain and inspect the boiler, the fire and resulting damages would not have occurred. According to the court, there was a gap between the alleged acts of negligence and the cause of the fire. The district court reiterated that the evidence did not support a reasonable inference as to the cause of the fire, only impermissible speculation.

Plattsmouth Chiropractic now challenges these rulings on appeal.

ASSIGNMENTS OF ERROR

Plattsmouth Chiropractic assigns, condensed and restated, that the district court erred in (1) sustaining the motion to strike the testimony of its expert and (2) granting summary judgment.

STANDARD OF REVIEW

[1,2] We review de novo whether the trial court applied the correct legal standards for admitting an expert's testimony. *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d

776 (2015). We review for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony. *Id*.

[3,4] 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. *Sparks v. M&D Trucking*, 301 Neb. 977, 921 N.W.2d 110 (2018). 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

Exclusion of Wolf's Testimony.

We first address the contention that the district court erred in excluding the testimony of Plattsmouth Chiropractic's expert, Wolf.

[5,6] The Nebraska Evidence Rules provide: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016). Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018). Therefore, if an expert's opinion involves scientific or specialized knowledge, a trial court must determine whether the reasoning or methodology underlying the testimony is valid (reliable). *Freeman v. Hoffman-La Roche,*

Inc., 300 Neb. 47, 911 N.W.2d 591 (2018). It must also determine whether that reasoning or methodology can be properly applied to the facts in issue. *Id.*

In this case, the district court did not permit Wolf to testify to his conclusion that the fire and resulting damages were caused by negligent maintenance of mechanical equipment on the part of Quart House. It found that Wolf could reach that conclusion only by engaging in speculation. We have recognized that an expert's opinion cannot be based on "'unsupported speculation.'" See *King v. Burlington Northern Sante Fe Ry. Co.*, 277 Neb. 203, 227, 762 N.W.2d 24, 43 (2009). Here, we find that the district court did not abuse its discretion in excluding Wolf's causation testimony on this basis.

While Wolf expressed opinions as to the general vicinity where the fire originated and that the fire was caused by a mechanical issue, he did not have an opinion about what that mechanical issue was. In fact, he could not even form an opinion as to the specific piece of equipment in which a mechanical failure occurred. Wolf did testify that he believed the fire most likely originated in the boiler, but he could not say that a particular condition in the boiler caused the fire. He mentioned one scenario involving the boiler—a dry fire caused by a low water level—as a possible cause, but he could not testify that scenario was actually the cause of the fire, because he did not have the opportunity to inspect the boiler. And, in any event, he admitted that even if the fire was caused by a dry fire in the boiler, that condition could have developed suddenly; in which case, by Wolf's own admission, periodic inspections would not have prevented the fire.

If Wolf had opined that the fire was caused by a particular mechanical failure, we understand how he might have been able to conclude that proper inspections and maintenance would have prevented that failure and thus prevented the fire. But, as we have explained, Wolf did not have an opinion as to the specific cause of the fire. And, as the "dry fire" scenario raised by Wolf illustrates, the fire might have been caused by

some condition that would have arisen even if Quart House had performed all the inspections and maintenance Wolf claims it should have. In the absence of an explanation from Wolf as to how he could conclude that proper inspections and maintenance would have prevented the fire without forming an opinion as to its specific cause, we do not believe the district court abused its discretion by finding that Wolf's opinion was based on unsupported speculation.

Summary Judgment.

Plattsmouth Chiropractic also argues that the district court erred in granting summary judgment in favor of Quart House. Plattsmouth Chiropractic contends that there is a genuine issue of material fact as to the cause of the fire and maintains that this is the case even if Wolf's causation testimony is excluded.

As we stated above, and as we have often said, 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. *Sparks v. M&D Trucking*, 301 Neb. 977, 921 N.W.2d 110 (2018). Here, as in any negligence action, Plattsmouth Chiropractic was required to adduce evidence showing that there was a negligent act or omission by Quart House and that such act or omission was the proximate cause of its injury or was a cause which proximately contributed to it. See *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997). But without Wolf's expert opinion as to causation, only Ward's opinion remained, and he unequivocally stated that the condition of the site precluded an adequate scientific basis for fire experts to render an opinion as to the cause or origin of the fire. Thus, no admissible expert opinion established the key element of causation.

Plattsmouth Chiropractic would have us conclude that summary judgment was improper even without an expert opinion

that negligence on the part of Quart House proximately caused the fire. Plattsmouth Chiropractic points to evidence that on the night of the fire, smoke first emerged from the area above the boiler and water heater. It also points to testimony from the bartender that it was cold inside the bar on the night of the fire and suggests the cold temperature is consistent with a failure of the boiler. Plattsmouth Chiropractic argues this is sufficient circumstantial evidence to create a genuine issue of fact as to the cause of the fire.

To avoid summary judgment, however, Plattsmouth Chiropractic had to adduce evidence from which a finder of fact could conclude, without engaging in guess, speculation, conjecture, or choice of possibilities, that a negligent failure to adequately maintain equipment caused the fire and resulting damage. See *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997). The evidence summarized above suggests, at most, that the fire originated near or in the boiler. It does not constitute a basis for the finder of fact to conclude that negligent maintenance on the part of Quart House caused the fire. Since the record did not contain evidence that would allow a finder of fact to find that negligent maintenance caused the fire, without engaging in guess, speculation, conjecture, or a choice of possibilities, we find that the district court did not err in granting summary judgment.

CONCLUSION

For the foregoing reasons, we affirm the order of the district court that excluded Wolf as an expert witness and granted summary judgment in favor of Quart House.

Affirmed.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Randy S., appellee, v. Nicolette G., appellant.

924 N.W.2d 48

Filed March 8, 2019. No. S-18-407.

1. **Child Custody: Appeal and Error.** An appellate court reviews child custody determinations de novo on the record, but the trial court's decision will normally be upheld absent an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
4. **Trial: Judges: Presumptions: Appeal and Error.** An appellate court presumes in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.

Appeal from the District Court for Washington County: John E. Samson, Judge. Affirmed.

Mark J. Milone and Michael W. Milone, of Koukol & Johnson, L.L.C., for appellant.

Edmond E. Talbot III, of Talbot Law Office, P.C., L.L.O., for appellee.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

This appeal arises out of paternity proceedings involving Nicolette G., Randy S., and their daughter Eleanor G. Nicolette

appeals the order of the district court that awarded sole legal and physical custody of Eleanor to Randy.

Nicolette's primary argument on appeal rests on her contention that she proved at trial that Randy had committed child abuse under Nebraska law. She argues that under such circumstances, the district court was required by statute both to impose sufficient limitations on Randy's custody and parenting time to protect Eleanor and to make special written findings that Eleanor would be protected by such limitations. She contends the district court did neither. Nicolette also contends that the district court generally abused its discretion in its award of custody, parenting time, and child support. Upon our de novo review of the record, we find no reversible error, and therefore, we affirm.

BACKGROUND

Paternity Proceeding.

Nicolette and Randy agree that they are the parents of Eleanor. Eleanor was born in 2014. Nicolette and Randy have never married one another, but they did live together with Eleanor until October 2016, when Randy initiated paternity proceedings.

Randy's operative complaint sought a paternity determination, sole legal and physical custody, and child support. In her operative answer and counterclaim, Nicolette sought a paternity determination, sole physical custody, joint legal custody, and child support. In accordance with the parties' stipulation, in November 2016, the district court entered a temporary order providing for a parenting time cycle of two weekdays with Randy, three weekdays with Nicolette, and alternating weekends and major holidays. The matter proceeded to trial in January 2018.

General Evidence Regarding Parties and Their Relationship With Eleanor.

The evidence at trial showed that both Nicolette and Randy have been active caregivers for Eleanor, both contributing their

time, efforts, and money. Nicolette and Randy both described strong, positive relationships with Eleanor. Both parties also have supportive families.

Nicolette testified that she has degrees in culinary arts and general studies, focusing on nutrition, healthcare, and restaurant management. As of the date of trial, Nicolette had spent 3 months working full time for a nonprofit organization focusing on literacy. Previously, she had held various jobs in the retail and service industries. At the time of trial, Nicolette resided with her parents in Omaha, Nebraska, where Eleanor has her own bedroom. Nicolette testified that within weeks, she would move to her own two-bedroom apartment in Omaha, where Eleanor would have her own bedroom.

Randy had completed high school and one semester of community college. At the time of trial, Randy owned and operated a business installing electronic accessories in cars, something he had done for 12 years. He had also previously done intermittent construction work and sold roofing materials, gutters, and siding. Randy testified that at the time of trial, he resided in Blair, Nebraska, where he owns a home in which Eleanor has her own bedroom. Nicolette presented evidence of unsafe conditions that existed in Randy's home at the time they separated in October 2016, including unfinished and exposed electrical outlets and an open staircase without a railing, leading from the first to the second floor. Randy presented evidence that he had fixed the unsafe conditions after he filed suit.

Randy's Alcohol Use.

The district court heard evidence about Randy's alcohol use. In general, the evidence showed that Randy, who has a family history of alcoholism, drank heavily while Nicolette lived with him, but since she had moved out in October 2016, his drinking had diminished.

Nicolette testified that when she lived with Randy after Eleanor's birth, he drank alcohol daily. He would come home from work with the odor of alcohol on his breath and continue

to drink throughout the evening. Nicolette stated that he would start with beer and progress to cocktails. According to Nicolette, when Randy used alcohol, he had red eyes, poor balance, and slurred speech; was confused; repeated himself "a lot"; and "didn't seem to have a care in the world." Nicolette stated that the more Randy drank, the more irritable he would become. If she tried to advise him to slow down or stop drinking, he would "get mean" and critical. Nicolette testified that Randy's drinking affected his ability to care for Eleanor. She said he became "very inattentive, he was on his cell phone a lot."

Nicolette testified that after Eleanor was born, she had observed Randy "drink to excess" and then drive at least once or twice a week, and "[m]ore frequently" than "once or twice" when Eleanor was in the car. According to Nicolette, Randy turned down Nicolette's offers to drive and did not stop driving with Eleanor in the car when he was "in that condition." Randy's mother testified that she had observed Randy parent Eleanor while he was intoxicated. She denied knowing whether Randy had driven while intoxicated with Eleanor in the car. She stated, "[H]aving a beer and being intoxicated, you know, if I'm not counting I don't know."

Nicolette testified that both she and Randy had consumed alcohol while on a boat with Eleanor and that Randy had operated the boat while drinking, with Eleanor on board. Nicolette offered photographs purporting to show Randy operating a boat while drinking, with Eleanor as a passenger. However, either Randy is not operating the boat in the photographs or it is indiscernible whether the beverages he is holding are alcoholic. Randy's mother admitted that she had observed Randy consuming alcoholic beverages "while boating" and had warned him about it more than once, but that she did not recall whether Eleanor was present on the boat while Randy was drinking.

Randy admitted to being a heavy drinker when he and Nicolette were together. He claimed he used alcohol to cope

with Nicolette, with whom he found it difficult to get along. He defined heavy drinking as consuming more than six beers a day, 6 out of 7 days per week. Randy admitted that before Nicolette left, he had cared for Eleanor while intoxicated. He denied being intoxicated or "under the influence of alcohol" when driving with Eleanor in the car, but he admitted to driving with her after he had consumed "[a] drink, maybe two, over the course of three, four hours."

Randy and his family testified that Randy had changed his drinking habits and attitude since filing the paternity suit. Randy's stepmother testified that if she saw Randy drink at all, he would have only one beer and tell others he was not drinking because he had Eleanor. Randy's brother testified that he saw Randy once or twice a week. According to Randy's brother, before Eleanor was born, Randy was a regular drinker who "drank quite a bit." However, after breaking up with Nicolette, Randy's drinking had "changed a lot" and he no longer seemed depressed. Randy's brother stated that Randy does not drink more than one or two beers in Eleanor's presence.

Randy testified that since he and Nicolette separated, he had not been intoxicated while caring for Eleanor. According to Randy, since the separation, he usually consumed only one or two drinks at a time, except for the occasional social event. Randy maintained that 2 or 3 days per week, he does not consume alcohol at all. On the other days, he may have "a couple of drinks" after work. He stated that while Eleanor is in his care, he sometimes has a beer with dinner and then another drink after she is in bed.

Confrontational Behavior.

There was evidence that both parties had lashed out when they were angry. Nicolette admitted that on one occasion, when Eleanor was not present, she pushed Randy when he tried to take her keys to prevent her from driving while she was upset. Randy testified that before the parties separated, Nicolette threatened to hurt herself, call the police, blame it on Randy, and not allow him to see Eleanor again. Nicolette

admitted that Randy had never hit her, but she testified that when she resided with Randy, he would become angry, slam doors, and throw and kick things around in front of Eleanor. Nicolette stated that Randy had yelled at her and called her a "bitch" on multiple occasions in front of Eleanor.

Nicolette's Mental Health.

The parties presented evidence regarding Nicolette's mental health. Nicolette testified that she had been diagnosed with depression and anxiety. Depression makes her tired, makes her believe "there's nothing right in the world," and makes her worry all the time. She admitted that there are some days "where I shut down." She testified that occasionally, her anxiety will cause her to get nervous, shaky, dizzy, unfocused, and disoriented. Nicolette testified that she takes daily medication to manage her depression symptoms and medication for anxiety as needed.

Nicolette acknowledged that in May 2015, she had been hospitalized for 4 days because she experienced suicidal ideation after stopping her prescribed medication. Nicolette stated that she stopped taking her medication for 1 month, because it made her feel tired all the time and unfocused. She also testified that Randy criticized her for needing medication.

After being hospitalized, Nicolette consulted with mental health professionals to adjust her medication. Nicolette testified that since changing her medication, her mental health had improved, particularly her energy and mood. At the time of trial, she was attending therapy regularly. Nicolette developed a safety plan to provide for Eleanor's care in the event that she was hospitalized again, and the plan involved Randy, her parents, and her sister.

Nicolette's therapist confirmed Nicolette's mental health diagnoses, symptoms, and current treatment. The therapist opined that Nicolette had been working hard and responding positively to her current treatment while staying active in Eleanor's life. She rated Nicolette's progress as a "nine" on a "scale of one to ten" and stated Nicolette can be and is being a

good parent to Eleanor. The therapist had no concerns with an award of sole custody of Eleanor to Nicolette.

Randy presented evidence raising concerns related to Nicolette's mental health. Randy and his family and friends expressed generalized concerns about Nicolette frequently sleeping. Randy's mother, who saw Nicolette twice a week before the separation, testified that she had observed Nicolette to have negative attitudes and mood swings.

In addition, there was evidence that Nicolette had allowed Eleanor to play with her empty prescription pill bottles, but Nicolette testified that she stopped allowing it after Randy had confronted her. The parties testified that while they were living together, they called a poison control center due to concerns that Eleanor may have had contact with Nicolette's psychotropic medication. However, Eleanor apparently suffered no ill effects from any exposure, and Nicolette testified that she had learned from the experience.

There was testimony that once or twice a week, Nicolette consumes a beer or a glass of wine while caring for Eleanor. Nicolette conceded that alcohol consumption is likely contraindicated for her medication, although she had not specifically checked.

Randy expressed concerns about Nicolette's moving out on her own with Eleanor, because she had never been on her own with Eleanor and because of Nicolette's mental health. He testified that Nicolette had remarked in the past that she did not feel like she could handle Eleanor on her own. He also stated that previously when Nicolette lived on her own, her apartment was "very dirty," with unwashed dishes and cat litter, cat feces, and cat vomit on the floor.

Eleanor's Education.

Both Nicolette and Randy testified that they believe high quality education is important. But they disputed what that meant for Eleanor.

The parties disagreed about enrolling Eleanor in preschool. After researching the top preschools in the area, Nicolette

enrolled Eleanor in a preschool in Omaha, which Nicolette also considered daycare. Nicolette testified that Randy had toured the facility and initially agreed to enrolling Eleanor there. Nicolette testified that 2 weeks after enrolling Eleanor, she received a letter from Randy saying that if Nicolette put Eleanor in preschool, Randy would "fight for custody." In response, Nicolette decided not to enroll Eleanor in preschool at that time. Later, however, Nicolette again enrolled Eleanor for one-half day per week after Randy agreed. Eleanor attended the preschool only during Nicolette's parenting time, and Nicolette paid the fee, in accordance with the temporary order, which required her to pay for daycare expenses accrued during her parenting time.

Both parties testified that Randy asked Nicolette to include him as an emergency contact and a parent on Eleanor's preschool paperwork, but Nicolette refused. Nicolette explained that she had not included Randy, because the paperwork did not require it and because she was concerned that Randy would interfere with Eleanor's enrollment, after he alternately agreed and disagreed to it.

Randy testified that he had agreed that the preschool Nicolette had chosen was a good facility, but he also expressed to Nicolette that he did not believe Eleanor should attend preschool "two years in a row." He stated that Nicolette enrolled Eleanor despite his opinion, giving him less than 12 hours' notice. He opined that at the time of trial, he did not believe Eleanor's attendance was "hurting anything," but that he did not like Nicolette's choosing to enroll her without his complete agreement and without giving him time to process the issue.

Nicolette and Randy also disagreed about where Eleanor should attend elementary school. Nicolette preferred Millard Public Schools in Omaha, where she had attended, based on her research of the relative strength of the schools compared to other area schools, including Blair Community Schools. Nicolette's research was received into evidence. Randy wanted Eleanor to attend an elementary school in Blair which was

located less than a block from his home. Randy presented documentary evidence showing Blair Community Schools to be essentially comparable to Millard Public Schools.

Communication and Contact.

The evidence showed that sometimes, the parties had difficulty communicating about Eleanor. Each party testified that at times, it had been difficult reaching the other party. But Randy admitted that at the time of trial, he had not had recent problems contacting Nicolette, and Nicolette admitted that Randy returns her calls and texts.

Randy testified that since the parties separated, there have been issues with the parenting time schedule. He stated that he frequently asks for extra time with Eleanor and that Nicolette has generally refused, even though there were occasions when he offered extra visitation to Nicolette. Nicolette testified that Randy had expressed that the temporary custody order was not fair, because Nicolette received more time with Eleanor, but that Nicolette abided by the temporary custody order and refused to change the parenting time schedule.

According to Randy, 2 weeks before he was scheduled to take Eleanor on a vacation they had agreed upon in a mediated parenting plan, Nicolette refused to allow it, because, Nicolette said, Randy was not allowed to take Eleanor out of state. Randy testified that Nicolette later said she would allow Randy to take Eleanor on vacation if he agreed to terms that they had not agreed upon at mediation. Nicolette testified that although she had agreed to the vacation time at mediation, the parenting plan had not been signed, implying that it was not binding. Later at trial, she explained she was concerned that Randy was a "flight risk" after she received his "threatening" letter about "fighting for custody."

Regarding cooperation, Randy testified that Nicolette talks to him about decisions concerning Eleanor but that ultimately, Nicolette decides on her own. He stated that Nicolette does not give him time to process the matter before she acts.

District Court's Findings and Order.

After the parties presented their evidence, the district court summarized its findings and conclusions on the record. The district court stated the positive and negative aspects of each party's parenting and behavior and ultimately awarded sole legal and physical custody to Randy.

The district court found that both parties were loving parents who had been adequate caretakers. It also remarked that each parent had an "extremely positive" family support system. Regarding Randy's alcohol consumption, the district court stated that it was "very concerning," while noting evidence that Randy was "over the hump" and had "turned the corner" and remarking that "six or seven beers a night is inappropriate when you have a child. That should be your main focus." Still addressing Randy, the district court expressed concern that "you do consume and drive a car with [Eleanor]" and questioned whether that was "a good idea." It characterized Randy's driving a boat when he has been consuming alcohol as a "bad choice," though the court stated that it could not discern from the photographs offered by Nicolette whether Randy was drinking alcohol and operating the boat with Eleanor on board. The district court also acknowledged the safety concerns with Randy's residence and that some of those concerns had not been fixed until after Randy filed suit.

The district court remarked that although Nicolette was getting treatment for her mental health issues, she made a poor decision to consume alcohol while taking her medication. The district court considered Nicolette's prior hospitalization and the side effects of her current medication, including that Nicolette "sleep[s] a lot." And the district court was "astounded" that Nicolette allowed Eleanor to play with empty pill bottles.

The district court concluded joint legal custody was not an option because of the parties' difficulty communicating with one another and having "too many differences of opinion." The district court expressed concern over whether Nicolette "would

support parenting time between [Eleanor] and [Randy]." In particular, the district court observed that it believed Randy would "support [Nicolette] more in regard to extra parenting time or this or that." It noted that Nicolette had not allowed Randy to take Eleanor on vacation; that Nicolette did not give Randy much "extra time" with Eleanor; that Nicolette refused to include Randy on the preschool paperwork; and that both parties' proposed parenting plans gave her parenting time on Eleanor's birthday every year, which Nicolette said Randy had offered to her. Further, the district court expressed concern about Nicolette's view of the importance of Randy in Eleanor's life. It perceived Nicolette to be "controlling" and not "a reasonable person when it comes to giving parenting time to [Randy]," but, rather, someone who would "follow the letter of the decree only and there won't be any exceptions."

The district court concluded the hearing by discussing child support and the proposed parenting plans with the parties. As to parenting time, the district court took into consideration Eleanor's school schedule and the parties' work schedules, while noting that the parties live in different communities, making it impractical to award Nicolette significant parenting time during the week once Eleanor started kindergarten. It encouraged the parties to deviate from the parenting plan by agreement as needed. The district court invited the parties to submit additional suggestions concerning parenting time for its consideration before entry of the decree.

In the decree, the district court determined Nicolette and Randy to be Eleanor's biological parents. It ordered that it was in Eleanor's best interests to be in Randy's legal and physical custody and established parenting time and child support accordingly. Specifically, the district court ordered that until Eleanor began kindergarten, the parents would follow a 50-50 parenting time schedule. The district court further ordered that once Eleanor began kindergarten, Nicolette would essentially receive parenting time one weekday evening, every other weekend, 2 weeks in the summer, and alternating holidays. The

district court did not make special written findings pursuant to Neb. Rev. Stat. § 43-2932 (Reissue 2016).

Nicolette timely appealed.

ASSIGNMENTS OF ERROR

Nicolette assigns, condensed and rephrased, that the district court erred in (1) not imposing limitations on Randy's custody and visitation rights and not making special written findings that such limitations would sufficiently protect Eleanor from harm pursuant to § 43-2932, (2) awarding sole legal and physical custody of Eleanor to Randy subject to Nicolette's parenting time, and (3) ordering Nicolette to pay Randy child support.

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] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *Id.*

ANALYSIS

Compliance With § 43-2932.

Nicolette's primary argument on appeal is that the district court's award of custody to Randy failed to comply with § 43-2932. Before addressing Nicolette's arguments, we briefly summarize relevant portions of the statute.

The statute has three basic parts that are relevant to this appeal. The first, subsection (1)(a), identifies when the statute applies. The statute applies "[w]hen the court is required to develop a parenting plan" and a "preponderance of the evidence demonstrates" that "a parent who would otherwise be

allocated custody, parenting time, visitation, or other access to the child under a parenting plan" has engaged in specified conduct including, relevant to this appeal, child abuse. See § 43-2932(1)(a).

The second part of the statute relevant to this appeal is in subsection (1)(b). It directs courts to impose limitations on a parent's custody and parenting time if a parent is found to have engaged in any of the conduct listed in subsection (1)(a). The court must impose limits that "are reasonably calculated to protect the child or child's parent from harm." § 43-2932(1)(b). The statute then provides a nonexhaustive list of potential limitations.

Finally, subsection (3) requires an additional step a court must take before awarding legal or physical custody of a child to a parent found to have engaged in any of the conduct listed in subsection (1)(a). "[T]he 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 [subsection (1)(b)]." § 43-2932(3).

Nicolette relies on each of the three parts of § 43-2932 summarized above. She contends that she demonstrated that Randy committed child abuse under subsection (1)(a)(i) and that the district court was therefore obligated by subsections (1)(b) and (3) to impose limitations on Randy's rights concerning Eleanor and to make special written findings that those limitations were sufficient to protect her from harm. See § 43-2932. She contends that the district court's failure to impose limitations and make special written findings constitutes reversible error.

[4] The district court did not impose any limitations on Randy's custody of Eleanor, let alone make special written findings that such limitations would protect Eleanor from harm. Neither did the district court explicitly find that § 43-2932 did not apply. However, we presume in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise. *Molczyk v. Molczyk*,

285 Neb. 96, 825 N.W.2d 435 (2013). We thus presume that the district court did not impose limitations or make special findings because it found § 43-2932 did not apply. And, for reasons we will explain, we find no basis to reverse the district court's determination that neither limitations nor special findings were required in this case.

Nicolette points to specific evidence introduced at trial and claims this evidence demonstrated that Randy committed child abuse for purposes of § 43-2932(a)(1). In particular, Nicolette claims that evidence Randy drove with Eleanor in the car after drinking and verbally abused Nicolette in Eleanor's presence demonstrated that Randy committed child abuse.

Randy responds to this evidence in two ways. First, he contends in his brief that it is immaterial, because no evidence was introduced that he was convicted of child abuse. Alternatively, he argues that the evidence Nicolette points to does not establish that he committed child abuse.

Randy's first argument can be dispensed with quickly. Section 43-2932 provides no indication that it applies only when one parent has been criminally convicted for engaging in the specified conduct. The statute is triggered if a preponderance of the evidence demonstrates that the parent engaged in the specified conduct. No mention is made of a criminal conviction. The only way we could conclude that § 43-2932 is triggered by criminal convictions alone would be to read meaning into the statute that is not reflected in its text, but we do not interpret statutes in that manner. See *State v. Garcia*, 301 Neb. 912, 920 N.W.2d 708 (2018).

Having determined that § 43-2932 can apply even in the absence of a criminal conviction, we proceed to consider whether the evidence demonstrated that Randy committed child abuse. Section 43-2932 is a part of the Parenting Act. The Parenting Act defines "child abuse or neglect" by reference to Neb. Rev. Stat. § 28-710 (Reissue 2016), a criminal statute. See Neb. Rev. Stat. § 43-2922(5) (Reissue 2016). Section 28-710(2) defines child abuse or neglect as follows:

> (b) Child abuse or neglect means knowingly, intentionally, or negligently causing or permitting a minor child to be:
>
> (i) Placed in a situation that endangers his or her life or physical or mental health;
>
> (ii) Cruelly confined or cruelly punished;
>
> (iii) Deprived of necessary food, clothing, shelter, or care;
>
> (iv) Left unattended in a motor vehicle if such minor child is six years of age or younger;
>
> (v) Sexually abused; or
>
> (vi) Sexually exploited . . . .

Nicolette argues that by drinking and driving with Eleanor in the car and using harsh language toward Nicolette and physical aggression in Eleanor's presence, Randy placed Eleanor "in a situation that endanger[ed] . . . her life or physical or mental health." See § 28-710(2)(b)(i). As we will explain, however, the evidence that Randy actually placed Eleanor in danger is not as clear as Nicolette contends.

Nicolette did testify that she saw Randy "drink to excess" and then drive his car with Eleanor as a passenger. Nicolette did not explain what she meant by her testimony that Randy drank "to excess." In any event, Randy provided contrary testimony. He testified that he had driven with Eleanor in the car after having "[a] drink, maybe two, over the course of three, four hours," but he specifically denied ever driving while intoxicated with Eleanor. As for evidence of verbal abuse, Nicolette testified that Randy had previously, in the presence of Eleanor, yelled at Nicolette, called her a "bitch," and kicked and thrown objects around the room in anger.

On this record, we cannot say that the district court erred by not applying § 43-2932. Nicolette and Randy provided conflicting testimony on whether Randy ever drove while intoxicated with Eleanor in the car. Both parties acknowledge that under these circumstances, it is appropriate for this court to give weight to the fact that the trial judge heard and saw the

witnesses and was in a position to accept one version of the facts rather than another. See *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). The parties disagree, however, over which way that familiar principle cuts under these circumstances.

Nicolette contends that because the district court expressed concern that Randy would consume alcohol and drive with Eleanor as a passenger and questioned whether it was a "good idea," the district court must have accepted her testimony as credible. We disagree. We believe the district court's remarks and its decision not to apply § 43-2932 are most sensibly understood as reflecting that the district court accepted Randy's testimony that he did not drive while intoxicated with Eleanor as a passenger but was still concerned that Randy's decision to drive after drinking a small amount over several hours may not have been prudent in light of his history of alcohol use, even if it did not rise to the level of child abuse. And we do not believe the district court erred by concluding that the level of drinking to which Randy admitted—one or two drinks over the course of 3 or 4 hours prior to driving with Eleanor as a passenger—did not amount to child abuse.

As for the claimed verbal abuse and physical outbursts, we again find that the district court did not err by not applying § 43-2932. Nicolette's testimony regarding Randy's displays of anger does not portray admirable behavior on his part, but neither does it establish that the behavior endangered Eleanor's physical or mental health and thus rose to the level of child abuse.

Legal and Physical Custody.

Nicolette also argues that even if § 43-2932 is not considered, the district court's decisions on custody and parenting time amounted to an abuse of discretion. Nicolette contends that the district court, in awarding sole legal and physical custody to Randy, improperly punished her for what she calls "perceived inflexibility" regarding parenting time. Brief for appellant at 26. She also argues that the district court should

have granted her more parenting time than it did. We address these arguments in turn.

In the course of stating its findings on the record after the trial, the district court expressed concern over, among other things, whether Nicolette "would support parenting time between [Eleanor] and [Randy]." The district court went on to identify specific evidence adduced at trial that prompted this concern. The court mentioned one instance in which Nicolette initially agreed to make an exception to the parties' stipulated temporary parenting plan and allow Eleanor to accompany Randy on a vacation, but then withdrew that permission. It also expressed concern that if Nicolette was given custody, it did not appear she would be "a reasonable person when it comes to giving parenting time to [Randy]," but instead she would "follow the letter of the decree only and there won't be any exceptions." Nicolette points to these remarks by the district court, contending that the district court improperly punished her for her desire to follow the stipulated temporary parenting plan and its perception that she would also follow the final parenting plan adopted by the court.

Contrary to Nicolette, we do not believe the district court has "punished" Nicolette for her desire to follow either the temporary or final parenting plan. Rather, we understand the district court's remarks to express concern about how supportive Nicolette would be of Randy's involvement in Eleanor's life if she were granted custody. We believe that is a valid consideration in determining custody. See *Coffey v. Coffey*, 11 Neb. App. 788, 798, 661 N.W.2d 327, 340 (2003) ("it is appropriate to consider which parent would better promote visitation and a positive relationship between the children and the other parent"). And, given the evidence in the record, we cannot say that the district court's conclusion that Randy would be more supportive of Nicolette's parenting time than vice versa amounted to an abuse of discretion.

Neither do we believe that the district court abused its discretion as to the parenting time it awarded to Nicolette. Once Eleanor begins school, the district court's decree gives

Nicolette weekend parenting time with Eleanor every other Friday through Monday, with 3 hours of evening parenting time each week in addition to alternating holidays and 2 weeks in the summer. Nicolette contends that with only one evening of parenting time during the week, the court's parenting plan has reduced her to a "'weekend' or 'sometimes' parent." Brief for appellant at 23. As the district court noted, however, the commute between the parties' respective homes in different communities presented practical difficulties in awarding Nicolette more parenting time during the week. Nicolette points out that the specific distance between their residences was not in the record. But the record is clear that Randy lives in Blair and that Nicolette lives in the Millard area. We cannot say that the district court abused its discretion by considering the difficulties presented by the parties' living in different communities and fashioning its award of parenting time accordingly.

Child Support.

Finally, Nicolette contends that the district court erred by ordering her to pay child support to Randy. Nicolette's argument that the district court's child support order should be reversed is dependent, however, on her claim that the district court should have awarded sole legal and physical custody of Eleanor to her. Having concluded that the district court did not abuse its discretion by awarding sole legal and physical custody of Eleanor to Randy, we see no basis to reverse the district court's award of child support.

CONCLUSION

For the foregoing reasons, we affirm the order of the district court that awarded sole legal and physical custody to Randy.

Affirmed.

Heavican, C.J., participating on briefs.

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

State of Nebraska on behalf of Walter E., a minor child, appellant, and Nebraska Department of Health and Human Services, appellee, v. Mark E., appellee.

924 N.W.2d 59

Filed March 8, 2019. No. S-18-436.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which 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.
2. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
3. **Jurisdiction.** A lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
4. **Jurisdiction: Child Support: Actions.** As a prerequisite for an action under Neb. Rev. Stat. § 43-512.03(1)(a) (Reissue 2016), there cannot be an existing child support order in any jurisdiction. Hence, a court has subject matter jurisdiction for an action under § 43-512.03(1)(a) only "when there is no existing child support order" in Nebraska or any other jurisdiction.

Appeal from the District Court for Sarpy County: George A. Thompson, Judge. Affirmed.

Sarah E. Preisinger, Deputy Sarpy County Attorney, for appellant.

No appearance for appellee Mark E.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

The State of Nebraska on behalf of Walter E. appeals the order of the district court for Sarpy County which dismissed the State's complaint filed against his father, Mark E., to establish an order of support. The complaint was filed pursuant to Neb. Rev. Stat. § 43-512.03 (Reissue 2016). We conclude that because there was an existing support order, the district court lacked subject matter jurisdiction under § 43-512.03(1)(a) to consider the State's complaint. We therefore affirm the district court's order which dismissed the State's complaint.

STATEMENT OF FACTS

The record on appeal indicates that on February 9, 2016, the juvenile court ordered Walter to be placed in the custody of the Nebraska Department of Health and Human Services (DHHS) with placement at home pending an assessment for safety and services. In an order filed February 22, the juvenile court determined that Walter should be in the protective custody of DHHS, because although his parents had attempted numerous therapeutic interventions, he continued to engage in "extremely aggressive and out-of-control behaviors as well as self-harming behaviors." The juvenile court ordered Walter to be placed in the temporary custody of DHHS, pending an appropriate placement for treatment. In the February 22 order, the juvenile court further ordered that "[t]he costs of the child's care to the extent not covered by the parent's insurance shall be borne by the State of Nebraska." On March 11, the juvenile court ordered Walter to be placed at the Boys Town psychiatric residential treatment facility.

On July 19, 2016, the juvenile court filed an order in which it found Walter to be a child within the meaning of Neb. Rev.

Stat. § 43-247(3)(a) (Supp. 2015) and ordered him to remain in the custody of DHHS for placement at the Boys Town main campus. The juvenile court further ordered, inter alia, that DHHS "continue to be responsible for all costs associated with the Order herein not covered by insurance." The record on appeal contains two orders filed by the juvenile court following subsequent reviews: one order was filed February 14, 2017, and the other was filed June 19. In both orders, the juvenile court ordered Walter to remain in the custody of DHHS for placement at the Boys Town main campus.

On June 12, 2017, the State, through a deputy Sarpy County Attorney, filed a complaint in the district court on behalf of Walter and against Walter's father, Mark. The State alleged that the complaint was filed pursuant to § 43-512.03, which generally authorizes the county attorney to take certain actions in connection with child support, including filing a complaint against a nonsupporting party when there is no existing child or medical support order. See § 43-512.03(1)(a). The State alleged that Walter was under the jurisdiction of the juvenile court, that he had been placed in the custody of DHHS in an out-of-home placement, that he was in need of financial support from Mark, and that Mark had a duty of support for Walter. The State requested an order from the district court determining that Mark had a duty of support and ordering Mark to "pay a sum certain each month to meet that duty of support" and to "provide ongoing medical support for [Walter]."

Mark filed an answer in which he alleged, inter alia, that the juvenile court had placed Walter at Boys Town and had ordered that the State should be responsible for costs associated with the placement. He also alleged that he continued to provide coverage for Walter under his private medical insurance.

The district court's child support referee held a hearing on the State's complaint and thereafter filed a report finding that Mark was able to and should pay child support in accordance with the Nebraska Child Support Guidelines. The referee

recommended that Mark be ordered to pay to DHHS child support of $631 per month beginning September 1, 2017.

Mark took exception to the referee's report. Mark asserted that the district court and referee lacked jurisdiction, because there was a pending case in the juvenile court and the juvenile court had already entered support orders specifically requiring the State to pay support beyond that covered by Mark's insurance. Mark filed a motion to transfer the matter to the juvenile court. Mark later filed a motion to dismiss the district court action for lack of jurisdiction.

The district court held a hearing on Mark's motion to dismiss, motion to transfer, and exception to the referee's report. The district court received evidence, including the juvenile court orders discussed above. After the hearing, the district court filed an order on March 13, 2018, in which it dismissed the State's complaint and ordered the parties to pay their own costs.

In its order of March 13, 2018, the district court stated that it had examined the juvenile court orders and that the orders showed that "at each juncture [the juvenile court] has assigned the costs of care for the child shall be paid by [Mark's] insurance and to the extent that costs are not covered by insurance, they shall be paid by the State of Nebraska." The district court further stated that the juvenile court had "made findings that the parents cannot afford appropriate treatment and costs were waived in that matter."

The district court noted that § 43-512.03 authorizes an action seeking a support order "in cases where there is no existing child or medical support order." The district court determined that there was "an existing order for support as announced by Juvenile Court." As part of its order, the district court observed that "res judicata" prevented the parties from relitigating the issues in this action and noted that "the issue of support has been address[ed] by the Juvenile Court, the support order has the same finality as in this proceeding, the merits were litigated, and all of the parties are the

same." The district court finally determined that because the juvenile court had jurisdiction over Walter and because the juvenile proceeding was still ongoing, the issue of whether the matter may or should be transferred to juvenile court was moot.

Following the denial of the State's motion to reconsider, the State appealed.

ASSIGNMENTS OF ERROR

The State claims, restated and consolidated, that the district court erred when it dismissed the case based on its determination that an order of support had been entered by the juvenile court and that res judicata barred this action. The State alternatively claims that the district court erred when it declined to transfer the action to the juvenile court.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which 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. *Retroactive, Inc. v. Nebraska Liquor Control Comm.*, 298 Neb. 936, 906 N.W.2d 328 (2018).

ANALYSIS

The State challenges at length the district court's reliance on "res judicata" in its order of dismissal. However, as we explain below, because the action was properly dismissed on a statutory basis for lack of subject matter jurisdiction, we need not engage in an analysis of the relevance of the principle of res judicata.

[2,3] Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018). A lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Id*.

In its complaint, the State alleged that it was filing the complaint in district court pursuant to § 43-512.03. We note that § 43-512.03 provides for various types of child support enforcement actions, including actions for enforcement of existing child support orders and actions for paternity. However, the State in its complaint sought an order to establish Mark's child and medical support obligations, and therefore, it is clear that the State was specifically proceeding under § 43-512.03(1)(a), which authorizes a county attorney, on request of DHHS, to "file a complaint against a nonsupporting party in the district, county, or separate juvenile court praying for an order for child or medical support in cases when there is no existing child or medical support order."

[4] In *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 267-68, 465 N.W.2d 773, 775 (1991), we held that "as a prerequisite for an action under § 43-512.03, there cannot be an existing child support order in any jurisdiction. Hence, a court has subject matter jurisdiction for an action under § 43-512.03 only 'when there is no existing child support order' in Nebraska or any other jurisdiction." See, also, *State ex rel. Cammarata v. Chambers*, 6 Neb. App. 467, 574 N.W.2d 530 (1998). We concluded in *Gaddis* that because there was an existing child support order issued in Colorado, the district court lacked subject matter jurisdiction for an action brought under § 43-512.03 and that therefore, the district court should have dismissed the proceedings on that basis.

Recently, in *House v. House*, 24 Neb. App. 595, 894 N.W.2d 362 (2017), the Nebraska Court of Appeals clarified that the above-quoted holding in *Gaddis* applied specifically to a complaint filed under the part of the juvenile statute that is now found at § 43-512.03(1)(a). The Court of Appeals further clarified that the requirement in § 43-512.03(1)(a) that there be "no existing . . . support order" did not apply to actions brought under other subsections of § 43-512.03, such as the one at issue in *House* brought under § 43-512.03(1)(c) to enforce an

already existing child support order. We agree with the Court of Appeals' analysis in *House*.

In this case, the district court determined that there was already an existing support order issued by the juvenile court and therefore dismissed the complaint. The district court made this determination by reviewing the juvenile court orders that it received into evidence and that we have described above. We agree with the district court's determination that "[t]he Juvenile Court has issued an order of support . . . ."

On appeal, the State contends that the orders of the juvenile court were not general child support orders and that the juvenile court did not employ child support calculations like those available in the district court. As discussed below, we reject the contention that juvenile court orders were not general child support orders, and we do not address the State's contention that the juvenile court did not employ proper procedures to determine child support. Instead, we conclude that the district court lacked subject matter jurisdiction by virtue of § 43-512.03(1)(a).

In the July 19, 2016, order in which the juvenile court adjudicated Walter to be a child within the meaning of § 43-247(3)(a) and ordered him to remain in the custody of DHHS for placement at the Boys Town main campus, the juvenile court ordered, inter alia, that DHHS "continue to be responsible for all costs associated with the Order herein not covered by insurance." As did the district court, we read "all costs" to refer broadly to all necessary support required by the placement and not limited to medical support.

For completeness, we note that juvenile courts have authority to order support. Specifically, Neb. Rev. Stat. § 43-290 (Reissue 2016), which is part of the Nebraska Juvenile Code, authorizes a juvenile court to order support to be paid by a parent. Section 43-290 provides in part:

> Pursuant to a petition filed by a county attorney or city attorney having knowledge of a juvenile in his or her

> jurisdiction who appears to be a juvenile described in subdivision (1), (2), (3), or (4) of section 43-247, whenever the care or custody of a juvenile is given by the court to someone other than his or her parent, which shall include placement with a state agency, or when a juvenile is given medical, psychological, or psychiatric study or treatment under order of the court, the court shall make a determination of support to be paid by a parent for the juvenile at the same proceeding at which placement, study, or treatment is determined or at a separate proceeding. Such proceeding, which may occur prior to, at the same time as, or subsequent to adjudication, shall be in the nature of a disposition hearing.

We conclude that the district court did not err when it determined that there was an existing support order from the juvenile court. Therefore, under § 43-512.03(1)(a), the district court did not have subject matter jurisdiction over the State's complaint and, consequently, the district court did not err when it dismissed the complaint. The State asserts that, in any event, the juvenile court did not follow adequate procedures to determine the amount of Mark's support obligation. The State's attempt to use a separate district court proceeding to challenge the sufficiency of the juvenile court proceeding was an impermissible collateral attack, which the district court lacked jurisdiction to entertain. However, as we noted above, juvenile courts have authority to enter support orders, and our decision in this matter does not foreclose subsequent filings in juvenile court to further consider support issues.

Notwithstanding the foregoing analysis, the State alternatively claims that the district court erred when it did not transfer the present action to the juvenile court. However, we agree with the district court's reasoning that there was already an ongoing proceeding in the juvenile court in which the State was a party and that therefore, the transfer issue

was moot. We conclude that the district court did not err in this regard.

CONCLUSION

We determine that because there was an existing support order issued by the juvenile court, the district court did not have subject matter jurisdiction over the complaint filed by the State under § 43-512.03(1)(a). We affirm the district court's order which dismissed the State's complaint.

Affirmed.

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

State of Nebraska, appellee, v.
Courtney J. Savage, appellant.
924 N.W.2d 64

Filed March 15, 2019. No. S-17-1166.

SUPPLEMENTAL OPINION

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Darik J. Von Loh, of Hernandez Frantz, Von Loh, appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

This case is before us on a motion for rehearing filed by the appellant, Courtney J. Savage, concerning our opinion in *State v. Savage*, 301 Neb. 873, 920 N.W.2d 692 (2018). We overrule the motion, but we modify the opinion as follows:

In the subsection "(a) Authentication," after the fourth sentence of the fourth paragraph, we insert the following language:

> As for Savage's contention that the State did not properly authenticate messages sent to him by others, we again disagree. The State was required only to introduce testimony sufficient to establish that the evidence was what

> the State claimed it to be. The State did not claim that messages sent by others were anything more than messages sent to Savage's cell phone. See *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014).

Savage, 301 Neb. at 885, 920 N.W.2d at 703.

In subsection "(b) Hearsay," following the second to the last paragraph, we insert the following paragraph:

> We also reject Savage's argument that text messages sent to his cell phone by unidentified individuals contained inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Rev. Stat. § 27-801(3) (Reissue 2016). Messages sent to Savage's cell phone were not offered for the truth of the matters asserted. They were offered to prove that the statements were made.

Savage, 301 Neb. at 887, 920 N.W.2d at 704.

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

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

Melissa Burke, appellant and cross-appellee, v. Board of Trustees of the Nebraska State Colleges, appellee and cross-appellant.

924 N.W.2d 304

Filed March 15, 2019. No. S-17-1167.

1. **Immunity: Jurisdiction.** Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter. Subject matter jurisdiction is a question of law.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Actions: Colleges and Universities.** An action against the Board of Trustees of the Nebraska State Colleges is an action against the State of Nebraska.
4. **Constitutional Law: Immunity: States.** The sovereign immunity of a state neither derives from nor is limited by the terms of the 11th Amendment to the U.S. Constitution. Rather, a state's immunity from suit is a fundamental aspect of sovereignty.
5. **Statutes: Immunity: Waiver.** Statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.
6. ____: ____: ____. A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
7. **Immunity: Waiver: Jurisdiction: Legislature.** Absent legislative action waiving sovereign immunity, a trial court lacks subject matter jurisdiction over an action against the State.

8. **Declaratory Judgments: Immunity: Waiver.** Nebraska's Uniform Declaratory Judgments Act does not waive the State's sovereign immunity.
9. **Actions: Colleges and Universities: Immunity: Waiver: Legislature.** Language in Neb. Rev. Stat. § 85-302 (Reissue 2014) permitting the Board of Trustees of the Nebraska State Colleges to "sue and be sued" is not self-executing, prescribes no terms or conditions under which the board can be sued, and is not an express legislative waiver of sovereign immunity.
10. **Jurisdiction: Appeal and Error.** When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim.

Appeal from the District Court for Dawes County: Derek C. Weimer, Judge. Vacated and dismissed.

Nicholas J. Welding, of Norby & Welding, L.L.P., for appellant.

George E. Martin III, of Baird Holm, L.L.P., for appellee.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

Melissa Burke began working at Chadron State College in 2007. In April 2016, she was notified her employment contract would not be renewed for the upcoming contract year. Burke filed a declaratory judgment action in district court against the governing body of Chadron State College, alleging she had not been notified of the nonrenewal within the timeframe required by a collective bargaining agreement. The district court dismissed the action on summary judgment, and Burke appeals. We find Burke's action is barred by the doctrine of sovereign immunity, and therefore, we vacate the district court's judgment and dismiss this appeal for lack of subject matter jurisdiction.

I. FACTS

The underlying facts are largely undisputed, and most have been stipulated by the parties. Burke brought this action against

the Board of Trustees of the Nebraska State Colleges (the Board). The Board is the governing body of Chadron State College, Wayne State College, and Peru State College.[1] The Board was created by article VII, § 13, of the Nebraska Constitution, and its duties and powers are prescribed by the Legislature.[2] The Legislature describes the Board as "a body corporate"[3] and as a "representative" of the State.[4]

In 2007, Burke was hired to work at Chadron State College. At all relevant times, she was a member of a bargaining unit represented by the Nebraska State College System Professional Association. As such, the terms and conditions of her employment were provided in collective bargaining agreements between the association and the Board.

1. Burke's Employment

Burke entered into yearly employment contracts with the Board for specific positions at Chadron State College. The term of each contract was from July 1 to June 30. As relevant to this case, the collective bargaining agreement requires that association members in their first year of employment must be given notice that their contract will not be renewed 30 days prior to its expiration. Association members in their second year of employment must be given notice 120 days prior to contract expiration, and members in their third and subsequent years of employment must be given notice 180 days prior to contract expiration.

From 2007 to 2011, Burke was an athletic administrative assistant at Chadron State College. From 2011 to 2015, Burke was a compliance coordinator at Chadron State College. In early 2015, Burke requested a review of her job duties, and in March 2015, her job was changed and she began working

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[1] See Neb. Rev. Stat. § 85-301 et seq. (Reissue 2014 & Cum. Supp. 2018).

[2] See Neb. Const. art. VII, § 13.

[3] § 85-302.

[4] See Neb. Rev. Stat. §§ 81-1370 and 81-1371 (Reissue 2014).

as an associate athletic director. The parties generally dispute whether this change was a reclassification or a transfer. If it was a reclassification, then under the collective bargaining agreement, Burke kept her prior years of service for purposes of notice of nonrenewal. If it was a transfer, then Burke's years of service started over for purposes of notice of nonrenewal. The parties do not dispute the meaning of the terms "reclassification" and "transfer" in the collective bargaining agreement; rather, the dispute is over the underlying facts of Burke's change in employment and whether it amounted to a "reclassification" or a "transfer" under that agreement.

On April 8, 2016, Burke was notified via letter from the president of Chadron State College that her employment contract would not be renewed for the 2016-17 contract year. Her 2015 contract was due to expire on June 30, 2016. Burke believed this notice was untimely, because she understood that her job had been reclassified and that she retained her prior years of service and, per the collective bargaining agreement, was entitled to 180 days' notice that her contract would not be renewed. The Board, however, reasoned that Burke had been transferred in 2015, and not reclassified, and that her years of service for computing notice of nonrenewal started over and she was entitled to only 30 days' notice of nonrenewal.

2. Grievance Procedure

The collective bargaining agreement contains a grievance procedure designated as "the exclusive method for resolving grievances concerning the administration of this Agreement." It defines a grievance as a "dispute . . . concerning the interpretation or application of this Agreement." The grievance procedure has several steps, one of which involves an evidentiary hearing before a committee. The grievance procedure culminates with an appeal to the chancellor. Thereafter, any party who is dissatisfied with the chancellor's decision "may seek relief under applicable State or Federal laws" or, if the parties agree, through binding arbitration. The parties agree Burke did

not initiate or exhaust the grievance procedure before filing this declaratory judgment action in district court.

3. Declaratory Judgment Action

On June 8, 2016, a few weeks before her 2015 employment contract was to expire, Burke filed what she styled as a declaratory judgment action in the district court for Dawes County, Nebraska. Her complaint alleged the Board had breached the collective bargaining agreement by failing to timely notify her in writing of its intent not to renew her employment contract. The complaint sought a declaration that as a result of the breach, Burke was entitled to an employment contract for the 2016-17 contract year. The complaint also sought a declaration that Burke was entitled to "all salary and fringe benefits associated with her employment," as well as back pay and consequential damages.

After Burke filed her complaint, the Board moved to dismiss. It argued the court lacked subject matter jurisdiction, because Burke's action was not really seeking a declaration regarding construction of a contract, but, rather, was seeking relief for breach of contract. The Board also argued that to the extent the complaint sought declaratory relief, Burke had another equally serviceable remedy, namely, an action for breach of contract. The district court overruled the motion to dismiss, reasoning it had subject matter jurisdiction over the declaratory judgment action and had the discretion to entertain it.

While Burke's declaratory judgment action was pending, we issued our opinion in *Armstrong v. Clarkson College*.[5] In that case, we held that the "exhaustion of a mandatory grievance procedure in a contract is a condition precedent to enforcing the rights under that contract."[6] In response to *Armstrong*, the Board moved for summary judgment, arguing Burke's action

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[5] *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[6] *Id.* at 633, 901 N.W.2d at 28-29.

was barred because she failed to exhaust the mandatory grievance procedure in the collective bargaining agreement before filing suit.

The district court granted summary judgment in favor of the Board and dismissed Burke's complaint. Burke filed this timely appeal, and the Board cross-appealed. We granted the Board's petition to bypass.

II. ASSIGNMENTS OF ERROR

All four of Burke's assigned errors challenge the district court's application of *Armstrong* to this case. Burke assigns, reordered and restated, that the district court erred in (1) granting summary judgment in favor of the Board on the basis that Burke failed to exhaust the grievance procedure in the collective bargaining agreement; (2) interpreting *Armstrong* to require, as a matter of law, the exhaustion of a grievance procedure contained in a contract as a condition precedent to bringing an action to enforce the contract; (3) rejecting her argument that requiring exhaustion of a grievance violates the constitutional right to access the courts without delay; and (4) rejecting her argument that requiring exhaustion of the grievance procedure unlawfully infringes on the court's original equity jurisdiction.

On cross-appeal, the Board assigns, restated, that the district court erred in overruling its motion to dismiss, because (1) the court lacked subject matter jurisdiction over the declaratory action and (2) the complaint failed to state a claim upon which relief could be granted.

III. STANDARD OF REVIEW

[1,2] Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter.[7] Subject matter jurisdiction is a question of law.[8] When a jurisdictional question does not

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[7] *Cappel v. State*, 298 Neb. 445, 905 N.W.2d 38 (2017).

[8] *LeRette v. Howard*, 300 Neb. 128, 912 N.W.2d 706 (2018).

involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.[9]

IV. ANALYSIS

After oral argument, the parties were ordered to file supplemental briefs addressing (1) whether Burke's action is an action against the State and (2) if so, whether the Legislature has enacted any statute waiving the State's sovereign immunity for this action. In their responsive briefs, the parties agree Burke's action against the Board is an action against the State. They disagree, however, as to whether the doctrine of sovereign immunity applies or has been waived by the Legislature.

As a threshold matter, we agree with the parties that Burke's action is one against the State of Nebraska. Her operative complaint names the Board as the only defendant. The Board was created by article VII, § 13, of the Nebraska Constitution, and its duties and powers are prescribed by the Legislature.[10] The Legislature describes the Board as "a body corporate"[11] and as a "representative" of the State.[12] The Nebraska State Treasurer serves as treasurer of the Board,[13] and the Board must report all expenditures to the Governor annually.[14]

[3] We have at times, perhaps imprecisely, characterized the Board as a political subdivision of the State.[15] We also have

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[9] *Abdouch v. Lopez*, 285 Neb. 718, 829 N.W.2d 662 (2013); *S.L. v. Steven L.*, 274 Neb. 646, 742 N.W.2d 734 (2007).

[10] See Neb. Const. art. VII, § 13.

[11] § 85-302.

[12] See §§ 81-1370 and 81-1371.

[13] § 85-302.

[14] § 85-303.

[15] *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 235 N.W.2d 223 (1975). See, also, *Brady v. Board of Trustees of Nebraska State Colleges*, 196 Neb. 226, 242 N.W.2d 616 (1976).

compared the Board to the Board of Regents of the University of Nebraska.[16] Most recently, in *Thomas v. Board of Trustees*,[17] we applied the State Tort Claims Act to the Board. That act provides that a "State agency" includes "all departments, agencies, boards, bureaus, and commissions of the State of Nebraska and corporations the primary function of which is to act as, and while acting as, instrumentalities or agencies of the State."[18] Regardless of the precise terminology used historically, it is beyond debate that the Board is an instrumentality of the State and is accountable to the State. As such, an action against the Board is an action against the State.[19]

1. Sovereign Immunity

Principles

[4] The 11th Amendment makes explicit reference to the states' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[20] This court has, as a result, sometimes referred to the 11th Amendment when discussing Nebraska's sovereign immunity from suit.[21] However, the sovereign immunity of a state neither derives from nor is limited by the terms of the 11th Amendment.[22] Rather, as we have recognized, a state's immunity from suit is a fundamental

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[16] *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991).

[17] *Thomas v. Board of Trustees*, 296 Neb. 726, 895 N.W.2d 692 (2017).

[18] Neb. Rev. Stat. § 81-8,210(1) (Reissue 2014).

[19] See, *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 917 N.W.2d 903 (2018); *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999). See, also, *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017) (describing Nebraska's Board of Parole as constitutionally created body of state government).

[20] U.S. Const. amend. XI. See *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

[21] See *State ex rel. Rhiley, supra* note 19.

[22] *Alden, supra* note 20; *State ex rel. Rhiley, supra* note 19.

aspect of sovereignty.[23] And a trial court lacks subject matter jurisdiction over an action against the State unless the State has consented to suit.[24]

Neb. Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." Long ago, we held that this provision is not self-executing and that no suit may be maintained against the State unless the Legislature, by law, has so provided.[25] Over time, we have examined the Legislature's limited waivers of the State's sovereign immunity, usually in the context of either the State Tort Claims Act or the Political Subdivisions Tort Claims Act.[26]

[5-7] In doing so, we have found it well settled that statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.[27] A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[28] Absent legislative action waiving sovereign immunity, a trial court lacks subject matter jurisdiction over an action against the State.[29] The question, then, is whether the Legislature has waived sovereign immunity for purposes of this declaratory judgment action. Before we directly address this question, we pause to address an argument made by Burke in her supplemental brief.

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[23] *State ex rel. Rhiley, supra* note 19. See *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017).

[24] *Davis, supra* note 19.

[25] *State ex rel. Rhiley, supra* note 19; *Shear v. State*, 117 Neb. 865, 223 N.W. 130 (1929).

[26] *State ex rel. Rhiley, supra* note 19.

[27] *Id.*; *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

[28] *Id.*

[29] *State ex rel. Rhiley, supra* note 19; *Henderson, supra* note 19.

Burke argues that her declaratory judgment action does not implicate the State's sovereign immunity because, she contends, her suit "is not in essence one for the recovery of money."[30] She relies on *Doe v. Board of Regents*[31] to argue that actions against the State "to compel or restrain state action do not implicate sovereign immunity if such actions do not seek monetary relief,"[32] and she contends that sovereign immunity applies only when an action against the State "requires the expenditure of public funds."[33]

Burke's argument is premised on a fundamental misunderstanding of *Doe* and sovereign immunity principles. In *Doe*, we were addressing a situation not present here—how sovereign immunity applies when a suit is brought against individuals sued in their official capacity as State employees. We recognized the following general rule:

> [A]ctions to restrain a state official from performing an affirmative act and actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds. As the [U.S.] Supreme Court has consistently stated, "'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'"[34]

Here, Burke brought the action only against the Board. She did not name as a defendant any state official, whether in an

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[30] Supplemental brief for appellant at 7.

[31] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010), *overruled on other grounds, Davis, supra* note 19.

[32] Supplemental brief for appellant at 5.

[33] *Id.*

[34] *Doe, supra* note 31, 280 Neb. at 511-12, 788 N.W.2d at 282, quoting *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997).

individual or official capacity. As such, the distinctions iterated in *Doe* are inapplicable here. Because Burke's action against the Board is an action directly against the State, sovereign immunity applies to bar the action, unless the Legislature has waived it.

2. No Statute Waives Board's Immunity

It is well settled that statutes purporting to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.[35] A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[36] With these key principles in mind, we turn to the parties' arguments regarding waiver of sovereign immunity.

(a) Uniform Declaratory Judgments Act Does Not Waive Sovereign Immunity

[8] Burke has styled her action as one for declaratory judgment, and the Board correctly points out that Nebraska's Uniform Declaratory Judgments Act[37] does not waive the State's sovereign immunity.[38] Thus, a party who seeks declaratory relief by suing only the State must find authorization for such remedy from a source other than the Uniform Declaratory Judgments Act.[39]

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[35] *State ex rel. Rhiley, supra* note 19; *Amend, supra* note 27; *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

[36] *State ex rel. Rhiley, supra* note 19; *Amend, supra* note 27; *Jill B. & Travis B., supra* note 23.

[37] Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016).

[38] *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995); *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993).

[39] *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). See *Zawaideh, supra* note 35.

(b) § 85-302 Does Not Waive Sovereign Immunity

[9] Nor do the statutes creating the state college system and the Board directly address sovereign immunity.[40] Burke points out that § 85-302 provides that the Board, as a body corporate, "may sue and be sued," but, as previously noted, we have not found such language to be sufficient to waive sovereign immunity. Specifically, in *Livengood v. Nebraska State Patrol Ret. Sys.*,[41] we considered whether the State's sovereign immunity had been waived for an action against the Nebraska State Patrol seeking a declaration that retirement annuities had been miscalculated. We noted that under the Nebraska Constitution, "'[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.'"[42] But we reasoned this provision merely permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. We held that language permitting the State to "sue and be sued" is not self-executing, but instead requires the Legislature to take specific action to waive the State's sovereign immunity.[43] Based on this rationale, we find the language in § 85-302 permitting the Board to "sue and be sued" is not self-executing, prescribes no terms or conditions under which the Board can be sued, and is not an express legislative waiver of sovereign immunity.

(c) State Contract Claims Act Does Not Apply

Nor is the State Contract Claims Act[44] a possible source of waiver on this record. Section 81-8,303 of that act specifies

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[40] See § 85-301 et seq.

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

[42] *Id.* at 251, 729 N.W.2d at 60.

[43] *Id.* Accord *Cappel, supra* note 7.

[44] Neb. Rev. Stat. §§ 81-8,302 to 81-8,306 (Reissue 2014).

that it does not apply to employment contracts entered into pursuant to the State Employees Collective Bargaining Act,[45] and the contract at issue was entered into pursuant to that act.[46] Thus, we can find no waiver of sovereign immunity for Burke's suit under the State Contract Claims Act.

(d) § 25-21,206 Does Not Apply

Finally, both parties discuss Neb. Rev. Stat. § 25-21,206 (Reissue 2016), which provides that the State may be sued in "any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state." Burke's action is founded upon or growing out of her contract with the Board, and that contract was founded upon the State Employees Collective Bargaining Act,[47] a law of the state. Both parties suggest the waiver of sovereign immunity under § 25-21,206 could be broad enough to cover an action such as Burke's, but we need not decide that question, because Burke has failed to comply with the requirements of that statute, and thus she cannot rely on it as a potential waiver of sovereign immunity.

Section 25-21,206 contains specific requirements, one of which is that the complaint must comply with the pleading requirements in Neb. Rev. Stat. § 25-21,202 (Reissue 2016). Section 25-21,202 lists five specific allegations that must be included in the complaint and requires that "in all cases," the complaint "shall" set forth:

> (1) the facts out of which the claim originally arose; (2) the action of the Legislature, or of any department of the government thereon, if any such has been had; (3) what person or persons is the owner or are the owners thereof,

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[45] Neb. Rev. Stat. §§ 81-1369 to 81-1388 (Reissue 2014).

[46] See §§ 81-1370 and 81-1371.

[47] See § 81-1371(6).

> or in anywise interested therein; (4) that no assignment or transfer of the same, or any part thereof, or interest therein, has been made, except as stated in the complaint; and (5) that the claimant is justly entitled to the amount claimed therein from the state after allowance of all just credits and setoffs.

Even liberally construed, Burke's complaint does not address the requirements of subsections (4) or (5) in § 25-21,202. In fact, because Burke has consistently taken the position that she is not seeking any monetary amount from the Board in this action, it is questionable whether she could ever plead factual allegations that satisfy § 25-21,202(5).

As noted, statutes that purport to waive the State's protection of sovereign immunity must be strictly construed in favor of the sovereign and against the waiver.[48] Here, § 25-21,206 expressly waives the State's sovereign immunity, but only if the requirements of the statute are met. Burke's complaint does not contain the necessary factual allegations to satisfy § 25-21,202, and therefore she cannot rely on § 25-21,206 to waive the State's sovereign immunity here. And because we conclude that § 25-21,206 does not apply on this record, we need not address the Board's argument that Burke cannot rely on § 25-21,206 because she failed to comply with the presuit procedures of Neb. Rev. Stat. § 81-1170.01 (Reissue 2014).

V. CONCLUSION

[10] Burke's declaratory judgment action against the Board is an action against the State, and we have not been directed to any statute that serves to waive the State's sovereign immunity. As such, we must find the district court lacked subject matter jurisdiction over Burke's action against the Board.[49]

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[48] *State ex rel. Rhiley, supra* note 19; *Amend, supra* note 27.

[49] See *State ex rel. Rhiley, supra* note 19.

When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim.[50] We thus vacate the district court's judgment and dismiss this appeal for lack of subject matter jurisdiction.

Vacated and dismissed.

Miller-Lerman, J., not participating.

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[50] *Id.*

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

Meyer Natural Foods LLC and Crum & Forster Specialty Insurance Company, appellants, v. Greater Omaha Packing Co., Inc., appellee.

925 N.W.2d 39

Filed March 15, 2019. No. S-18-108.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
5. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
6. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
7. **Contracts.** A determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested

opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.

8. **Contracts: Appeal and Error.** An appellate court will not rewrite a contract to provide terms contrary to those which are expressed. Nor is it the province of a court to rewrite a contact to reflect the court's view of a fair bargain.
9. **Contracts.** The parties to a contract must be held to the plain language of the agreement they entered into.
10. **Uniform Commercial Code: Contracts: Intent.** The question of whether it is a contract for the sale of goods depends upon an examination of the entire contract. The Uniform Commercial Code applies where the principal purpose of the contract is the sale of goods, even though in order for the goods to be utilized, some installation is required. On the other hand, if the contract is principally for services and the goods are merely incidental to the contract, the provisions of the Uniform Commercial Code do not apply.
11. ____: ____: ____. The test for inclusion in or exclusion from the sales provisions of Neb. U.C.C. art. 2 (Reissue 2001) is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.
12. **Damages.** Damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

Thomas A. Grennan and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellants.

Michael F. Coyle and Jordan W. Adam, of Fraser Stryker, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

Meyer Natural Foods LLC (Meyer), together with Crum & Forster Specialty Insurance Company, sued Greater Omaha Packing Company, Inc. (GOP), for breach of contract following

a purported *E. coli* "O157:H7" contamination of beef owned by Meyer and processed by GOP. The district court for Douglas County granted summary judgment in favor of GOP. Although our reasoning differs from that of the district court, we affirm.

BACKGROUND

On April 27, 2006, Meyer and GOP entered into a processing agreement, which was amended on May 17, whereby GOP would slaughter Meyer's cattle, process the beef, and fabricate the same into various beef products. GOP engaged in the processing of Meyer beef 1 day per week for 5 years, until May 2011.

Processing of beef by GOP generally entails that after cattle are "harvested," the carcasses are chilled for 24 hours. Once chilled, the beef is "fabricated," a practice in which workers process the chilled carcasses into larger cuts of beef known as intact cuts (e.g., tenderloins, rib eyes, briskets) and into smaller pieces of beef known as nonintact cuts or trim (used to make products such as ground beef). Intact cuts are shrink wrapped and shipped in boxes, referred to as "boxed beef." The nonintact beef, or trim, is placed into large cardboard "combo bins" containing approximately 2,000 pounds of a combination of raw beef trim. The trim is then shipped to processing facilities across the United States for the purpose of making ground beef. When making ground beef, trim is mixed and ground with other nonintact beef products. This requires that the large cardboard combo bins of beef trim be tested for the presence of *E. coli* prior to the production of ground beef.

On April 25, 2011, Meyer delivered 1,600 head of cattle to GOP for slaughter, processing, and fabrication pursuant to the agreement. On April 27, GOP slaughtered the cattle delivered by Meyer. Also pursuant to the agreement, in the days following the slaughter and rendering, GOP tested the beef for the presence of various strains of *E. coli*.

The Meyer beef that had been fabricated by GOP on April 27, 2011, was then sealed and delivered to Meyer's offices

in Omaha, Nebraska, under a "hold," per GOP's standard procedure known as the Hazard Analysis and Critical Control Point plan, which is approved by the U.S. Department of Agriculture.

Under the plan, the combo bins are tested and then sealed. Once sealed, the combo bins may be placed on refrigerated trailers and shipped, but cannot be opened until the results of the *E. coli* testing are returned. Any combo bins containing trim testing presumptively positive for the presence of impermissible pathogens are diverted to "cookers" for a lethality treatment, which is industry standard.

In this case, an independent laboratory found that of the 211 samples tested, 37 resulted in a presumptive positive finding of the presence of *E. coli* O157:H7. The 37 presumptive positive samples constituted a 17½-percent finding of *E. coli* contamination. This percentage was over three times the number of presumptive positives necessary to trigger an "event day," in which there is a very high percentage of presumptive positive findings for *E. coli*.

On April 28, 2011, GOP met with Meyer and informed them of the presumptive positive test results for the presence of *E. coli*. Meyer immediately recalled the trucks. The beef that had tested presumptively positive for *E. coli* O157:H7 was either sent to a cooker so that the product could ultimately be sold at a reduced charge or transported to a landfill because it was altogether unsafe for human consumption.

Meyer filed suit against GOP. As set forth in its second amended complaint, Meyer alleged breach of contract, breach of warranty, breach of an indemnity obligation, failure to obtain insurance, and breach of the guarantee. Meyer filed an amended motion for partial summary judgment, requesting the court to find that GOP failed to obtain and maintain "'property insurance'" on the value of Meyer's property. Prior to the district court's ruling on Meyer's motion, GOP filed its own motion for summary judgment.

The district court concluded the evidence was clear that GOP had a property insurance policy with Liberty Mutual Fire

Insurance Company, which policy remained in full force and effect for the duration of the agreement. The court found that the policy provided insurance coverage for any nonowned personal property in GOP's care, custody, and control that GOP "'agreed, prior to loss, to insure.'" The court further found that the policy's liability limit was $98,836,333 per occurrence, complying with the terms of the addendum to section 18. The court noted that the addendum to section 18, which replaced the original language in section 18 of the processing agreement, required only that GOP "maintain property insurance on Meyer Natural Angus property in its possession, with a total value of $1,800,000," with which GOP complied. The court interpreted the agreement and addendum as not requiring GOP to carry property insurance coverage for an *E. coli* O157:H7 contamination. Therefore, the court held that Meyer's contention that GOP failed to obtain insurance as required by the contract failed as a matter of law.

The court then found that Meyer's claims against GOP with regard to breach of contract, breach of warranty, breach of indemnity obligation, and breach of guarantee failed as a matter of law due to Meyer's failure to return the rejected processed meat to GOP, which the court found was the remedy provided under the agreement for products failing to meet a specification or warranty provided by GOP. The court subsequently granted GOP's renewed amended motion for summary judgment and denied Meyer's amended motion for summary judgment.

ASSIGNMENTS OF ERROR

Meyer alleges 11 assignments of error, which can be condensed and restated as 4: The trial court erred in (1) finding that GOP carried property insurance in accordance with the agreement and overruling Meyer's motion for partial summary judgment; (2) finding that the agreement did not require GOP to carry property insurance for *E. coli* contamination and, as such, granting GOP's motion for summary judgment; (3) incorrectly interpreting section 10 of the agreement to conclude that

Meyer had accepted the *E. coli* contaminated beef under the agreement or under the Uniform Commercial Code; and (4) finding that GOP was not negligent and therefore not liable for indemnity under the agreement.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[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.[2]

[3] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

[4] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[4]

ANALYSIS

GOP's Property Insurance Pursuant to Agreement.

Meyer assigns that the trial court erred in finding that GOP carried property insurance in accordance with the agreement and, accordingly, overruling Meyer's motion for partial summary judgment. The crux of Meyer's argument is that the

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[1] *Continental Cas. Co. v. Calinger*, 265 Neb. 557, 657 N.W.2d 925 (2003).

[2] *Edwards v. Hy-Vee*, 294 Neb. 237, 883 N.W.2d 40 (2016).

[3] *Zornes v. Zornes*, 292 Neb. 271, 872 N.W.2d 571 (2015).

[4] *McKinnis Roofing v. Hicks*, 282 Neb. 34, 803 N.W.2d 414 (2011).

insurance policy's exclusion of coverage for damage resulting from *E. coli* constituted a breach of section 18 of the agreement, which required GOP to "maintain property insurance on Meyer Natural Angus Property in its possession, with a total value of $1,800,000." Incorporated into Meyer's claim that GOP failed to carry insurance in accordance with the terms of the agreement is Meyer's claim that the agreement did not permit the exclusion of *E. coli* insurance in GOP's insurance policy.

[5-9] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[5] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[6] A determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[7] Further, we will not rewrite the contract to provide terms contrary to those which are expressed. Nor is it the province of a court to rewrite a contact to reflect the court's view of a fair bargain.[8] The parties to a contract must be held to the plain language of the agreement they entered into.[9]

Turning to the record, we note that GOP and Meyer first entered into an agreement that contained a provision requiring GOP to maintain comprehensive property insurance. We need

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[5] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[6] *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

[7] *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

[8] See *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990).

[9] See *Berens & Tate v. Iron Mt. Info. Mgmt.*, 275 Neb. 425, 747 N.W.2d 383 (2008).

not pass on the extent to which the original insurance provision would have covered an *E. coli* contamination, because the original language of the provision entered into on April 27, 2006, was replaced by the addendum entitled "Letter of Understanding - Revisions," which was executed on or about May 17. Despite the typographical error with regard to the date the original agreement was signed, it is clear that the addendum was to replace the language of the original section 18 contained in the agreement. This conclusion is evidenced by the language of the addendum, just below "Section 18 — INSURANCE," which states "[t]he following verbiage will replace the signed Processing Agreement language . . . ."

Under section 18 of the agreement, as amended by the addendum dated May 17, 2006, Meyer and GOP agreed that "[t]he following verbiage will replace the signed Processing Agreement language: [GOP] shall, during term of agreement, maintain property insurance on Meyer Natural Angus property in its possession, with a total value of $1,800,000. Additionally, [GOP] agrees to provide coverage as evidenced in the Certificate of Insurance."

According to the language of the addendum, GOP was required to maintain property insurance only on Meyer's property in GOP's possession. The language of the addendum is void of any requirements regarding the inclusion of *E. coli* coverage or the prohibition of exclusions contained within the insurance policy. Section 18, as contemplated in the addendum, further specifies that the coverage to be provided would be "evidenced in the Certificate of Insurance." The certificate of insurance is void of any language guaranteeing coverage for loss caused by *E. coli* contamination. Additionally, nothing in the addendum required GOP to carry property insurance for coverage for an *E. coli* O157:H7 contamination. As we have previously stated, it is not the province of the court to rewrite a contract to reflect the court's view of a fair bargain.[10]

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[10] *Wurst v. Blue River Bank, supra* note 8.

As the district court correctly noted, the evidence is clear that GOP had a property insurance policy with Liberty Mutual Fire Insurance Company, which remained in full force and effect for the duration of the agreement. The policy provided insurance coverage for any nonowned personal property in GOP's care, custody, and control that GOP "'agreed, prior to loss, to insure.'" The language of the addendum is clear and unambiguous, requiring only that GOP "maintain property insurance on Meyer Natural Angus property in its possession, with a total value of $1,800,000." The record is clear that GOP maintained property insurance in accordance with the addendum to the agreement.

Meyer's assignment of error with regard to whether GOP carried property insurance in accordance with the agreement, and accordingly, Meyer's argument that the court erred in denying its motion for partial summary judgment, is without merit.

Meyer's assignment of error in regard to the insurance policy, as well as the agreement requiring coverage for *E. coli* contamination, is without merit.

Section 10 of Agreement as It Pertains to Meyer's Alleged Acceptance and Implications of Uniform Commercial Code.

Next, Meyer assigns that the court erred in granting GOP's motion for summary judgment, finding that Meyer had accepted the *E. coli* contaminated beef according to section 10 of the agreement, and that GOP was not liable to Meyer under the agreement.

Meyer argues that it did not accept the meat under the terms of the agreement or the Uniform Commercial Code, because it notified GOP of its nonconforming product within days of delivery. Meyer argues alternatively that if it is found to have accepted the meat, GOP is nevertheless responsible for any breach of express warranties. Specifically, Meyer contends that GOP breached the guarantee and agreement when it delivered possession of *E. coli* contaminated beef to Meyer, because the

beef was adulterated under federal and state law. Meyer argues that GOP expressly warranted that the meat it processed would not be adulterated under any applicable law.

We turn first to the contractual argument concerning the alleged acceptance. Meyer argues that it did not accept the beef processed by GOP, because the meat was adulterated and thus a nonconforming good, to which they alerted GOP within days of the delivery.

The district court found that pursuant to Neb. U.C.C. § 2-707(2) (Reissue 2001), Meyer had knowingly accepted the contaminated meat and "had it sent to either a cooker so that the product could ultimately be sold at a reduced charge or was transported to a landfill, since it was altogether unsafe for human consumption." The court further found that Meyer failed to avail itself of its rights under the agreement and that its claims failed as a matter of law.

[10] The district court improperly applied article 2 of the Uniform Commercial Code when it relied on Neb. U.C.C. § 2-607(2) (Reissue 2001). In *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*,[11] this court discussed the applicability of the Uniform Commercial Code when a contract calls for both the sale of goods and the rendition of services, noting:

> The question of whether this is a contract for the sale of goods depends upon an examination of the entire contract. The cases are uniform in holding that the [Uniform Commercial Code] applies where the principal purpose of the contract is the sale of goods, even though in order for the goods to be utilized, some installation is required. On the other hand, if the contract is principally for services and the goods are merely incidental to the contract, the provisions of the [Uniform Commercial Code] do not apply.

[11] The test for inclusion in or exclusion from the sales provisions of Neb. U.C.C. art. 2 (Reissue 2001) is not whether

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[11] *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 307-08, 363 N.W.2d 155, 160 (1985).

the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.[12]

Here, the contract spanned several years with the predominant factor's being GOP's fabrication of beef supplied by Meyer. It is significant that ownership of the cattle never left Meyer's control and that it does not appear from the record that GOP engaged in any exchange of beef products between Meyer and other GOP clients. Thus, the contract involved in this case was for that of services and only incidentally involved goods.

Still, we find no error in the district court's ultimate conclusion. Under section 10 of the agreement, Meyer had the option to reject "[a]ll products failing to meet the warranties and specifications contained in this Agreement . . . ." Section 10 provides that rejected products be "returned or held at GOP's expense and risk." That section further indicates that "Meyer shall charge GOP its out-of-pocket expenses of storing and reshipping any products *properly rejected* by Meyer under this Agreement." (Emphasis supplied.)

As the district court noted, some of the contaminated products were sent to cookers where the products were to be treated in accordance with industry standards to eradicate *E. coli* contamination. While the parties contended at oral argument that some of the contaminated products were returned to GOP, the record does not demonstrate that any of the contaminated products were returned. Specifically, under the heading "5-03-11-Tuesday," exhibit 101 states, "[GOP] discussed re-working the product on Saturday. . . . The Meyer Natural Angus decision was to send the entire product produced within the event time period to a cooker." The record demonstrates that the products were diverted to cookers, landfills, or simply

[12] *Id.*

left unreturned. Under the terms of the agreement, Meyer had the responsibility of returning to GOP any rejected product. In this case, Meyer acted unilaterally in disposing of the contaminated beef and therefore failed to adhere to the terms specified to properly reject products under the agreement.

[12] According to the Restatement (Second) of Contracts, "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation."[13] Here, Meyer could have avoided the loss caused by GOP's breach had Meyer simply returned or held the rejected product at GOP's expense according to section 10 of the agreement. The record demonstrates that GOP sought to "rework" the product in order to cure the breach, which Meyer rejected. Meyer failed to avoid the damages, and is not entitled to recover for damages that could have been avoided. Therefore, although the district court's reasoning was flawed in its application of the Uniform Commercial Code, it was correct in its ultimate conclusion with regard to the products left unreturned.

Express Warranty.

We turn now to Meyer's contention that GOP breached its express warranty that the meat it processed would "not be adulterated or misbranded within the meaning of *any* applicable federal, state, or local law, or any rules and regulations promulgated thereunder[.]" (Emphasis supplied.) As the meaning of the word "adulterated" is not ambiguous under the terms of section 15(a)(iv)(A), the issue turns on statutory interpretation. Meyer argues that under the Federal Meat Inspection Act (FMIA),[14] and Nebraska law, the meat delivered by GOP was adulterated, in breach of GOP's express warranty.[15]

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[13] Restatement (Second) of Contracts § 350(1) at 126 (1981).

[14] See 21 U.S.C. § 601 et seq. (2012 & Supp. V 2017).

[15] See Neb. Rev. Stat. § 81-2,282(2) (Reissue 2014). See, also, Neb. Rev. Stat. § 54-1902 (Reissue 2010).

Under the FMIA,

> [t]he term "adulterated" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:
>
> (1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;
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> (2)(A) if it bears or contains (by reason of administration of any substance to the live animal or otherwise) any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive) which may, in the judgment of the Secretary, make such article unfit for human food;
>
> . . . .
>
> (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food[.][16]

In *Texas Food Industry Ass'n v. Espy*,[17] the U.S. District Court for the Western District of Texas, when commenting on the U.S. Department of Agriculture's program of sampling retail establishments for the presence of *E. coli*, stated that "[a]ny of these samples testing positive for the pathogen *E. Coli* would be treated as 'adulterated' under the [FMIA]." GOP argues that *Espy* is distinguishable, because in that case the samples tested positive, not merely presumptive positive as is the case here.

GOP further seeks to have this court hold that in order for the meat to be considered "adulterated" under the law, it must

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[16] 21 U.S.C. § 601(m).

[17] *Texas Food Industry Ass'n v. Espy*, 870 F. Supp. 143, 145 (W.D. Tex. 1994).

enter into the stream of commerce. GOP argues that the central purpose of the FMIA is to prevent the adulteration of food and to prevent adulterated food from being introduced into, or received in, interstate commerce. Thus, GOP contends that in this case, the contaminated beef does not meet the definition of adulterated, because it was withheld from public distribution under GOP's standard procedure plan.

GOP's argument misconstrues the purpose of the inclusion of the term "commerce" in the law. As contemplated in the federal law, "commerce" refers to the constitutional grant of authority to Congress to enact laws under article I, § 8, of the Constitution of the United States. That is to say, that in promulgating the regulatory scheme, the FMIA was describing that

> [t]he commerce power is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[18]

As the U.S. Supreme Court has noted, the power of Congress to regulate commerce extends even to that which is not intended to enter the stream of commerce but may have a substantial economic effect on interstate commerce.[19]

Therefore, the contaminated meat did not need to enter the stream of commerce to be considered adulterated under the FMIA. However, even if that were the case under the FMIA, § 81-2,282 provides:

> (2) Food shall be deemed to be adulterated if:
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> (a) It bears or contains any substance which may render it injurious to health, considering the quantity of such substance in or on the food;

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[18] *United States v. Lopez*, 514 U.S. 549, 553, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

[19] See *Wikard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).

> (b) It consists in whole or in part of any diseased, contaminated, filthy, putrid, or decomposed substance or is otherwise unsafe for use as food.

A plain reading of § 81-2,282 demonstrates that when food—in this case meat—bears or contains any substance which may render it injurious to health, then the food should be considered adulterated. As the U.S. Court of Appeals for the Eighth Circuit noted *in Am. Home Assur. v. Greater Omaha Packing*,[20]

> *E. coli* O157:H7 bacteria live in the digestive tracts of cows and can be transferred to meat during slaughter. Humans become infected by consuming contaminated beef, and the O157:H7 strain is so virulent that even a small dose can make a person ill. Unlike the harmless *E. coli* bacteria commonly found in human intestines, *E. coli* O157:H7 produces Shiga toxins, which cause inflammation of the colon and large intestine, resulting in stomach cramps and bloody diarrhea. Hemolytic uremic syndrome is a severe complication of *E. coli* O157:H7 infection that can cause anemia and kidney damage.

Further, the record demonstrates that the product was processed by GOP and delivered to Meyer before the *E. coli* O157:H7 had been eradicated. Therefore, under Nebraska law, every processed product produced by GOP containing *E. coli* appears to have been adulterated in breach of its express warranties.

The district court determined that as a result of Meyer's accepting and retaining the adulterated meat, Meyer had failed to avail itself of its contracted-for remedy. The court relied on section 19 of the agreement to apply the Uniform Commercial Code. Section 19 states in relevant part that the "nonbreaching party shall be entitled to pursue, in addition to any remedies specifically provided herein, all further remedies then available under the applicable state Uniform Commercial Code or otherwise available at law or in equity." The court

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[20] *Am. Home Assur. v. Greater Omaha Packing*, 819 F.3d 417, 420 (8th Cir. 2016).

proceeded to apply § 2-607(2), stating that "'[a]cceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured . . . .'"

However, as noted above, the court's application of article 2 of the Uniform Commercial Code was improper. Specifically, section 19 of the agreement states that the nonbreaching party shall be entitled to "all further remedies then available under the *applicable* state Uniform Commercial Code." (Emphasis supplied.) As previously discussed, article 2 is not applicable to a contract for services that only incidentally involve goods.

Having found that GOP breached the express warranty contained in section 15(a)(iv)(A) of the contract, we return to the fact that Meyer prevented GOP from mitigating the amount of damages by refusing to allow GOP to "rework" the *E. coli* contaminated meat. Additionally, according to the terms of the contract, Meyer could have, but failed to, return more of the adulterated meat for full credit. As a result of Meyer's failure to mitigate the damages, Meyer is not entitled to recover.

GOP's Alleged Negligence and Resulting Indemnity.

Lastly, Meyer assigns that the court erred in finding that GOP was not negligent and therefore not liable for indemnity under the agreement.

As stated above, we will affirm a lower court's grant of summary judgment where 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. The Restatement (Third) of Torts states:

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's

> conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.[21]

In support of its argument, Meyer alleges that reports of GOP workers violating GOP's own sanitation procedures on days surrounding the fabrication of Meyer's cattle, and the failure of supervisors to investigate those reports, raised a genuine issue of material fact precluding summary judgment.

Meyer argues that it raised valid sanitary issues, specifically in regard to three instances of sterilization violations on the part of GOP employees, within 5 days of the "event day" date, which provided sufficient evidence to suggest that negligence occurred on the "event day." However, Meyer did not present any evidence of negligence on the "event day."

The district court noted, and the parties agreed at oral arguments, that *E. coli* has historically occurred in the production of raw beef products. The district court concluded that Meyer had failed to present any evidence to the court to suggest any negligence occurred on the days in which Meyer's cattle were fabricated. Based on the evidence presented and our standard of review, we agree with the district court.

CONCLUSION

Although the district court incorrectly applied the Uniform Commercial Code in regard to Meyer's acceptance of adulterated meat under the agreement, the court nevertheless arrived at the correct result. Therefore, the decision of the district court is affirmed.

Affirmed.

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[21] 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 at 29 (2010).

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

State of Nebraska, appellee, v. Larry G. Martinez, appellant.

924 N.W.2d 295

Filed March 15, 2019. No. S-18-618.

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. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. 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. 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.
3. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order.
4. **Postconviction: Constitutional Law: Judgments.** Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.
5. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved,

constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.

6. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
7. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
8. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
9. **Confessions: Police Officers and Sheriffs.** Coercive police activity is a necessary predicate to a finding that a confession is not voluntary.
10. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.
11. **Homicide: Intent: Proof: Words and Phrases.** The deliberation element of first degree murder means not suddenly or rashly, and requires the State to prove that the defendant considered the probable consequences of his act before committing it.
12. **Homicide: Intent: Time: Proof.** The premeditation element of first degree murder requires the State to prove that a defendant formed the intent to kill a victim before doing so, but no particular length of time for premeditation is required.
13. **Criminal Law: Intent: Time: Proof.** A defendant may, with appropriate evidence, try to defeat a charge by proving that at the time the offense occurred, the defendant lacked the ability to intend the voluntary and probable consequences of his or her act.

Appeal from the District Court for Cheyenne County: Derek C. Weimer, Judge. Affirmed.

Jerrod P. Jaeger for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Papik, J.

Larry G. Martinez was convicted by a jury of first degree murder and use of a firearm to commit a felony. We affirmed his convictions and sentences on direct appeal. See *State v. Martinez*, 295 Neb. 1, 886 N.W.2d 256 (2016). Martinez filed a motion for postconviction relief, which was denied without an evidentiary hearing. Martinez appeals the denial of his motion for postconviction relief without an evidentiary hearing, and we affirm.

BACKGROUND

Events Surrounding Death of Victim.

We provided a summary of the facts regarding this case on direct appeal, and we quote from that opinion at length below.

> Martinez was romantically involved with the victim, Mandy Kershman. The record shows that this relationship was tumultuous, with the couple fighting often. About a week prior to the murder, Martinez told one of his roommates that he was "going to kill that fucking bitch," referring to Kershman.
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> On July 18, 2012, at approximately 4:50 p.m., Kershman was shot and killed while sitting on the couch at a friend's home. The cause of death was a single gunshot wound to her chest.
>
> At the time of the shooting, Kershman was alone in the living room; her friend, Leland Blake, was on the computer in the next room. Blake testified that Kershman had told him Martinez was planning to come over and that immediately prior to the shooting, Blake heard Martinez' voice in the next room with Kershman. Blake testified that Kershman and Martinez were engaged in some type of verbal altercation. Moments later Blake heard gunshots, and upon entering the living room Blake found Kershman dead on the couch. Through the window, Blake saw Martinez entering his vehicle and driving away.

> Martinez was subsequently located and questioned about the shooting. During the course of that interview, Martinez admitted that he shot Kershman and told law enforcement where to find the weapon. In addition, Martinez admitted to one of his roommates that he shot Kershman. A gun was located in Martinez' house in the place he had indicated. That weapon was consistent with the type of weapon used to shoot Kershman. Because of the type of weapon used, it was not possible to conclusively find that the gun found in Martinez' home was the murder weapon. Martinez was arrested and eventually charged with first degree murder.

Id. at 2-3, 886 N.W.2d at 259.

Trial and Sentencing.

Prior to trial, Martinez filed a motion to suppress the statements he made in his interview with law enforcement. He argued that he suffered from a hearing impairment and that because he was not provided with an interpreter, Neb. Rev. Stat. § 20-152 (Reissue 2012) required that his statements be suppressed. The district court denied the motion to suppress, finding that Martinez was not "deaf or hard of hearing" for purposes of § 20-152. It also found that Martinez' statements were voluntary and thus not subject to suppression under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

At trial, Martinez' defense was that he shot Mandy Kershman during a sudden quarrel and, thus, was guilty of only manslaughter. Following a jury trial, however, Martinez was convicted of first degree murder and use of a firearm to commit a felony.

After trial, Martinez' counsel asked the district court to determine his mental competency to be sentenced. A hearing was held at which two defense experts testified that Martinez was incompetent, with one of those experts testifying that because Martinez' incompetency was based upon

his intellectual functioning, it was unlikely that his competency could be restored. A witness for the State testified that Martinez was competent. The State also offered the testimony of several lay witnesses who testified as to their observations and interactions with Martinez.

The district court found Martinez to be competent, and he was sentenced to life imprisonment for the murder conviction, plus an additional 10 to 50 years' imprisonment for the use of a firearm conviction.

Direct Appeal.

Martinez appealed. He contended that the district court erred by not suppressing his statements due to his hearing impairment and by finding him competent. This court affirmed. See *State v. Martinez*, 295 Neb. 1, 886 N.W.2d 256 (2016). We found that the district court did not err by finding Martinez was not deaf or hard of hearing for purposes of § 20-152. We explained that the video of Martinez' interview with law enforcement showed that he was able to follow along and answer questions appropriately without an interpreter or hearing aids. Additionally, we noted the testimony of acquaintances of Martinez who did not even know that he suffered from a hearing impairment.

We also concluded that the evidence was sufficient for Martinez to be found competent. While two experts testified that Martinez was incompetent due to his low level of intellectual functioning, a third expert testified that it was his opinion that Martinez was malingering and that he was competent to stand trial. We determined that this testimony, along with the testimony of several lay witnesses regarding Martinez' level of functioning, was sufficient to show that Martinez was competent. See *id*.

Motion for Postconviction Relief.

Martinez filed a motion for postconviction relief, asserting ineffective assistance of counsel and requesting an evidentiary hearing. Relevant to this appeal, Martinez alleged that his trial counsel was ineffective (1) for not raising his mental

capacity in support of an argument that his statements to law enforcement should have been suppressed for being involuntary and (2) for not raising an argument that his mental capacity precluded him from acting with the premeditation, deliberation, and intent necessary to be found guilty of first degree murder.

The district court denied Martinez' motion without an evidentiary hearing. In its order, the district court reasoned that Martinez could have raised both of the claims at issue in this appeal in his direct appeal, but did not. The district court also found that, even if it was assumed that Martinez' counsel provided deficient representation, Martinez could not demonstrate he was prejudiced.

Martinez timely appealed.

ASSIGNMENTS OF ERROR

Martinez assigns, restated, that the trial court erred by denying him postconviction relief without an evidentiary hearing on his claims that his counsel was ineffective for not raising his mental capacity (1) in support of an argument that his statements to law enforcement were involuntary and (2) in support of an argument that he could not have formed the requisite deliberation, premeditation, and intent to commit the crimes charged.

STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Tyler*, 301 Neb. 365, 918 N.W.2d 306 (2018).

ANALYSIS

Legal Standards.

Martinez contends that the district court erred by dismissing his claims of ineffective assistance of counsel without

an evidentiary hearing. His appeal thus requires us to apply the familiar framework for ineffective assistance of counsel claims set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We briefly review aspects of that framework relevant to this appeal, as well as standards governing postconviction relief before proceeding to Martinez' assignments of error.

[2,3] To prevail on a claim of ineffective assistance of counsel under *Strickland*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Taylor*, 300 Neb. 629, 915 N.W.2d 568 (2018). 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. *Taylor, supra.* A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *Id.* The two prongs of this test may be addressed in either order. See *id.*

[4,5] Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. *Id.* Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *Taylor, supra.*

[6,7] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *Taylor, supra.* If a postconviction motion alleges only conclusions of fact or law, or if the records and files in

the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id.*

Waiver.

As noted above, the district court found that Martinez had waived his ineffective assistance of counsel claims by failing to raise them on direct appeal. Martinez argues this was incorrect, and we agree.

[8] It is true that a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014). This rule, however, is not applicable in this case. Martinez was represented by the same counsel at trial and on direct appeal. This motion for postconviction relief was thus his first opportunity to assert claims of ineffective assistance of counsel. See *Taylor, supra*.

While the district court was incorrect in finding that Martinez waived his claims of ineffective assistance of counsel, it also found that Martinez' claims failed on their merits. We now turn to consider the merits of his claims of ineffective assistance of counsel.

Voluntariness of Statements.

Martinez acknowledges that the district court determined his statements to law enforcement were voluntary prior to trial. He contends, however, that his counsel provided deficient representation by not raising his mental capacity when the voluntariness of his statements was under consideration. He points to the fact that, after trial, two medical professionals found him to be incompetent, with one finding him to have an "extremely low IQ." He contends that had his counsel introduced evidence of his mental capacity at the time the court was considering the voluntariness of his statements, there is a reasonable probability the court would have found those statements to be involuntary and therefore would have suppressed

them. In support of this argument, Martinez directs us to cases from both this court and the Nebraska Court of Appeals in which it has been observed that the intelligence, education, and background of the accused are factors that can be considered in determining whether a defendant's statement was voluntary or coerced. See, e.g., *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983); *State v. Grimes*, 23 Neb. App. 304, 870 N.W.2d 162 (2015).

[9] But while the intelligence, education, and background of the accused are factors that may be relevant to whether a confession was voluntary, we have also repeatedly held that coercive police activity is a necessary predicate to a finding that a confession is not voluntary. See *State v. Hernandez*, 299 Neb. 896, 911 N.W.2d 524 (2018) (collecting cases). As we have explained, "[t]he prohibition on the use of involuntary confessions is at its core—like other constitutional rights—a limitation on the power of government. Thus, the focus of this inquiry is on the conduct of governmental actors." *Id.* at 914, 911 N.W.2d at 540.

On appeal, Martinez has not even attempted to identify any coercive conduct by the two law enforcement officers who interviewed him. The video of that interview makes clear that he could not do so. The video shows that neither law enforcement officer made threats or promises to Martinez. The officers did not raise their voices or otherwise attempt to intimidate him. Rather, they sat with Martinez, who was not in handcuffs or shackled when the statements were made, and calmly engaged him in conversation. Neither officer touched Martinez, invaded his physical space, or brandished a weapon. The entire interview was also relatively short, lasting less than 40 minutes. In sum, nothing the law enforcement officers did in their interview with Martinez could be described as coercive.

[10] In the absence of any evidence of coercion, an emphasis on Martinez' mental capacity could not have rendered his statements to law enforcement involuntary. Because defense counsel is not ineffective for failing to raise an argument that

has no merit, see *State v. Stricklin*, 300 Neb. 794, 916 N.W.2d 413 (2018), we find no error in the denial of this claim without an evidentiary hearing.

Premeditation, Deliberation, and Intent.

[11,12] Martinez also contends that his trial counsel was ineffective for failing to argue that his mental capacity precluded him from committing first degree murder. To convict Martinez of first degree murder, the State was required to show that he killed Kershman purposely and did so with deliberate and premeditated malice. See *State v. Braesch*, 292 Neb. 930, 874 N.W.2d 874 (2016). The deliberation element means not suddenly or rashly, and requires the State to prove that the defendant considered the probable consequences of his act before committing it. *Id.* The premeditation element requires the State to prove that a defendant formed the intent to kill a victim before doing so, but no particular length of time for premeditation is required. *Id.*

[13] In Martinez' appellate brief, he claims that because of his diminished capacity, he was not capable of acting with the deliberation, premeditation, and intent necessary to commit first degree murder. We have held that a defendant may, with appropriate evidence, try to defeat a charge by proving that at the time the offense occurred, the defendant lacked the ability to intend the voluntary and probable consequences of his or her act. See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

Martinez contends his counsel should have investigated his mental capacity prior to trial and suggests that if they had, the experts who testified at his competency hearing could have testified at trial. Martinez' motion points to the testimony from medical professionals that he was incompetent and had a low IQ as evidence that his counsel should have presented at trial. This testimony, however, was countered both by a witness for the State who testified that Martinez was competent, as well as by several lay witnesses who testified to

their observations and interactions with Martinez which suggested competency.

Even if counsel should have investigated Martinez' mental capacity and introduced the evidence Martinez points to, however, Martinez must still prove that he was prejudiced by a failure to do so. In a number of cases, courts have held that defendants who claim that their counsel should have introduced evidence of a mental limitation and argued that the limitation rendered them unable to act with the necessary intent could not establish prejudice in light of factual evidence introduced at trial showing that they did act with the necessary intent. See, e.g., *Hernandez v. Chappell*, 913 F.3d 871 (9th Cir. 2019); *Howard v. Horn*, 56 F. Supp. 3d 709 (E.D. Pa. 2014); *Morales v. Vaughn*, 619 Fed. Appx. 127 (3d Cir. 2015); *Wallace v. Smith*, 58 Fed. Appx. 89 (6th Cir. 2003). We believe that is the case here.

Had evidence regarding Martinez' intellectual functioning been introduced at trial, we see no reasonable probability it could have overcome all of the evidence introduced at trial showing that Martinez deliberately killed Kershman. About a week before Kershman was killed, Martinez told his roommate that he was "'going to kill that fucking bitch,'" referring to Kershman. Then in his interview with police, Martinez told the officers that he planned to shoot Kershman after she sent him a text message that made him angry and that when he drove over to Blake's house, he did so with the intention of shooting her. Blake testified that he heard Martinez say "this is for you, bitch," just prior to the gunshot. After the shooting, Martinez told his roommate that he shot Kershman, and he hid the gun under a coffee table in his house.

All of the facts recounted above demonstrate that Martinez intended to kill Kershman, that he formed the intent to kill her before doing so, and that he was capable of and did consider the probable consequences of his act before committing it. We find no reasonable probability that the testimony Martinez argues his counsel should have elicited at trial regarding his

mental capacity could have overcome this evidence and produced a different result. Because the records and files show no reasonable probability that the result of the proceeding would have been different, we find the district court did not err in denying Martinez postconviction relief without an evidentiary hearing. See *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999).

CONCLUSION

We find that the district court did not err in denying Martinez' motion for postconviction relief without an evidentiary hearing, and thus affirm.

Affirmed.

Freudenberg, J., not participating.

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

Terry P. Brown and Linda S. Brown, husband and wife, appellees, v. Jacobsen Land and Cattle Company, a Nebraska corporation, et al., appellees, and State of Nebraska ex rel. Game and Parks Commission, intervenor-appellant.

924 N.W.2d 65

Filed March 15, 2019. No. S-18-803.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
4. **Adverse Possession: Words and Phrases.** A possession that is adverse is under a claim of ownership. Claim of ownership or claim of right means "hostile," and these terms describe the same element of adverse possession. The word "hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land.
5. **Adverse Possession: Notice.** The purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his or her title or ownership is in danger so that he or she may, within the period of limitations, take action to protect his or her interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he or she takes possession.

6. **Adverse Possession: Title.** Possession of property by permission can never ripen into title by adverse possession unless there is a change in the nature of possession which is brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby.
7. **Adverse Possession: Leases: Intent.** Entering real property as part of a lease agreement is entering it with permission and with acknowledgment of the owner's superior title and is not entering the land with hostile or adverse intent.
8. **Adverse Possession: Landlord and Tenant: Notice: Intent.** A tenant cannot assert ownership by adverse possession unless he or she first surrenders possession or, by some unequivocal act, notifies the landlord he or she no longer holds under the lease agreement.
9. **Adverse Possession.** A permissive use remains permissive where an original owner permitted the use and devised the land to another who simply continued to permit the use.
10. **Adverse Possession: Presumptions.** As between parties sustaining parental and filial relations, the possession of land of the one by the other is presumed to be permissive.
11. **Landlord and Tenant: Words and Phrases.** In the common law, a tenant or other lawful occupant who holds over without right is a tenant at sufferance.
12. **Landlord and Tenant: Contracts.** A tenancy at sufferance does not require privity of contract or estate between the holdover occupant and the property's record owner.
13. **Adverse Possession: Landlord and Tenant.** A tenancy at sufferance is a permissive interest; it is not an adverse possession and cannot be the basis for adverse possession.

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

Douglas J. Peterson, Attorney General, and Charles E. Chamberlin for intervenor-appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellees Terry P. Brown and Linda S. Brown.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Terry P. Brown (Brown) and Linda S. Brown, husband and wife (collectively the Browns), filed an adverse possession action in the district court for Banner County against the adjacent record property owner, Jacobsen Land and Cattle Company (Jacobsen), to quiet title in disputed agricultural land to the north of the Browns' property. The Nebraska Game and Parks Commission (the State) intervened due to a purported purchase agreement with Jacobsen by which the State was to acquire the disputed land and other land. The State was permitted to present evidence. See *Brown v. Jacobsen Land & Cattle Co.*, 297 Neb. 541, 900 N.W.2d 765 (2017). The State opposed the Browns' claim and also asserted that it was entitled to relief under various equitable doctrines, because the State alleged that it had relied on Brown's purported misrepresentations regarding the Browns' interest in the disputed land. After trial, the district court quieted title to the disputed land in the Browns, and the State appealed. Because the Browns' interest in the disputed land began with permission and did not ripen into adverse possession, we reverse.

STATEMENT OF FACTS

Jacobsen is the record owner of agricultural land in Banner County, Nebraska. Brown is a longtime farmer and rancher in Banner County and owns land adjacent to and south of Jacobsen's property. The disputed land claimed by the Browns consists of approximately 77 acres and is located in an area within Jacobsen's recorded land. For many years, the disputed land has been fenced in and, as a practical matter, enclosed with the Browns' land used for grazing cattle to the south. This fence essentially forms the perimeter of the disputed land. The disputed land has been adequately described as follows:

> Beginning at the west corner of the boundary line between the Jessup/Jacobson and Bud Jessup/Brown properties, the fence is on the true boundary line until it encounters

> hardpan. . . . The fence then turns north following a ridgeline that eventually turns east and then south back to the true property boundary encompassing approximately 77 acres of the Jessup/Jacobson property.

Brief for appellant at 10.

The evidence indicates, and the district court found, that Stanley Jessup, Sr., who owned the land to the south, built the fence and used the land to the north, which was owned by his brother, Frank Jessup, and under principles recited in our analysis, Stanley's use was permissive. After transfers within Frank's family, John Jessup and Alan Jessup sold the land, including the disputed land, to Jacobsen in 2014.

The Browns' property was formerly owned by Stanley and, later, by Stanley "Bud" Jessup, Jr. (Bud). Brown helped Bud with his ranching operation on the land, including the disputed land, prior to the 1980's. In the 1980's, Brown began to lease property, including the disputed property, from Bud. Brown testified that it was at this point, with permission from Bud, that he began grazing cattle on the disputed property. The oral lease continued until 1992, when Brown purchased the Browns' property and other real property from Bud. The 1992 sale did not include the disputed land, but Brown continued to use the disputed land as he had under the lease. Records admitted at trial show that the Browns have neither been taxed nor paid taxes on the disputed land.

The evidence showed that a barbed wire and post fence existed in its current location for many years before the 1980's. As noted, the disputed land is fenced in with the Browns' ranch and Jacobsen and its predecessors in interest have raised cattle on the other side of the fence. Brown walks or rides the fence line at least annually and has hired a worker to assist him in maintaining the fence. The fence follows the topography of the land and is attached to trees along the ridge line, and trees have grown into the fence in some places.

In approximately 2013, John and Alan decided to sell the Jacobsen property, including the disputed land. They offered

Brown an opportunity to buy the entire Jacobsen property, but he declined. Brown made an offer to purchase a portion of the Jacobsen property that included the disputed land, but John and Alan refused the offer. John and Alan sold the property, including the disputed land, to Jacobsen in a warranty deed filed on May 6, 2014.

Jacobsen soon decided to resell the property, including the disputed land. Brown contacted Jacobsen and inquired about the sale. In 2014, the State began the process of purchasing the land. Prior to October 2, 2014, the State published notice and held a public hearing in Banner County regarding the proposed purchase of Jacobsen's property, including the disputed land. Brown attended several public hearings. Although Brown did not express an ownership interest in the disputed land, he wrote a letter to a commissioner for the State in which he generally opposed the sale. On October 3, Jacobsen and the State entered into a purchase agreement for the sale of a portion of Jacobsen's land that included the disputed land.

After Jacobsen and the State entered into their purchase agreement, but before they closed and recorded a deed, the Browns filed this action against Jacobsen to quiet title in the disputed land through adverse possession and recorded a lis pendens on the disputed land. The State intervened due to its purchase agreement with Jacobsen, the record owner of the disputed land. The State asserted various affirmative defenses. Jacobsen filed an answer which denied the claim of adverse possession and set forth several affirmative defenses, but declined to participate throughout most of the litigation, did not present evidence, and did not appeal.

The original trial took place in May 2016, and the district court found generally in favor of the Browns. The State appealed. We determined that the State, as intervenor, was denied its right to participate in the trial, including offering evidence and questioning witnesses. See *Brown v. Jacobsen Land & Cattle Co.*, 297 Neb. 541, 900 N.W.2d 765 (2017). We

reversed the decision of the district court and remanded the matter for a new trial. See *id*.

The district court held a second trial on April 12 and 13, 2018. Brown and the State offered evidence, and the district court took the matter under advisement. In an initial order, and in a subsequent amended order, the district court found generally in favor of the Browns and against the State.

In summary, the district court reviewed the elements of an adverse possession claim, found that the Browns' evidence satisfied each element, and found that the State's evidence was insufficient to overcome the Browns' proof or otherwise succeed. The district court granted the relief sought by the Browns and quieted title to the disputed land described particularly in an attached document which was incorporated in its order. The State appeals.

ASSIGNMENTS OF ERROR

The State primarily claims, consolidated and restated, that the district court erred when it found that the Browns' evidence satisfied their burden of proof and established their entitlement to the disputed land by adverse possession. Because the State's foregoing argument is meritorious and dispositive, we do not reach the State's other assignments of error.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Brown v. Jacobsen Land & Cattle Co., supra*. On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination. *Id*.

ANALYSIS

[3] The Browns sought to quiet title to the disputed land under the theory of adverse possession. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual,

(2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Poullos v. Pine Crest Homes*, 293 Neb. 115, 876 N.W.2d 356 (2016). The statutory period in Nebraska is 10 years. Neb. Rev. Stat. § 25-202 (Reissue 2016). Although the district court found that the Browns' possession of the disputed land satisfied all of these elements, upon our de novo review, we believe there was a failure of proof regarding the last element, i.e., adverse possession under a claim of ownership. Because of the Browns' failure to prove that their possession of the disputed land was under a claim of ownership, we need not consider other elements of their adverse possession claim or the equitable defenses raised by the State.

[4,5] Certain principles of law apply to our analysis. We have described the element of adverse possession under a claim of ownership as follows:

> A possession that is adverse is under a claim of ownership. . . . Claim of ownership or claim of right means "hostile," and these terms describe the same element of adverse possession. . . . The word "hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land. . . . The purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitations, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.

Wanha v. Long, 255 Neb. 849, 859, 587 N.W.2d 531, 540 (1998).

[6-10] Possession by "permission" is also critical to our analysis, because possession of property by permission can never

ripen into title by adverse possession unless there is a change in the nature of possession which is brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby. See *Wanha v. Long, supra*. See, also, *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985); *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983). With respect to permissive use, it is well settled that entering real property as part of a lease agreement is entering it with permission and with acknowledgment of the owner's superior title and is not entering the land with hostile or adverse intent. See, *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979); *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957). A tenant cannot assert ownership by adverse possession unless he or she first surrenders possession or, by some unequivocal act, notifies the landlord he or she no longer holds under the lease agreement. See *Jackson v. Eichenberger*, 189 Neb. 777, 205 N.W.2d 349 (1973). The use remains permissive where an original owner permitted the use and devised the land to another who simply continued to permit the use. *Petsch v. Widger, supra*. We have noted that "'[a]s between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive . . . .'" *Chase v. Lavelle*, 105 Neb. 796, 807, 181 N.W. 936, 940 (1921).

[11-13] In the common law, a tenant or other lawful occupant who holds over without right is a tenant at sufferance. *Watkins v. Dodson*, 159 Neb. 745, 68 N.W.2d 508 (1955); *State v. Cooley*, 156 Neb. 330, 56 N.W.2d 129 (1952). It is not necessary that the original occupancy should have been as tenant of the record landowner, because a tenancy at sufferance does not require privity of contract or estate between the holdover occupant and the property's record owner. See, *Pillans & Smith Co., Inc. v. Lowe, et al.*, 117 Fla. 249, 157 So. 649 (1934); 52 C.J.S. *Landlord & Tenant* § 292 (2012). A tenancy at sufferance is a permissive interest; it is not an adverse possession and cannot be the basis for adverse possession. 52 C.J.S., *supra*.

In this case, the State contends that the Browns' possession of the disputed land was permissive and, thus, not hostile. It asserts that the district court erred when it determined that "[t]here is no evidence that the [Browns] were given . . . permission." We agree with the State that this finding is at odds with the record.

The district court acknowledged in its findings of fact that "[t]he area making up the 'disputed ground' was included in the lease agreement . . . ." And Brown testified that he received permission from Bud to graze his cattle on the disputed land as part of his lease agreement. Although Brown points out that he did not receive permission by a record owner, such fact would not be dispositive. A review of our adverse possession and other jurisprudence recited above shows that Brown's occupancy of the disputed land was not hostile where he began his lease—including use of the disputed land—with permission, even if such permission flowed from Bud and not a record owner. A change in ownership in the disputed land did not affect Brown's intent, which was at no point expressed as adverse under a claim of ownership. See *Petsch v. Widger, supra*.

Because the genesis of Brown's use and possession of the disputed land was a lease agreement and by lawful permission, when he began to hold over, he became a tenant at sufferance. And, as noted, a tenant at sufferance has a permissive interest. Brown admitted that neither his use of the disputed land nor his conduct toward the record owners, their successors in interest and individuals granted or granting permission, changed after he bought the Browns' property. Upon our de novo review, we determine that the Browns have not presented evidence of an act which manifested notice or warning to the real owner of the disputed land that his title or ownership was in danger. Brown came to the disputed land by permission, and because there was no change in the nature of his possession's being brought home to the true owner, his use did not ripen into title by adverse possession. *Young v. Lacy*, 221 Neb. 511, 378

N.W.2d 192 (1985). Because the Browns failed to prove the element of a claim of ownership, their claim of adverse possession must fail.

CONCLUSION

Brown's use and possession of the disputed land began with permission under a lease, and the Browns failed to prove that the nature of their possession changed and that such change was brought to the attention of the real owners. The Browns failed to establish that their possession of the disputed land was under a claim of ownership, and therefore, their possession did not ripen into title by adverse possession. The district court erred when it concluded to the contrary. Accordingly, we reverse the judgment of the district court.

Reversed.

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

Salem Grain Company, Inc., a Nebraska corporation, et al., appellants, v. City of Falls City et al., appellees.

924 N.W.2d 678

Filed March 22, 2019. No. S-17-277.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Actions: Equity: Public Meetings: Appeal and Error.** An appellate court reviews actions for relief under the Open Meetings Act in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.
4. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. But when credible evidence is in conflict on material issues of fact, an appellate court may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
5. **Statutes.** Statutes relating to the same subject, though enacted at different times, are in pari materia and should be construed together.
6. **Statutes: Legislature: Intent.** Statutes relating to the same subject should be construed together to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
7. ____: ____: ____. When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed legislative intention to

the contrary, to regard each as effective, and to harmonize overlapping statutes so long as each reaches some distinct cases.

8. **Statutes.** Where it is possible to harmonize apparently conflicting statutes, a court should do so.
9. **Actions: Bonds: Contracts: Statutes: Presumptions: Time.** Construed together, Neb. Rev. Stat. §§ 18-2129 and 18-2142.01 (Reissue 2012) effectively provide that any suit, action, or proceeding brought outside the 30-day period established in § 18-2142.01 will be subject to the conclusive presumptions required by §§ 18-2129 and 18-2142.01, as long as the action is one challenging the validity or enforceability of a redevelopment bond or contract and the bond or contract recites in substance the language required by the statutes.
10. **Statutes: Legislature: Intent.** In the absence of clear legislative intent, a construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.
11. **Statutes.** It is not within the province of the courts to read a meaning into a statute which is not there.
12. **Pleadings.** An affirmative defense raises a new matter which, assuming the allegations in the petition or complaint to be true, constitutes a defense to the merits of a claim asserted in the petition. An affirmative defense generally avoids, rather than negates, the plaintiff's prima facie case.
13. **Statutes: Presumptions: Limitations of Actions.** A statute providing a conclusive presumption is very different from a statute of limitations, and the conclusive presumptions under Neb. Rev. Stat. §§ 18-2129 and 18-2142.01 (Reissue 2012) are not statutes of limitation.
14. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by these rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
15. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and an appellate court will not reverse a trial court's decision regarding relevance absent an abuse of discretion.
16. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
17. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Appeal from the District Court for Richardson County: Daniel E. Bryan, Jr., Judge. Affirmed.

Stephen D. Mossman, Ryan K. McIntosh, and J.L. Spray, of Mattson Ricketts Law Firm, for appellants.

John M. Guthery, Jeanette Stull, and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee Community Redevelopment Authority of the City of Falls City.

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Michael R. Dunn, of Halbert, Dunn & Halbert, L.L.P., for appellee City of Falls City.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Vaughan, District Judge.

Stacy, J.

This is the latest in a series of appeals involving litigation over a redevelopment project in the City of Falls City, Nebraska.[1] In this case, the plaintiffs filed suit seeking a declaratory judgment that the redevelopment project was not planned or adopted in accordance with the Community Development Law[2] and requesting a permanent injunction to prevent the project from proceeding. Most of the plaintiffs' claims were dismissed on summary judgment, and the remaining claims were dismissed after a bench trial. The plaintiffs appeal. Although our reasoning differs from that of the district court, we affirm.

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[1] See, *Salem Grain Co. v. Consolidated Grain & Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017); *Frederick v. City of Falls City*, 295 Neb. 795, 890 N.W.2d 498 (2017); *Frederick v. City of Falls City*, 289 Neb. 864, 857 N.W.2d 569 (2015).

[2] Neb. Rev. Stat. §§ 18-2101 to 18-2144 (Reissue 2012).

I. BACKGROUND

1. Redevelopment Project

Falls City is a community located in Richardson County, Nebraska. Pursuant to the Community Development Law, Falls City created the five-member Falls City Community Redevelopment Authority (the Authority) to redevelop blighted or substandard areas within Falls City.[3]

In 2012, Consolidated Grain and Barge Co. (Consolidated Grain) proposed a redevelopment project that involved constructing a new commercial grain receiving, storage, and shipping facility in Falls City using tax increment financing (TIF). The owner of another commercial grain facility in the area, Salem Grain Company, Inc. (Salem Grain), opposed the redevelopment project.

During the summer and fall of 2012, land for the redevelopment project was annexed by Falls City, a zoning change was recommended and approved for the annexed land, a study was conducted upon which the land was declared blighted and substandard, a cost-benefit analysis was conducted, and a redevelopment plan was prepared. Ultimately, in September and October 2012, the redevelopment project was approved at separate public meetings of the Authority, the city council of Falls City, and the planning commission of Falls City.

On November 10, 2012, the Authority and Consolidated Grain formally entered into a redevelopment contract. Summarized, the redevelopment contract required Consolidated Grain to acquire the land for the project and construct the grain facility, and in exchange, the Authority agreed to enter into and utilize TIF indebtedness to fund a portion of the project. Thereafter, a TIF bond in the amount of $3,710,000 was issued by the Authority and sold to Consolidated Grain. The bond funds were disbursed to Consolidated Grain pursuant to the redevelopment contract. Roughly 1 year later, Consolidated

[3] See § 18-2101.01.

Grain completed construction of the commercial grain facility and began business operations.

2. Lawsuit

(a) Original Complaint

On October 24, 2012, approximately 2 weeks before the redevelopment contract was formally entered into, Salem Grain and two residents of Falls City (collectively Salem Grain) filed a lawsuit against the City of Falls City, the Authority, and Consolidated Grain in the district court for Richardson County, Nebraska. The complaint sought declaratory and injunctive relief and was styled as 12 separate causes of action.

The first 11 causes of action sought declarations that the redevelopment project had not been planned and adopted in accordance with the Community Development Law, alleging specifically that (1) the blighted and substandard study was insufficient, (2) the redevelopment plan did not conform to a "'general plan'" for the development of Falls City, (3) the Authority acted without a quorum at several key meetings, (4) the cost-benefit analysis was insufficient, (5) it was improper to include TIF in the redevelopment plan, (6) the redevelopment plan was improperly adopted by the city council, (7) the redevelopment plan was improperly adopted by the Authority, (8) the city council impermissibly renamed a portion of the platted land included in the redevelopment project, (9) Falls City provided an insufficient public comment period regarding its plan to finance the redevelopment project using community development block grant program funds, (10) the Authority's adoption of the resolution approving TIF was null and void, and (11) the land for the redevelopment project was improperly annexed. Salem Grain's 12th cause of action sought to equitably estop the city council from asserting that the redevelopment project was not feasible without TIF funding.

The prayer for relief sought (1) declarations that the redevelopment project was not properly planned or adopted for all of the reasons alleged in the various causes of action; (2) a

declaration that because the project was not properly adopted, the "Redevelopment Contract, and any bonds issued thereto, are null and void"; and (3) a permanent injunction blocking the redevelopment project from proceeding.

Falls City, the Authority, and Consolidated Grain (collectively the defendants) moved to dismiss the original complaint for reasons that are not relevant to the issues on appeal. The district court granted the motion to dismiss, and Salem Grain was given leave to file an amended complaint.

(b) Amended Complaint

The amended complaint was filed January 22, 2013, and is the operative complaint in this action. Like the original complaint, the amended complaint was styled as 12 causes of action. The first 11 sought declarations that the redevelopment project had not been planned and adopted in accordance with the Community Development Law for generally the same reasons alleged in the original complaint.

The 12th cause of action alleged the Authority held two meetings which violated Nebraska's Open Meetings Act[4] (NOMA), and it sought to have the actions taken during those meetings declared void.[5] The first meeting allegedly occurred on August 15, 2012, when three members of the Authority attended a community dinner that included the mayor, members of the city council, community business leaders, and representatives from Consolidated Grain. The second meeting allegedly occurred on November 9, in the context of email communications between members of the Authority.

Like the original complaint, the amended complaint sought (1) declarations that the redevelopment project was not properly adopted for all of the reasons alleged in the various causes of action; (2) a declaration that because the project was not properly adopted the "Redevelopment Contract, and any bonds issued thereto, are null and void"; and (3) a permanent

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[4] Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 2008 & Supp. 2011).

[5] See § 84-1414.

injunction blocking the redevelopment project from proceeding. In addition, the amended complaint sought a declaration that any formal action taken by the Authority in violation of NOMA was void.[6]

After the amended complaint was filed, the court dismissed the 11th cause of action for reasons that are not relevant to the issues on appeal. Thereafter, answers were filed and the defendants proceeded to defend the amended complaint on the merits. Due to the procedural complexity of this case, we discuss only that which relates to the issues raised on appeal.

(c) Completion of Redevelopment Project

While the lawsuit was pending, the redevelopment project was completed. It is undisputed that the project was completed in September 2013 and that Consolidated Grain has been operating the commercial grain receiving, storage, and shipping facility since that time.

(d) Motion to File Second Amended Complaint

On December 17, 2015, nearly 2 years after completion of the redevelopment project, Salem Grain tried unsuccessfully to further amend its complaint. The proposed second amended complaint sought to add claims of "improper economic development" and "unjust enrichment" resulting from the TIF funds provided to Consolidated Grain. The proposed second amended complaint also sought to alter the nature of the relief being requested; rather than seeking injunctive relief to prevent the redevelopment project from proceeding, the proposed second amended complaint sought "[r]ecission, recoupment and restitution" of the TIF funds paid to Consolidated Grain.

After a hearing, the district court denied leave to amend, finding that Salem Grain's request was unnecessarily delayed and that the proposed amendment would be unduly prejudicial to the defendants.

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[6] See *id.*

(e) Summary Judgment

In April 2016, the defendants moved for summary judgment on the amended complaint, claiming the requested declaratory and injunctive relief had been rendered moot by completion of the redevelopment project. The district court agreed and granted partial summary judgment in favor of the defendants on Salem Grain's first 10 causes of action. But the court denied summary judgment on the 12th cause of action alleging NOMA violations, reasoning that the completion of the redevelopment project had not rendered the NOMA claims moot. A bench trial was set to resolve the remaining NOMA claims.

(f) Motion to File Third Amended Complaint

As the date for the bench trial neared, Salem Grain filed a motion to continue trial and again requested leave to further amend its complaint. Salem Grain's proposed third amended complaint was substantially similar to the proposed second amended complaint which had not been permitted, but it alleged several additional NOMA violations. The district court overruled the motion to amend and refused to continue the bench trial.

(g) Trial

The bench trial on the alleged NOMA violations was held on February 9, 2017. Salem Grain tried to offer evidence related to several alleged NOMA violations, but the defendants objected on relevancy grounds and the district court limited the evidence to the violations alleged in the operative complaint: the August 15, 2012, dinner and the November 9, 2012, email communications.

Salem Grain argued that both the August 15, 2012, dinner and the November 9 email communications were "meetings" of the Authority under § 84-1409, and it sought to have any action taken on the redevelopment project during these meetings declared void under § 84-1414. After considering the evidence,

the district court concluded that neither event was a meeting of the Authority under NOMA.

Regarding the dinner, the district court found it was hosted by the Falls City Economic Development and Growth Enterprise, and was attended by many Falls City community leaders, including three members of the Authority. At the dinner, which some witnesses described as a "meet-and-greet," Consolidated Grain gave a presentation regarding its interest in constructing the grain facility. Salem Grain argued that because of the presentation, members of the Authority were essentially "brief[ed]" by Consolidated Grain during the dinner and later used that information to approve the redevelopment project. The district court found the dinner was not a meeting that required compliance with NOMA, reasoning that there was insufficient evidence regarding the substance of the information actually presented at the dinner and that there was no direct evidence any Authority member used the information in later approving the redevelopment project.

Regarding the November 9, 2012, email communications, the court found an email had been sent by the Authority's chairman to all Authority members. The email advised that Salem Grain had recently filed a lawsuit and told the members that the chairman intended to proceed with executing the redevelopment contract with Consolidated Grain, but that he would be adding amendments recommended by counsel to (1) disclose the lawsuit and (2) add language to the existing indemnification provision. Prior to November 9, the Authority had approved the redevelopment contract with Consolidated Grain during a public meeting and had adopted a resolution authorizing the chairman to "take any and all actions, and to execute any and all documents" deemed necessary to conclude the transaction. The chairman's November 9 email stated:

> Should any [Authority] member find need to discuss and/or act upon these matters, notice needs to be provided to me by 8 pm today (11/9/12) so that I may schedule a special meeting for that purpose. Otherwise, you are

> hereby notified that I intend to execute the Redevelopment Contract as previously authorized by the [Authority] with the above cited immaterial changes recommended by legal counsel and proceed with the issuance of bonds and a TIF Grant to Consolidated Grain . . . .

All members of the Authority responded via email to the chairman, indicating that a special meeting was not necessary and that the chairman could proceed to execute the redevelopment contract pursuant to the earlier resolution. The district court found this email exchange was not a "meeting" as defined in § 84-1409(2), reasoning that no new action was taken or authorized by the Authority during this exchange beyond that which already had been taken or authorized during the earlier public meeting.

After concluding Salem Grain had not met its burden of proving either alleged violation of NOMA, the court entered an order dismissing the action. No attorney fees were allowed. Salem Grain timely appealed, and we moved the case to our docket.

II. ASSIGNMENTS OF ERROR

Salem Grain assigns, restated, that the district court erred in (1) making certain discovery rulings, (2) denying Salem Grain leave to file a second amended complaint, (3) granting the defendants' motion for partial summary judgment, (4) denying Salem Grain leave to file a third amended complaint, (5) denying Salem Grain's motion to continue trial, (6) excluding evidence of additional NOMA violations at trial, and (7) dismissing the NOMA claims after trial.

III. STANDARD OF REVIEW

[1,2] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.[7] Statutory interpretation presents a question of

[7] *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018).

law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[8]

[3,4] An appellate court reviews actions for relief under NOMA in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.[9] 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.[10] But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[11]

IV. ANALYSIS

1. Supplemental Briefing

After oral argument, the parties were ordered to file supplemental briefs (1) addressing whether Salem Grain brought its lawsuit within the timeframe set forth in § 18-2142.01 and (2) analyzing the impact, if any, of this court's holding in *Community Dev. Agency v. PRP Holdings*[12] on Salem Grain's claims. This briefing was requested to assist the court in determining whether the conclusive presumptions contained in the Community Development Law[13] have any effect on Salem Grain's action challenging the validity and enforceability of the redevelopment contract and bonds.

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[8] *Salem Grain Co., supra* note 1.

[9] *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

[10] *Id.*

[11] *Id.*

[12] *Community Dev. Agency v. PRP Holdings*, 277 Neb. 1015, 767 N.W.2d 68 (2009).

[13] See §§ 18-2129 and 18-2142.01.

Salem Grain's supplemental briefing urges this court to find that the reasoning of *PRP Holdings* is inapplicable and that the conclusive presumption does not foreclose its claims under the Community Development Law. The defendants, in a joint supplemental brief, argue just the opposite. Although they advance different statutory interpretations, no party raises a constitutional challenge to any provision of the Community Development Law. Because we find the applicability of the conclusive presumption to be dispositive of Salem Grain's claims under the Community Development law, we begin our analysis with an overview of the relevant statutory scheme.

2. Conclusive Presumptions Under Community Development Law

In 1951, the Nebraska Legislature passed an act referred to as the Community Development Law.[14] Included in that act is § 18-2129, which at the time of the instant litigation provided:

> In any suit, action, or proceedings involving the validity or enforceability of any bond of an authority or the security therefor, any such bond reciting in substance that it has been issued by the authority to aid in financing a redevelopment project, as herein defined, shall be conclusively deemed to have been issued for such purpose and such project shall be conclusively deemed to have been planned, located, and carried out in accordance with the purposes and provisions of [the Community Development Law].[15]

Section 18-2129 applies only to certain suits, actions or proceedings—those involving the validity and enforceability of bonds issued by a community redevelopment authority where the bond recites certain language. But when these factual predicates are met, § 18-2129 applies to more than just

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[14] 1951 Neb. Laws, ch. 224, § 1, p. 797 (currently codified at § 18-2101).

[15] See 1951 Neb. Laws, ch. 224, § 10(6), p. 813.

the redevelopment bonds and requires a court to "conclusively deem[]" the entire redevelopment project to have been planned, located, and carried out in accordance with the Community Development law. The Community Development Law does not expressly label this a "conclusive presumption," but we adopt that term for ease of reference because it accurately describes the legal effect of the statutory language.

In 1997, the Legislature added another statute[16] to the act which, as we explain below, created a narrow exemption from the conclusive presumption established by § 18-2129. But before we discuss the 1997 statute, we discuss the nature of conclusive presumptions generally.

Commentators have observed that a conclusive presumption "is not a presumption at all, but rather, a substantive rule of law directing that proof of certain basic facts conclusively proves an additional fact which cannot be rebutted."[17] The legislative decision to make a presumption conclusive is one based on "overriding social policy"[18] and typically "rest[s] upon grounds of expediency or public policy so compelling in character as to override the requirement of proof."[19] The Utah Supreme Court has explained that "[w]hen the Legislature includes a conclusive presumption in a statute, [it is] stating that the objective promoted by the conclusive presumption is of greater importance than the opportunity to present facts challenging the presumed fact."[20]

It has been observed that conclusive presumptions frequently occur in statutes pertaining to decisions of governmental

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[16] 1997 Neb. Laws, L.B. 875 (currently codified at § 18-2142.01).

[17] 29 Am. Jur. 2d *Evidence* § 201 at 215 (2008). Accord 1 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 4:57 (7th ed. 1992).

[18] 1 Fishman, *supra* note 17 at 393.

[19] 29 Am. Jur. 2d, *supra* note 17, citing *U.S. v. Provident Trust Co.*, 291 U.S. 272, 54 S. Ct. 389, 78 L. Ed. 793 (1934).

[20] *Davis v. Provo City Corp.*, 193 P.3d 86, 90-91 (Utah 2008).

entities.[21] This is certainly the case in Nebraska, where conclusive presumptions appear in several different statutes addressing suits brought to challenge the actions of governmental entities.[22] Some of these Nebraska statutes reference a point in time after which the conclusive presumption applies,[23] and others do not contain any temporal limitation.[24] But regardless, when considering the application of conclusive presumptions, it is important to understand they are evidentiary rules affecting the merits of an action and not procedural time limits on bringing an action.[25]

As stated, Nebraska's Community Development Law contains two separate statutes governing conclusive presumptions. The first is § 18-2129, which was quoted above. The other is § 18-2142.01, enacted in 1997, which provides:

> (1) In any suit, action, or proceeding involving the validity or enforceability of any bond of a city, village, or authority or the security therefor brought after the lapse of thirty days after the issuance of such bonds has been authorized, any such bond reciting in substance that it has been authorized by the city, village, or authority to aid in financing a redevelopment project shall be conclusively deemed to have been authorized for such purpose and

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[21] *Davis, supra* note 20.

[22] See, e.g., Neb. Rev. Stat. § 13-1109 (Reissue 2012); Neb. Rev. Stat. § 13-2512 (Reissue 2012); §§ 18-2129 and 18-2142.01; Neb. Rev. Stat. §§ 18-2424 and 18-2434 (Reissue 2012); Neb. Rev. Stat. § 58-519 (Reissue 2010); Neb. Rev. Stat. § 70-1406(5) (Reissue 2018); Neb. Rev. Stat. § 71-15,116 (Reissue 2018).

[23] See, e.g., § 13-1109(3) (conclusive presumption applies to actions "brought after the lapse of thirty days after" contract is formally entered into or issuance of bonds has been authorized); § 18-2142.01 (same); § 58-519 (conclusive presumption applies in actions "brought after the lapse of thirty days after the bonds are issued").

[24] See, e.g., §§ 13-2512, 18-2129, 18-2424, 18-2434, 70-1406(5), and 71-15,116.

[25] *Davis, supra* note 20.

> such redevelopment project shall be conclusively deemed to have been planned, located, and carried out in accordance with the purposes and provisions of the Community Development Law . . . .
>
> (2) In any suit, action, or proceeding involving the validity or enforceability of any agreement of a city, village, or authority brought after the lapse of thirty days after the agreement has been formally entered into, any such agreement reciting in substance that it has been entered into by the city, village, or authority to provide financing for an approved redevelopment project shall be conclusively deemed to have been entered into for such purpose and such project shall be conclusively deemed to have been planned, located, and carried out in accordance with the purposes and provisions of the Community Development Law . . . .

Neither § 18-2129 nor § 18-2142.01 expressly references the other, but both statutes relate to the same subject matter: application of a conclusive presumption in actions brought to challenge redevelopment contracts and bonds under the Community Development Law. Section 18-2129 addresses actions brought to challenge bonds of a redevelopment authority, while § 18-2142.01 addresses actions brought to challenge both redevelopment bonds and redevelopment contracts. But under both statutes, when the factual predicates are met and the conclusive presumption applies, courts are required to deem the entire redevelopment project to have been "planned, located, and carried out in accordance with the purposes and provisions of" the Community Development Law.[26]

Despite their similarities, there is tension between §§ 18-2129 and 18-2142.01. The former contains no temporal restriction on application of the conclusive presumption, but the latter expressly identifies a time period *after which* the

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[26] § 18-2129. Accord § 18-2142.01(1) and (2).

conclusive presumption applies.[27] This is our first opportunity to construe this competing language, and in doing so, we are guided by well-settled principles of statutory construction.

[5-7] Long ago we recognized the fundamental principle that statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.[28] Because §§ 18-2129 and 18-2142.01 address the same conclusive presumption under the Community Development Law, we construe them together to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[29] And when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed legislative intention to the contrary, to regard each as effective, and to harmonize overlapping statutes "so long as each reaches some distinct cases."[30]

The conclusive presumption established in § 18-2129 already existed when § 18-2142.01 was enacted, but the two statutes plainly overlap. The conclusive presumption under § 18-2129 applies to all suits challenging the validity or enforceability of a redevelopment bond, without regard to when the suit was brought. The conclusive presumption under § 18-2142.01 also applies to suits challenging redevelopment bonds (as well as contracts), but that statute only applies the conclusive presumption to suits "brought after the lapse of thirty days after" the issuance of the bonds has been authorized[31] or the contract has been formally entered into.[32]

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[27] See § 18-2142.01(1) ("after the lapse of thirty days after" triggering event). Accord § 18-2142.01(2).

[28] *Enyeart v. City of Lincoln*, 136 Neb. 146, 285 N.W. 314 (1939).

[29] See *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

[30] See *Citizens of Humanity v. Applied Underwriters*, 299 Neb. 545, 560, 909 N.W.2d 614, 627 (2018), *cert. denied* ___ U.S. ___, 139 S. Ct. 274, 202 L. Ed. 2d 135, quoting *J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001).

[31] § 18-2142.01(1).

[32] § 18-2142.01(2).

[8] Where it is possible to harmonize apparently conflicting statutes, a court should do so.[33] Reading the plain text of §§ 18-2129 and 18-2142.01 together, we conclude they can be harmonized, and each can be given effect, if § 18-2129 is understood to create a conclusive presumption that applies anytime the factual predicates are met and § 18-2142.01 is understood to modify that conclusive presumption by creating a narrow exemption for actions brought during the 30-day period after the contract is formally entered into or the bond is authorized to be issued.

[9] So construed, §§ 18-2129 and 18-2142.01 together effectively provide that any suit, action, or proceeding brought outside the 30-day period established in § 18-2142.01 will be subject to the conclusive presumptions required by §§ 18-2129 and 18-2142.01, as long as the action is one challenging the validity or enforceability of a redevelopment bond or contract and the bond or contract recites in substance the language required by the statutes.

Although not dispositive, we note the legislative history supports such a construction. Ordinarily, when construing statutes, we look no further than the plain text.[34] But a court may inquire into legislative history when a statute is open to construction because its terms require interpretation or may reasonably be considered ambiguous.[35] The senator who introduced what became § 18-2142.01 described it as creating "a 30-day window" to challenge the validity and enforceability of redevelopment bonds and contracts, before the conclusive presumption applied.[36] Without any discussion of § 18-2129, we adopted a similar interpretation in *PRP Holdings*.[37]

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[33] See *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

[34] See *McGuire, supra* note 29.

[35] *Id*.

[36] See Floor Debate, L.B. 875, 95th Leg., 1st Sess. 8095 (May 22, 1997) (remarks of Senator Paul Hartnett).

[37] *PRP Holdings, supra* note 12.

In that case, the community development agency (Agency) entered into a redevelopment contract to convert a building into apartments. The redevelopment contract included TIF funding. After the redevelopment project was completed, it was sold to a subsequent purchaser. The Agency, claiming the subsequent purchaser was not entitled to TIF funds, brought a lawsuit seeking to have the redevelopment contract declared void ab initio, alleging it failed to comply with the Community Development Law. The district court found the conclusive presumption under § 18-2142.01(2) foreclosed the Agency from contesting the redevelopment contract's validity. On appeal, we agreed. After reciting the provisions of § 18-2142.01(2), we explained the purpose and effect of that statute as follows:

> The Legislature has set a specific window of time during which a party can challenge a redevelopment contract. Under the statute, after the window has closed, the contract has conclusively complied with the [Community Development Law] and Neb. Rev. Stat. §§ 18-2145 to 18-2154 (Reissue 1997). In short, § 18-2142.01(2) provides finality and gives all parties to a contract that provides financing for a redevelopment project a green light to proceed. *The only exception is if a suit or other proceeding is initiated within 30 days of the parties' formally entering into the contract.*[38]

In *PRP Holdings*, we found the redevelopment agreement at issue was "formally entered into" when the redevelopment contract was signed by the Agency and the redevelopers,[39] and we found the Agency's declaratory judgment action challenging the validity of that agreement was not filed until 8 years later. Because the Agency had not filed suit to contest the

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[38] *Id.* at 1020, 767 N.W.2d at 72 (emphasis supplied).

[39] *Id.* at 1016, 767 N.W.2d at 70. See § 18-2103(15) (defining "[r]edevelopment contract" as "a contract entered into between an authority and a redeveloper for the redevelopment of an area in conformity with a redevelopment plan").

validity of the redevelopment agreement "within 30 days after the contract was signed," we found it was precluded from contesting the contract's validity and we did not address the merits of the claim being raised, reasoning that "§ 18-2142.01(2) forecloses all of the Agency's arguments."[40]

In *PRP Holdings*, we considered the application of the conclusive presumption to an action brought after the 30-day time period in § 18-2142.01. The instant appeal requires us to consider how, if at all, the conclusive presumption applies in an action brought before the commencement of that 30-day time period.

3. Conclusive Presumption Applies to Salem Grain's Claims

No party disputes that Salem Grain's suit falls within the category of actions governed by §§ 18-2129 and 18-2142.01. Salem Grain admits this action was brought to challenge the validity and enforceability of the redevelopment contract and the bonds issued pursuant thereto, and the record shows the necessary statutory language was recited in substance in both the redevelopment contract and the bond.

But Salem Grain argues the conclusive presumption should not apply to foreclose its claims, because its lawsuit was already on file when the 30-day window opened under § 18-2142.01. Salem Grain asks us to find, summarized, that § 18-2142.01 exempts from the conclusive presumption not only those actions brought during the 30-day period after the redevelopment contract is executed or the bond is authorized to be issued, but also those actions already pending at that point. We must reject this interpretation for two reasons.

[10] First, Salem Grain's position would require that we construe the statutory scheme in a manner that effectively nullifies § 18-2129. But the Legislature did not repeal § 18-2129 upon enacting § 18-2142.01 in 1997. And in 2018, when the Community Development Law was amended, both statutes

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[40] *PRP Holdings, supra* note 12, 277 Neb. at 1019, 1020, 767 N.W.2d at 72.

were retained and updated.[41] Under the statutory scheme, § 18-2129 creates a conclusive presumption that applies to any action challenging the validity or enforceability of a bond reciting the statutory language—and this necessarily includes actions already pending at the time such a redevelopment bond is issued. In the absence of clear legislative intent, a construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.[42] We decline to interpret § 18-2142.01 in a manner that would effectively nullify § 18-2129.

[11] Next, we must reject Salem's Grain's position because it advocates the judicial expansion of the narrow category of suits which the Legislature has chosen to exempt from the conclusive presumption. While there may be sound policy reasons for the Legislature to expand the 30-day exemption under § 18-2142.01 to include suits already pending when a redevelopment contract is formally entered into or a bond is authorized to be issued, it has not done so. And it is not within the province of the courts to read a meaning into a statute which is not there.[43] We decline Salem Grain's invitation to construe § 18-2142.01(2) in a way that expands the category of cases exempted from the conclusive presumption established by the Legislature.

We instead adhere to the construction of § 18-2142.01 we articulated in *PRP Holdings*.[44] When a redevelopment contract or bond recites in substance the language set out in § 18-2142.01(1) and (2), that statute establishes a specific window of time during which a party may challenge the validity or enforceability of the redevelopment contract or bond, unencumbered by the conclusive presumption under the Community

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[41] See 2018 Neb. Laws, L.B. 874, §§ 23 and 30.

[42] *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997).

[43] *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

[44] *PRP Holdings, supra* note 12.

Development Law. That window opens on the date the redevelopment contract is formally entered into[45] or the bond is authorized to be issued,[46] and it closes 30 days later. And while the plain text of § 18-2142.01 does not apply the conclusive presumption to actions brought before this 30-day period, the conclusive presumption of § 18-2129 applies to all actions regardless of when they are brought.

When §§ 18-2129 and 18-2142.01 are construed together, the effect is that any suit, action, or proceeding brought outside the 30-day period established in § 18-2142.01 will be subject to the conclusive presumptions required by §§ 18-2129 and 18-2142.01, assuming the action is one challenging the validity or enforceability of a redevelopment bond or contract and the bond or contract recites in substance the language required by the statutes. We emphasize that this construction is applied only because the Legislature chose to include both §§ 18-2129 and 18-2142.01 in the Community Development Act and both statutes must, if possible, be given effect. The construction articulated here would not be required in the absence of either § 18-2129 or § 18-2142.01.

No party raises it as an issue in the present case, but we pause here to point out a practical challenge presented by the statutory scheme. The Community Development Law does not require that a redevelopment contract be executed during a public meeting.[47] Nor does it require that the public be given notice of either the date a redevelopment agreement is "formally entered into" or the date a bond is "authorized" to be issued for purposes of § 18-2142.01. Consequently, while parties to the redevelopment agreement and those who are involved in or closely following the redevelopment project may have personal knowledge of when the 30-day time period under § 18-2142.01 begins to run, others may not. This could

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[45] § 18-2142.01(2).

[46] § 18-2142.01(1).

[47] See § 18-2119(1).

present a practical challenge for those wishing to challenge the validity or enforceability of a redevelopment contract or bond within the 30-day window under § 18-2142.01. But the proper role of this court is to declare the law as it finds it,[48] not to redesign the statutory scheme. Consideration of whether the Community Development Law should include some form of public notice when a redevelopment agreement is executed or the issuance of a bond is authorized is a policy matter for the Legislature.

To summarize, when Salem Grain filed its suit on October 24, 2012, challenging the validity and enforceability of the redevelopment contract and bond, no conclusive presumption yet applied under § 18-2129 because, at that point, the factual predicates of the statute had not been met. Specifically, no redevelopment contract had yet been executed, so no bond had yet been issued and it was not possible to determine whether the bond recited in substance the language required by § 18-2129.

But later, when the redevelopment contract was executed and the bond was issued, reciting in substance the requisite language, the action became one to which the conclusive presumption under § 18-2129 applied as a matter of law. And assuming without deciding that an amended complaint brought within the 30-day period "after the lapse of thirty days after" the contract was executed and the bond was issued could trigger the narrow exemption created by § 18-2142.01, Salem Grain's amended complaint was filed outside that time period. On these facts, the conclusive presumption under § 18-2129 applied as a matter of law as soon as the factual predicates were met, and the narrow 30-day exemption under § 18-2142.01 was never triggered.

Thus, as a matter of law, the conclusive presumption mandated by § 18-2129 applies to Salem Grain's suit and requires

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[48] *Woodmen of the World v. Nebraska Dept. of Rev.*, 299 Neb. 43, 907 N.W.2d 1 (2018).

that the redevelopment project at issue "shall be conclusively deemed to have been planned, located, and carried out in accordance with the purposes and provisions of" the Community Development Law.[49] This conclusive presumption is nonrebuttable, and it forecloses all of Salem Grain's alleged challenges to the validity and enforceability of the redevelopment contract and the bond issued pursuant thereto, under the Community Development Law.

Therefore, although our reasoning differs from that applied by the district court, we find no error in the court's dismissal of Salem Grain's first 10 causes of action. Moreover, because all of Salem Grain's claims under the Community Development Act are foreclosed by the conclusive presumption, there could be no reversible error in the trial court's discovery rulings on those claims or in its refusal to allow Salem Grain to further amend its complaint to present additional challenges to the validity and enforceability of the redevelopment agreement and the bond.

(a) Conclusive Presumption Is Not Affirmative Defense

Salem Grain equates the conclusive presumption to a statute of limitations and argues it should not apply here because it was not raised below as an affirmative defense. The defendants' answers included the general allegation that the amended complaint failed to state a claim upon which relief could be granted, but Salem Grain is correct that no defendant alleged the claims were foreclosed by application of the conclusive presumption.

Nebraska's pleading rules require that certain enumerated defenses "and any other matter constituting an avoidance or affirmative defense" must be pled in a defendant's answer.[50] But the conclusive presumptions of §§ 18-2129 and 18-2142.01

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[49] § 18-2129. Accord § 18-2142.01(1) and (2).

[50] Neb. Ct. R. Pldg. § 6-1108(c).

are neither affirmative defenses nor statutes of limitations, and the fact that they were neither alleged nor argued below does not preclude their application, as a matter of substantive law, to this case.

[12] An affirmative defense raises a new matter which, assuming the allegations in the petition or complaint to be true, constitutes a defense to the merits of a claim asserted in the petition.[51] It generally avoids, rather than negates, the plaintiff's prima facie case.[52]

[13] A statute of limitations is an affirmative defense,[53] but "[a] statute providing a conclusive presumption is very different from a statute of limitations."[54] The purpose of a statute of limitations is to prevent recovery of stale claims.[55] In contrast, a conclusive presumption is "a substantive rule of law directing that proof of certain basic facts conclusively proves an additional fact which cannot be rebutted."[56] The conclusive presumptions under §§ 18-2129 and 18-2142.01 are not procedural statutes of limitations.

Nor are they affirmative defenses. The statutory mandate that a redevelopment project "shall be conclusively deemed to have been planned, located, and carried out in accordance with the purpose and provisions of" the Community Development Law[57] does not raise a new matter or constitute a defense to the merits of the claim. Rather, as explained previously, it is a substantive evidentiary rule that forecloses or negates any proof

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[51] See, *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017); *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

[52] John P. Lenich, Nebraska Civil Procedure § 12:11 (2018).

[53] See § 6-1108(c).

[54] *Davis, supra* note 20, 193 P.3d at 89.

[55] *Becker v. Hobbs*, 256 Neb. 432, 441, 590 N.W.2d 360, 366 (1999).

[56] 29 Am. Jur. 2d, *supra* note 17, § 201 at 215. Accord 1 Fishman, *supra* note 17.

[57] § 18-2129. Accord § 18-2142.01(1) and (2).

to the contrary. Stated differently, when the factual predicates are met, §§ 18-2129 and 18-2142.01 establish the legal standard courts must apply to actions brought outside the 30-day window challenging the validity or enforceability of redevelopment agreements and bonds.[58] The fact that the conclusive presumption was neither alleged nor argued below does not affect its applicability as a matter of substantive law.

(b) Community Development Law and NOMA Claims

Finally, Salem Grain argues that even if the conclusive presumption applies to foreclose its claims under the Community Development Law, it should have no effect on Salem Grain's NOMA claims related to the redevelopment project. It contends that regardless of the conclusive presumption under the Community Development Law, NOMA provides a separate legal basis for declaring void any resolution made or formal action taken by the Authority in violation of NOMA.

Salem Grain alleged multiple causes of action, including NOMA violations, to support its ultimate request that the redevelopment contract and any bonds issued pursuant thereto be declared null and void. The question becomes whether, in light of the conclusive presumption required by §§ 18-2129 and 18-2142.01, any violation of NOMA could affect the validity and enforceability of the redevelopment contract and bonds.

There is potential tension between the conclusive presumptions under the Community Development Law and the provisions under § 84-1414 for declaring void a resolution made or formal action taken by a public body in violation of NOMA. That is because the Community Development Law contains express provisions governing the public hearing and notice requirements for redevelopment plans[59] and also makes clear

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[58] *PRP Holdings, supra* note 12.

[59] See, e.g., §§ 18-2109, 18-2115, 18-2115.01, and 18-2119 (Cum. Supp. 2018).

that the Community Development Law "shall be full authority for the . . . exercise of the powers therein granted to a city or village and to such authority" and that "[i]nsofar as the provisions of [the Community Development Law] are inconsistent with the provisions of any other law . . . the provisions of [the Community Development Law] shall be controlling."[60]

When the conclusive presumption of §§ 18-2129 or 18-2142.01 applies, the "project shall be conclusively deemed to have been planned, located, and carried out in accordance with the purpose and provisions of" the Community Development Law.[61] This presumption necessarily encompasses an authority's compliance with the public hearing and notice provisions of the Community Development Law and prompts the question whether the public meeting requirements under NOMA, and in particular the provisions under § 84-1414 for declaring void a resolution made or formal action taken by a public body in violation of NOMA, are inconsistent with the conclusive presumption under the Community Development Law.

This case, however, does not require that we resolve any possible tension between the Community Development Law and NOMA. That is because, as we explain below, no NOMA violation has been proved.

An appellate court reviews actions for relief under NOMA in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.[62] 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.[63] But when credible evidence is in conflict on material issues

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[60] § 18-2144.

[61] § 18-2129. Accord § 18-2142.01(1) and (2).

[62] *Schauer, supra* note 9.

[63] *Id.*

of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[64]

Salem Grain alleged that two events—the August 15, 2012, dinner and the November 9 email communications—were "meetings" of the Authority for purposes of NOMA. And Salem Grain argued that because NOMA requirements were not followed with respect to such meetings, any action taken by the Authority was invalidated pursuant to § 84-1414. The Authority denied that either event was a meeting governed by NOMA, and the district court agreed. After a de novo review of the record, so do we.

(i) Dinner

NOMA defines a "[m]eeting" as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body."[65] NOMA also provides, however, that it

> does not apply to chance meetings or to attendance at or travel to conventions or workshops of members of a public body at which there is no meeting of the body then intentionally convened, if there is no vote or other action taken regarding any matter over which the public body has supervision, control, jurisdiction, or advisory power.[66]

In *Schauer v. Grooms*,[67] parties seeking to challenge the annexation of land for a redevelopment project involving an ethanol plant claimed that a dinner and walking tour of another ethanol facility constituted a public meeting of the city council under NOMA. The dinner and tour were hosted by the

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[64] *Id.*

[65] § 84-1409(2).

[66] § 84-1410(5).

[67] *Schauer, supra* note 9.

economic redevelopment board and attended by the mayor, three members of the city council, and approximately 40 other people. The city council members testified that during the dinner, they "did not discuss or receive information associated with the redevelopment plan and contract" and did not "take any formal action on behalf of the city council."[68] We found the plaintiffs had not presented any evidence the dinner was "'for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body'"[69] and thus found no violation of NOMA.

Here, witnesses testified that Consolidated Grain gave a presentation during the dinner, but no witness could recall specifics about the content of that presentation. The quorum of Authority members who attended the dinner testified that no business was discussed and that they did not rely on any information from the dinner to support their subsequent decisions during public meetings to approve the redevelopment project.

On this record, we agree there is insufficient evidence that the dinner involved any "briefing, discussion of public business, formation of tentative policy, or the taking of any action"[70] by the Authority. The dinner did not constitute a meeting under NOMA.

(ii) Email

For similar reasons, we agree with the district court that the email communications were not a "[m]eeting" as defined in § 84-1409(2), as there was no purpose to hold a briefing session, discuss public business, form tentative policy, or take any action of the public body. To the contrary, the record shows the purpose of the email communications was to let Authority members know Salem Grain had filed suit and advise that

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[68] *Id.* at 447, 786 N.W.2d at 926.

[69] *Id.*, quoting § 84-1409(2).

[70] § 84-1409(2).

the previously approved contract was being amended to disclose the litigation and to include additional indemnification language recommended by counsel. The chairman was not seeking permission to take these actions, because the Authority already had authorized him to "take any and all actions, and to execute any and all documents," deemed necessary to conclude the transaction.

Section 84-1410(4) provides in part, "No closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the act." Salem Grain argues the emails were used by the Authority to circumvent the requirements of NOMA. But the chairman's email stated that if any member wanted to "discuss and/or act upon these matters," the chairman would "schedule a special meeting for that purpose."

Properly understood, the chairman's email demonstrates it was sent not to circumvent the requirements of NOMA, but, rather, to adhere to them. The district court did not err in finding no NOMA violation with respect to the emails.

4. Evidence of Additional NOMA Violations

[14-16] Lastly, Salem Grain assigns error to the district court's exclusion of certain evidence offered at trial and objected to as irrelevant. In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by these rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[71] The exercise of judicial discretion is implicit in determining the relevance of evidence, and we will not reverse a trial court's decision regarding relevance absent an abuse of discretion.[72] A judicial abuse of discretion exists when

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[71] *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

[72] *Id.*

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.[73]

[17] The evidence excluded by the trial court pertained to NOMA violations which had not been alleged in the operative amended complaint. 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.[74]

The NOMA violations alleged in Salem Grain's amended complaint focused exclusively on the August 15, 2012, dinner and the November 9 email exchange. Because only those two alleged NOMA violations were at issue, and because the proffered evidence of other possible NOMA violations had no tendency to make any fact of consequence to those two violations any more or less probable, the evidence had no relevance and the trial court did not abuse its discretion in excluding it.

V. CONCLUSION

The conclusive presumptions of §§ 18-2129 and 18-2142.01 present a formidable hurdle to those seeking to challenge the validity or enforceability of a redevelopment contract or bond under the Community Development Law. We find that all of Salem Grain's claims challenging the procedure by which the redevelopment project was adopted and the validity and enforceability of the redevelopment agreement and bond are conclusively foreclosed by §§ 18-2129 and 18-2142.01. And after a de novo review of the NOMA claims, we agree with the district court that no open meeting violation occurred. Finding all of Salem Grain's assignments of error to be without merit, we affirm the judgment of the district court.

Affirmed.

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[73] *Id.*

[74] *Id.*

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

Tom Ecker et al., appellants, v. E & A Consulting Group, Inc., et al., appellees.

924 N.W.2d 671

Filed March 22, 2019. No. S-17-1190.

1. **Summary Judgment: Appeal and Error.** In reviewing the grant of a motion for summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
4. **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.
5. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
6. **Trial: Appeal and Error.** An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.
7. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
8. **Negligence: Proximate Cause: Words and Phrases.** The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.

Appeal from the District Court for Sarpy County: William B. Zastera and Stefanie A. Martinez, Judges. Affirmed.

Michael L. Storey and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellants.

Gregory C. Scaglione and John V. Matson, of Koley Jessen, P.C., L.L.O., for appellee E & A Consulting Group, Inc.

Gerald L. Friedrichsen and William M. Bradshaw, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellee City of La Vista.

John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellee Sanitary Improvement District No. 237.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

I. INTRODUCTION

Tom Ecker, Ruth Ecker, Jim Sledge, and Rosemary Sledge own homes in La Vista, Nebraska. After those homes were flooded, they brought suit against E & A Consulting Group, Inc. (E&A), Sanitary Improvement District No. 237 (SID No. 237), the City of La Vista (City), and two other parties who have since been dismissed with prejudice from this litigation, alleging that the parties were negligent in various ways, which led to the flood damages suffered. The district court granted summary judgment in favor of E&A, SID No. 237, and the City. The Eckers and Sledges (collectively the homeowners) appeal. We moved this case to our docket, because it presents an issue of first impression regarding revisions to the statute allowing motions for summary judgment as set forth in Neb. Rev. Stat. § 25-1332 (Supp. 2017). We affirm.

II. BACKGROUND

1. Factual Background

The homeowners are neighbors residing in the Cimarron Woods area of La Vista. Their homes are adjacent to each other, feature walkout basements, and have backyards abutting Applewood Creek. The Ecker home has a basement elevation of 1,079.009 feet above sea level, and the Sledge home has a basement elevation of 1,079.808 feet above sea level.

A 2010 drainage study completed by E&A found that several Cimarron Woods homes would flood during a less-than-100-year flood event. As such, E&A recommended that SID No. 237 construct a berm at 100-year flood levels. The parties all concede that the 100-year flood level was 1,081.9 feet above sea level. Plans called for a berm built up to 1,082.5 feet above sea level. A berm intended to meet that recommendation was built in 2011. As relevant to this appeal, the record indicates that the berm had low spots: Adjacent to the Eckers' backyard, the berm was built at 1,081.6 feet above sea level, while adjacent to the Sledges' backyard, the berm was at 1,081.4 feet above sea level.

On June 20 and 21, 2014, a rainstorm in the area generated sufficient water to overcome the berm. The record includes evidence that the total rainfall measured at the Millard Airport, located 3 miles away, was 6.6 inches during an 8-hour period, while the total rainfall measured at the City's public works facility, located 1 mile away, was 7.4 inches during an 8-hour period. The Ecker and Sledge basements both flooded as a result of this storm. The Sledges had 3.5 feet of water in their basement, while the Eckers had 5 feet of water in theirs.

Apparently, other homeowners experienced flooding, but this litigation involves only the Eckers and the Sledges, who filed suit against E&A, BNSF Railway Company (BNSF), and Pedcor Management Corporation. Approximately 1 year later, their suit was amended to join SID No. 237 and the City. Subsequently, E&A, BNSF, SID No. 237, and the City filed

motions for summary judgment. BNSF's motion was denied; the other motions were granted. The homeowners' motion to reconsider was denied. The action against BNSF was dismissed with prejudice; the action against Pedcor Management Corporation was dismissed with prejudice prior to the disposition of the summary judgment motions.

The homeowners appeal.

2. Expert Testimony

George Bryan, an expert for the homeowners, testified that E&A, SID No. 237, and the City failed to meet the standard of care to protect against flooding. Bryan further testified that the City should not have allowed construction of the homes and that the drainage did not comply with the "Omaha Regional Stormwater Design Manual," because it was not built for a 100-year storm event. Bryan specifically testified that the maximum flow capacity of the channel running behind the Ecker and Sledge homes was less than the peak flow of a 100-year storm event. Bryan noted that the studies undertaken in preparation for building the drainage channel did not take into account stormwater flow, but only stormwater storage. However, Bryan did agree that the berm was a proper design device to prevent flooding and agreed that the storm in question was in excess of a 100-year storm.

BNSF was still a defendant at the time of the summary judgment hearing and introduced the deposition and reports of its own expert. According to allegations set forth in the motion for summary judgment, the evidence was additionally relied upon by other defendants. BNSF's expert testified that both the size of the storm and the design of the area caused the flooding in question, specifically noting that the City should not have allowed the construction of homes in that area, that the berm was not a prudent protective remedy, that the design studies underestimated the size of a 100-year flood event, and that SID No. 237 did not build the berm to the standards recommended by E&A.

E&A's first expert, Mark Westergard, testified that the flooding was caused by the size of the storm and, perhaps, blockage of the nearby BNSF culvert. Westergard noted that there was no neighborhood data on the storm and that the closest official totals (of 6.6 inches of rain) were gathered at the Millard Airport, located 3 miles away. Westergard observed that the Millard Airport rain total exceeded the Omaha Regional Stormwater Design Manual but not the "Soil Conservation Service" manual, which listed a 100-year storm event at 6.7 inches of rainfall. Finally, Westergard agreed that SID No. 237 did not build the berm to the specifications recommended by E&A. E&A's second expert testified that the storm event could have been anticipated and that the flooding was caused by the magnitude of the storm and culvert blockage.

The City's engineer testified via deposition that he found that the drainage studies complied with the Omaha Regional Stormwater Design Manual and the application subdivision regulations for the City. In a later affidavit, the engineer indicated that contrary to the homeowners' contention, their homes were not built in a designated floodway and thus those regulations did not apply, and that the drainage provided exceeded that required by other regulations.

III. ASSIGNMENTS OF ERROR

The homeowners assign, restated and consolidated, that the district court erred in granting summary judgment in favor of E&A, SID No. 237, and the City.

IV. STANDARD OF REVIEW

[1,2] In reviewing the grant of a motion for summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[1] Statutory interpretation

[1] See *Ewers v. Saunders County*, 298 Neb. 944, 906 N.W.2d 653 (2018).

presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[2]

V. ANALYSIS

The homeowners assign that the district court erred in granting summary judgment to E&A, SID No. 237, and the City. Specifically, they argue that (1) there were genuine issues of material fact preventing summary judgment in favor of E&A, SID No. 237, and the City; (2) E&A and SID No. 237 failed to file statements of undisputed fact cited to in the record as required by § 25-1332(2) and Rules of Dist. Ct. of Second Jud. Dist. 2-7 (rev. 2018); and (3) E&A and SID No. 237 failed to submit a brief in support of their motion for summary judgment as required by rule 2-7.

1. Failure to File Statements of Fact and Briefs

The homeowners argue on appeal that E&A and SID No. 237 failed to meet their prima facie burden for summary judgment, because both failed to comply with the requirements set forth in § 25-1332(2). That subsection requires a party to provide citations to the record to support its assertion that a fact cannot be or is genuinely disputed. As an initial matter, E&A and SID No. 237 argue that the homeowners did not object to the failure to cite to the record and thus have waived this argument on appeal. We agree.

[3-6] We have often said that failure to make a timely objection waives the right to assert prejudicial error on appeal.[3] 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

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[2] *Salem Grain Co. v. Consolidated Grain & Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017).

[3] *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

to it for disposition.[4] One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[5] For that reason, an issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.[6]

The homeowners noted at the hearing on the motions for summary judgment that E&A and SID No. 237 did not file briefs with their motion. But they did not make any objection to this failure, or to the failure of E&A and SID No. 237 to cite to the record. As such, we agree that the homeowners waived consideration of this issue on appeal and decline to address this issue on appeal.

While we conclude that the issue was waived, we do observe that district courts generally retain considerable discretion with respect to the procedures used in their courtrooms. And indeed, § 25-1332(3) also provides considerable discretion to the district court in the event that § 25-1332(2) is not complied with. Moreover, we have held that "'[i]n appropriate circumstances where no injustice would result, the district court may exercise its inherent power to waive its own rules.'"[7]

2. Summary Judgment

[7] We turn next to a review of the district court's grant of summary judgment. In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.[8] The legal duty owed in this case was to design and build a drainage solution for a 100-year storm or rain event.

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Kibler v. Kibler*, 287 Neb. 1027, 1031-32, 845 N.W.2d 585, 589 (2014).

[8] *Eadie v. Leise Properties*, 300 Neb. 141, 912 N.W.2d 715 (2018).

(a) Negligence of E&A and SID No. 237

In their petition, the homeowners alleged that E&A and SID No. 237 owed them a duty to design, engineer, and maintain an effective stormwater management plan and that this duty was breached. On appeal, the homeowners argue that E&A failed to design the berm to an adequate height, that SID No. 237 failed to construct the berm as designed, and that these breaches were the proximate cause of the homeowners' damages. The homeowners also contend that the decision of E&A and SID No. 237 in choosing a berm and constructing a berm, rather than adopting other flood control measures, caused the flooding.

E&A's goal in its various drainage studies was to protect the homes in this subdivision from a 100-year storm event. E&A concluded that to accomplish this, an earthen berm should be built to 1,082.5 feet above sea level. This height exceeded the 100-year storm event elevation of 1,081.9 feet above sea level. This recommendation was based in part on a conclusion on the part of E&A, later proved false, that the BNSF culvert was round and 52 inches in diameter, when in reality, the culvert was elliptically shaped and was 52 inches by 48 inches. In addition, the record shows that the berm had low spots at 1,081.4 and 1,081.6 feet above sea level.

BNSF's expert testified that he felt that usage of the berm as a flood control device was "imprudent" and that he would have recommended the use of a detention/retention system. But the expert agreed in his testimony that had the berm been constructed at a height about 3 inches higher than recommended by E&A, it would have been sufficient. The homeowners' expert testified that due to vegetation in the BNSF culvert that was not properly accounted for, the berm should have been 1 to 1.5 feet higher than its lowest point, or approximately 1,082.9 feet above sea level.

E&A and SID No. 237 had a duty to the homeowners to provide flood protection from a 100-year storm and chose to

provide this protection by constructing a berm. We assume without deciding that E&A breached this duty when it recommended construction of a berm over other flood control measures, and then miscalculated the appropriate height of that berm, and further, that SID No. 237 breached its duty when the berm, as constructed, included several low spots.

[8] But the homeowners are unable to show that these breaches were the proximate cause of the flooding. "The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred."[9]

The uncontroverted evidence in the record, including the testimony of all the experts, shows that the storm that occurred the evening and early morning hours of June 20 and 21, 2014, exceeded a 100-year storm event. The evidence was also uncontroverted that the water elevation in the drainage basin reached 1,083.7 feet above sea level, or nearly 1 foot above the highest recommended height of the berm. Even if the berm had been built to the specifications which the experts recommended in hindsight, the rain event was still so significant that the homeowners' properties would have flooded. The fact that there was evidence that the flooding might have begun at a point earlier than a 100-year event is immaterial to this conclusion, given that the 100-year event threshold was eventually met. In sum, the storm event was ultimately the cause of the flooding, not any defect in the berm.

Because the uncontroverted evidence showed that regardless of any breach of duty by E&A or SID No. 237, the proximate cause of the homeowners' damages was the magnitude of the storm. As such, the district court did not err in granting E&A and SID No. 237's motions for summary judgment.

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[9] *Strode v. City of Ashland*, 295 Neb. 44, 68, 886 N.W.2d 293, 310 (2016).

(b) Negligence of City

The homeowners also assert that the district court erred in granting summary judgment to the City. Specifically, the homeowners contend the City was required to ensure that the E&A drainage studies conformed to the City's regulations, which required a stormwater management plan to handle the minimum of a 100-year storm.

As we concluded above with respect to E&A and SID No. 237, even if the homeowners could show that the City breached its duty, the homeowners cannot show that this breach was the proximate cause of their damage. While the homeowners direct us to varying rainfall totals in the area, all of the experts, including the homeowners' expert, agreed that the storm was in excess of a 100-year event.

We need not address the various arguments that the storm was an "act of God," or could not otherwise have been anticipated, because the only relevant duty at issue was the duty to protect against a 100-year storm, and the storm in this case was undisputedly larger than a 100-year storm. Because the storm exceeded the size of storm for which a duty was owed, the proximate cause of any damage was the storm and not any breach of duty.

The district court did not err in granting summary judgment in favor of E&A, SID No. 237, or the City. There is no merit to the homeowners' arguments on appeal.

VI. CONCLUSION

The decision of the district court granting summary judgment in favor of E&A, SID No. 237, and the City is affirmed.

Affirmed.

Miller-Lerman, J., not participating.

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

Lucinda D. Moore, appellee, v. Thayne D. Moore, appellant.

924 N.W.2d 314

Filed March 22, 2019. No. S-18-273.

1. **Divorce: Attorney Fees: Appeal and Error.** In an action involving 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.
2. **Divorce: Child Support: Appeal and Error.** In an action involving a marital dissolution decree, factual determinations as to childcare expenses incurred are reviewed de novo on the record for an abuse of discretion.
3. **Minors: Child Support.** Supervision of children in the form of day camps, lessons, or activities may under the circumstances constitute childcare so long as such supervision is reasonable, in the child's best interests, and necessary due to employment or for education or training to obtain a job or enhance earning potential.
4. **Judges: Words and Phrases.** 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.
5. **Attorneys at Law: Trial: Stipulations: Parties.** Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.
6. **Courts: Trial: Stipulations: Parties.** Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo.
7. **Divorce: Stipulations: Appeal and Error.** As in other matters involving dissolution decrees, a court's decision whether to approve and

honor a stipulation is reviewed de novo on the record for an abuse of discretion.

8. **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.
9. **Divorce: Attorney Fees.** In awarding attorney fees in a dissolution action, a court shall 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 Buffalo County: John H. Marsh, Judge. Affirmed in part as modified, and in part vacated.

John D. Icenogle, of Bruner Frank, L.L.C., for appellant.

Heather Swanson-Murray, of Swanson Murray Law, L.L.C., P.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

I. NATURE OF CASE

The ex-husband appeals from the district court's order that he reimburse his ex-wife for half of certain "work related day-care expense[s]" for the parties' three children, as required by the dissolution decree, and as required by Neb. Ct. R. § 4-214 (rev. 2016) of the Nebraska Child Support Guidelines, which states that "[c]are expenses for the child" shall be allocated to the obligor parent. The ex-husband asserts that none of the expenses that the ex-wife testified she incurred as a means of providing adult supervision for her children while she worked, consisting of day camps, overnight camps, lessons, sitters, and transportation to and from the same, qualified as "work related daycare expense[s]" or "[c]are expenses for the child." He argues they were instead merely "activities." The ex-husband also asserts that the district court erred in awarding to the

ex-wife $3,500 in attorney fees when the court found that the ex-husband's complaint to modify, which he voluntarily dismissed after the parties had their respective experts conduct psychological/custody evaluations of the children, was not frivolous. Finally at issue is whether the district court erred in ordering the ex-husband to pay $2,500 toward the ex-wife's expert's evaluation fees, when the parties had stipulated that they would each pay their own expert's fees.

II. BACKGROUND

1. Decree

A decree of dissolution of the marriage of Lucinda D. Moore and Thayne D. Moore was entered on October 1, 2014. The decree ordered that Lucinda be given sole physical and legal custody over the parties' three minor children. One child was born in 2002, one in 2005, and one in 2006. Thayne was ordered to pay child support and "50% of said work related daycare expenses . . . within 10 days of being provided a receipt." He was also ordered to share in the children's medical expenses. Lucinda and Thayne were to inform each other of "activities or events" where a parent may participate. The order did not contain a provision specifically relating to payment of "activities or events."

2. Complaint to Modify

On September 10, 2015, Thayne filed a complaint to modify the decree due to a material change of circumstances. Thayne alleged that Lucinda was "unwilling to co-parent" with him and had been inflicting "substantial mental abuse" on their children. He asked the court to modify the decree by awarding sole physical and legal custody of the children to him. Lucinda generally denied the operative allegations of the complaint and asked that it be dismissed.

(a) Motions for Expert Evaluations

Lucinda moved for a "psychological/custody evaluation" of the children. Thayne joined the motion for a psychological/

custody evaluation and nominated an expert to conduct the evaluation, proposing that both parties share jointly in the expense. Lucinda proposed Dr. Theodore DeLaet as the expert to conduct the evaluation instead. On May 2, 2016, the court granted the motions for psychological/custody evaluations but ordered the parties to stipulate who should conduct the evaluation and how the costs of the evaluation should be divided.

Lucinda and Thayne were unable to reach an agreement on a single expert to perform the evaluation. They instead jointly stipulated that they would each use his or her own expert to conduct independent evaluations of the children and that they would each be solely responsible for his or her respective expert's fees and expenses. On June 3, 2016, the court issued an order approving the stipulation and providing that Lucinda and Thayne could have evaluations conducted by their respectively chosen experts, with Lucinda and Thayne to be solely responsible for their respective expert's fees and expenses.

(b) Motion to Reduce Daycare Expenses to Judgment

On January 30, 2017, Lucinda filed a "Motion to Reduce Daycare Expenses to Judgment," in which she asked the court to determine daycare expenses owed by Thayne to Lucinda and reduce such expenses to a judgment against Thayne.

(c) Thayne's Motion to Dismiss Without Prejudice

On February 15, 2017, the day before the scheduled hearing on Thayne's complaint for modification, Thayne moved to dismiss his complaint without prejudice. The motion to dismiss was made after the psychological/custody evaluations had been conducted. DeLaet's evaluation had not been available to Thayne until January 17, 2017. Neither Thayne's nor Lucinda's expert recommended a change in custody.

(d) February 15, 2017,
Order of Dismissal

The court granted Thayne's motion to dismiss the same day that the motion was filed. The court ordered each party to bear his or her own costs. The court did not at that time take up Lucinda's motion to reduce daycare expenses to judgment.

(e) Lucinda's Motion for
Attorney Fees

On February 21, 2017, Lucinda moved for an award of attorney fees incurred as a result of the dismissed complaint to modify and for such further relief as the court deemed equitable. Thayne responded with a motion, by "Special Appearance," to dismiss Lucinda's motion for attorney fees on the ground that it was the filing of a new lawsuit without service of process.

By an order dated June 19, 2017, the court denied Lucinda's motion for attorney fees. It still had not resolved her motion to reduce daycare expenses to judgment, however.

(f) Order to Alter or Amend
June 19, 2017, Order

Lucinda timely moved to vacate, alter, or amend the June 19, 2017, order on the ground that she had been denied an opportunity to be heard on her motion for attorney fees. On July 19, the court altered and amended its June 19 order.

The court took stock of Lucinda's unresolved motion to reduce daycare expenses to judgment and concluded that it was not a proper motion within the modification proceedings brought by Thayne. The court explained that the question of daycare expenses was not raised in the complaint or in Lucinda's answer to the complaint. The court concluded that the "motion" was a request for relief, which required a complaint and service of process. Thus, the court did not consider the motion as being properly before it.

In contrast, the court considered Lucinda's motion for attorney fees to be incidental to Thayne's motion to dismiss. Further, the court considered Thayne's motion to dismiss to be

a general appearance. It overruled Thayne's motion to dismiss Lucinda's motion for attorney fees.

The court altered and amended its June 19, 2017, order to state: "[Thayne's] Special Appearance is overruled. [Thayne's] Motion to Dismiss is sustained as to [Lucinda's] Motion to Reduce Daycare Expense to Judgment but overruled as to [Lucinda's] Motion for Attorney Fees."

The court did not at that time rule on Lucinda's motion for attorney fees.

(g) Complaint to Reduce Daycare Expenses to Judgment

On August 1, 2017, Lucinda filed a "Complaint/Application to Reduce Daycare Expenses to Judgment" and served process. She asked for attorney fees and costs associated with the motion and such other relief as the court deemed just and equitable.

Evidentiary hearings were conducted to address Lucinda's motion for attorney fees and her complaint/application to reduce daycare expenses to judgment.

(i) Daycare Expenses

In relation to her complaint/application to reduce daycare expenses to judgment, Lucinda sought reimbursement for what she described as "daycare expenses" incurred during 2015 and 2016 when the children were not in school. She testified that she had arranged "activities . . . that would serve as day care."

She chose the activities both for their enrichment and for the level of supervision they provided. Some of the activities were within walking or biking distance from the house, and the children would transport themselves to and from the activity. Others required transportation, and Lucinda incurred some expenses in paying young adults to transport the children or to watch them for shorter periods of time.

Lucinda explained that the children were not of an age where she thought it suitable for them to all be home by

themselves the entire time she was at work. Lucinda said that the oldest child would occasionally watch the younger two for shorter periods of time, but she did not believe it appropriate to have her oldest child watch her younger siblings full time during Lucinda's work day every day of school break. The oldest child was apparently 13 years old by the summer of 2016.

Lucinda testified that she generally worked from 6 a.m. to 2:30 p.m. but that on certain days, she worked from 6 a.m. to noon. Lucinda explained that her schedule fluctuated. She testified that all the expenses she sought reimbursement for were incurred while she was at work.

The expenses Lucinda sought reimbursement for as "daycare" fell roughly under five categories: day camps, overnight camps, lessons, sitters, and transportation. Lucinda testified that the expense of sending the children to a local daycare, where they had been cared for before, would have been significantly more, and she provided documentation of that fact.

Specifically, Lucinda sought 50 percent reimbursement for childcare services for her two younger children offered through the Kearney, Nebraska, public school system and run by school staff, which expenses totaled $130 in 2015 and $175 in 2016.

She sought reimbursement for three different volleyball camps which cost a total of $210 in 2015 ($90 for the oldest and $120 for the younger two) and a total of $120 in 2016 (for all three children).

She also sought reimbursement for 50 percent of the $130 fee incurred for a basketball camp in 2016. Lucinda sought 50 percent reimbursement for $375.90 incurred in sending the three children to a "Crossfit" speed and agility camp in 2015, which lasted from 9 to 11 a.m. each day, during a period of time when she worked until noon.

Lucinda also sought reimbursement of 50 percent of $250 in piano lessons, apparently for all three children, and $60 in dance lessons for the youngest child. For 2016, she sought 50

percent reimbursement for $120 in fees for a "tennis camp" that all three children attended, and which lasted 1½ hours each day. Lucinda testified that these lessons provided supervision while she was at work.

Lucinda submitted $81.20 in childcare costs provided by trusted young adults in 2015. She submitted $110 in transportation costs provided by trusted young adults and associated with getting the children to and from various camps and lessons.

Finally, Lucinda sought reimbursement for one-quarter of the expenses incurred in sending the three children to overnight camps during the summers of 2015 and 2016. The expenses for these camps, referring to the copies of the checks in the record, were $451 in 2015 and $490 in 2016, totaling $941.

(ii) Attorney Fees and Expert Witness Fees

Lucinda reiterated her request for attorney fees and asked that she be reimbursed for the fees related to DeLaet's evaluation. Lucinda entered into evidence the itemized billing statement by DeLaet, which demonstrated a total fee of $7,000. The court also received the billing statement for $571.33 in hotel accommodations while evaluations were performed in Omaha, Nebraska, the location of DeLaet's office. The court accepted into evidence an affidavit by Lucinda's attorney, averring that since the complaint to modify, Lucinda had incurred $11,121.56 in attorney fees and costs. Itemized bills were attached to the affidavit. Lucinda believed that she should not be bound by the stipulation regarding expert fees, because the agreement contemplated that the expert reports would be submitted at the hearing on Thayne's complaint and such hearing was never held because of Thayne's voluntary dismissal.

(h) February 21, 2018, Order

On February 21, 2018, the court ruled on Lucinda's motions to reduce daycare expenses to judgment, for attorney fees, and

expert fees. Citing *Nimmer v. Nimmer*,[1] the court explained that it had jurisdiction over the motion regarding daycare expenses pursuant to its continuing jurisdiction over the decree. And the court ultimately found that the claimed expenses should be "equitably treated as work-related childcare." Accordingly, the court granted Lucinda's motion and entered judgment against Thayne in the amount of $1,394.35. It appears from the record that the district court apportioned to Thayne 50 percent of the total expense for all the claimed expenses, except for the overnight camps. The court apportioned 50 percent of one-quarter, or one-eighth, of the total cost of $941 for the overnight camps.

The court explained that the camps and activities served a "dual purpose" of providing both a supervised environment during Lucinda's working hours and opportunities for academic or athletic development. Moreover, the cost of such care was less than half the cost of Lucinda's credible estimated cost for alternate childcare.

The court granted Lucinda's motion for attorney fees. The court explained that it was not doing so because Thayne's complaint to modify was frivolous; to the contrary, the court explained it appeared that Thayne had brought the complaint out of a credible concern for his minor children and that Lucinda took the complaint seriously enough to retain her own expert witness. The court further noted that DeLaet's evaluation, which appeared to be a factor in Thayne's motion to dismiss, was not available until approximately 1 month before Thayne filed his motion to dismiss.

The court considered Lucinda to be the prevailing party. The court noted that DeLaet's evaluation appeared to be one of the factors considered by Thayne in dismissing his complaint to modify. The court also took into consideration the fact that an earlier dismissal would have avoided significant cost.

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[1] *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979).

The court awarded Lucinda attorney fees in the amount of $3,500. The court also ordered, without additional explanation, that Thayne pay $2,500 toward Lucinda's expert's fees.

Thayne appeals.

III. ASSIGNMENTS OF ERROR

Thayne assigns that the district court erred in (1) ruling that extracurricular activity costs constituted daycare expenses, (2) awarding attorney fees to Lucinda after determining that Thayne's case was not frivolous and dismissal was preferable to proceeding to trial, and (3) awarding expert witness fees without finding exceptional circumstances warranting the stipulation.

IV. STANDARD OF REVIEW

[1] In an action involving 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.[2]

[2] In an action involving a marital dissolution decree, factual determinations as to childcare expenses incurred are reviewed de novo on the record for an abuse of discretion.[3]

V. ANALYSIS

1. Childcare Expenses

Thayne first argues that the district court erred in finding that the claimed expenses fall under the category of "daycare" or "childcare." Although contempt actions are the proper means to enforce a prior court order, including a child support

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

[3] See, *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995), *overruled in part on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010); *Hoover v. Hoover*, 2 Neb. App. 239, 508 N.W.2d 316 (1993).

decree,[4] Thayne does not take issue with how Lucinda's complaint was denominated.

Thayne points out that Neb. Rev. Stat. § 42-364.17 (Reissue 2016) provides:

> A decree of dissolution, legal separation, or order establishing paternity shall incorporate financial arrangements for each party's responsibility for reasonable and necessary medical, dental, and eye care, medical reimbursements, day care, extracurricular activity, education, and other extraordinary expenses of the child and calculation of child support obligations.

Thayne argues that because "day care," "extracurricular activity," and "education" are listed separately in § 42-364.17, they are necessarily distinct concepts. He argues that if Lucinda wished to be reimbursed for what were in reality extracurricular activities or education, she should have filed a complaint for modification of the decree.

Neb. Rev. Stat. § 42-364.16 (Reissue 2016) states that child support shall be established in accordance with guidelines provided by the rules of the Supreme Court, unless one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order. Under § 4-214 of the Nebraska Child Support Guidelines, the relevant terminology is "[c]are expenses for the child":

> *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 (worksheet 1, line 6) and shall be

[4] See Neb. Rev. Stat. § 42-358(2) (Reissue 2016). See, also, e.g., *State on behalf of Mariah B. & Renee B. v. Kyle B.*, 298 Neb. 759, 906 N.W.2d 17 (2018).

> added to the basic support obligation computed under these guidelines.

(Emphasis supplied.) We find this terminology to be interchangeable with the term "day care" utilized in § 42-364.17 and in the custody decree here at issue.

This is the first time our court has addressed whether camps, lessons, and supervised activities can be considered childcare expenses allocated as part of a decree of child support. Under similar guidelines in other states, camps and other supervised activities are considered childcare expenses when they provide supervision for a child in need of care during the custodial parent's employment or educational training.[5] The basic requirements for such expenses to be considered childcare or daycare are that they be work- or education-related and reasonable.[6]

Thus, the court in *Marriage of Mattson*[7] held that the trial court did not abuse its discretion in ordering the noncustodial parent to pay a share of YMCA; soccer; basketball; and music, art, and drama camps, as well as other day activities, on the grounds that they were reasonable and necessary "daycare expenses" during school breaks. The court explained that while the statutory scheme did not define daycare expenses or provide guidelines for determining what types of expenses are reasonable and necessary, it must interpret the language of the statute consistent with the overall purpose of the statutory framework of preventing a harmful reduction in the child's standard of living and to allocate parental responsibilities in

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[5] See, *Simpson v. Simpson*, 650 N.E.2d 333 (Ind. App. 1995); *Trausch-Azar v. Trausch*, 983 S.W.2d 199 (Mo. App. 1998); *In re Arabian*, 151 N.H. 109, 855 A.2d 560 (2004); *Micciche v. Micciche*, 62 A.D.3d 673, 879 N.Y.S.2d 502 (2009); *Marriage of Mattson*, 95 Wash. App. 592, 976 P.2d 157 (1999); Laura W. Morgan, *Summer Camp Expenses and Child Support Guidelines*, 17 No. 3 Divorce Litig. 47 (Mar. 2005).

[6] See Laura W. Morgan, Child Support Guidelines: Interpretation and Application § 7.02 (2d ed. 2018).

[7] *Marriage of Mattson, supra* note 5, 95 Wash. App. at 602, 976 P.2d at 163.

accordance with the child's best interests. The court noted that although the children were 11 and 13 years of age, "[e]ven if their physical health and maturity might enable them to avoid harm without an adult present, complete lack of adult supervision during school vacations would not be in their best interests."[8]

The court in *Simpson v. Simpson*[9] similarly affirmed the district court's order requiring the noncustodial parent to pay a share of summer camp expenses for his 14-year-old child, despite his contention that the child could care for herself and even babysit others. The court noted that the child support guidelines did not set forth a specific age as to when childcare expenses are unnecessary and therefore unreasonable and that the determination of whether the expenses are necessary and reasonable rests in the sound discretion of the trial court.[10]

[3] We have repeatedly held that the paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.[11] We find no merit to Thayne's argument that because the Legislature listed in § 42-364.17 "day care," "extracurricular activity," and "education" separately, these are necessarily mutually exclusive concepts. Indeed, this court is hard pressed to imagine childcare that does not entail some educational or activity component, and the hard-line definition Thayne suggests is contrary to the flexible, fact-specific inquiries that otherwise govern child support.[12] We hold that supervision of children in the form of day camps, lessons, or activities may

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[8] *Id.* at 600-01, 976 P.2d at 162. See, also, *Price v. Price*, 205 W. Va. 252, 517 S.E.2d 485 (1999).

[9] *Simpson v. Simpson, supra* note 5.

[10] See *id.*

[11] See, e.g., *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009); *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

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

under the circumstances constitute childcare so long as such supervision is reasonable, in the child's best interests, and necessary due to employment or for education or training to obtain a job or enhance earning potential.

[4] We review factual determinations as to childcare expenses incurred de novo on the record for an abuse of discretion.[13] 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.[14] As to the majority of the expenses found compensable by the district court, we find no such abuse of discretion.

The district court did not abuse its discretion in determining in light of the children's best interests that the expenses incurred for day camps, activities, lessons, sitters, and transportation constituted reasonable and necessary care while Lucinda was at work. There was no evidence that Thayne had objected to the particular nature of the camps, activities, and lessons chosen by Lucinda in order to provide supervision and care while she was at work. The camps, activities, lessons, sitter services, and transportation, occurred while Lucinda was at work. Lucinda explained that it was not suitable for the children to be home by themselves during the entire time she was at work. Thayne's counsel conceded at oral arguments that but for the camps, lessons, activities, sitters, and transportation, the children would have been supervised at a traditional daycare facility. Lucinda provided undisputed evidence that care at such a traditional daycare facility would have been more costly. Thus, we affirm the district court's finding that the

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[13] See, *McCullough v. McCullough, supra* note 3; *Robbins v. Robbins, supra* note 3; *Hoover v. Hoover, supra* note 3. See, also, *Simpson v. Simpson, supra* note 5; *Trausch-Azar v. Trausch, supra* note 5; *In re Arabian, supra* note 5; *Micciche v. Micciche, supra* note 5; *Marriage of Mattson, supra* note 5; Morgan, *supra* note 5; Morgan, *supra* note 6.

[14] *Armkneckt v. Armkneckt*, 300 Neb. 870, 916 N.W.2d 581 (2018).

expenses for day camps, lessons, activities, sitters, and transportation were "[c]are expenses for the child" under § 4-214 or "day care" expenses under § 42-364.17 that Thayne had an obligation under the dissolution decree to pay.

But we find that the court's decision categorizing the overnight camps as work-related childcare was untenable. Though Lucinda sought only a portion of the total cost of those camps, most of the time spent in the overnight camps were not hours that Lucinda was working. The fees for such camps cannot be broken down by the hour. We have found no other court that considers overnight camps amenable to being considered work- or education-related childcare when the parent works only 8 hours per day. Furthermore, while not controlling, we note that overnight camps are not considered work-related childcare expenses for purposes of the federal child and dependent care tax credit.[15] Overnight camps might be appropriately specified as a shared expense in a support order, but the wording of the order here at issue did not put Thayne on notice that he would be responsible for overnight camps as "work related daycare expense[s]."

Therefore, we affirm the district court's order regarding childcare expenses with the exception of its apportionment of the costs of overnight camps, which we vacate as an abuse of discretion. We modify the award of $1,394.35 by deducting the $117.63 attributable to overnight camps. The amount of childcare owed shall thus be $1,276.72.

2. Expert Fees

[5,6] Next, Thayne argues that the district court should have honored the stipulation voluntarily entered into between the parties that they would each pay the fees of their respective experts. We agree. Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of

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[15] See U.S. Dept. of Treas., I.R.S. Publication 503, cat. No. 15004M, Child and Dependent Care Expenses (Dec. 19, 2017).

their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.[16] Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo.[17]

[7] As in other matters involving dissolution decrees, a court's decision whether to approve and honor a stipulation is reviewed de novo on the record for an abuse of discretion.[18] But the district court failed to make any finding of good cause or other reasoning as to why it chose not to enforce the stipulation. Lucinda argues that such finding was implicit and that she demonstrated exceptional circumstances, specifically, that Thayne's last-minute voluntary dismissal of his complaint rendered her expert unnecessary, but the district court found that the expert's report was likely instrumental in Thayne's decision to dismiss the complaint.

Furthermore, the district court explicitly found that the complaint that prompted the expert evaluations was not frivolous and that the last-minute voluntary dismissal was not in bad faith. The parties acted in reliance upon the stipulation that had been approved by the court, each hiring their own expert. There was at the time of the February 21, 2017, order no means to return the parties to the status quo. Finally, there was no evidence that any portion of DeLaet's fees were incurred as a result of circumstances that were different than those present when the parties stipulated to pay their own expert fees.

There was simply no evidence by which the court could have found good cause for disregarding the stipulation and concluding that honoring the parties' stipulation would be

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[16] *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972).

[17] *Id.*

[18] See, *McCullough v. McCullough, supra* note 3; *Garza v. Garza, supra* note 2.

contrary to good morals or sound public policy. Thus, the court's award of a portion of the expert fees incurred, against the stipulated agreement expressly approved by the court stating that each party would be responsible for the fees of their own experts, was an abuse of discretion. We vacate the portion of the district court's order that awarded $2,500 in expert witness fees.

3. Attorney Fees

Lastly, Thayne asserts that the court erred in awarding Lucinda attorney fees in the amount of $3,500. Thayne argues that attorney fees were inappropriate because he voluntarily dismissed his complaint, which was brought in good faith. Lucinda does not cross-appeal the amount of the attorney fees awarded.

[8] 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.[19] Attorney fees shall be awarded against a party who alleged a claim or defense that the court determined was frivolous, interposed any part of the action solely for delay or harassment, or unnecessarily expanded the proceeding by other improper conduct.[20] Additionally, in dissolution cases, as a matter of custom, attorney fees and costs are awarded to prevailing parties.[21] Finally, a uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.[22]

Thus, the fact that Thayne's complaint was not frivolous or maintained in bad faith did not prevent the court from awarding attorney fees.

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[19] *Garza v. Garza, supra* note 2.

[20] See Neb. Rev. Stat. § 25-824 (Reissue 2016).

[21] See, e.g., *Garza v. Garza, supra* note 2; *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

[22] *Garza v. Garza, supra* note 2.

[9] In an action involving 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.[23] In awarding attorney fees in a dissolution action, a court shall 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.[24]

The district court found that Lucinda was the prevailing party. Although Thayne voluntarily dismissed his complaint to modify, Lucinda prevailed in her complaint to enforce the dissolution decree in relation to childcare expenses. Lucinda presented an affidavit by her attorney outlining over $11,000 in attorney fees and costs. We find no abuse of discretion in the award of $3,500 in attorney fees.

VI. CONCLUSION

For the foregoing reasons, we affirm the February 21, 2018, order as modified and vacate the awards of $2,500 in expert witness fees and $117.63 in overnight camp expenses. The modified order awards $1,276.72 in childcare expenses and $3,500 in attorney fees.

Affirmed in part as modified, and in part vacated.

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[23] See *id.*

[24] *Id.*

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

State of Nebraska ex rel. Douglas J. Peterson, Attorney General, appellee, v. Creative Community Promotions, LLC, and Joel Bieschke, appellants.

924 N.W.2d 664

Filed March 22, 2019. No. S-18-321.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Attorney Fees: Appeal and Error.** A trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
4. **Summary Judgment: Appeal and Error.** After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.

Appeal from the District Court for Buffalo County: John H. Marsh, Judge. Affirmed in part, and in part dismissed.

Siegfried H. Brauer for appellants.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Papik, J.

After years of litigation, the State of Nebraska voluntarily dismissed claims it had asserted under Nebraska's Consumer Protection Act and the Uniform Deceptive Trade Practices Act against Creative Community Promotions, LLC, and its owner and operator, Joel Bieschke (collectively CCP). CCP claimed that after the State's dismissal, it was entitled to attorney fees under those statutes. The district court denied CCP's request for attorney fees, and CCP now appeals. Because both statutes authorize an award of attorney fees only to a "prevailing party" and because we find that CCP does not qualify as such, we affirm, in part. We also find that we lack jurisdiction to review orders vacating summary judgment in favor of CCP and overruling CCP's subsequent motion for summary judgment and therefore dismiss, in part.

BACKGROUND

Allegations of Parties.

The State of Nebraska commenced this action against CCP in September 2014. It alleged that CCP promoted and sold ticket packages to a January 2014 concert in Omaha, Nebraska. The ticket packages were to include transportation from various locations in Nebraska to Omaha, accommodations in Omaha, meals, and a concert ticket. The State alleged, however, that CCP did not secure all the necessary tickets to the concert and that many purchasers traveled to Omaha, only to learn they did not have concert tickets. The State alleged that while attempts were made to secure seating, many purchasers missed part of the concert, had to stand for portions of it, or were unable to watch the concert altogether. Based on these allegations, the State asserted claims under Nebraska's Consumer Protection Act (hereinafter CPA), see Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2010 & Cum. Supp. 2018), and the Uniform Deceptive Trade Practices Act (hereinafter UDTPA), see Neb. Rev. Stat. § 87-301 et seq. (Reissue 2014 & Cum. Supp. 2018).

CCP generally denied the State's allegations. Additionally, CCP contended that Bieschke had made arrangements to purchase tickets to the concert from an individual who obtained and resold entertainment tickets, but that the individual failed to provide the tickets. CCP contended that there had been no violation of the CPA or the UDTPA. In its answer, it asked that the State's action be dismissed and that CCP be awarded attorney fees.

Procedural History.

The parties proceeded to litigate the case and encountered various twists and turns along the way. Notably, in October 2015, the district court entered summary judgment in favor of CCP. In a written order, the court explained that the evidence demonstrated that CCP intended to provide the tickets to its customers and thus did not violate the CPA or the UDTPA. Shortly thereafter, CCP filed a "Motion for Statutory Attorneys Fees," in which it claimed a right to attorney fees under §§ 59-1608 and 87-303.

Before CCP's attorney fees motion was heard and ruled upon, however, the State moved for reconsideration of the summary judgment order. On April 1, 2016, the State's motion was granted in a written order. The district court stated that after reviewing its prior order, it determined that it had failed to draw all inferences in favor of the State as the nonmoving party. Finding that summary judgment was inappropriate, the district court vacated its prior order of summary judgment in favor of CCP.

With the court's previous summary judgment order vacated, the parties returned to the litigation battlefield. CCP moved for summary judgment again and this time was unsuccessful. CCP later filed a document styled as a "Motion to Dismiss," and it, too, was unsuccessful.

Finally, on January 10, 2018, more than 3 years after it initiated the action, the State filed a notice of voluntary dismissal. The State asserted that it was "voluntarily dismiss[ing] the

above captioned matter with prejudice." In the notice, the State specified that it had determined that settlement was "impossible" and that any financial recovery for Nebraska consumers was "extremely unlikely." The notice concluded as follows: "As such, the [State] has made a determination that its limited resources can be spent more effectively on other matters than by pursuing this case further and respectfully requests that prejudice attach to this dismissal."

One week later, on January 17, 2018, CCP filed a notice of hearing regarding its motion for statutory attorney fees. The district court proceeded to hold a hearing on the matter and received briefs from the parties regarding whether CCP was entitled to attorney fees. In a subsequent written order, the district court concluded that it had jurisdiction to decide CCP's claim for attorney fees notwithstanding the State's voluntary dismissal. The district court went on to conclude, however, that CCP was not entitled to attorney fees under either the CPA or the UDTPA. It found that the UDTPA authorizes an award of attorney fees only if "the party complaining of a deceptive trade practice has brought an action which he knew to be groundless" and that CCP was not entitled to attorney fees under the UDTPA, because the State's action was not "groundless." The district court found that CCP was not entitled to attorney fees under the CPA, because the CPA authorizes the award of attorney fees only to a "prevailing party," § 59-1608(1), and it found that the State's voluntary dismissal did not make CCP a prevailing party for purposes of the statute.

ASSIGNMENTS OF ERROR

CCP assigns a number of errors, which can be consolidated and restated into three: (1) that the district court erred in vacating its entry of summary judgment in favor of CCP, (2) that the district court erred in denying CCP's second motion for summary judgment, and (3) that the district court erred in not awarding attorney fees to CCP under the UDTPA and the CPA.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Millard Gutter Co. v. American Family Ins. Co.*, 300 Neb. 466, 915 N.W.2d 58 (2018).

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

[3] A trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *State ex rel. Stenberg v. Consumer's Choice Foods*, 276 Neb. 481, 755 N.W.2d 583 (2008).

ANALYSIS

CCP's Challenges to District Court's Summary Judgment Rulings.

We begin by addressing CCP's challenges to the district court's summary judgment rulings. As noted above, CCP challenges both the district court's order vacating its prior summary judgment in favor of CCP and its later order denying CCP's motion for summary judgment. We conclude we lack jurisdiction to address either issue.

We have held that both the denial of a motion for summary judgment and an order vacating a previous entry of summary judgment are interlocutory rather than final orders and thus not immediately appealable. See, e.g., *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999) (collecting cases holding that denial of motion for summary judgment is interlocutory and not final order); *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960) (holding that order vacating summary judgment was interlocutory and not final order). See, also, *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016) (holding that order vacating dismissal and reinstating case did not affect substantial right and was thus not appealable). CCP thus could not obtain review of

the district court's summary judgment orders at the time they were entered.

[4] We have further observed that denials of summary judgment are not appealable or reviewable even after the conclusion of a case. See *Doe v. Zedek, supra*. As we have explained, after trial, "the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment." *Id.* at 969, 587 N.W.2d at 890. While we do not appear to have previously confronted the same question concerning an order vacating a prior grant of summary judgment, the same rationale would seem to suggest that review of such an order is also unavailable at the conclusion of a case.

We recognize that under the circumstances of this case, the State's voluntary dismissal prevented a "fully developed record" from being formed, but we do not believe that makes the earlier summary judgment orders reviewable. For while a record was not developed, neither is there a merits determination for us to make on appeal. The State exercised its right to voluntarily dismiss its claims, and while CCP insisted that the district court take up its motion for attorney fees, an issue we discuss in more detail below, it did not otherwise object to the voluntary dismissal. The dismissal thus ended the controversy on the State's claims, and they are no longer subject to appellate review. See *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999).

CCP's Motion for Attorney Fees: Jurisdiction.

We now turn to CCP's argument that the district court erred by denying its motion for attorney fees. And again, we are confronted with a jurisdictional issue. Here, the State argues that once it exercised its right to voluntarily dismiss its claims, the district court was without power to consider CCP's motion for attorney fees. The State argues that because the district court was without jurisdiction to award attorney

fees, we are without jurisdiction to consider CCP's entitlement to attorney fees on appeal. We disagree for reasons explained below.

The State claims it had a right to voluntarily dismiss its claims and thereby terminate the district court's jurisdiction. We have recognized, however, that even when the plaintiff has the right to dismiss an action, trial courts have discretion to protect rights which "have accrued to [a] defendant as a result of the bringing of the action, such as the preservation of a counterclaim, the restitution of property of which he has been deprived, the recovery of his costs, and the like." See *Blue River Power Co. v. Hronik*, 116 Neb. 405, 413, 217 N.W. 604, 607 (1928). See, also, *Millard Gutter Co. v. American Family Ins. Co.*, 300 Neb. 466, 915 N.W.2d 58 (2018); *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951).

CCP is claiming a right to attorney fees as a result of the State's having brought this action against it. Our case law generally treats attorney fees, where recoverable, as an element of court costs. See *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002). And as noted above, we have previously recognized that even when a plaintiff seeks voluntary dismissal, trial courts have discretion to protect rights of the defendant that accrued as a result of the bringing of the action, including the recovery of costs "and the like." For this reason, we believe the district court had the authority to consider CCP's claim that it was entitled to an award of attorney fees notwithstanding the State's voluntary dismissal.

We also observe that this case is not controlled by *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002), a case in which we held that a district court did not have jurisdiction to grant the defendant an award of attorney fees after the plaintiff voluntarily dismissed. In that case, however, at the time the plaintiff sought to voluntarily dismiss with prejudice, the defendant had no pending motion for attorney fees. Under those circumstances, we held that once the

court dismissed the action, "nothing remained for the court to decide." *Id.* at 980-81, 644 N.W.2d at 872.

The circumstances in this case are different from those in *Halford*. At the time the State sought to voluntarily dismiss, CCP had already filed a motion for attorney fees which had never been ruled upon. Because CCP claimed a right that the district court had the power to protect and because it had asserted that right prior to the State's notice of voluntary dismissal, the district court had the jurisdiction to consider CCP's claim for attorney fees.

CCP's Motion for Attorney Fees: Merits.

This leaves the merits of CCP's motion for attorney fees. CCP claims that the district court should have awarded it attorney fees pursuant to two different statutes, §§ 87-303(b) and 59-1608(1). Section 87-303(b) provides as follows:

> Costs shall be allowed to the prevailing party unless the court otherwise directs. The court in its discretion may award attorneys' fees to the prevailing party if (1) the party complaining of a deceptive trade practice has brought an action which he or she knew to be groundless or (2) the party charged with a deceptive trade practice has willfully engaged in the trade practice knowing it to be deceptive.

Similarly, § 59-1608(1) states:

> The Attorney General may bring an action in the name of the state against any person to restrain and prevent the doing of any act prohibited by the [CPA]. The prevailing party may, in the discretion of the court, recover the costs of such action including a reasonable attorney's fee.

Both statutes authorize the award of attorney fees only to a "prevailing party." We thus begin our analysis with whether CCP is a prevailing party. To answer that question, we must engage in statutory interpretation.

Our basic principles of statutory interpretation generally require us to give statutory language its plain and ordinary meaning. See *Village at North Platte v. Lincoln Cty. Bd. of Equal.*, 292 Neb. 533, 873 N.W.2d 201 (2016). As the U.S. Supreme Court has observed, however, "prevailing party" is a "legal term of art." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (*Buckhannon*).

A legal term of art is a word or phrase having a specific, precise meaning in a given specialty apart from its general meaning in ordinary contexts. See *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018). When legal terms of art are used in statutes, they are to be construed and understood according to their term of art meaning. See *Davis v. Gale*, 299 Neb. 377, 908 N.W.2d 618 (2018) (citing Neb. Rev. Stat. § 49-802(5) (Reissue 2010)). See, also, *Hammond v. Stamps.com, Inc.*, 844 F.3d 909, 911 (10th Cir. 2016) ("[w]hen Congress chooses to employ a term of legal art like this we typically assume it is employing its accepted meaning").

In *Buckhannon*, the case in which the U.S. Supreme Court identified "prevailing party" as a term of art, it also explored the contours of that meaning. It explained that a "prevailing party" is "one who has been awarded some relief by the court." *Id.*, 532 U.S. at 603. Applying that concept, the Court held that the plaintiff seeking attorney fees as a "prevailing party" under federal statutes in the case before it did not qualify. It explained that even though the defendant in that case voluntarily ceased the activity challenged by the plaintiff's suit, there was no "necessary judicial *imprimatur*" on the change in relationship. *Id.*, 532 U.S. at 605 (emphasis in original). We have subsequently relied on *Buckhannon* to hold that when a defendant voluntarily ceases conduct challenged by a plaintiff's suit without judicial involvement, the plaintiff does not

qualify as a "prevailing party" under 42 U.S.C. § 1988 (2012). See *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

Buckhannon, to be sure, involved different factual circumstances from the case at hand. In *Buckhannon*, the plaintiff brought suit, the defendant voluntarily changed its ways, and the case was dismissed as moot. Here, CCP defended itself and the State (eventually) dropped the suit. But while the circumstances are not exactly the same, they are alike in a crucial way. In both cases, one side surrendered and, as a result, the case concluded without any judicial determination as to whether the suit was meritorious. As *Buckhannon* explains, without such a judicial determination, there is no prevailing party. With this understanding of the term "prevailing party," it quickly becomes clear that CCP does not qualify in this case. The State chose to voluntarily dismiss its claims before any judicial determination could be made as to their merits.

We note that we are not the first court to rely on the understanding of prevailing party set forth in *Buckhannon* to conclude that a defendant does not qualify merely because a plaintiff voluntarily dismissed a suit with prejudice. See, e.g., *Bridgeport Music, Inc. v. London Music, U.K.*, 345 F. Supp. 2d 836 (M.D. Tenn. 2004); *Bryant v. MV Transp., Inc.*, 231 F.R.D. 480 (E.D. Va. 2005); *Smalley v. Account Services Collections, Inc.*, No. 2:15cv1488, 2017 WL 1092678 (W.D. Pa. Mar. 23, 2017) (memorandum opinion); *Righthaven LLC v. Hill*, No. 1:11-cv-00211-JLK, 2011 WL 4018105 (D. Colo. Sept. 9, 2011) (unpublished opinion). In each of these cases, courts found that because the dismissal did not involve a grant of judicial relief, the defendant was not a prevailing party.

We acknowledge other cases, some of which are cited by CCP, in which defendants were awarded attorney fees as a "prevailing party" after a voluntary dismissal with prejudice. But we believe those cases are not inconsistent with the result

we reach today. To take one illustrative example, in *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005), the Seventh Circuit found that a defendant was a prevailing party after the plaintiff voluntarily dismissed. In that case, however, the plaintiff filed a motion to dismiss, presumably under Fed. R. Civ. P. 41(a)(2), and *the trial court* decided the dismissal should be with prejudice. In doing so, the trial court placed its "judicial imprimatur" on the dismissal. See, also, *Highway Equipment Co., Inc. v. FECO, Ltd.*, 469 F.3d 1027 (Fed. Cir. 2006) (explaining that district court's exercise of discretion to grant dismissal with prejudice under Fed. R. Civ. P. 41(a)(2) constitutes necessary judicial imprimatur to confer prevailing party status); *Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 440 F. Supp. 2d 495 (E.D. Va. 2006) (same).

Unlike the cases discussed immediately above, the district court here did not order that the case be dismissed with prejudice or make any determination regarding the merits of the suit. In fact, the absence of any order from the district court dismissing the action with prejudice at least raises the question of whether the dismissal was, in fact, with prejudice. We recognize that the State's notice of dismissal purported to dismiss with prejudice, but it also invoked Neb. Rev. Stat. § 25-601 (Reissue 2016), a statute that refers only to dismissals without prejudice. It also requested that "prejudice attach to [its] dismissal," but the district court never took any action to indicate that the dismissal was, in fact, with prejudice. We need not, however, resolve the question of whether prejudice attached to the State's dismissal, because whether it was with or without prejudice, the district court did not find in favor of CCP on the merits or otherwise put its imprimatur on the outcome, and thus CCP was not a "prevailing party" under either § 87-303(b) or § 59-1608(1).

Because CCP was not a "prevailing party" under § 87-303(b) or § 59-1608(1) and because both of those statutes authorize the award of attorney fees only to a "prevailing party," we find

that the district court did not err in denying CCP's motion for attorney fees.

CONCLUSION

As explained above, we lack jurisdiction to review CCP's claim that the district court's summary judgment orders were erroneous. While we do have jurisdiction to review CCP's claim that the district court should have granted its motion for attorney fees, we find that the district court did not err in denying that motion. Accordingly, we dismiss the portion of the appeal seeking review of the court's summary judgment orders and otherwise affirm.

Affirmed in part, and in part dismissed.

Freudenberg, J., not participating.

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

Juan Martinez, appellee, v. CMR Construction & Roofing of Texas, LLC, defendant and third-party plaintiff, appellant, and Rene Menjivar and Texas Mutual Insurance Company, third-party defendants, appellees.

924 N.W.2d 326

Filed March 22, 2019. No. S-18-419.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. ____: ____. Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
4. **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.
5. **Workers' Compensation: Liability.** When a contractor fails to require a subcontractor to carry workers' compensation insurance and an employee of the latter sustains a job-related injury, the contractor is a statutory employer and, with the immediate employer subcontractor, is jointly and severally liable to pay compensation under the terms of the Nebraska Workers' Compensation Act.
6. **Workers' Compensation.** When determining a loss of earning capacity for an injured worker, the four factors to consider under Neb. Rev. Stat. § 48-121 (Reissue 2010) are the worker's (1) eligibility to procure

employment generally, (2) ability to earn wages, (3) ability to hold a job obtained, and (4) capacity to perform the work in the job in which the worker is engaged.

7. **Workers' Compensation: Words and Phrases.** A worker who, solely because of his or her injury, is unable to perform substantial amounts of labor, either in his or her particular line of work, or in any other for which he or she would be fitted except for the injury, is totally disabled within the meaning of the workers' compensation law.
8. **Final Orders: Appeal and Error.** 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.
9. **Workers' Compensation: Final Orders.** A workers' compensation case is a special proceeding.
10. **Final Orders: Appeal and Error.** A substantial right is an essential legal right, not a mere technical right. A substantial right is affected if the 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.
11. **Final Orders.** It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.
12. **Final Orders: Appeal and Error.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2016) is not affected when that right can be effectively vindicated in an appeal from the final judgment.
13. **Jurisdiction: States.** Specific personal jurisdiction requires that the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.
14. ____: ____. To exercise specific jurisdiction, the plaintiff's cause of action must arise out of, or be related to, the defendant's contacts with Nebraska.
15. ____: ____. In order to give rise to specific personal jurisdiction, 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.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed.

Benjamin E. Maxell, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellant.

James R. Walz for appellee Juan Martinez.

Jason W. Grams and Stacy L. Morris, of Lamson, Dugan & Murray, L.L.P., for appellee Texas Mutual Insurance Company.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

The Nebraska Workers' Compensation Court concluded that CMR Construction & Roofing of Texas, LLC (CMR), was a statutory employer under Neb. Rev. Stat. § 48-116 (Reissue 2010) of the Nebraska Workers' Compensation Act,[1] thus requiring it to compensate Juan Martinez for injuries sustained while acting as an employee of Rene Menjivar, a CMR subcontractor.

CMR challenges the compensation court's determination under § 48-116 of what constitutes the term "employer" and alleges the compensation court lacked personal jurisdiction over Texas Mutual Insurance Company (Texas Mutual), a workers' compensation insurance company domiciled and having its principal place of business in Texas. CMR also challenges the compensation court's findings regarding earning capacity, attorney fees, and entitlement to future medical care. We affirm.

BACKGROUND

CMR is engaged in the repair and replacement of the roofs of single family dwellings anywhere in the continental United States, corresponding to the aftermath of severe weather conditions. In 2014, CMR engaged Menjivar as a subcontractor and at that time, required Menjivar to produce workers' compensation insurance, which CMR verified. CMR further required Menjivar to add CMR to its workers' compensation policy and produce a certificate that demonstrated CMR would be notified

[1] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2010 & Cum. Supp. 2014).

by Menjivar's insurance carrier, Texas Mutual, before the cancellation or expiration of the policy.

CMR agreed to repair a residential roof in Omaha, Nebraska. CMR subsequently assigned the roofing project to Menjivar. On March 12, 2015, Martinez, employed by Menjivar, was working on the roof when he fell two stories and suffered significant injuries to his back, hip, and legs. Martinez was treated at various medical facilities in Omaha.

On December 11, 2015, Martinez initiated an action in the compensation court to recover for his injuries. Martinez moved for summary judgment, and in the course of litigating that motion, Martinez and CMR agreed that Menjivar previously possessed valid workers' compensation insurance through Texas Mutual, but that the policy of insurance was canceled on December 16, 2014, due to nonpayment.

On August 17, 2016, following a motion for summary judgment, the compensation court found that CMR was the statutory employer of Martinez. The court specifically noted in response to Martinez' third set of requests for admissions, that CMR admitted it had "created or carried into operation a 'scheme, artifice, or device' as contemplated by Neb. Rev. Stat. §48-116" to avoid employer liability. On September 6, CMR sought an interlocutory appeal seeking to reverse the employer determination, which on October 27, in case No. A-16-857, was summarily dismissed by the Nebraska Court of Appeals.

During the course of the workers' compensation proceedings, Texas Mutual sought to be dismissed from the suit on the basis that the court lacked personal jurisdiction over it. CMR offered the affidavit of its attorney in opposition to the motion to dismiss filed by Texas Mutual. That affidavit contained the policy of insurance between Menjivar and Texas Mutual, with CMR added as an additional insured. The policy of insurance shows that Texas Mutual's company office is in Austin, Texas, and further that Texas Mutual issued the policy to CMR, whose office was in Haltom City, Texas.

Evidence in the record demonstrates that Texas Mutual is a creation of the Texas Legislature as an insurer of last resort and does not provide insurance or do business in the State of Nebraska. The record further demonstrates that in item 3(A) of the policy procured in this case, Texas is the only state in which benefits of the workers' compensation insurance applies. The court found that the evidence offered by CMR failed to establish a prima facie case of personal jurisdiction.

Martinez also opposed Texas Mutual's motion to dismiss and offered exhibit 35, a workers' compensation insurance policy between Menjivar and Texas Mutual. Exhibit 35 showed that a policy of workers' compensation insurance was issued to Menjivar at an address in Houston, Texas. Texas Mutual's address was noted to be in Austin. The court again found that this exhibit did nothing to show the existence of any contacts between Texas Mutual and Nebraska.

The court noted that Texas Mutual had initiated a declaratory action in the State of Texas, asking a Texas court to determine whether the policy of workers' compensation insurance issued by Texas Mutual afforded coverage for the injuries suffered by Martinez. The compensation court ultimately found that Texas was the proper forum to decide a dispute between two Texas companies involving a policy of workers' compensation insurance that was issued in Texas, and it therefore granted Texas Mutual's motion to dismiss. On September 20, 2017, CMR filed a second interlocutory appeal with the Court of Appeals, seeking review of the trial court's finding that it lacked personal jurisdiction over Texas Mutual. On October 27, in case No. A-17-1020, the Court of Appeals dismissed the appeal without opinion.

On January 12, 2017, the compensation court held a hearing on Martinez' second motion for partial summary judgment, in which Martinez sought a finding and award of, among other things, attorney fees. On February 10, the compensation court entered partial summary judgment in favor of Martinez, finding that Martinez was entitled to "a reasonable attorney's fee

pursuant to Neb. Rev. Stat. § 48-125 for [CMR's] failure to pay the medical bill from [a medical center in Omaha] within thirty days of its receipt."

On February 13, 2018, the compensation court held a trial in this case. The court issued its award on March 23. During trial, the court resolved the outstanding issues of the nature and extent of the injuries Martinez suffered on March 12, 2015, the extent of Martinez' entitlement to temporary and permanent disability benefits, CMR's liability for medical bills incurred by Martinez, and Martinez' entitlement to an award of future medical care.

The court found that Martinez was entitled to temporary total disability benefits for the 3 months he was off work after the accident. The court relied on the opinion of the physician who treated Martinez' femur fracture, as well as the testimony of Martinez, to find that Martinez was temporarily totally disabled from and including March 12 through and including June 12, 2015, a period of 13.2857 weeks. The court found that Martinez was entitled to temporary total disability benefits at the weekly rate of $761, which was the maximum rate for injuries in 2015.

Finding insufficient evidence, the compensation court declined to award Martinez temporary partial disability benefits. The court found that Martinez had reached maximum medical improvement from all of his injuries on October 12, 2016. Relying on the testimony of Dr. Sunil Bansal, a physician who examined Martinez, the court further found that Martinez suffered permanent impairment to his whole body due to his neck, head, and back injuries.

Having considered all of the evidence, including the opinion of the agreed-upon vocational rehabilitation counselor, the court found that Martinez had suffered an 80-percent loss of earning capacity. Based upon that factual finding, the court found that Martinez was entitled to permanent partial disability benefits at the weekly rate of $613.34, starting June 13, 2015, and continuing for 286.7143 weeks.

CMR was ordered to pay a total of $52,980.58 in medical and physical therapy expenses. The court further found that Martinez was entitled to an award of future medical care for his neck injury only.

ASSIGNMENTS OF ERROR

CMR assigns, consolidated and restated, that the compensation court erred in (1) finding that CMR was the statutory employer of Martinez and that therefore CMR was liable for the payment of any awarded indemnity, medical, or other benefit to Martinez; (2) awarding Martinez an excessive loss of earning capacity; (3) finding that CMR was liable for the payment of attorney fees to Martinez for unpaid medical bills related to Martinez' injuries; (4) finding that Martinez is entitled to future medical care; and (5) finding that the court lacked personal jurisdiction over Texas Mutual.

STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award.[2]

[2,3] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[3] Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.[4]

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[2] See *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995). See, also, § 48-185.

[3] *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

[4] *Id.*

[4] 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.[5]

V. ANALYSIS

CMR's Liability for Martinez' Injuries.

CMR assigns that it was not liable for Martinez' injuries. CMR argues that it is not a statutory employer under § 48-116, because it had taken all requisite steps to ensure that Menjivar, its subcontractor, had proper workers' compensation coverage for its employees and therefore was excluded from the status of a statutory employer under § 48-116.

The Nebraska Workers' Compensation Act applies to every nonresident employer performing work in the state who employs one or more employees in the regular trade, business, profession, or vocation of such employer.[6] Workers' compensation coverage must be obtained from an insurance company licensed to provide workers' compensation coverage in Nebraska, unless the employer is authorized to self-insure workers' compensation liability under Nebraska law.[7] The record contains no cooperative agreements showing Nebraska was required to honor any workers' compensation coverage provided by state funds in other states.

In Nebraska, principal employers can be held jointly and severally liable with the immediate employer for uninsured injuries to the immediate employer's workers.[8] Section 48-116 provides:

> Any person, firm, or corporation creating or carrying into operation any scheme, artifice, or device to enable him or her, them, or it to execute work without being

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[5] *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

[6] § 48-106(1).

[7] § 48-106(6).

[8] See § 48-116.

> responsible to the workers for the provisions of the Nebraska Workers' Compensation Act shall be included in the term employer, and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of such act. This section, however, shall not be construed as applying to . . . a contractor, who, in good faith, lets to a subcontractor a portion of his or her contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to write such insurance in this state . . . .

The purpose of statutes such as § 48-116 is to protect employees of "irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, which has it within its power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers."[9] Another important reason for statutes like § 48-116 is to prevent evasion of compensation coverage by the subcontracting of the employer's normal work.[10]

[5] When a contractor fails to require a subcontractor to carry workers' compensation insurance and an employee of the latter sustains a job-related injury, the contractor is a statutory employer and, with the immediate employer subcontractor, is jointly and severally liable to pay compensation under the terms of the Nebraska Workers' Compensation Act.[11]

CMR argues that it does not qualify as a statutory employer, because it required its subcontractor, Menjivar, to obtain workers' compensation insurance. In support of this argument, CMR

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[9] 6 Arthur Larson et al., Larson's Workers' Compensation Law § 70.04 at 70-6 (2017).

[10] See *id.*

[11] See *Rogers v. Hansen*, 211 Neb. 132, 317 N.W.2d 905 (1982).

offered various affidavits, including that of both its comptroller and its general manager, showing that it required Menjivar to present valid workers' compensation insurance. Although CMR's comptroller verified that Menjivar had workers' compensation insurance in July 2014, the record lacks any indication that he checked the status of the policy immediately before commencing the roofing project in March 2015.

CMR did require that it be added as an additional insured on the Menjivar policy and that in the event the insurance policy was canceled before the expiration date of the policy, the insurance company, Texas Mutual, would provide notice to CMR. CMR's general manager indicated that it is a normal business practice of CMR to list the subcontractor's insurance policy expiration date next to its name on a project board. He noted that he and CMR's comptroller reviewed the subcontractor's listed insurance expiration date prior to allowing the subcontractor to begin work on the project. CMR contends that these steps are designed to require a subcontractor to carry workers' compensation insurance.

In arguing that it was exempt under § 48-116, CMR relies on the fact that it took the above-listed steps to require Menjivar to provide insurance. CMR contends that beyond merely incorporating the requirement into a contractual provision in the subcontractor agreement, an issue that we addressed in *Hiestand v. Ristau*,[12] CMR took the additional steps of verifying that a policy had been obtained, recording the expiration date of the policy, and requiring that CMR be added as an additional insured.

CMR's argument fails for three reasons. First, it is undisputed that CMR, in response to a request for admission from Martinez in regard to this action, affirmatively admitted that it had "created or carried into operation a 'scheme, artifice, or device' as contemplated by Neb. Rev. Stat. §48-116" to evade workers' compensation coverage requirements. This admission

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[12] *Hiestand v. Ristau*, 135 Neb. 881, 284 N.W. 756 (1939).

was noted by the compensation court, and under court rules, the result in this case cannot be avoided. Under Neb. Ct. R. Disc. § 6-336(b), "[a]ny matter admitted under this rule is conclusively established . . . ." Therefore, we must treat CMR's admission that it "created or carried into operation a 'scheme, artifice, or device' as contemplated by Neb. Rev. Stat. §48-116" as conclusively established.

Second, even if we were to disregard such an admission, it is clear from the record that CMR is Martinez' statutory employer. The record demonstrates that CMR engaged in a contractual relationship by agreeing to the roof repair project. Had CMR completed the work itself, it would have been required to provide workers' compensation insurance under the Nebraska Workers' Compensation Act. However, CMR subcontracted the roof project to Menjivar, a subcontractor with whom CMR had an established relationship.

The record indicates that CMR confirmed Menjivar had workers' compensation insurance in July 2014 and that it made an attempt to ensure that it would be made aware of the cancellation of such insurance. But the record also indicates that Menjivar's policy with Texas Mutual was nevertheless canceled without notice being provided to CMR and that CMR did not verify the status of the policy before beginning the work in March 2015. Hence, CMR failed to meet its § 48-116 obligations.

Third, the record shows that Texas Mutual was never authorized by the compensation court, pursuant to § 48-146, to issue insurance for workers' compensation purposes in Nebraska. As Texas Mutual contended, the record shows that the Texas Mutual policy provided coverage for workers' compensation benefits for individuals injured only in the State of Texas. Further, the certificate provided by Texas Mutual specifically denoted the word "NONE" under the section identifying states where the coverage would extend.

According to the affidavit of the senior manager of corporate underwriting at Texas Mutual, Texas Mutual is not

authorized to provide workers' compensation insurance in any jurisdiction other than Texas. Further, the policy specifically states that "[t]his policy does not provide 'other states' insurance coverage."

Even if Menjivar had not allowed his insurance with Texas Mutual to be canceled, under Nebraska law, Menjivar—and in turn CMR—would still have been jointly and severally liable for compensating injured employees, because Menjivar was executing work without being responsible to the workers for the provisions of the Nebraska Workers' Compensation Act. Specifically, under the workers' compensation statutes, Menjivar was engaging in covered work that required the insurer to be authorized to transact the business of workers' compensation insurance in this state.[13] The failure of CMR to follow the laws of this state with regard to workers' compensation means that CMR fell well short of requiring its subcontractor to carry valid workers' compensation insurance.

The decision of the compensation court finding that CMR was the statutory employer of Martinez is correct. As the statutory employer, CMR is subject to all the provisions of the Nebraska Workers' Compensation Act with regard to Martinez' March 12, 2015, work accident, and is jointly and severally liable to pay the compensation provided for thereunder.

CMR's Claim of Excessive Earning Capacity.

CMR next assigns that the court erred in the amount of its award for loss of earning capacity. CMR grounds this argument on the fact that because Martinez "worked in similar, albeit lighter, jobs and earned equal or similar wages," he does not qualify as being 80 percent disabled.[14]

A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that

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[13] See § 48-146.

[14] Brief for appellant at 23.

(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 judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award.[15]

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[16] However, findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.[17]

[6] We held in *Sidel v. Travelers Ins. Co.*[18] that when determining a loss of earning capacity for an injured worker, the four factors to consider under § 48-121 are the worker's (1) eligibility to procure employment generally, (2) ability to earn wages, (3) ability to hold a job obtained, and (4) capacity to perform the work in the job in which the worker is engaged.

Having found that Martinez had reached maximum medical improvement, the court assessed Martinez' permanent disability. The court found that neck, head, and back injuries like those suffered by Martinez in this case were injuries to the body as a whole under § 48-121(2) and (3). For permanent partial disability purposes, injuries to the body as a whole are compensated based upon a loss of earning capacity.[19] The court noted that evidence of permanent impairment or permanent physical restrictions was sufficient to establish a permanent medical impairment for purposes of determining loss of earning capacity.

Bansal, Martinez' medical expert, opined that Martinez had both permanent impairment and permanent restrictions. The

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[15] *Buckingham v. Creighton University, supra* note 2. See, also, § 48-185.

[16] *Hull v. Aetna Ins. Co., supra* note 3.

[17] *Id.*

[18] See *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980).

[19] *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990).

court noted that Martinez underwent a functional capacity evaluation documenting that he could work only in the light demand category. A physician hired by CMR to conduct a review of Martinez' medical records opined that Martinez did not suffer permanent impairment and that he required no work restrictions for his whole body injuries. The court noted that CMR's expert found Martinez had suffered a l5-percent impairment to his left leg as a result of his left leg fractures. But the court then found, based on Bansal's opinion, that Martinez suffered permanent impairment to his whole body due to his neck, head, and back injuries.

The court noted that the vocational rehabilitation counselor found Martinez was 100 percent disabled. However, it conducted a thorough analysis of the factual circumstances and applied the four factors of *Sidel* noted above to determine that Martinez was only 80 percent disabled. The court then noted that Martinez continued to work as a roofer, did many of the job duties of a roofer, and was paid basically the same wages he earned at the time of his injury. Based upon these facts, the court found that Martinez can and does work as a roofer, which is his only past form of employment. The court noted that there were certainly jobs that Martinez could no longer perform and accordingly determined that Martinez was 80 percent disabled.

[7] We have previously noted that a worker who, solely because of his or her injury, is unable to perform substantial amounts of labor, either in his or her particular line of work, or in any other for which he or she would be fitted except for the injury, is totally disabled within the meaning of the workers' compensation law.[20] Here, Martinez is working in the same field as when he was injured; however, he is now limited in his ability to perform tasks, which CMR readily admitted at oral argument by stating that Martinez performs "albeit lighter [work]."

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[20] *Craig v. American Community Stores Corp.*, 205 Neb. 286, 287 N.W.2d 426 (1980).

We hold that the compensation court's findings of fact were not clearly erroneous and that its ultimate conclusions of law were supported by competent evidence. Therefore, CMR's second assignment of error is without merit.

Award of Attorney Fees.

CMR assigns that the compensation court erred in awarding Martinez attorney fees. CMR claims that there was a reasonable controversy with regard to CMR's status as a statutory employer, CMR's liability, and the court's determination that Martinez suffered an 80-percent loss of earning capacity and that the award of fees was therefore erroneous. Meanwhile, Martinez argues that we lack jurisdiction to address this issue; he contends that the compensation court's February 10, 2017, order regarding the second motion for partial summary judgment and attorney fees was a final and appealable order, because a benefit in the form of the fees had been conferred and CMR failed to appeal from that benefit.

Martinez' assertion regarding this court's jurisdiction is rooted in our decision in *Jacobitz v. Aurora Co-op*.[21] In *Jacobitz*, we held that a compensation court's finding of a compensable injury, or its rejection of an affirmative defense without a determination of benefits, was not an appealable order that affected an employer's substantial right in a special proceeding.

Martinez argues that under *Jacobitz*, the trial court's award of attorney fees conferred a benefit affecting a substantial right for CMR and was therefore a final appealable order from which CMR failed to appeal at the time it appealed from the February 10, 2017, order for partial summary judgment. The Court of Appeals dismissed CMR's second appeal on October 26, 2017, noting that it lacked jurisdiction.

[8] CMR could have appealed from the award of attorney fees at the time the fees were ordered only if the order awarding fees was final. Under Neb. Rev. Stat. § 25-1902 (Reissue

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[21] *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

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.

[9] The requests for fees and the orders granting such fees in this case were made pursuant to § 48-125, which is contained within the workers' compensation statutes. It is well settled that a workers' compensation case is a "special proceeding."[22] Accordingly, we examine the February 10, 2017, order granting Martinez' request for attorney fees to determine if such order affected a substantial right made in this special proceeding.

[10-12] We have held:

> "A substantial right is an essential legal right, not a mere technical right. . . . A substantial right is affected if the 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."[23]

Moreover, it is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[24] And a substantial right under § 25-1902 is not affected when that right can be effectively vindicated in an appeal from the final judgment.[25] There is nothing here to suggest that the award of attorney fees cannot be effectively vindicated on appeal to this court.

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[22] *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 329, 603 N.W.2d 368, 372 (1999).

[23] *Id.*

[24] *In re Estate of Abbott-Ochsner*, 299 Neb. 596, 910 N.W.2d 504 (2018).

[25] *Id.*

In this case, the award of attorney fees does not affect the subject matter of the litigation. Nor can it be said that the award of attorney fees affected the substantive rights of the parties. Rather, the attorney fees are closer to rules that regulate the conduct of employers or affect the remedy available.[26] We conclude that the order granting fees was not final at the time it was issued.

Having established that CMR could not have raised this issue in its interlocutory appeal to the Court of Appeals, we find that we have jurisdiction over this matter and turn to the compensation court's award of attorney fees. With regard to attorney fees, a judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award.[27]

Section 48-125 provides:

> Whenever the employer refuses payment of compensation or medical payments . . . for thirty days after injury or neglects to pay medical payments . . . after thirty days' notice has been given of the obligation for medical payments, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award.

We note that a statutory attorney fee provision is designed to encourage private action to vindicate the rights granted by

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[26] See *Midwest Grain Products v. Productization*, 228 F.3d 784 (7th Cir. 2000). See, also, *Furstenfeld v. Pepin*, 23 Neb. App. 673, 875 N.W.2d 468 (2016); *Frederick v. Seeba*, 16 Neb. App. 373, 745 N.W.2d 342 (2008).

[27] *Buckingham v. Creighton University, supra* note 2.

the statutory scheme.[28] Thus, the purpose of § 48-125 is to provide an incentive to employers to pay the claims of injured workers in a timely manner in order to prevent additional cost to the employee accruing from litigation or late payment of fees and interest.

CMR points to the trial court's determination that CMR was the statutory employer of Martinez and in turn argues that where reasonable controversy exists between an employer and an employee as to the employer's liability, the employer is not liable for a penalty for waiting time or for allowance of attorney fees. This case, however, does not present such a controversy.

Here, the compensation court determined that no reasonable controversy existed as to CMR's status as a statutory employer or its liability as such an employer. This result is evident, because even if CMR's policy had not been canceled prior to the commencement of work in March, Texas Mutual was not authorized to operate as an insurance carrier providing workers' compensation insurance in this state and, therefore, the policy did not meet the requirements under the Nebraska Workers' Compensation Act.

Further, as we have already noted, CMR, in providing answers to Martinez' request for admissions, conceded that it "created or carried into operation a 'scheme, artifice, or device' as contemplated by Neb. Rev. Stat. §48-116" in order to avoid the requirement to maintain workers' compensation insurance.

To deny fees in such a situation would shift the cost of litigation onto the prevailing injured worker in a case involving no reasonable controversy. Such a result would frustrate the design and purpose of workers' compensation and encourage unscrupulous employers to litigate every claim for workers' compensation in an attempt to avoid their statutorily prescribed responsibility.

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[28] *Black v. Brooks*, 285 Neb. 440, 827 N.W.2d 256 (2013).

CMR's assignment of error regarding attorney fees is without merit.

Martinez' Entitlement to Future Medical Care.

CMR assigned that the compensation court erred in finding that Martinez was entitled to future medical care, but argues only that "Martinez has clearly reached maximum medical improvement from his injuries, and is able to secure and hold gainful employment; the exact same employment that Martinez held prior to his injury."[29]

We address this issue with an eye toward our standard of review in workers' compensation cases, recognizing that a judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award.[30]

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[31] However, findings of fact made by the compensation court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.[32]

Under § 48-120(1)(a), "[t]he employer is liable for *all* reasonable medical, surgical, and hospital services . . . ." (Emphasis supplied.) The Court of Appeals has noted that before an order for future medical benefits may be entered pursuant to § 48-120(1)(a), there must be explicit evidence that

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[29] Brief for appellant at 25-26.

[30] *Buckingham v. Creighton University, supra* note 2. See, also, § 48-185.

[31] *Hull v. Aetna Ins. Co., supra* note 3.

[32] *Id.*

future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury.[33]

Here, the district court found that Martinez had met his burden of proof and persuasion on this issue. The court relied on Bansal's opinion, which was that Martinez will need epidural steroid injections, physical therapy, a transcutaneous electrical nerve stimulation or "TENS" unit, and an evaluation with a pain specialist for his neck. The court found that Martinez was entitled to an award of future medical care only for his neck injury. The court noted that Martinez was not entitled to future medical care for any of his other injuries, because no doctor recommended additional care for those injuries.

CMR asserts that Martinez' return to work prevents him from obtaining an award for future medical care. This assertion is incorrect: § 48-120(1)(a) provides in pertinent part that "[t]he 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 . . . ." (Emphasis supplied.) The Legislature's use of the word "or," in the context of § 48-120, indicates that the employer is liable for reasonable medical expenses to both relieve pain and promote and hasten the restoration of health and employment.

In light of our standard of review, we find that CMR's assignment of error is without merit.

Personal Jurisdiction Over Texas Mutual.

Finally, CMR assigns that the court erred in dismissing Texas Mutual for lack of personal jurisdiction.

An appellate court examines the question of whether the nonmoving party has established a prima facie case of personal

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[33] *Adams v. Cargill Meat Solutions*, 17 Neb. App. 708, 774 N.W.2d 761 (2009).

jurisdiction de novo.[34] 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.[35]

In order for the compensation court to bind Texas Mutual to its decision, the court must have personal jurisdiction. There are two types of personal jurisdiction that courts may assert over a defendant: general personal jurisdiction and specific personal jurisdiction.

[13-15] A court has general jurisdiction over a party when the party's contact with the forum is so extensive as to be continuous and systematic, such that the defendant would be "'essentially at home'" in the court's jurisdiction.[36] Specific personal jurisdiction requires that "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[37] To exercise specific jurisdiction, the plaintiff's cause of action must arise out of, or be related to, the defendant's contacts with Nebraska.[38] In regard to the activities giving rise to specific personal jurisdiction, the U.S. Supreme Court has stated that "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there."[39]

As noted by the parties, the facts of this case clearly do not give rise to general jurisdiction. Therefore, our discussion turns to whether Texas Mutual purposefully availed itself of

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[34] *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014).

[35] *Id.*

[36] *Daimler AG v. Bauman*, 571 U.S. 117, 127, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

[37] *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

[38] *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013).

[39] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

the privilege of conducting activities within this state, thus invoking the benefits and protections of its laws giving rise to specific personal jurisdiction.

CMR argues that Texas Mutual availed itself of Nebraska law when it entered into an insurance contract with a business it knew operated across state lines. CMR relies on the language contained in the liability policy under the section entitled, "Limited Reimbursement for Texas Employees Injured in Other Jurisdictions." However, the information page addressed to CMR from Texas Mutual indicates under item 3(c), entitled "Other States Insurance," the word "NONE" is clearly stated. Despite the fact that Nebraska is not mentioned anywhere in the insurance agreement or certificate, CMR proposes that because Texas Mutual contemplated that insured parties may cross state lines for work, that fact gives rise to personal jurisdiction. CMR contends that Nebraska case law is sparse with regard to minimum contacts and out-of-state insurance companies, directing our attention to three cases CMR asserts are pertinent.

First, CMR directs us to *Peay v. BellSouth Medical Assistance Plan*.[40] *Peay* involved a Georgia employer's medical assistance insurance plan and the plan's Alabama administrator, which provided benefits to one of the plaintiffs, an employee of the defendant's company, and the plaintiff's ward. The insurance company operated in nine southeastern states. The ward received care in Utah for which the insurance company refused to pay for the full cost of treatment. The plaintiff filed suit in Utah, and the insurance company countered that Utah lacked personal jurisdiction. The U.S. Court of Appeals for the 10th Circuit disagreed, holding that because the company had precertified treatment at a Utah hospital and paid for a portion of the care, it had established minimum contacts with the jurisdiction.

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[40] *Peay v. BellSouth Medical Assistance Plan*, 205 F.3d 1206 (10th Cir. 2000).

In *Nieves v. Houston Industries, Inc.*,[41] an insured employee moved to Louisiana from Texas, maintaining the insurance policy with her company following her departure from Texas. After a dispute arose, the employee filed suit in Louisiana. The court found that because several claims had already been paid by the company, personal jurisdiction had been established.

Lastly, CMR relies on *Hirsch v. Blue Cross, Blue Shield of Kansas City*.[42] In *Hirsch*, the U.S. Court of Appeals for the Ninth Circuit held that an out-of-state insurance company "purposefully availed" itself of the jurisdiction of California, based on the minimum contacts established by evidence that the insurance company had freely negotiated the enrollment agreement with the insured company, knowing that the insured company employed people nationwide.[43] CMR contends that Texas Mutual similarly knew that Menjivar and CMR operated in states outside of Texas and had agreed to insure their workers for injuries occurring in other states. We find CMR's authority for its argument wholly unpersuasive.

In *Peay v. BellSouth Medical Assistance Plan*, because the insurance company had precertified treatment at a Utah hospital and paid for a portion of the care, the 10th Circuit held that it had established minimum contacts with the jurisdiction. The same is true of *Nieves v. Houston Industries, Inc.*, wherein the court again found that several claims had already been paid by the company, giving rise to personal jurisdiction.

In this case, the record is void of any payments made by Texas Mutual to any claims arising in the State of Nebraska. Therefore, even if we were to acknowledge the persuasive authority of these federal cases, they are inapplicable to the facts of this case.

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[41] *Nieves v. Houston Industries, Inc.*, 771 F. Supp. 159 (M.D. La. 1991).

[42] *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474 (9th Cir. 1986).

[43] *Id.* at 1480.

Texas Mutual, however, directs our attention to *Brunkhardt v. Mountain West Farm Bureau Mut. Ins. Co.*,[44] in which we indicated that "[u]nder a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." Additionally, when an insured travels to another state, his or her presence in the state is unilateral and does not serve to create purposeful contacts between the insurer and the state. Further, an insurance company's mere act of insuring a person who might travel to a nearby state is insufficient to find that the insurer purposely directed its activities at the forum state.

Here, Texas Mutual insured Menjivar and listed CMR as an additional insured. While the policy contains a scheme of limited coverage for injuries occurring outside of Texas, the policy and information page contain no information listing or indicating coverage in Nebraska. The record is clear that Texas Mutual does not solicit business from Nebraska, has never maintained an office in Nebraska, is not an authorized insurance company in Nebraska, is a creation of the Texas Legislature, and provides coverage for Texas claims only. Further, the policy issued to CMR lists the insured's address as "4308 Garland Dr, Haltom City, TX." The record demonstrates that according to item 3(A) of the policy, Texas is the only state to which part one of the workers' compensation insurance applies. Finally, as noted above, the record does not demonstrate that in regard to this case, Texas Mutual paid any claim originating in Nebraska.

Therefore, we affirm the decision of the compensation court in dismissing Texas Mutual for lack of jurisdiction.

CONCLUSION

The compensation court did not err in finding that CMR was the statutory employer of Martinez and in imposing

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[44] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, 269 Neb. 222, 227, 691 N.W.2d 147, 152 (2005).

liability on CMR. Additionally, we agree with the compensation court's determination that it lacked personal jurisdiction over Texas Mutual. Under our deferential standard of review, we find that the court did not err in awarding Martinez attorney fees and future medical care, as well as determining that Martinez had sustained an 80-percent loss of earning capacity. We affirm.

Affirmed.

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

Brenda R. Rice, appellant, v. Terrance A. Poppe, an individual, and Morrow, Poppe, Watermeier & Lonowski, P.C., a limited liability organization, appellees.

924 N.W.2d 344

Filed March 22, 2019. No. S-18-701.

1. **Judgments: Appeal and Error.** 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 on appeal unless clearly erroneous.
2 ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** To succeed in a legal malpractice claim, a plaintiff must ultimately prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff.
4. **Malpractice: Attorney and Client.** A client cannot recover for malpractice (1) when the client failed to follow the attorney's reasonable advice, (2) when the client directed the attorney's actions in a matter and the attorney acted in accordance with the client's instruction, and (3) when the client misrepresented material facts upon which the attorney relied.
5. **Malpractice: Negligence: Proximate Cause.** A plaintiff's contributory negligence is a defense in a malpractice action when it contributed to the professional's inability to meet the standard of care and was a proximate cause of the plaintiff's injury.
6. **Malpractice: Attorney and Client: Negligence: Proximate Cause.** A client's negligence in a legal malpractice case is sometimes more

relevant to negating the proximate causation element of the claim than to showing that the plaintiff's negligence was a contributing cause to the plaintiff's injury.

Appeal from the District Court for Lancaster County: James G. Kube, Judge. Affirmed.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellant.

Randall L. Goyette and Christopher M. Schmidt, of Baylor Evnen, L.L.P., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

Terrance A. Poppe represented Brenda R. Rice (Rice) in her divorce from Dale Rice. Rice subsequently filed a malpractice action against Poppe. Poppe's motion for summary judgment was initially granted, but this court reversed.[1] A bench trial was held at which the district court found in Poppe's favor. Rice appeals.

FACTUAL BACKGROUND

Rice and her husband, Dale, were divorced in 2011. Poppe represented Rice in the divorce, while Dale was unrepresented. Poppe testified that it is his practice, when he first meets with new clients, to ask them a series of questions about the marriage and the marital estate. Poppe testified that he would have asked Rice whether there was "'any life insurance with any cash surrender value or any life insurance that we need to deal with.'" Several sheets of notepaper, which Poppe testified

[1] *Rice v. Poppe*, 293 Neb. 467, 881 N.W.2d 162 (2016).

were his notes from this meeting, were offered into evidence. Life insurance was listed in those notes under a heading entitled "Assets." A "0" was next to that entry. Poppe testified that "[z]ero means [the client] told me no, there is no insurance with cash value or insurance that we need to deal with. . . . It means there is no life insurance with cash value or no life insurance that was an issue."

Poppe further testified that his questions are intended to discover policies even if they do not have cash value, as he needs to know about anything that "we need to be concerned with or deal with." Poppe testified that there was no doubt in his mind that he asked about life insurance at this initial meeting. According to Poppe, he and Rice met several times after the initial meeting and at no point did Rice mention anything about any life insurance policies.

Rice also testified about this meeting, indicating that she did not recall talking about life insurance at the initial meeting or subsequently. She further testified that she and Dale had a conversation about life insurance prior to the entry of the decree and that it was her intention to keep Dale as her beneficiary. Rice was not permitted to testify regarding Dale's intention as to his policy, but she did testify that it was her belief that they each "retained right to our policies. To me that meant we retained the right to keep our beneficiary as well. We could do whatever we want. . . . We were each other's beneficiary and nothing changed with that divorce decree, was our understanding — my understanding."

Based upon his discussion with Rice, Poppe prepared a draft property settlement agreement. According to Rice, she went "back and forth to [Poppe's] office several times" about the agreement, and she made several suggestions that were incorporated into the final agreement.

The decree was entered on August 8, 2011. As relevant, the decree included a property settlement agreement with the following provisions. Paragraph VI provided in part:

> **STOCKS, BANK ACCOUNTS, LIFE INSURANCE POLICICES** [sic]**, PENSION PLANS AND RETIREMENT PLANS**
>
> [Rice] shall be awarded all interest in all pension plans, stocks, retirement accounts, 401(k), IRA, life insurance policy and checking or savings account in [Rice's] name, free from any claim of [Dale]. [Dale] shall be awarded all interest in any pension plans, stocks, retirement accounts, 401(k), IRA, life insurance policy and checking or savings account in [Dale's] name, free from any claim of [Rice].

Paragraph IX provided:

> **PROPERTY PROVISIONS AND SETTLEMENT OF PROPERTY RIGHTS OF PARTIES**
>
> It is expressly understood by and between the parties hereto that the provisions of this agreement relating to the property and liabilities of each, set aside and allocate to each party his or her respective portions of the properties belonging to the parties and of the liabilities of the parties at the date hereto; and each party acknowledges that the properties set aside to him or her, less the liabilities so allocated to him or her, will be in full, complete and final settlement, release and discharge, as between themselves, of all rights, claims, interests and obligations of each party in and to the said properties and the same in their entirety constitute a full, fair and equitable division and the partition of their respective rights, claims and interests in and to the said properties of every kind and nature.

And, in relevant part, paragraph X provided:

> **WAIVER AND RELEASE OF MARITAL RIGHTS**
>
> . . . .
>
> (b) In consideration of the provisions of this agreement, [Rice] waives and relinquishes any and all interest or rights of any kind, character, or nature whatsoever,

> including but not limited to all rights to elective share, homestead allowance, exempt property, and family allowance in the property of [Dale], and renounces all benefits which would otherwise pass to [Rice] from [Dale] by intestate succession or by virtue of the provisions of any Will executed before this Settlement Agreement which she, as wife, or as widow, or otherwise, has had, now has, or might hereafter have against [Dale], or, in the event of his death, as an heir at law, surviving spouse, or otherwise. [Rice] also waives and relinquishes any and all interest, present and future, in any and all property, real, personal, or otherwise, now owned by [Dale] or hereafter acquired, and including all property set aside for him in this agreement, it being the intention of the parties that this agreement shall be a full, final, and complete settlement of all matters in dispute between the parties hereto.

Rice testified that Poppe did not go through the property settlement agreement with her prior to the hearing during which it was entered.

About a week after the divorce decree was entered, Dale died. Rice made a claim for the death benefits under life insurance policies owned by Dale. Dale's children from his first marriage challenged her right to the benefits. This court affirmed the district court's finding that Rice had waived her beneficiary interest in the policies by the property settlement agreement, and accordingly concluded that Rice was not entitled to the death benefits.[2]

Rice sued Poppe for legal malpractice, alleging that he did not advise her that the property settlement agreement waived her interest in Dale's life insurance policies. The district court granted Poppe's motion for summary judgment, but we reversed, concluding that Poppe had not established a

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[2] *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (2014).

prima facie case for which he was entitled to judgment as a matter of law.[3]

Upon remand, a bench trial was held. Rice and Poppe testified as to the factual background of the case. Each also called an expert. Rice offered the deposition of Lyle J. Koenig, who testified that Poppe did not meet the applicable standard of care when he included the "boilerplate" language regarding life insurance, when it was his belief that there was no life insurance in the marital estate. Poppe offered the testimony of John Ballew, who testified to the contrary; it was his opinion that Poppe had complied with the applicable standard of care in his representation of Rice.

The district court found in favor of Poppe. Rice appealed.

ASSIGNMENTS OF ERROR

Rice assigns, renumbered, that the district court erred in (1) holding that Rice's failure to provide information about the life insurance policies and their beneficiary designations to Poppe was a misrepresentation that broke the causal chain of the legal malpractice claim and (2) finding that Rice's expert testified that Poppe failed to meet the applicable standard of care only by failing to explain the effect of the inclusion of life insurance in paragraph VI of the decree, and not by failing to explain the effect of the waiver and relinquishment language in paragraphs IX and X(b).

STANDARD OF REVIEW

[1,2] 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 on appeal unless clearly erroneous.[4] In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence

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[3] See *Rice v. Poppe, supra* note 1.

[4] *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001).

in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[5]

ANALYSIS

[3] To succeed in a legal malpractice claim, a plaintiff must ultimately prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff.[6]

Rice first assigns that the district court erred in concluding that her failure to provide Poppe with information regarding her and Dale's life insurance policies broke the causal chain and prevented her from sustaining her burden for legal malpractice. The district court relied on *Balames v. Ginn*[7] to support its conclusion.

[4] In *Balames*, we discussed the "role that a client's negligence or contributory negligence plays in a legal malpractice case."[8] We have held that a client cannot recover for malpractice (1) when the client failed to follow the attorney's reasonable advice, (2) when the client directed the attorney's actions in a matter and the attorney acted in accordance with the client's instruction, and (3) when the client mispresented material facts upon which the attorney relied.[9]

[5,6] But in *Balames*, we added to this list, noting that "a plaintiff's contributory negligence is a defense in a malpractice action when it contributed to the professional's inability to meet the standard of care and was a proximate cause of the

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[5] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

[6] *Rice v. Poppe, supra* note 1.

[7] *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

[8] *Id*. at 694, 861 N.W.2d at 695.

[9] *Balames v. Ginn, supra* note 7.

plaintiff's injury."[10] And, relying on a legal malpractice treatise, we further noted that "[f]requently, a client's negligence in a legal malpractice case is more relevant to negating the proximate causation element of the claim than to showing that the plaintiff's negligence was a contributing cause to the plaintiff's injury."[11]

When the record is considered in this light, there was sufficient evidence presented at trial to support the district court's finding. Rice testified that Poppe did not ask about life insurance; Poppe testified that he did. In addition, Poppe offered notes of his first meeting with Rice, indicating that he inquired about life insurance. The district court's finding as to this issue effectively negates Rice's claim as to causation—the property settlement agreement in the decree waived Rice's right to Dale's life insurance, because she did not inform Poppe about that life insurance so that he could properly include it in the decree.

Nor is there merit in a more general argument that the district court erred by finding for Poppe. While Rice highlights Koenig's testimony, she fails to account for the testimony of Poppe's expert, Ballew, who testified that Poppe's conduct did not fall below the applicable standard of care. Our standard of review is deferential; we review for clear error and consider the evidence in a light most favorable to the successful party.

In this instance, the parties offered conflicting testimony regarding whether Poppe's conduct fell below the applicable standard of care. The district court found for Poppe and, in doing so, found Ballew to be more persuasive. Ballew testified that Poppe's actions in gathering information and drafting and advising Rice regarding the property settlement agreement were proper. Ballew further opined that not only

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[10] *Id.* at 697, 861 N.W.2d at 696-97.

[11] *Id.* at 698, 861 N.W.2d at 697.

was it proper to include the so-called "boilerplate" language which Rice complains of, but that it was "essential," and that those provisions were ubiquitous. Ballew further testified that he would not have gone "line-by-line" through the waiver provisions.

Because we conclude that the district court did not err in concluding that Poppe did not breach any duty owed to Rice, and further that Rice could not show that, even assuming a breach of duty, that Poppe's action were the proximate cause of her injury, we need not address Rice's second assignment of error.

There is no merit to Rice's appeal. We affirm.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Stacy, J., not participating.

Nebraska Supreme Court
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, and Douglas County Attorney's Office, appellant and cross-appellee, v. Heather N. and Robert N., appellees and cross-appellants.

925 N.W.2d 51

Filed March 29, 2019. No. S-18-335.

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. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
4. **Final Orders: Appeal and Error.** Among the three types of final orders which may be reviewed on appeal is an order that affects a substantial right made during a special proceeding.
5. **Service of Process: Waiver.** A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.
6. **Jurisdiction: Pleadings: Parties.** A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.
7. **Judges: Recusal: Judgments.** Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion directed to a trial judge.

Appeal from the Separate Juvenile Court of Douglas County: Elizabeth G. Crnkovich, Judge. Affirmed in part, and in part dismissed.

Donald W. Kleine, Douglas County Attorney, and Mark P. Hanna for appellant.

Karen S. Nelson and Nicholas W. O'Brien, Senior Certified Law Student, of Carlson & Burnett, L.L.P., for appellee Heather N.

Kristina B. Murphree, of Marks, Clare & Richards, L.L.C., for appellee Robert N.

Peder Bartling, Special Prosecutor, of Bartling Law Offices, P.C., L.L.O., for appellee State of Nebraska.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

This appeal arises from juvenile proceedings involving Michael N. and his parents, Heather N. and Robert N. Following an appeal to the Nebraska Court of Appeals and the State's multiple dismissals and refilings of the petitions, the parents separately moved to dismiss based on lack of service and filed motions for recusal of the trial judge. After the parents argued unsuccessfully in favor of recusal, the juvenile court ordered that the Douglas County Attorney's office (County Attorney's Office) be removed as counsel for the State and ordered the appointment of a special prosecutor. Following a hearing, the juvenile court denied the motions to dismiss and entered a detention order requiring that Michael remain in the temporary custody of the Nebraska Department of Health and Human Services (the Department).

Multiple appeals have now been filed. The County Attorney's Office appeals the order removing it from the case

and appointing a special prosecutor, and on that issue, we conclude that we lack jurisdiction. As to Heather's and Robert's cross-appeals of the order denying their motions to dismiss and the detention order, we have jurisdiction, but those issues have been waived because the parents made general appearances in seeking recusal. Finally, we have jurisdiction to address Heather's and Robert's challenges to the order overruling their motions to recuse, but we find no merit to their arguments.

BACKGROUND

This case involves Heather, Robert, and their son Michael, who was born in December 2011. Michael has trisomy 8, a congenital condition which requires a special feeding regimen. In July 2016, Michael arrived at an Omaha hospital extremely malnourished after traveling and living for an unspecified amount of time in a furnished semitrailer truck cab with his parents, two siblings, and two large dogs. Similar iterations of juvenile court proceedings under three separate case numbers followed.

Initial Juvenile Court Proceedings.

On July 25, 2016, the State, represented by the County Attorney's Office, filed a petition in case No. JV 16-1277 seeking to adjudicate Michael pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016). The juvenile court, Hon. Elizabeth G. Crnkovich presiding, issued a protective custody order temporarily placing Michael in the custody of the Department. Shortly thereafter, the parents left Nebraska. Attempts to serve the parents in person were unsuccessful, and the juvenile court allowed service by publication in Nebraska and in Georgia where the parents had said they maintained a residence.

Heather's and Robert's court-appointed counsel filed multiple motions to dismiss based on insufficient process and insufficient service of process. They argued that the notices by publication did not include statutorily required language. The juvenile court overruled the parents' motions to dismiss.

The County Attorney's Office later moved for dismissal due to an unspecified mistake in service by publication. In response, on February 2, 2017, the juvenile court dismissed the petition without prejudice and terminated its jurisdiction. The same day, the County Attorney's Office filed another petition and supplemental petition on behalf of the State, seeking adjudication of Michael and termination of Heather's and Robert's parental rights, docketed as case No. JV 17-213.

In a subsequent appeal, the Court of Appeals summarized the juvenile court proceedings in case No. JV 17-213 as follows:

> 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.

In re Interest of Michael N., 25 Neb. App. 476, 478-79, 908 N.W.2d 400, 402-03 (2018).

Appeal and Cross-Appeal to Court of Appeals.

Heather appealed and Robert cross-appealed case No. JV 17-213 to the Court of Appeals. They alleged that the juvenile court erred in overruling their motions to dismiss the petitions based on improper service and in ruling on the State's motion for continued custody when neither had been served with notice of the detention hearing.

The Court of Appeals affirmed the juvenile court's ruling on the motions to dismiss. However, the Court of Appeals reversed the juvenile court's order continuing the Department's custody. It observed that because the juvenile court had not specifically identified the subject of its judicial notice, the Court of Appeals could not determine whether such judicial notice was proper and had no evidence to support the juvenile court's finding that the parents' whereabouts were unknown. Because the parents had not received notice of the detention hearing and because the record did not show that the State made any effort to provide notice of the hearing, the Court of Appeals determined that the parents were denied their due process rights to notice of the hearing. It remanded the cause with instructions to provide the parents with notice and to hold continued detention hearings periodically until service was perfected or actual notice occurred. It mandated that the juvenile court's order of temporary custody should remain in effect for 10 days following the mandate. See *id*.

Juvenile Court Proceedings on Remand.

On March 14, 2018, the State, represented by the County Attorney's Office, moved to dismiss case No. JV 17-213.

The same day, it filed new petitions under a new case No. JV 18-382. The new petitions were nearly identical to the previous petitions in case No. JV 17-213 and again sought adjudication and termination of parental rights. It also provided the juvenile court with an ex parte order of immediate temporary custody for case No. JV 18-382, which the juvenile court signed but did not file on March 14. On March 15, at a hearing on the State's motion to dismiss case No. JV 17-213, the juvenile court expressed "concern" about the motion. It stated:

> I am trying to find a way to say it that does not — honestly, I am kind of worried it was not well thought out in the context of this case. What I intend to do today is to have the first appearance and protective custody as it was originally scheduled for and — and may seek updated briefing on the — you know, the last case and the one that everybody cites in terms of the State's prerogative in this child protection matter is a case called in re: Moore, M-o-o-r-e. . . . I do not know that it's — that may be the last thing. I do not know. But it would be helpful in this circumstance to the Court in discerning what to do.
>
> . . . I have not quite ordered that of you, of the parties yet, but I am laying some groundwork while I am thinking about it.

The juvenile court heard brief arguments from the parties on the State's motions to dismiss, with the parents' counsel arguing in favor of the motion, but the juvenile court did not order written briefs on the issue. Moments later, the juvenile court signed the order to dismiss the matter pending under case No. JV 17-213 and ordered Heather and Robert to present themselves to the juvenile court to request court-appointed counsel for case No. JV 18-382. It filed the aforementioned ex parte order of immediate temporary custody and scheduled a detention hearing for March 21 in case No. JV 18-382.

Motions to Dismiss and Motions to Recuse.

On March 20, 2018, Heather's and Robert's counsel filed nearly identical motions to dismiss and/or vacate the petitions and the ex parte order pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(4) and (5). Their motions claimed that because there was no evidence of service, the matter should be vacated and/or dismissed. They alleged that failure of proper service had violated their due process rights. They pointed out that the matters arising out of the State's petition in case No. JV 18-382 were substantially like the filings in case No. JV 17-213, which they claimed had been dismissed in an effort to circumvent the Court of Appeals' mandate that the State provide evidence that service had been perfected or actual notice had occurred. The parents contended that due to successive filings of similar petitions, Michael had been in the Department's custody since July 2016 without his parents' being properly served.

Also on March 20, 2018, Heather's and Robert's counsel filed motions to recuse. Both motions alleged that based on the circumstances of the proceedings, a reasonable and objective person would find that there is an appearance of partiality and impropriety by the juvenile court and requested that Judge Crnkovich recuse herself. The motions specifically cited the juvenile court's requirement that the parents present themselves to the court for the appointment of counsel, despite the fact that they had not been served or notified of the proceedings as required by the Court of Appeals.

Detention Hearing on March 21, 2018; Appointment of Special Prosecutor; and Denial of Motions to Recuse.

On March 21, 2018, the parents' counsel appeared at the detention hearing and sought dismissal of the petitions. Counsel for Heather and counsel for Robert also argued in support of the motions to recuse, with counsel for Heather presenting

evidence on the matter. Heather's counsel argued that the juvenile court's prior remarks to the County Attorney's Office cautioning dismissal gave the appearance that the juvenile court was prosecuting the case. The juvenile court stated on the record in open court that the motions to recuse were denied.

The family permanency specialist assigned to the case then testified concerning his efforts to contact the parents. Upon questioning by the juvenile court, he stated that the County Attorney's Office had not asked him for the information he had provided at the hearing. The County Attorney's Office did not cross-examine the witness.

At that point, the juvenile court announced that it was removing the County Attorney's Office from the case and appointing a special prosecutor. It stated that the way the County Attorney's Office had addressed the case was "problematic."

Following the hearing, the juvenile court issued an order removing the County Attorney's Office, appointing a special prosecutor, overruling the motions to recuse, continuing the motions to dismiss, and continuing the first appearance and detention hearing on the petition and supplemental petition.

Continued Detention Hearing on April 9, 2018; Denial of Motions to Dismiss; and Detention Order.

On April 9, 2018, the juvenile court conducted a hearing on the motions to dismiss, first appearance, and detention. The family permanency specialist testified that on April 2, the parents were served in the State of Washington with notice of the April 9 hearing. The special prosecutor offered documents purporting to show service of summons, which the juvenile court received. At the conclusion of the hearing, the court announced that the motions to dismiss were denied.

On April 11, 2018, the juvenile court issued a detention order that also memorialized its ruling disposing of the parents' motions to dismiss. It found that the parents had been personally served; that the juvenile court's jurisdiction was proper;

that reasonable efforts had been made to prevent the need for removal; that due to exigent circumstances in evidence, it would be contrary to Michael's health, safety, or welfare to return home; and that it was in his best interests to remain in the temporary custody of the Department. Accordingly, the juvenile court ordered that Michael remain in the temporary custody of the Department and scheduled an adjudication hearing for June 1.

The County Attorney's Office timely appealed, and the parents cross-appealed.

ASSIGNMENTS OF ERROR

On appeal, the County Attorney's Office assigns that the juvenile court erred in ordering the removal of the County Attorney's Office and in appointing a special prosecutor.

In their separate cross-appeals, Heather and Robert each assign, condensed and restated, that the juvenile court erred in (1) denying their respective motions to dismiss and/or vacate, despite violations of their due process rights in relation to service of process; (2) detaining Michael in continued protective custody without sufficient admissible evidence that they had received service of process, in violation of their due process rights; (3) failing to notify them of their right to counsel; and (4) overruling their respective motions to recuse.

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 motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. *In re Interest of J.K.*, 300 Neb. 510, 915 N.W.2d 91 (2018). An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *Id.*

ANALYSIS

Order Appointing Special Prosecutor: No Jurisdiction.

We begin our analysis with the appeal filed by the County Attorney's Office. The County Attorney's Office argues that the juvenile court did not have the authority to remove it from the case and appoint a special prosecutor. At oral argument, counsel for the County Attorney's Office additionally asserted that because the special prosecutor was not validly appointed, his actions on behalf of the State are void. The County Attorney's Office asks that we reverse the order appointing the special prosecutor as well as all orders entered thereafter and remand the cause with instructions for the case to proceed with the County Attorney's Office representing the State.

[3] Before reaching the legal issues presented for review, however, it is the duty of an appellate court to determine whether it has jurisdiction to decide them. See *In re Interest of Paxton H.*, 300 Neb. 446, 915 N.W.2d 45 (2018). For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken. *Jennifer T. v. Lindsay P.*, 298 Neb. 800, 906 N.W.2d 49 (2018).

[4] Among the three types of final orders which may be reviewed on appeal is an order that affects a substantial right made during a special proceeding. Neb. Rev. Stat. § 25-1902 (Reissue 2016). Juvenile court proceedings are special proceedings. *In re Interest of Kamille C. & Kamiya C., ante* p. 226, 922 N.W.2d 739 (2019). Because this is a juvenile court proceeding, we would have jurisdiction to review the order appointing a special prosecutor if it affected a substantial right. On the other hand, if the order did not affect a substantial right, it is not a final order. See *Mutual of Omaha Bank v. Watson*, 301 Neb. 833, 920 N.W.2d 284 (2018).

Numerous factors determine whether an order affects a substantial right. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by

the order at issue. *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016). 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.* It also depends on whether the right could otherwise effectively be vindicated. *Id.* Stated another way, an order affects a substantial right if it affects the subject matter of the litigation such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *Id.*

The County Attorney's Office purports to bring this appeal on behalf of the State. In this regard, the County Attorney's Office argues that the order removing the County Attorney's Office and appointing the special prosecutor affected a substantial right of the State. The County Attorney's Office claims that the State's substantial right to protect the welfare of children through juvenile adjudications is affected by the order removing the County Attorney's Office and appointing the special prosecutor.

In support of its argument, the County Attorney's Office directs us to *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017). The County Attorney's Office correctly points out that in that case, we recognized that the State has a right to protect the welfare of its resident children and that this right is especially important in juvenile adjudications. The County Attorney's Office asserts that the order removing it and appointing the special prosecutor affects the State's substantial right to protect children through pursuing juvenile adjudications in the same way as the order we found appealable in *In re Interest of Noah B. et al.* As we will explain, however, the order we found appealable in *In re Interest of Noah B. et al.* is materially different from the order at issue here.

In *In re Interest of Noah B. et al.*, we held that an order dismissing an adjudication petition brought by the State without leave to amend affected the State's substantial right to protect

children through juvenile adjudications. We held that this right was affected by the order dismissing the adjudication petition because it "foreclose[ed] the State from pursuing adjudication and disposition on grounds of sexual abuse" and "prevent[ed] the State from seeking to protect the children from such abuse." *Id*. at 775, 891 N.W.2d at 119-20. In other words, we found that the order dismissing the adjudication petition affected the subject matter of the adjudication proceeding by completely precluding the State from pursuing its claim for adjudication.

The same cannot be said of the order removing the County Attorney's Office and appointing the special prosecutor in this case. That order did not impact the subject matter of the adjudication proceeding in any way. Nor did it prevent the State from continuing to pursue the matter. The order merely removed one lawyer and appointed another.

In another context, we have held that an order disqualifying an attorney from representing a client does not affect a substantial right of the client. See *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), *overruled on other grounds, Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017). As we explained, an order disqualifying counsel affects a "peripheral matter" rather than the subject matter of the litigation, because regardless of who represents the client, "the same claims and defenses persist." *Id*. at 830, 560 N.W.2d at 434. The same is true here. Because the order effectively replacing the County Attorney's Office with the special prosecutor did not affect the subject matter of the litigation, we cannot say it affected a substantial right of the State.

In addition to all we have said so far, there is another reason that precludes us from reviewing the order removing the County Attorney's Office and appointing a special prosecutor. The County Attorney's Office contends that the juvenile court had no authority to remove it and appoint a special prosecutor. For this reason, the County Attorney's Office takes the position that the County Attorney's Office is entitled to represent the

State in this matter and that the special prosecutor lacks the authority to do so. The County Attorney's Office is effectively raising a question of who has authority to carry out the duties of a public office. We have held for many years that a question of title to an office can be challenged only in a direct proceeding brought for that purpose.

By way of example, in *Atkins v. Department of Motor Vehicles*, 192 Neb. 791, 224 N.W.2d 535 (1974), the Department of Motor Vehicles commenced license revocation proceedings against an individual. The individual sought to challenge the revocation on the ground that the hearing examiner was not effectively appointed. This court refused to consider the contention. We pointed out that while a hearing examiner must be effectively appointed, the lawfulness of the appointment could not be considered in the revocation proceeding. Rather, the "question of title to an office" could "only be challenged in a direct proceeding brought for that purpose." *Id*. at 793, 224 N.W.2d at 536. Many other cases hold the same. See, e.g., *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds, Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004); *State v. Birdwell*, 188 Neb. 116, 195 N.W.2d 502 (1972); *State ex rel. Weiner v. Hans*, 174 Neb. 612, 119 N.W.2d 72 (1963); *Haskell v. Dutton*, 65 Neb. 274, 91 N.W. 395 (1902).

The contention by the County Attorney's Office that the special prosecutor was unlawfully appointed to represent the State in this case raises the "question of title to an office." *Atkins v. Department of Motor Vehicles*, 192 Neb. at 793, 224 N.W.2d at 536. Such a claim can be considered only in a "direct proceeding brought for that purpose." *Id*. This is a juvenile court proceeding, not a proceeding brought for the purpose of challenging the right to represent the State in this matter. We therefore cannot consider that challenge in this case.

Because we find that we do not have jurisdiction over the appeal brought by the County Attorney's Office, we dismiss its appeal.

Detention Order and Denial of Parents' Motions to Dismiss and Motions to Recuse: Jurisdiction.

We move now to the parents' challenges to the orders that overruled their motions to dismiss the petition and supplemental petition and ordered Michael's continued detention. Again, we must first address jurisdiction and determine whether there is a final order or final judgment entered by the court from which the appeal is taken. See *In re Interest of Paxton H.*, 300 Neb. 446, 915 N.W.2d 45 (2018).

In the juvenile context, we have held that if a party's substantial rights are not determined by the court's order overruling a motion to dismiss juvenile proceedings and the cause is retained for further action, the order is not final. See *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000). We believe the denial of the motion to dismiss is such an order. The order overruling the parents' motions to dismiss merely kept the proceedings on the path toward eventual resolution on the merits and did not affect the parents' rights with finality. For this reason, the denial of the motion to dismiss was not, standing alone, immediately appealable.

But while the denial of the motion to dismiss, standing alone, was not immediately appealable, the detention order was. This court has held that a detention order entered after a hearing which continued to keep a juvenile's custody from his or her parent pending an adjudication hearing to determine whether the juvenile is neglected, pursuant to § 43-247(3)(a), is final and thus appealable. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). See, also, *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991); *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). Consequently, we have jurisdiction to review the juvenile court's detention order and the hearing that preceded it.

Our conclusion that we have jurisdiction to review the detention order returns us to the question of whether we may review the denial of the motion to dismiss. While the denial of the motion to dismiss would not have been reviewable if that were the only order on which review was sought, we find that we may review it under these circumstances. We have held that we may review otherwise nonfinal orders that "bear on the correctness" of a reviewable final order or judgment. See, e.g., *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 637, 849 N.W.2d 523, 532 (2014); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). The denial of Heather's and Robert's motions to dismiss, which sought dismissal on the grounds that they were not properly served with process, bears on the correctness of the detention order. If Heather and Robert were not properly served or did not waive service and the action was subject to dismissal on those grounds, we would be required to reverse, vacate, or modify the detention order. Accordingly, we also have jurisdiction to review the denial of the motion to dismiss. See *Breci v. St. Paul Mercury Ins. Co., supra*.

Denial of Parents' Motions to Dismiss and Detention Order: Merits.

Having determined that we have jurisdiction to do so, we proceed to review the parents' challenges of the order overruling the motions to dismiss and the detention order, which are mainly based on the grounds that Heather and Robert were not properly served with process or did not receive actual notice of hearing. We find no merit to these challenges.

[5,6] Heather and Robert have waived the arguments that they were not properly served or provided with notice. Under Neb. Rev. Stat. § 25-516.01(1) (Reissue 2016), the voluntary appearance of a party is the equivalent of service of process. Participation in the proceedings on any issue other than the defenses of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process, waives all such issues except as to the objection that the party is not

amenable to process issued by a court of this state. See *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016). See, also, *Applied Underwriters v. Oceanside Laundry*, 300 Neb. 333, 912 N.W.2d 912 (2018); *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015). Thus, a general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof. *Id.* A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party. *Id*.

Here, the parents, through counsel, asked the juvenile court to act on a matter apart from its jurisdiction over them. On the same day the parents raised the issue of service in their motions to dismiss, they filed motions to recuse in which they alleged an appearance of partiality by Judge Crnkovich. At a hearing the next day, counsel for Heather and counsel for Robert appeared and sought dismissal of the petitions, but they also argued in support of the motions to recuse. Heather's counsel presented evidence pertaining to recusal, arguing in part that Judge Crnkovich's prior remarks to the County Attorney's Office had given the appearance that Judge Crnkovich was prosecuting the case. The parents thus invited the juvenile court to exercise its discretion in ruling on their motions to recuse. See *Thompson v. Millard Pub. Sch. Dist. No. 17, ante* p. 70, 921 N.W.2d 589 (2019) (recusal motion addressed to discretion of trial judge to whom motion is directed). In diverging from the issue of service of process with their motions to recuse, the parents made general appearances and waived the issue of whether they had been properly served. See *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001) (motion to recuse, among other filings, invoked court's power and constituted general appearance). Therefore, the arguments in their motions to dismiss necessarily fail.

In addition to asserting that the juvenile court ought to have dismissed the petitions due to lack of service, the parents

contend that dismissal of the entire matter was warranted, because the State did not comply with the Court of Appeals' direction to hold a detention hearing in case No. JV 17-213 within 10 days. While we recognize that a detention hearing was not held on that docket within the time prescribed by the Court of Appeals, a detention hearing for Michael did ultimately occur. And more important, Heather and Robert provide no authority for the position that they were entitled to dismissal of the entire case due to the timing of this detention hearing. Indeed, we have repeatedly stated that the goal of juvenile proceedings is to protect children and promote their best interests. See, e.g., *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015); *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014). It would be inconsistent with this objective if the failure of the State to meet a procedural deadline resulted in a child who is alleged to come within the meaning of § 43-247(a), due to the faults and habits of his parents, being summarily returned to those parents.

Heather and Robert also propose the return of Michael as the remedy for the claimed continual violation of their due process rights occasioned by the successive dismissals and refilings of the juvenile petitions. We acknowledge that repeated dismissals and refilings have the potential to violate due process. But a detention hearing was held in this case after Heather and Robert waived service of process, and they do not argue that the juvenile court ruled incorrectly on the merits in ordering detention. Any complaints about the delayed detention hearing were resolved by the detention order, which, as we explain below, we affirm.

The parents' opposition to the detention order, like their challenges to the order overruling their motions to dismiss, is defeated by their waiver of service of process. Heather and Robert assert that the juvenile court erred in entering a detention order in violation of their due process rights because there was not sufficient admissible evidence that they had received

service of process or notice of the detention hearing. But as explained above, they waived service of process prior to the detention hearing. Further, Heather and Robert cannot claim that they were unaware of the detention hearing. Their counsel participated in scheduling it and represented the parents when it occurred, and the general rule is that notice to, or knowledge of facts by, an attorney is notice to, or knowledge of, the client. See *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995). We therefore reject the parents' assertions that their due process rights were violated by the detention proceedings.

Advisement of Right to Counsel.

Heather and Robert assign and argue that the juvenile court erred in failing to notify them of their right to counsel during the proceedings that resulted in the reviewable detention order. They point out that Neb. Rev. Stat. § 43-279.01 (Reissue 2016) confers the right of a parent to have counsel appointed if the parent is unable to afford to hire a lawyer. Under § 43-279.01, when a petition seeks adjudication or termination, the juvenile court must inform a parent of his or her right to counsel, when "the parent . . . appears with or without counsel." But for § 43-279.01 to apply, the parent must actually be present in court; the appearance by counsel alone does not trigger the statute. See *In re Interest of Maxwell T.*, 15 Neb. App. 47, 721 N.W.2d 676 (2006). In this case, Heather and Robert were not present in court and therefore were not entitled to be advised of their right to counsel, and the juvenile court was not incorrect in requiring them to appear to obtain counsel. Thus, the parents' assignments of error on this issue lack merit.

Order Overruling Motions to Recuse: Jurisdiction and Merits.

Finally, Heather and Robert contend that the juvenile court erred in overruling their motions to recuse. Once again, we must first address whether we have jurisdiction to consider the

order appealed from. See *In re Interest of Paxton H.*, 300 Neb. 446, 915 N.W.2d 45 (2018).

For the same reason we could review the denial of the motions to dismiss, we conclude that the circumstances of this case allow us to review the appeals from the order overruling the motions to recuse. We have held that a denial of a motion to recuse is generally not final and appealable in its own right. See *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005). However, in this instance, the juvenile court's rulings on the motions to recuse "bear on the correctness" of the final, appealable detention order. See, e.g., *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 637, 849 N.W.2d 523, 532 (2014); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). If the juvenile court incorrectly denied the motions to recuse, it would be disqualified from deciding the subsequent detention order. See *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011). Consequently, we also have jurisdiction to review the denial of the motions to recuse. See *Breci v. St. Paul Mercury Ins. Co., supra*.

As for the merits, the parents argue that both the juvenile court's decision to require their appearance before the appointment of counsel and its remarks on the State's dismissal of its own petitions create an objective appearance of impropriety, requiring recusal. We disagree.

Under Neb. Rev. Code of Judicial Conduct § 5-302.11, a judge is disqualified whenever the judge's impartiality might reasonably be questioned. Under the code, such instances in which the judge's impartiality might reasonably be questioned specifically include where "'[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer . . . .'" *Tierney v. Four H Land Co.*, 281 Neb. at 664, 798 N.W.2d at 591, quoting § 5-302.11(A)(1). Impartiality requires, among other things, that a judge must not appear to act in the dual capacity of judge and advocate. See *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007). A judge's official conduct must be free

from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action. See *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014). The inquiry is whether a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. See *In re Interest of J.K.*, 300 Neb. 510, 915 N.W.2d 91 (2018). A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Id.*

[7] We first address the parents' arguments that recusal was warranted by the juvenile court's requirement that they appear for the appointment of counsel following "consistent and egregious due process violations" related to lack of service of process. Brief for appellee Heather on cross-appeal at 32. Accord brief for appellee Robert on cross-appeal at 25. We have determined that by their motions to recuse, the parents made general appearances and waived their objections to service of process, which is the basis of their due process arguments. And Heather and Robert do not explain how requiring them to present themselves for the appointment of counsel shows bias or partiality by the juvenile court. Instead, their arguments suggest that the ruling was merely wrong. But judicial rulings alone almost never constitute a valid basis for a bias or partiality motion directed to a trial judge. *In re Interest of J.K., supra*. We conclude that the juvenile court did not abuse its discretion in declining to recuse itself on the basis of this ruling.

Likewise, we see no reasonable basis to question Judge Crnkovich's impartiality due to her comments on the State's dismissal of its own petitions. Heather and Robert argue that these comments cautioned the State about aspects of the case before ruling on the State's motion to dismiss and pointed out precedent supporting the motion to dismiss. All this, they contend, communicated the judge's view of how the State should

proceed and crossed the line from neutral and unbiased decisionmaker to advocate. We find that the remarks cited by the parents are not sufficiently clear to cross this line or otherwise give the appearance of impropriety. At most, the judge was stating the authority relevant to the issue at hand and inviting the State to consider the consequences of dismissal, not directing the State's decision. See *Torres v. Morales*, 287 Neb. at 592, 843 N.W.2d at 810 ("there are times when trial judges must inform a party of the legal consequences of an order without directing the party's decision"). And the judge's comments did not unduly interfere with the hearing. The parties were given the opportunity to argue their positions on the motions to dismiss, with the parents' counsel arguing in favor, before the juvenile court announced its ruling.

The parents also suggest that the juvenile court judge called her impartiality into question because the ex parte order that she filed after the hearing on March 15, 2018, was signed by her prior to the hearing. They seem to contend that the judge's ex parte ruling reflects that she never intended to conduct a detention hearing as required by the Court of Appeals. We simply do not understand how signing the ex parte order demonstrates an intention not to conduct a detention hearing. In fact, the judge did hold a detention hearing, after which she entered a detention order, which is one of the issues appealed. We perceive no appearance of impropriety.

For these reasons, we conclude that the juvenile court judge did not abuse her discretion in refusing to recuse herself.

CONCLUSION

As noted above, we find that we must dismiss the appeal of the County Attorney's Office, because we lack jurisdiction to consider the issue it raises, and we otherwise affirm.

This appeal exposes a troubling process begun in the Douglas County Separate Juvenile Court in 2016 which remains unresolved to this day. Given the posture of the issues we address, this court's authority is limited in this appeal. We alert the

participants that the duration and the procedure utilized have not gone unnoticed. The focus of the case needs to return to the best interests of Michael.

Affirmed in part, and in part dismissed.

Papik, J., concurring.

I concur fully in this court's decision, including the determination that we do not have jurisdiction to decide the challenge by the County Attorney's Office to the juvenile court's order removing it from the case and appointing a special prosecutor. I write separately to emphasize my belief that our opinion should not be understood as concluding that issues related to such a removal could never be reached on appeal. In this case, it was the County Attorney's Office that challenged its removal and the court's appointment of the special prosecutor. But I can envision a scenario in which an opposing party could raise the argument that a court's removal of one prosecutor and appointment of another required the court's recusal.

Nebraska law recognizes some circumstances under which a special prosecutor can be appointed. Under Neb. Rev. Stat. § 23-1205 (Reissue 2016), a court can appoint a special prosecutor under the limited circumstances of the "absence, sickness, disability, or conflict of interest of the county attorney and his or her deputies." We have held, however, that a judge's personal dissatisfaction with the county attorney's performance does not allow for the appointment of a special prosecutor under § 23-1205. See *In re Complaint Against White*, 264 Neb. 740, 651 N.W.2d 551 (2002), citing *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965).

Indeed, it does not require much imagination to conceive of potential problems that could arise if courts had the authority to remove and replace lawyers simply because the judge did not approve of the lawyers' work. One such problem is the power this would give a judge to dictate how a case is litigated. A judge with the power to remove a prosecutor based on dissatisfaction with the way the case is being prosecuted

is a judge with the power to, in a sense, decide how the case will be prosecuted. As courts have observed in other separation of powers contexts, "the power to remove is the power to control." See *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, Circuit Judge, concurring). See, also, *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986); *Silver v. U.S. Postal Service*, 951 F.2d 1033 (9th Cir. 1991); *U.S. v. Chambless*, 680 F. Supp. 793 (E.D. La. 1988).

If a judge were to remove a prosecutor solely because of dissatisfaction with the prosecutor's work, an opposing party may be able to raise serious questions about the judge's impartiality. As we have often said, "'[a] judge must be careful not to appear to act in the dual capacity of judge and advocate.'" *Torres v. Morales*, 287 Neb. 587, 592, 843 N.W.2d 805, 810 (2014), quoting *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

But while there may be a case in which a party could argue that a court's removal of a prosecutor and appointment of a replacement crossed the line into advocacy and required the court's recusal, Heather and Robert did not do so here. While they filed motions to recuse, which are addressed in this court's opinion, the motions were filed before the appointment of the special prosecutor and no argument was made to the juvenile court that its removal of the County Attorney's Office and appointment of a special prosecutor required recusal. The issue is thus not before us in this case. See *Weber v. Gas 'N Shop*, 278 Neb. 49, 54, 767 N.W.2d 746, 750 (2009) ("[a]n appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court").

Stacy and Freudenberg, JJ., join in this concurrence.

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

State of Nebraska, appellee, v. Kobe Paez, appellant.

925 N.W.2d 75

Filed March 29, 2019. No. S-18-412.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
2. **Criminal Law: Presumptions: Statutes.** A presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.
3. **Criminal Law: Minors.** Where a prosecution under Neb. Rev. Stat. § 28-833 (Reissue 2016) involves a minor child rather than a decoy, a defendant's knowledge that the recipient is under age 16 is an element of the crime of enticement by electronic communication device.
4. **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.
5. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.
6. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Scotts Bluff County: Andrea D. Miller, Judge. Stipulation allowed. Reversed and remanded for a new trial.

Sterling T. Huff, P.C., L.L.O., for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

After a jury convicted Kobe Paez for enticement by electronic communication device,[1] he appealed. Paez claimed that the court erred in failing to instruct the jury that the elements of the offense required knowledge that the recipient was under age 16. Although the parties have stipulated to remand, we address the stipulation in an opinion because we have not previously considered the precise issue. Because we agree, we allow the stipulation, reverse the judgment of the district court, and remand the cause for a new trial.

BACKGROUND

We briefly summarize the evidence at trial. While working at a swimming pool, 19-year-old Paez first met 14-year-old A.F. She gave Paez contact information for her Instagram account, and Paez communicated with her that evening via Instagram. Paez told A.F. that he wanted to see her, and A.F. responded that her "aunt and uncle would literally . . . kill you" and then A.F.'s sister would kill him. Paez asked whether A.F. could "go Out[si]de or something." She responded, "You have to remember us isn't legal" immediately followed by "And no they would hear you." Paez then sent a message stating, "I know." The conversation later became sexual in nature, with Paez stating that he would "do stuff" "[l]ike eat u out n finger."

[1] Neb. Rev. Stat. § 28-833 (Reissue 2016).

Paez and A.F. eventually met that night. That same night, A.F.'s aunt saw the Instagram communications between Paez and A.F. and called the police when she realized that A.F. was not in the house.

Paez and A.F. both told the police that they merely kissed. Paez informed the police that he thought A.F. was 17 or 18 years old. When an officer told A.F.'s family that Paez said A.F. told him she was 17, A.F. did not dispute saying that. According to Paez, A.F. told him that she was 17 years old, that she had a car, and that she had driven to Scottsbluff, Nebraska, from Gretna, Nebraska.

The State ultimately charged Paez with first degree sexual assault and enticement by electronic communication device. The court conducted a jury trial, and the primary issues in dispute were whether Paez knew A.F. was under age 16 and whether Paez and A.F. engaged in sexual intercourse. Paez objected to the court's proposed jury instruction on enticement by electronic communication device. He advised the court of his belief that the instruction needed to add the words "knowingly and intentionally." Paez tendered an instruction, which the court refused.

The jury found Paez guilty of enticement but not guilty of sexual assault. The court accepted the verdict and sentenced Paez to 36 months of probation.

Paez timely appealed. The State filed a suggestion of remand, conceding that the instruction was erroneous and that the error was not harmless. Paez stipulated to remand. Rather than disposing of the appeal summarily, we believe a detailed opinion would be of value to the bench and the bar.

ASSIGNMENT OF ERROR

Paez assigned three errors. Based on the State's suggestion of remand, we limit our analysis to whether the court erred in failing to properly instruct the jury.

STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[2]

ANALYSIS

The parties agree that the court erred in instructing the jury on the material elements of enticement by electronic communication device. The court instructed the jury that the elements of enticement by electronic communication device were:

> 1. That the defendant did knowingly and intentionally utilize an electronic device to contact [A.F.]; and
>
> 2. That at the time [A.F.] was less than sixteen years of age; and
>
> 3. That at the time the defendant was nineteen years of age or o[l]der; and
>
> 4. That the defendant did:
>
> a. Use or transmit any indecent, lewd, lascivious, or obscene language, writing, or sound; or
>
> b. Offer or solicit any indecent, lewd, or lascivious act.
>
> 5. That he did so on or about the date charged in Scotts Bluff County, Nebraska.

The parties contend that the court should have instructed the jury in a manner that required it to consider whether Paez knew or believed A.F. was a child under 16 years old.

We begin with the plain language of the statute in determining whether knowledge of the recipient's age is an essential element of the crime. Section 28-833(1) provides:

> A person commits the offense of enticement by electronic communication device if he or she is nineteen years of age or over and *knowingly and intentionally* utilizes an electronic communication device to contact a child under sixteen years of age or a peace officer who

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[2] *State v. Lessley*, 301 Neb. 734, 919 N.W.2d 884 (2018).

> is believed by such person to be a child under sixteen years of age . . . .

(Emphasis supplied.) We addressed this statutory language in *State v. Kass*.[3] There, we emphasized that

> to violate § 28-833, a person must "knowingly and intentionally . . . contact" the minor or decoy. We construe this language to mean that the statute only applies when a person uses the prohibited speech in a private conversation with a minor or a decoy. In other words, the statute only applies when the defendant is speaking exclusively to a minor or decoy.[4]

We explained that "the statute proscribes a person age 19 or older from knowingly and intentionally using an electronic communication device to contact a child under age 16, or peace officer whom the person believes to be a child under age 16, and using language that conjures up repugnant sexual images."[5] But where the prosecution under § 28-833 involves a minor child rather than a decoy, our case law is not explicit whether the defendant must know that the child is under 16 years old.

In the context of a different criminal statute, we determined that the specified intent applied to all of the crime's elements. In *State v. Scott*,[6] we considered the crime of unlawful membership recruitment into an organization or association, which included a requirement that the defendant "knowingly and intentionally" committed the act.[7] We determined that the mens rea should be applied to all of the elements of the crime. Applying that same reasoning here would require a

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[3] *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

[4] *Id.* at 902, 799 N.W.2d at 690.

[5] *Id.* at 903, 799 N.W.2d at 690.

[6] *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

[7] See Neb. Rev. Stat. § 28-1351 (Cum. Supp. 2018).

defendant to have actual knowledge that the recipient is under age 16.

The U.S. Supreme Court's decision in *United States v. X-Citement Video, Inc.*[8] informs our analysis. There, the statute at issue made it illegal for any person to "knowingly transport[] or ship[] . . . any visual depiction, if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct."[9] The Court interpreted the language to require knowledge of the minor's age, even though the most logical grammatical reading of the statute would not include application of "knowingly" to the phrase "use of a minor."

[2] The *X-Citement Video, Inc.* Court provided several reasons to require such knowledge. First, because transporting and shipping magazines and film was not a public welfare offense, "[p]ersons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation."[10] Thus, those charged under the statute were unlikely to realize that their conduct might be prohibited. Second, the harsh penalties provided in the statute indicated that Congress did not intend to dispense with mens rea. Third, precedent "instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."[11] Under the statute, innocent conduct would violate the statute in the absence of a knowledge of age requirement. Fourth, without a requirement concerning the minor's age, the statute would encroach on speech protected by the First Amendment. The Court also looked to the statute's legislative history, but

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[8] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994).

[9] See 18 U.S.C. § 2252(a)(1) (2012).

[10] *United States v. X-Citement Video, Inc., supra* note 8, 513 U.S. at 71.

[11] *Id.*, 513 U.S. at 72.

such history did not clarify whether the term "knowingly" extended to the age of the performers.

Like the history in *X-Citement Video, Inc.*, the legislative history of § 28-833 offers little insight. As introduced in 2007, L.B. 142 clearly addressed knowledge of the recipient's age: "A violation . . . is a Class IV felony if the violator is over eighteen years of age and knows or has reason to believe that the recipient of the communication is less than sixteen years of age."[12] But a committee amendment changed the bill as introduced to create a new and separate offense of enticement by electronic communication device rather than merely enhancing the penalty for the crime of intimidation by telephone.[13] The amendment changed the language to require that the violator "knowingly uses an electronic communication device to contact a child under sixteen years of age or a peace officer who is believed by such person to be a child under sixteen years of age."[14] A floor amendment that was adopted struck "'uses'" and added "'and intentionally utilizes.'"[15] The floor debate does not shed light on whether the Legislature intended that the violator know that the recipient is under 16 years of age. In creating the new offense, it is unclear whether the Legislature intended to eliminate the mens rea requirement that it had previously proposed should attach to the recipient's age.

[3] Much of the rationale outlined in *X-Citement Video, Inc.* applies here. Using an electronic communication device to transmit, offer, or solicit sexual material or acts is not a public

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[12] Introduced Copy, L.B. 142, Judiciary Committee, 100th Leg., 1st Sess. (Jan. 8, 2007).

[13] See Revised Committee Statement, L.B. 142, Amend. 579, Judiciary Committee, 100th Leg., 1st Sess. (Feb. 15, 2007).

[14] See Legislative Journal, 100th Leg., 1st Sess. 866 (Mar. 14, 2007).

[15] Floor Debate, L.B. 142, Judiciary Committee, 100th Leg., 1st Sess. 161 (May 23, 2007).

welfare offense,[16] and individuals would not expect that the contents of their communications might be proscribed. And, as a Class IV felony,[17] a violator could be punished by a maximum of 2 years' imprisonment and 12 months' postrelease supervision, a $10,000 fine, or both.[18] While this punishment is a far cry from the harshest available, it is greater than one might expect for an offense that required no mens rea outside of the context of sexual assault of a child. Perhaps most important, without a knowledge of age requirement, § 28-833 criminalizes conduct that is otherwise innocent and could impinge on the right to free speech. The age of the recipient "is the crucial element separating legal innocence from wrongful conduct."[19] We conclude that where the prosecution under § 28-833 involves a minor child rather than a decoy, a defendant's knowledge that the recipient is under age 16 is an element of the crime of enticement by electronic communication device.

The statute and offense here are distinguishable from those concerning sex trafficking. We recently held that a defendant's knowledge of a victim's age is not an essential element of the offense of sex trafficking of a minor.[20] But sex trafficking is a crime no matter the age of the victim.[21] Whether the victim is a minor is important for gradation purposes, because a victim's minority subjects the defendant to greater potential punishment.[22] And we observe that the law was changed in 2017 to specifically provide that a defendant's belief that the minor was an adult is not a defense to

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[16] See *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (discussing public welfare offenses).

[17] § 28-833(2).

[18] Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2018).

[19] *United States v. X-Citement Video, Inc., supra* note 8, 513 U.S. at 73.

[20] See *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[21] See Neb. Rev. Stat. § 28-830 (Cum. Supp. 2018).

[22] See Neb. Rev. Stat. § 28-831 (Cum. Supp. 2018).

prosecution.[23] In contrast, utilizing an electronic communication device to transmit lewd or sexually explicit material or to offer or solicit indecent acts is not a crime when the recipient is age 16 or over (unless the recipient is "a peace officer who is believed by [the defendant] to be a child under sixteen years of age").[24]

[4] 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.[25] Paez has met this burden. Here, the court failed to instruct the jury in a manner that required it to consider whether Paez knew A.F. was a child under 16 years old. Whether Paez knew that A.F. was under age 16 was a primary dispute at trial. And the jury's acquittal on the sexual assault charge shows that it had some issue with the credibility of the State's evidence.

[5] For those same reasons, we cannot say that the erroneous jury instruction was harmless. Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.[26] We cannot say that the jury's verdict was "surely unattributable" to the instruction that failed to inform it that in order to find Paez guilty, the State needed to prove that he knew A.F. was under age 16. We therefore conclude that the error is prejudicial and requires reversal of Paez' conviction.

[6] The next question is whether upon reversal, we may remand the cause for a new trial. The Double Jeopardy Clause

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[23] See 2017 Neb. Laws, L.B. 289, § 9.

[24] § 28-833(1).

[25] *State v. Swindle, supra* note 20.

[26] *State v. Draper*, 295 Neb. 88, 886 N.W.2d 266 (2016).

does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.[27] There was evidence, if believed, that Paez knew A.F. was under age 16. Moreover, Paez has expressly stipulated to the precise relief suggested by the State, which included a remand for a new trial. Accordingly, we conclude that double jeopardy does not preclude a remand for a new trial on the charge of enticement by electronic communication device.

CONCLUSION

We conclude that where the prosecution under § 28-833 involves a minor child rather than a decoy, a defendant's knowledge that the recipient is under age 16 is a material element of the crime of enticement by electronic communication device. Because the district court failed to instruct the jury in a manner that required it to consider whether Paez knew A.F. was under 16 years of age, we allow the stipulation, reverse the judgment of the district court, and remand the cause for a new trial on the charge of enticement by electronic communication device.

Stipulation allowed. Reversed and remanded for a new trial.

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[27] *State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016).

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

State of Nebraska, appellee, v. Caleb A. Phillips, appellant.

924 N.W.2d 699

Filed March 29, 2019. No. S-18-590.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court.
2. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court.
3. **Statutes: Intent: Appeal and Error.** When interpreting a statute, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. An appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
4. **Statutes: Time: Words and Phrases.** Unless the context shows otherwise, the word "month" used in a Nebraska statute means "calendar month." A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one.
5. **Sentences: Probation and Parole: Appeal and Error.** Because a court has discretion under Neb. Rev. Stat. § 29-2268(2) (Reissue 2016) to impose, upon revocation, any term of imprisonment up to the remaining period of post-release supervision, an appellate court will not disturb that decision absent an abuse of discretion.
6. **Judgments: Appeal and Error.** An abuse of discretion occurs when a court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Jennifer M. Houlden for appellant.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Funke, J.

Caleb A. Phillips appeals from his 365 days of imprisonment imposed as a result of his revocation from post-release supervision. Phillips absconded from post-release supervision and failed to appear at the hearing on the State's motion for revocation. He was subsequently arrested and spent 98 days in jail prior to revocation.

This appeal raises the novel issue of how a court should, for purposes of imposing a term of imprisonment upon revocation, calculate a probationer's "remaining period of post-release supervision" under Neb. Rev. Stat. § 29-2268(2) (Reissue 2016). We discuss in this opinion, as a matter of first impression, how the time a probationer has absconded and how the time a probationer has spent in jail prior to revocation factor into that calculation. We affirm.

BACKGROUND

In May 2016, the State filed an information against Phillips in the district court for Lancaster County which alleged one count of unlawful discharge of a firearm, a Class ID felony. Phillips pled no contest to one count of terroristic threats, a Class IIIA felony. On February 8, 2017, the court imposed a sentence of 3 years' imprisonment and 18 months of post-release supervision and credited Phillips for 339 days served. Phillips was originally scheduled to participate in post-release supervision from September 4, 2017, through March 4, 2019.

On October 23, 2017, Phillips' probation officer filed a report alleging that Phillips had violated the conditions of his post-release supervision. The report alleged that Phillips had

completed only his first scheduled drug test, which he failed; missed the other seven drug tests that were scheduled; and absconded on September 28. The Lancaster County Attorney's office filed a motion to revoke post-release supervision and sent Phillips a letter advising him to appear and be arraigned at the revocation hearing scheduled for December 6. Phillips failed to appear, and a warrant was issued for his arrest. Phillips was arrested on February 5, 2018.

On April 16, 2018, the court held the rescheduled hearing on the State's motion to revoke post-release supervision. Phillips entered a plea of no contest, which the court accepted. The court found Phillips guilty of the allegations set forth within the motion for revocation, ordered an updated presentence report, and scheduled a sentencing hearing for May 14.

At the May 14, 2018, hearing, the district court revoked Phillips' post-release supervision and considered the imposition of additional imprisonment. Phillips argued that the maximum imprisonment he could receive would be 295 days. This figure represented the period of time from the date of revocation, May 14, 2018, to the date Phillips was originally scheduled to complete post-release supervision, March 4, 2019. In addition, Phillips argued that he was entitled to 98 days' credit for the time he spent in jail from his arrest, on February 5, to the date of revocation, May 14.

The court disagreed on both points. The court started with the figure of 295 days provided by Phillips and added 127 days, which represented the period of time that Phillips had absconded, from September 28, 2017, to the date of Phillips' arrest, February 5, 2018. As a result, the court found that the maximum term of imprisonment that Phillips could receive upon revocation of post-release supervision was 422 days. The court further determined that Phillips was not entitled to credit for the time he spent in jail prior to revocation. As a result, the court ordered Phillips to serve a term of imprisonment of 365 days in the county jail with 0 days' credit for time served. Phillips appealed.

ASSIGNMENTS OF ERROR

Phillips assigns, restated, that the district court erred in (1) extending Phillips' remaining term of post-release supervision upon revocation, (2) failing to give Phillips credit for time served, and (3) imposing an excessive sentence.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court.[1] Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court.[2] An appellate court will not disturb a decision to impose imprisonment up to the remaining period of post-release supervision after revocation absent an abuse of discretion by the trial court.[3]

ANALYSIS

This appeal presents the opportunity to address how a court should calculate a probationer's "remaining period of post-release supervision"[4] and thus determine the maximum term of imprisonment upon revocation of post-release supervision. We also address whether a probationer is entitled to credit for time served in jail prior to revocation.

Post-release supervision is a relatively new concept in Nebraska sentencing law,[5] introduced into Nebraska's statutes by 2015 Neb. Laws, L.B. 605, which amended Nebraska law to, among other things, reduce the penalties for certain felonies. Before L.B. 605, Class IIIA felonies were punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both,

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[1] *State v. Kennedy*, 299 Neb. 362, 908 N.W.2d 69 (2018).

[2] *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

[3] See *State v. Wal, ante* p. 308, 923 N.W.2d 367 (2019).

[4] § 29-2268.

[5] See, *State v. Dill*, 300 Neb. 344, 913 N.W.2d 470 (2018); *Kennedy, supra* note 1.

with no minimum term of imprisonment.[6] L.B. 605 split the sentence for Class IIIA felonies into an initial period of imprisonment for a maximum of 3 years and, if imprisonment is imposed, added a period of post-release supervision having an 18-month maximum and 9-month minimum term.[7]

The Nebraska Probation Administration Act[8] provides the statutory framework governing post-release supervision. Post-release supervision is defined as "the portion of a split sentence following a period of incarceration under which a person found guilty of a crime . . . is released by a court subject to conditions imposed by the court and subject to supervision by the [Office of Probation Administration]."[9] Post-release supervision is a form of probation.[10] A person sentenced to post-release supervision is referred to as a "[p]robationer."[11]

All sentences of post-release supervision are served under the jurisdiction of the Office of Probation Administration and are subject to conditions imposed under § 29-2262 and subject to sanctions authorized under § 29-2266.02.[12] A court may revoke a probationer's post-release supervision upon finding that the probationer has violated one of the conditions of his or her post-release supervision.[13] The court shall not do so except after a hearing upon proper notice where the violation is established by clear and convincing evidence.[14] Clear and convincing evidence means that amount of evidence which produces in

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[6] See, Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014); *State v. Aguallo*, 294 Neb. 177, 881 N.W.2d 918 (2016).

[7] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2018).

[8] See Neb. Rev. Stat. §§ 29-2246 to 29-2269 (Reissue 2016 & Cum. Supp. 2018).

[9] § 29-2246(13).

[10] See, § 29-2246(4); *Dill, supra* note 5; *Kennedy, supra* note 1.

[11] § 29-2246(5).

[12] See § 28-105(5).

[13] See § 29-2268(2).

[14] See § 29-2267(1).

the trier of fact a firm belief or conviction about the existence of a fact to be proved.[15]

Once a court revokes a probationer's post-release supervision, is must then determine the appropriate term of imprisonment to be imposed. The controlling statute is § 29-2268, which provides:

> (2) If the court finds that a probationer serving a term of post-release supervision did violate a condition of his or her post-release supervision, it may revoke the post-release supervision and impose on the offender a term of imprisonment up to the remaining period of post-release supervision. The term shall be served in an institution under the jurisdiction of the Department of Correctional Services or in county jail subject to subsection (2) of section 28-105.
>
> (3) If the court finds that the probationer did violate a condition of his or her probation, but is of the opinion that revocation is not appropriate, the court may order that:
>
> . . . .
>
> (e) The probationer's term of probation be extended, subject to the provisions of section 29-2263.

The parties offer differing views regarding the approach taken by the court in arriving at the 365-day term of imprisonment. Phillips argues the court erred by implementing a hybrid approach under both § 29-2268(2) and (3). He contends that the court proceeded under § 29-2268(2) when it revoked his post-release supervision, but also proceeded under § 29-2268(3)(e) when the court included the 127 days of absconsion time in calculating the "remaining period of post-release supervision." Phillips argues the court thereby erred, based on our opinion in *State v. Kennedy*.[16]

In *Kennedy*, we determined that once a district court has found a violation of post-release supervision, it may "proceed

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[15] *State v. Johnson*, 287 Neb. 190, 842 N.W.2d 63 (2014).

[16] *Kennedy, supra* note 1.

under *either* subsection (2) or subsection (3) of § 29-2268."[17] Phillips also argues that once the court revoked post-release supervision, it could not also extend the term of post-release supervision. Therefore, Phillips contends that the maximum imprisonment the court could have imposed was 295 days. As indicated, 295 days represents the amount of time between the date of revocation and the end date of Phillips' original term of post-release supervision.

The State argues that the term of imprisonment imposed by the court was appropriate based on the State's interpretation of the phrase "remaining period of post-release supervision" under § 29-2268(2). The State points to our recognition in *Kennedy* that the Nebraska Probation Administration Act sometimes refers to probation and post-release supervision interchangeably,[18] and other times, separately.[19] The State contends that when the act is read as a whole, the phrase "remaining period of post-release supervision" does not represent a fixed number. The State relies on § 29-2263(5), which provides, "[w]henever a probationer disappears or leaves the jurisdiction of the court without permission, the time during which he or she keeps his or her whereabouts hidden or remains away from the jurisdiction of the court shall be added to the *original term of probation*." (Emphasis supplied.) The State argues that if the reference to the term of probation under § 29-2263(5) is synonymous with the term of post-release supervision referenced in § 29-2268(2), then the court was free to add Phillips' absconsion time to his "remaining period of post-release supervision." As a result, the State contends that the maximum term the court could have imposed was 295 days plus 127 days of absconsion time, for a total of 422 days

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[17] *Id*. at 371, 908 N.W.2d at 75 (emphasis supplied).

[18] *Kennedy, supra* note 1. See, e.g., §§ 29-2250, 29-2251, 29-2258, 29-2262, and 29-2267.

[19] *Kennedy, supra* note 1. See, e.g., §§ 29-2263(2) and (3) and 29-2268(1) and (2).

of imprisonment. The State argues Phillips' 365-day term of imprisonment is therefore valid.

Based on our decision in *Kennedy*, we agree that once the district court revoked Phillips' post-release supervision, it no longer had available the various options under § 29-2268(3), including the option to extend the probationer's term under § 29-2268(3)(e). But the district court here was not extending Phillips' term of post-release supervision under § 29-2268(3); it originally sentenced him to 18 months' post-release supervision, and that term did not change. Instead, the district court was simply calculating how much of the 18-month term had been served, and how much remained to be served, in order to determine the "remaining period of post-release supervision" under § 29-2268(2). It did so by considering how many days Phillips had actually served on post-release supervision. The district court found the 127 days Phillips had absconded[20] from post-release supervision by purposely avoiding supervision should not be considered time he had served on the 18-month term of post-release supervision.

We have not previously considered whether absconsion can be taken into consideration when calculating the time remaining on a term of post-release supervision under § 29-2268(2). Nor have we addressed generally how a court is to calculate the "remaining period of post-release supervision" under § 29-2268(2). While our analysis differs somewhat from that of the district court, we ultimately agree with its disposition.

Remaining Period of Post-Release Supervision

[3] When interpreting a statute, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.[21] An appellate court must look to the statute's

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[20] See § 29-2266(1).

[21] *Kennedy, supra* note 1.

purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.[22]

In *Kennedy*, we noted that the reference to probation in § 29-2268(1) was not used interchangeably with the reference to post-release supervision in § 29-2268(2) and we explained that the disposition available to a court differs based on whether a probationer is alleged to have violated the terms of probation or post-release supervision. We stated that once a district court finds a violation of post-release supervision, the court must proceed under either subsection (2) or subsection (3) of § 29-2268 and that this statute "does not authorize any disposition not therein enumerated."[23]

Here, the district court proceeded under § 29-2268(2). And, as part of calculating the time remaining on Phillips' term of post-release supervision under § 29-2268(2), it took into account the number of days Phillips absconded from supervision. Phillips contends this was error, but we disagree.

When determining the amount of time "remaining" on a period of post-release supervision, courts are not required to turn a blind eye to a probationer's absconsion from supervision. As the State notes in its brief, to conclude otherwise would mean that "if a person refuses to comply with the provisions of their post-release supervision or absconds altogether, as [Phillips] did, the clock keeps running and the period of noncompliance counts as time served toward the person's sentence of post-release supervision."[24] The State's position is in line with numerous federal courts of appeal which have held that a defendant's term of supervised release is tolled during a period in which the defendant has absconded from supervision.[25] As the Third Circuit recently observed, to hold

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[22] *Id.*

[23] *Id.* at 371, 908 N.W.2d at 75.

[24] Brief for appellee at 8.

[25] See *U.S. v. Island*, 916 F.3d 249 (3d Cir. 2019) (collecting cases).

otherwise would not serve the rehabilitative goals of supervised release and would credit defendants for their misdeeds.[26] We agree that noncompliance to the degree of absconsion suggests that a probationer has ceased serving his or her post-release supervision sentence, and this fact may be taken into consideration by a court when calculating the time served on post-release supervision.

While federal courts have held that a defendant's term of supervised release is tolled during a period of absconsion even though the federal statute is silent on that point,[27] our interpretation finds statutory support in § 29-2263(5), which provides: "Whenever a probationer disappears or leaves the jurisdiction of the court without permission, the time during which he or she keeps his or her whereabouts hidden or remains away from the jurisdiction of the court shall be added to the original term of probation." There are no reported appellate opinions construing or applying this statute, but its purpose is obvious: The Legislature did not want probationers to be able to hide from supervision and simultaneously demand credit toward completing their term of probation or post-release supervision. Stated differently, a probationer who has absconded has not actually served those days and can be required to do so. We see no abuse of discretion in taking this policy into account when calculating the time remaining on post-release supervision for purposes of § 29-2268(2).

Here, the district court found Phillips was absconded from September 28, 2017, to his arrest and detention on February 5, 2018, and it took that into account when determining how many days he had served on his 18-month period of post-release supervision and, consequently, how much time was remaining on his 18-month term. We find no abuse of discretion in considering Phillips' absconsion in this manner.[28]

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[26] *Id.*

[27] See *id.*

[28] See *Wal, supra* note 3.

We hold that when calculating the "remaining period of post-release supervision" under § 29-2268(2), courts must first identify the number of days the probationer was originally ordered to serve on post-release supervision. As we explain, this may require converting a term pronounced in a number of months into one consisting of a number of days. This is done by counting the number of days from the commencement of post-release supervision to the date of the revocation, less any days of absconsion. Finally, the court calculates the "remaining period of post-release supervision" by subtracting the number of days actually served from the number of days ordered to be served.

[4] Section 28-105(1) defines periods of post-release supervision in terms of months. When a court has pronounced the period of post-release supervision in terms of months, that period will need to be converted to a number of days in order to calculate the "remaining period of post-release supervision" under § 29-2268(2). Unless the context shows otherwise, the word "month" used in a Nebraska statute means "calendar month."[29] A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one.[30] However, we must also consider Neb. Rev. Stat. § 25-2221 (Reissue 2016), which provides in part as follows: "Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run."[31]

Here, Phillips was ordered to serve 18 months' post-release supervision commencing September 4, 2017. As a result, barring any period of absconsion, Phillips would have completed his post-release supervision on March 4, 2019, which equated

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[29] *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007).

[30] *Id.*

[31] See *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

to 546 days. We digress to remind the bench and bar that the outcome of converting a period of months to a number of days will vary depending on the date that period commences and the length of the months falling within that particular period. Here, the 18-month period equated to 546 days. But that will not always be so, and courts should perform the calculation by applying the statutory computation rules to the particular facts of each sentence.

The court found that after serving 24 days of post-release supervision, Phillips absconded for a period of 127 days. Because the court found Phillips' absconsion began on September 28, 2017, and ended when he was rearrested on February 5, 2018, he actually was absconded for a period of 130 days. Phillips' post-release supervision was revoked on May 14, 2018, 98 days after his rearrest. On the date of revocation, Phillips had actually served 122 days (24+98) of his original 546-day term of post-release supervision. As a result, on the date of his revocation, Phillips had 424 days remaining on his post-release supervision. Our calculations are set forth in the appendix attached hereto and incorporated herein by reference. Therefore, the court's imposition of a 365-day term of imprisonment was within the statutory range. Phillips' first assignment of error is without merit.

Credit for Time Served

This brings us to Phillips' argument that the court was required to give him credit for the time he spent in jail pending revocation. Phillips argues that the presentence investigation report indicates he served 98 days in jail pending revocation and that the court erred by awarding Phillips 0 days for time served. The State argues that Phillips received credit for the days he spent in jail, because the court did not include that time when it calculated Phillips' maximum possible term of imprisonment upon revocation. As our calculations above demonstrate, the days Phillips spent in jail pending revocation are considered days he actually served against his 18-month period of post-release supervision. As such, those days should

not also be credited against Phillips' term of imprisonment upon revocation.

To support his argument for jail credit, Phillips relies upon Neb. Rev. Stat. § 47-503 (Reissue 2010), which provides in relevant part:

> (1) Credit against a jail term shall be given to any person sentenced to a city or county jail for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based. Such credit shall include, but not be limited to, time spent in jail . . . .

But § 47-503 does not apply to the time Phillips spent in jail, because he had not yet been revoked from supervision and was still serving the post-release supervision portion of his original split sentence. We find that the 98 days Phillips spent in jail were not "as a result of the criminal charge for which the jail term [was] imposed" under § 47-503, but, rather, were a result of violating the terms of supervision.

The imposition of a term of post-release supervision that includes conditions is part of the sentence.[32] Under Neb. Ct. R. § 6-1904(A) (rev. 2016), "the court shall, at the time a sentence is pronounced, impose a term of incarceration and a term of post-release supervision pursuant to Neb. Rev. Stat. § 29-2204.02(1), and shall enter a separate post-release supervision order that includes conditions pursuant to Neb. Rev. Stat. § 29-2262."

Phillips violated the conditions of his supervision by failing to report to his probation officer and failing to refrain from unlawful conduct, and his probation was revoked for these violations.[33] These conditions were imposed upon Phillips under his original sentence. Phillips did not spend 98 days in jail prior to revocation as a result of a criminal charge, but, rather,

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[32] See, *Dill, supra* note 5; *State v. Phillips*, 297 Neb. 469, 900 N.W.2d 522 (2017).

[33] See § 29-2262(2)(a) and (k).

as a part of the administration of his sentence of post-release supervision. As explained above, once a court has revoked a probationer under § 29-2268(2), the court is not authorized to order any disposition not enumerated therein. The Legislature has not demonstrated within § 29-2268 that jail credit should be given for time served prior to revocation. In addition, the record indicates that Phillips spent time in jail as a result of his failure to appear.[34]

The court did not err in denying Phillips' request for jail time credit, because it credited the 98 days he spent in jail as time actually served on his term of post-release supervision. Phillips' second assignment of error is without merit.

Court Did Not Abuse Discretion

[5,6] Lastly, Phillips claims that the 365-day term of imprisonment was excessive. Because a court has discretion under § 29-2268(2) to impose, upon revocation, any term of imprisonment up to the remaining period of post-release supervision, an appellate court will not disturb that decision absent an abuse of discretion.[35] An abuse of discretion occurs when a court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.[36]

Based upon the record, which includes the court's order imposing imprisonment and a presentence investigation report, we cannot conclude that the court abused its discretion. The court's order stated that it imposed the 365-day term of imprisonment based on

> the nature and circumstances of the crime and the history, character and condition of [Phillips, and] the protection of the public, because the risk is substantial that [Phillips] would engage in additional criminal conduct and because a lesser sentence would depreciate the

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[34] See *State v. Heckman*, 239 Neb. 25, 473 N.W.2d 416 (1991).

[35] See *Wal, supra* note 3.

[36] See *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

> seriousness of [Phillips'] crime and promote disrespect for the law.

Phillips argues that the 365-day term of imprisonment does not give sufficient weight to his willingness to enter a plea of no contest to the original charge. However, by entering into the plea deal, Phillips received the significant benefit of having his charge reduced from a Class ID felony, with a maximum sentence of 50 years' imprisonment, to a Class IIIA felony.

Phillips suggests that based on the presentence investigation report, he expressed remorse, accepted responsibility for the offense, and "appear[ed] to be in the contemplative stage of change." However, Phillips is referring to the report that was generated for his sentence on the terroristic threats conviction and not the most recent presentence report. The presentence report prepared for Phillips' revocation indicates that Phillips refused to meet with the probation officer and did not make a statement for the report. The report that Phillips refers to indicates that he was "assessed as a very high risk to re-offend." When Phillips was arrested after absconding from supervision, he was charged with possession of a controlled substance and was found to be in possession of a switchblade and a BB gun. The court articulated that the 365-day term of imprisonment reflected a concern for public safety. It was within the court's discretion to impose a term of imprisonment that was approximately 85 percent of the maximum. Phillips' assignment of error that the court abused its discretion is without merit.

CONCLUSION

The 365-day term of imprisonment imposed by the court was within the statutory range and was not an abuse of discretion. The court did not err when it denied Phillips' request for credit for time served.

Affirmed.

Freudenberg, J., not participating.

(*See page 701 for the appendix.*)

APPENDIX

Calculation of Remaining Term of Post-Release Supervision (PRS)

1. From commencement date of PRS, determine original ending date (here, a term of 18 months of PRS):

Term began	September 4, 2017	First day excluded per § 25-2221
Next day	September 5, 2017	Beginning date for calculation of months
18 months forward	March 5, 2019	First step of calendar month method
Back 1 day	March 4, 2019	Second step of calendar month method
Ending date	March 4, 2019	Result of § 25-2221 and calendar month method

2. Calculate original number of days of term of PRS:

Term began	September 4, 2017
Term ends	March 4, 2019
Number of days per § 25-2221	**546** days

3. Calculate number of days of PRS served:

   (a) Days from beginning date to date of absconsion:

Term began	September 4, 2017	
Absconsion began	September 28, 2017	
PRS days served	(per § 25-2221)	24

   (b) Days from resumption date to date of revocation:

Arrest and detention	February 5, 2018	
Revocation	May 14, 2018	
PRS days served	(per § 25-2221)	98

   (c) Total number of days served:

From beginning to absconsion	24
From resumption to revocation	98
Total days of PRS served	**122**

4. From original number of days, subtract days served:

Original number of days	546
Total days of PRS served	122
Number of days remaining	**424**

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

State of Nebraska, appellee, v. Matthew J. Stubbendieck, appellant.

924 N.W.2d 711

Filed March 29, 2019. No. S-18-600.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
4. **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.
5. **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.

6. **Rules of Evidence.** An analysis under Neb. Rev. Stat. § 27-403 (Reissue 2016) consists of a balancing test, which is in large part left to the sound discretion of the trial court, absent an abuse of discretion.
7. ____. The "relevancy-versus-unfairly-prejudicial-effect-balancing" test seeks to weigh the probative value of the proffered evidence against the nonprobative factors listed in Neb. Rev. Stat. § 27-403 (Reissue 2016).
8. **Evidence: Words and Phrases.** Probative value is a relative concept involving a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issue of the case.
9. **Rules of Evidence: Appeal and Error.** Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only unfair prejudice with which an appellate court is concerned.
10. **Rules of Evidence: Words and Phrases.** "Unfair prejudice," in the context of Neb. Rev. Stat. § 27-403 (Reissue 2016), means a tendency to suggest a decision on an improper basis.
11. **Criminal Law: Evidence.** A defendant cannot negate an exhibit's probative value through a tactical decision to stipulate.
12. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
13. ____: ____. Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.
14. **Criminal Law.** The corpus delicti may be proved by circumstantial evidence.
15. **Circumstantial Evidence: Words and Phrases.** Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.
16. **Criminal Law: Evidence: Confessions: Proof.** An extrajudicial admission or a voluntary confession is, standing alone, insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence of facts and circumstances, establish the corpus delicti and guilty participation of the defendant.

Appeal from the District Court for Cass County: Michael A. Smith, Judge. Affirmed.

Julie E. Bear, Deputy Cass County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

I. INTRODUCTION

Matthew J. Stubbendieck was convicted of the crime of assisting suicide,[1] a Class IV felony, in regard to the death of Alicia Wilemon-Sullivan (Sullivan). Stubbendieck was sentenced to a term of probation. He appeals his conviction on various evidentiary grounds. We affirm.

II. BACKGROUND

On August 5, 2017, deputies from the Cass County Sheriff's Department were dispatched to an address in Weeping Water, Cass County, Nebraska, in response to a report of a suicide.

Upon arrival, deputies spoke to Stubbendieck, who reported that his girlfriend, Sullivan, had killed herself days prior. After being interviewed for more than an hour, Stubbendieck led deputies to Sullivan's body. The body was located in a densely wooded area of private land that once operated as a rock quarry.

Upon examination, it was determined that Sullivan's body was in the early stages of decomposition. Despite the stage of decomposition to the body, deputies noted injuries to both of Sullivan's wrists and further observed a knife located under Sullivan's left hand. In the immediate area surrounding Sullivan's body, deputies located two water bottles (one containing an unknown dark liquid), a potato chip can, a purse, a

[1] Neb. Rev. Stat. § 28-307 (Reissue 2016).

pair of sandals, and boxer briefs. The boxer briefs were later identified as belonging to Stubbendieck.

During the course of the investigation, Stubbendieck told investigators that he believed Sullivan was suffering from "Stage IV cancer." Stubbendieck indicated that Sullivan "hated" hospitals, but had been convinced by friends to undergo radiation treatments in Jacksonville, Florida. According to Stubbendieck, Sullivan terminated radiation therapy after only 5 weeks because her condition had not improved.

Investigators employed "Cellebrite," a technology used to conduct cell phone information extraction, and recovered from Stubbendieck's cell phone numerous text messages between Sullivan and Stubbendieck in the weeks leading up to Sullivan's death. In those text messages, Sullivan represents herself as being hospitalized, in pain, dying, and not able to live any longer.

Text messages from Sullivan's cell phone show a persistent state of suicidal ideation, evidenced by Sullivan's repeated threats of self-harm. Throughout the course of the lengthy text message transcript, it is clear that Stubbendieck and Sullivan developed a plan in which Sullivan would travel by plane from Florida to Nebraska in order to marry Stubbendieck, and then "go out in [Stubbendieck's] arms as [his] wife," a reference to a prearranged plan in which Sullivan would end her life.

Stubbendieck subsequently enlisted the assistance of his mother to purchase a one-way airline ticket to bring Sullivan to Nebraska. Prior to Sullivan's arrival, Stubbendieck set out in search of narcotics in order to assist Sullivan in committing suicide. According to Christine Timbs, a romantic acquaintance of Stubbendieck's, Stubbendieck asked Timbs if she could acquire heroin or morphine in order to make Sullivan more comfortable. A coworker of Stubbendieck testified that Stubbendieck had indicated that he had four doses of liquid morphine for Sullivan to take. Yet another coworker testified that Stubbendieck had told him that he planned to

"[s]hoot her [Sullivan] up with morphine" in order to "put her to sleep."

Sullivan arrived in Nebraska on July 31, 2017. The day following Sullivan's arrival, Sullivan was reportedly observed taking an unknown quantity and type of pill two to three times throughout the morning. Stubbendieck indicated that he took Sullivan to a remote area of Weeping Water, locally referred to as "Acapulco Lake." According to Stubbendieck, once at the lake, the two went swimming and had intercourse before Sullivan retrieved a knife and began cutting her wrists.

Stubbendieck indicated that the two remained in the remote area for approximately 8 hours. Stubbendieck admitted that during that time, on two occasions, he attempted to assist Sullivan by covering her nose and mouth in order to suffocate her. Stubbendieck told investigators that Sullivan was alive and conversing with him when he left her 7½ hours after arriving at the location.

After Stubbendieck led deputies to Sullivan's body, an investigation ensued that included the recovery of text messages, interviews with witnesses to whom Stubbendieck had confided, and an autopsy of Sullivan. Stubbendieck was arrested by Cass County Sheriff's Department investigators and subsequently charged with assisting suicide.

At trial, the State presented evidence in the form of text messages between Sullivan and Stubbendieck, which indicated Sullivan's desire to end her life and the ensuing plan to arrange for Sullivan's travel to Nebraska. In addition to text message conversations between Sullivan and Stubbendieck, the State offered, over a motion in limine and a continuing objection of defense counsel at trial, text conversations between Stubbendieck and Timbs. These text messages were offered in order to show both Stubbendieck's motive and plan. The State further provided testimony from Dr. Michelle Elieff, a forensic pathologist who performed Sullivan's autopsy. That testimony was also contested by way of a motion in limine and a continuing objection of defense counsel at trial.

Elieff testified that Sullivan's body was in a state of moderate decomposition, but that other than the cuts to Sullivan's wrists, the examination did not reveal any signs of traumatic injury, natural disease, or illness. Elieff, however, testified that the toxicology report indicated Sullivan had morphine in her liver measuring 876 nanograms per gram of tissue, an amount that Elieff testified was within the range of some fatal cases. Elieff indicated further testing revealed that Sullivan also had Tylenol, Benadryl, and alcohol in her system. Elieff testified that the cause of death was "undetermined." She stated that based on the circumstances surrounding Sullivan's death, the investigative information, and the condition of the body, "there were certain things that could not be excluded as causing or contributing factors."

Specifically, Elieff's official report, accepted in evidence, indicated that "[b]ased on the autopsy findings and ancillary tests, contributing factors such as asphyxia (smothering), drugs, and the environment (hypothermia) cannot be entirely excluded."

Following a jury trial, Stubbendieck was found guilty of assisting suicide and subsequently sentenced to a term of probation. Stubbendieck appeals.

III. ASSIGNMENTS OF ERROR

Stubbendieck assigns, consolidated and restated, that (1) the district court erred in admitting certain testimonial evidence and text messages that were irrelevant and unfairly prejudicial and (2) there was insufficient evidence to support the conviction.

IV. STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on

the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[2]

[2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[3]

[3-5] 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.[4] A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value.[5] 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.[6]

V. ANALYSIS

1. Admissibility and Unfair Prejudice

(a) Testimony of Elieff

Stubbendieck assigns that the district court erred in allowing the testimony of Elieff, the forensic pathologist who performed Sullivan's autopsy. Stubbendieck's argument is grounded in his contention that Elieff was not able to opine as to the cause of Sullivan's death, thus rendering Elieff's testimony irrelevant

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[2] *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

[3] *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014).

[4] *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

[5] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[6] See *State v. Henderson, supra* note 4.

and prejudicial. As such, Stubbendieck contends that under Neb. Rev. Stat. § 27-402 (Reissue 2016), Elieff's testimony is inadmissible. While Stubbendieck does not explicitly point to Neb. Rev. Stat. § 27-403 (Reissue 2016), he does claim that Elieff's testimony was "highly prejudicial,"[7] and further indicates that he fears the testimony resulted in a "danger of unfair prejudice,"[8] which leads us to review Stubbendieck's claim of prejudice under a § 27-403 analysis in addition to our § 27-402 analysis.

First, we turn to Stubbendieck's claim that Elieff's testimony was irrelevant. Under § 27-402:

> All relevant evidence is admissible except as otherwise provided by the Constitution of the United States or the State of Nebraska, by Act of Congress or of the Legislature of the State of Nebraska, by these rules, or by other rules adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters. Evidence which is not relevant is not admissible.

Here, the district court noted that the testimony regarding Sullivan's autopsy was relevant. Specifically, the court stated that "the charge as described in statute includes aiding and abetting a suicide- a definition which includes affirmative acts allegedly done by a defendant that result in the death of another." Having made the determination that Elieff's testimony would likely provide information as to affirmative acts that brought about Sullivan's death, the court overruled Stubbendieck's objections.

In light of evidence presented at trial with regard to Stubbendieck's attempts to procure morphine in order to aid Sullivan in committing suicide, the factual testimony of Elieff regarding the presence of morphine or other substances in Sullivan's system cannot be said to be irrelevant. Nor can

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[7] Brief for appellant at 17.

[8] *Id.*

the testimony regarding the overall findings of the autopsy be seen as irrelevant, as the findings provide factual information regarding the state of the body and any evidence or lack of evidence. This information can be useful to the trier of fact in determining whether a suicide did in fact occur and to what extent the defendant aided the deceased party under the circumstances.

We next turn to Stubbendieck's argument under § 27-403 concerning the prejudicial effect of the court's decision to admit Elieff's testimony and autopsy findings. Under § 27-403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

With regard to § 27-403, Stubbendieck contends that the relevancy of Elieff's testimony and results of the autopsy are outweighed by the danger of unfair prejudice and the risk that the testimony misled the jury. Specifically, Stubbendieck argues that Elieff's testimony left the jury to speculate as to the cause of Sullivan's death: whether it was due to asphyxiation, the cuts to Sullivan's wrists, the ingestion of a lethal dose of morphine, or hypothermia. Therefore, Stubbendieck appears to suggest that the jury was left with only the option to convict Stubbendieck of assisting suicide, supported by evidence suggesting a more nefarious act with which he had not been charged.

[6,7] An analysis under § 27-403 consists of a balancing test, which is in large part left to the sound discretion of the trial court, absent an abuse of discretion.[9] The "relevancy-versus-unfairly-prejudicial-effect-balancing" test seeks to weigh the probative value of the proffered evidence against the nonprobative factors listed in § 27-403.[10]

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[9] See R. Collin Mangrum, Mangrum on Nebraska Evidence 209 (2018).

[10] See *id.* at 212.

[8] First, the court weighs the probative value of the proffered testimony, a relative concept involving a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issue of the case.[11] The next step requires that the court weigh the probative value against the unfairly prejudicial effects listed in § 27-403. Only if the probative value is substantially outweighed by the prejudicial effect may the court exclude the evidence.

In light of the balancing test described above, Stubbendieck's argument discounts the fact that while the cause and manner of death were found to be undetermined by Elieff, the autopsy presented relevant probative evidence that was germane to the crime of assisting suicide with which Stubbendieck was charged. In his motion in limine, Stubbendieck sought to stipulate to the cause of Sullivan's death by stating that he "is willing to stipulate that the cause of death for . . . Sullivan is suicide."

Despite Stubbendieck's tactical trial strategy to prevent the introduction of evidence, the factual evidence contained in the autopsy and testified to at trial was directly connected to the elements charged. As noted by Justice Souter in *Old Chief v. United States*[12]:

> Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.

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[11] *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

[12] *Old Chief v. United States*, 519 U.S. 172, 187, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

The facts contained in the autopsy and Elieff's testimony undoubtedly relate to the charge of assisting suicide, with which Stubbendieck was tried. Elieff's testimony was relevant to the extent that it provided the trier of fact with evidence that the injuries sustained and drugs ingested were in furtherance of a successful attempt at suicide and not the result of natural causes. The fact that Sullivan's body was found to have a lethal amount of morphine cannot be discounted, especially as it relates to the testimonial evidence regarding Stubbendieck's attempts to acquire morphine in furtherance of Sullivan's plan, an affirmative act which constitutes aiding or abetting under § 28-307.

[9,10] Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only "unfair prejudice" with which we are concerned.[13] In the context of § 27-403, such prejudice means a tendency to suggest a decision on an improper basis.[14]

[11] Additionally, we have previously articulated that if an exhibit is relevant and illustrates or makes clear some controverted issue in a case, a defendant cannot negate an exhibit's probative value through a tactical decision to stipulate.[15] The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.[16]

On balance, we cannot say that the trial court abused its discretion in permitting Elieff's testimony regarding the findings of the post mortem examination of Sullivan.

(b) Admission of Text Messages

Stubbendieck makes a similar argument with regard to the court's admission of text messages shared between

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[13] See *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990).

[14] See *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997).

[15] *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

[16] *Id.*

Stubbendieck and Timbs. Stubbendieck objected to the admission of text messages in a motion in limine and through his continuing objection at trial.

Stubbendieck argues that the text messages of a romantic nature between Timbs and him were used by the State to "impugn his love for . . . Sullivan, and place him in an unfavorable light to the jury."[17] While Stubbendieck admits that some text messages directly relate and "could be perceived to have importance," he argues that text messages of a romantic nature "bear no relevance to the proof of any fact that is of consequence to the determination of whether . . . Stubbendieck assisted in the suicide of . . . Sullivan."[18]

While Stubbendieck again fails to argue with specificity the basis on which he challenges the court's determination regarding the admission of text messages and testimony involving Timbs, he does make reference to issues of relevance and unfair prejudice, rules which are discussed above.

Stubbendieck fails to point to any specific text message that demonstrates undue prejudice or is irrelevant standing alone. The trial court exercised its discretion in determining that the evidence was relevant and that its prejudicial effect did not substantially outweigh its probative value.[19] We review the admissibility of evidence for an abuse of discretion.[20]

In reviewing the district court's decision, we conduct a § 27-403 analysis against the backdrop of our standard of review for abuse of discretion. In conducting our review for abuse of discretion, we first consider the court's weighing of the probative value of the proffered evidence, then in the second step of the analysis, how the court weighed the probative value against the unfairly prejudicial effects listed in § 27-403.

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[17] Brief for appellant at 19.

[18] *Id.*

[19] *State v. Bauldwin, supra* note 5.

[20] *State v. Henderson, supra* note 4.

With regard to the court's admission of text messages between Stubbendieck and Timbs, the court found that the testimony and exhibits of "those communications are relevant as to a possible motive and to [Stubbendieck's] planning to commit the crime, and may go to the weight and credibility of other testimony by . . . Timbs." The text message conversations between Stubbendieck and Timbs give context to the relationship that Stubbendieck and Timbs shared in which he confided to Timbs details of Sullivan's plan to die. Further, the text messages corroborate Timbs' testimony at trial.

Of the several text message conversations that exist between Stubbendieck and Timbs, one particularly illuminating message reveals the level of trust Stubbendieck shared with Timbs, as demonstrated by Stubbendieck's revealing certain aspects of the plan to end Sullivan's life. This particular series of text messages sent from Stubbendieck to Timbs on July 31, 2017, stated: "I will be honest and she flew in early. She will be passed by sunrise [W]ednesday morning. Please bare [sic] with me. I[']m getting home from work and dinner with family and jumping in shower. She is with my parents. I miss you." Approximately 7 minutes later, Stubbendieck sent a text message to Timbs, which stated: "Please answer me. I can't have you mad. I enjoy our time so much and can't wait to get back to it."

At trial, Timbs testified to an oral conversation she shared with Stubbendieck in which he asked her if she could obtain heroin or morphine. Timbs further testified that following Sullivan's death, Stubbendieck and Timbs exchanged text messages in which he sought to speak to her on the telephone. In her testimony regarding their oral conversation that followed, Timbs stated:

> He was crying hysterically, telling me that they went out for a drive that day. She had gotten rid of all of her personal belongings and cell phone, then they were walking in the woods. . . . He walked off . . . . When he came back he didn't find her anywhere. When he found her he

> said there was blood everywhere. . . . Then he said he laid there and held her for a while.

In this conversation, largely corroborated by text messages sent on August 1, 2017, between approximately 10:11 and 10:50 p.m., Stubbendieck confided in Timbs the execution of Sullivan's plan and his role in her death.

In addition to the corroborative effect of the text messages between Stubbendieck and Timbs, the messages signal a connection between Stubbendieck and "Lake Acapulco," the location where Sullivan's body was found. In those messages, this lake is referenced on three separate occasions as a place known to both individuals. Therefore, we cannot say that the court abused its discretion in finding that the text conversations had strong probative value.

The next step in the analysis required that the district court weigh the probative value against the unfairly prejudicial effects listed in § 27-403. Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.[21] It speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.[22]

It cannot be said that the romantic undertones of Stubbendieck's text messages rise to the level of unfair prejudice in light of the discussion above. This conclusion is grounded in the fact that the substantive information contained within the text messages provides the finder of fact with information that goes directly to Stubbendieck's motive and plan. For that same reason, it cannot be said that the text messages lack relevance. The entire text message history between Stubbendieck and Timbs provides context to their relationship as it related to Sullivan and to Stubbendieck's actions surrounding Sullivan's death.

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[21] *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018).

[22] *Id.*

We cannot say that the district court abused its discretion in admitting the text messages between Stubbendieck and Timbs.

2. Sufficiency of Evidence

Stubbendieck argues that the evidence adduced at trial was insufficient to sustain a conviction for assisting suicide. It is Stubbendieck's contention that the evidence failed to demonstrate active participation in the planning or execution of Sullivan's suicide.

(a) Aiding and Abetting

In Nebraska, aiding and abetting under Neb. Rev. Stat. § 28-206 (Reissue 2016) is not a separate crime. Rather, it is another theory for holding one liable for the underlying crime.[23] Suicide or attempted suicide has not been criminalized in Nebraska, thus one cannot be held criminally liable for aiding and abetting suicide, pursuant to § 28-206. However, the Nebraska Legislature established the separate crime of assisting suicide under § 28-307. The statute relies largely on the term "aids and abets," which the Legislature left undefined in §§ 28-206 and 28-307.

[12,13] Specifically, the language of § 28-307 states: "A person commits assisting suicide when, with intent to assist another person in committing suicide, he aids and abets him in committing or attempting to commit suicide." While §§ 28-206 and 28-307 fail to define the term "aiding and abetting," our longstanding jurisprudence indicates that aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor.[24] No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime

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[23] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[24] *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

or that there was an express agreement to commit the crime.[25] Yet, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.[26]

Here, Stubbendieck argues that he merely acquiesced to Sullivan's planned suicide. Stubbendieck contends that his purchase of an airline ticket for Sullivan to travel to Nebraska as contemplated in her plan, his attempts to procure morphine on her behalf, and his mere presence as she engaged in the life-taking act were insufficient to sustain his conviction.

However, viewed in the light most favorable to the State, Stubbendieck did more than simply acquiesce to Sullivan's acts. As demonstrated by the evidence contained in text messages between Stubbendieck and Sullivan, Stubbendieck encouraged Sullivan to come to Nebraska in order to end her life. In one of Sullivan's many text message conversations to Stubbendieck regarding Sullivan's taking her life, she wrote that "[t]his[]is the final end baby." Stubbendieck replied, "When you get here. We both need this. I promise it will be what you want and what I need. Please."

Further evidence in the form of witness testimony demonstrated that Stubbendieck actively sought out and ostensibly obtained liquid morphine in order to "put [Sullivan] to sleep." Even if these acts alone were not enough, Stubbendieck, by his own admission, intentionally and voluntarily engaged in the act of attempting to asphyxiate Sullivan, first by covering her nose and mouth with his hand to prevent her from breathing, and later using a pair of boxer shorts to aid him in covering her nose and mouth in order to bring her life to an end.

As stated above, aiding and abetting requires some participation in a criminal act, which must be evidenced by word, act, or deed. Further, mere encouragement or assistance is sufficient. While we have said that no particular acts are necessary, nor is

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[25] *Id.*

[26] *Id.*

it necessary that the defendant take physical part in the act, the record, including Stubbendieck's own admissions, demonstrate that viewed in a light most favorable to the State, Stubbendieck took more than a passive role in bringing about Sullivan's ultimate demise, as evidenced by his above-referenced acts.

(b) Elieff's Testimony

Next, Stubbendieck argues that the inability of Elieff, the pathologist, to render an opinion as to the cause or manner of Sullivan's death required the court to make a "quantum leap" in the evidence to reach the conclusion that Stubbendieck assisted in a suicide.[27]

While the condition of Sullivan's body did not enable Elieff to determine the probable cause or manner of death, Elieff concluded that Sullivan, with the exception of the cuts to both of her wrists, had not sustained a traumatic injury such as a gunshot wound or penetrating injury. However, the decomposition of the body prevented Elieff from determining whether Sullivan had died from contributing factors such as asphyxiation, hypothermia, or drug overdose.

[14,15] To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt.[28] The corpus delicti is the body or substance of a crime, the fact that a crime has been committed without regard to the identity of the person committing it.[29] The corpus delicti may be proved by circumstantial evidence.[30] Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.[31]

[16] An extrajudicial admission or a voluntary confession is, standing alone, insufficient to prove that a crime has been

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[27] Brief for appellant at 16.

[28] *Reyes v. State*, 151 Neb. 636, 38 N.W.2d 539 (1949).

[29] *Id.*

[30] *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980).

[31] *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

committed, but either or both are competent evidence of the fact and may, with corroborative evidence of facts and circumstances, establish the corpus delicti and guilty participation of the defendant.[32]

In this case, Stubbendieck had numerous conversations with Sullivan about her plan to end her life. In those conversations, the two discussed Sullivan's taking her life and dying along the water's edge and in Stubbendieck's arms. The two forged and carried out a plan to transport Sullivan to Nebraska in order to conclude the contemplated act. In addition to his conversations with Sullivan, Stubbendieck sought to procure morphine from Timbs, and later told his coworkers that he had obtained morphine. Although Stubbendieck contends that the plan had changed and that morphine was no longer a part of the scheme, Sullivan's autopsy revealed she had morphine in her liver measuring 876 nanograms per gram of tissue, an amount that Elieff testified was known to be within the lethal spectrum. Further, as demonstrated in the record, Stubbendieck's insistence that Sullivan come to Nebraska to carry out her suicidal intentions because "[w]e both need this" cannot be characterized as anything but encouragement.

Having viewed the evidence in the light most favorable to the prosecution, we hold that any rational trier of fact could have found, beyond a reasonable doubt, that Stubbendieck did aid and abet Sullivan in committing suicide.

Stubbendieck's assignment of error is without merit.

VI. CONCLUSION

We conclude that there was sufficient evidence to support Stubbendieck's conviction. The district court did not err in admitting the testimonial evidence and text messages.

Affirmed.

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[32] *Olney v. State*, 169 Neb. 717, 100 N.W.2d 838 (1960).

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

Sonia Becher, appellant, v.
Mark A. Becher, appellee.

925 N.W.2d 67

Filed March 29, 2019. No. S-18-608.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. ____: ____. Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
3. **Courts: Jurisdiction.** 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.
4. **Actions: Moot Question.** An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
5. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.
6. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.
7. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
8. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
9. **Jurisdiction: Appeal and Error.** Generally, once an appeal is perfected, the trial court no longer has jurisdiction until a mandate issues.
10. **Jurisdiction: Child Custody: Visitation: Appeal and Error.** Under Neb. Rev. Stat. § 42-351(2) (Reissue 2016), a trial court may retain

jurisdiction to provide for an order concerning custody and parenting time even while an appeal of one of its orders is pending.

11. **Jurisdiction: Minors: Final Orders: Appeal and Error.** Neb. Rev. Stat. § 42-351(2) (Reissue 2016) does not grant a trial court authority to hear and determine anew the very issues then pending on appeal and to enter permanent orders addressing these issues during the appeal process.

Appeal from the District Court for Lancaster County: Kevin R. McManaman, Judge. Vacated and dismissed.

Sally A. Rasmussen, of Mattson Ricketts Law Firm, for appellant.

David P. Kyker and Bradley A. Sipp for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Sonia Becher and Mark A. Becher were divorced by decree in 2015. The parenting plan ordered by the court established a parenting time schedule for only one of the parties' three children. In 2018, while an appeal from the dissolution decree was pending in this court, Mark filed a motion seeking to establish parenting time and telephone communication with one of the other children. The court granted that motion, and Sonia appeals. For the reasons set forth herein, we vacate and dismiss.

BACKGROUND

Sonia and Mark were married in December 1991 and had three children: Daniel Becher, born in 2000; Cristina Becher, born in 2002; and Susana Becher, born in 2008. Sonia and Mark were divorced in 2015 after an exceptionally contentious dissolution proceeding.

Mark appealed, and Sonia cross-appealed the 2015 dissolution decree. Both parties, in part, assigned the district court

erred in its ordering of the custodial arrangement and the award of parenting time. The court's decree ordered what it described as a "split and joint" custody arrangement. We described the arrangement in *Becher v. Becher* (*Becher I*)[1]:

> The district court found that a split and joint custody arrangement with [a] parenting plan designed to reduce potential conflicts was in the best interests of the children. In its decree, the court ordered that Sonia have permanent legal and physical care, custody, and control of the parties' two daughters, while Mark have permanent legal and physical care, custody, and control of the parties' son with each "subject to the rights of parenting time for the noncustodial parent as set forth in the parenting plan." However, the court-ordered parenting plan provided that the parties would share joint legal custody of all three children, with Mark having primary physical custody of the parties' son, Sonia having primary physical custody of the parties' oldest daughter, and shared joint physical custody of the parties' youngest daughter. . . . [T]he court-ordered parenting plan did not provide a parenting schedule for the two oldest children. It did provide a joint physical custody arrangement for the youngest child with Mark and Sonia having equal parenting time on alternating weeks.

We concluded the district court had not abused its discretion in entering this parenting plan and found the provisions of the decree adequately set forth each party's rights and responsibilities.[2]

Relevant to the issues raised in the present appeal, the parenting plan gave the following rationale for not establishing a parenting time schedule for the two older children, and expressly contemplated future modification to address the issue.

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[1] *Becher v. Becher*, 299 Neb. 206, 224, 908 N.W.2d 12, 28 (2018).

[2] *Id.*

> Regular Monthly Parenting Time with Daniel and Cristina: Based upon the recommendations of George Williams, PhD., the Court determines that it is in the best interests of Daniel and Cristina . . . that no set parenting time schedule be established at this time. This is because of the significant conflict that still exists between these children and their non-custodial parent. Until such time as counseling with the family has resolved at least some of these issues, Dr. Williams believes a required parenting schedule would be inappropriate and perhaps detrimental. Both parties have agreed to voluntarily continue counseling with Dr. Williams and involve the children as may be necessary in order to reduce family conflict before a set schedule with respect to these two children is established. This parenting plan will need to be modified at some point in the future to include specific parenting time with these children, on a regular monthly basis, during the summer and on holidays. Except for summer parenting time, specific parenting time only involves Susana at this time.

As to communications between the parents and children during specified summer parenting time, the parenting plan stated:

> [D]uring the summer parenting time for each parent the parent who is not exercising parenting time is to have no communication of any nature with their children. They are not to attempt to contact their children in any fashion during the other parent summer parenting time. Additionally, the parent not having parenting time is not to accept or respond to any attempt by any child to communicate with them. In the event of an emergency of any nature during the summer parenting time, Mother and Father may communicate with each other to address the emergency.

Becher I was released March 9, 2018, and the mandate issued on July 13, 2018.[3]

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[3] *Becher I, supra* note 1.

After *Becher I* was released but before the mandate was issued, Mark filed a motion in the district court on June 8, 2018, seeking to establish specific parenting time and telephone contact with Cristina. On June 11, Mark amended his motion to add a sentence to the notice of hearing purporting to provide that "[t]he hearing will be by affidavit." Both motions were e-filed with the court and directed to Sonia's attorney by U.S. mail.

Neither motion was styled as a complaint to modify the decree, and it does not appear from the record that either motion was served on Sonia personally, nor was a praecipe for summons ever requested.

On June 14, 2018, a hearing was held on the amended motion. Sonia did not appear personally or through counsel. Mark also did not personally appear but was represented by counsel. Mark's affidavit was received as an exhibit. In it, he averred he had not had meaningful contact with Cristina since the entry of the decree and all telephone contact had to go through Sonia. Mark sought specific parenting time to take Cristina on a summer vacation in June 2018 and asked to purchase a cell phone to communicate directly with Cristina without having to go through Sonia. At the hearing, Mark's counsel indicated that the motion was made pursuant to Neb. Rev. Stat. § 42-351 (Reissue 2016) to enable the court to consider the issue of custody and parenting time before the mandate of the initial appeal issued.

The same day as the hearing, the district court entered an order providing, in full:

> 1. [Mark] may, at his sole expense, provide a cellular telephone for the minor child of the parties, Cristina . . . . While [Sonia] may restrict use of the cellular telephone, [Sonia] may not restrict any contact or communication between [Mark] and Cristina . . . through the use of the cellular phone.
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> 2. [Mark] may have parenting time with Cristina during the week of June 19, 2018[,] at 9:00 a.m. to June 26,

> 2018[,] at 9:00 a.m. [Mark] shall be responsible for all transportation necessary to effect parenting time with his daughter during this time.

The order was prepared by Mark's counsel. The order did not construe the motion as a complaint to modify, nor did the order purport to modify the decree or the court-ordered parenting plan. However, neither did the order indicate it was pursuant to § 42-351 nor that it was a temporary order. To the extent the order allowed specific parenting time for Mark, it was limited to 1 week in June 2018. The telephone parenting time authorized by the order contained no temporal limit.

ASSIGNMENTS OF ERROR

Sonia assigns, restated, that the district court erred in (1) modifying the decree while an appeal of the decree was pending, (2) exercising jurisdiction although Sonia had not been properly served, (3) failing to find Sonia was denied procedural due process, and (4) modifying the parties' parenting time without a showing of a material change in circumstances.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[4]

ANALYSIS

[2,3] Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.[5] While it is not a constitutional prerequisite for jurisdiction,

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[4] *In re Grand Jury of Douglas Cty., ante* p. 128, 922 N.W.2d 226 (2019); *Jennifer T. v. Lindsay P.*, 298 Neb. 800, 906 N.W.2d 49 (2018).

[5] See, *In re Grand Jury of Douglas Cty., supra* note 4; *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018).

the existence of an actual case or controversy is necessary for the exercise of judicial power.[6]

[4-8] We first note the time period granted to Mark for the specific summer parenting time with Cristina has passed. An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.[7] A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.[8] Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.[9] Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.[10] As a general rule, a moot case is subject to summary dismissal.[11]

On this point, the order stated that Mark "may have parenting time with Cristina during the week of June 19, 2018[,] at 9:00 a.m. to June 26, 2018[,] at 9:00 a.m." Because this period has passed and the order does not provide Mark a continuing summer parenting time schedule, the assigned errors concerning the order's grant of specific summer 2018 parenting time are moot.

Taking this limitation into account, we turn to Sonia's assignment that the district court erred in modifying the decree by allowing Mark to provide Cristina a cell phone and have unrestricted communication while an appeal of the decree was pending. Mark, in turn, argues that the court retained

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[6] *Nesbitt, supra* note 5.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

jurisdiction to issue the order under § 42-351(2) and that such order was implicitly temporary.

[9,10] Generally, once an appeal is perfected, the trial court no longer has jurisdiction until a mandate issues.[12] However, a trial court retains jurisdiction under § 42-351(2) for certain matters. Section 42-351(2) provides:

> When final orders relating to proceedings governed by sections 42-347 to 42-381 are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.

Thus, a trial court may retain jurisdiction to provide for an order concerning custody and parenting time even while an appeal of one of its orders is pending.

[11] Nevertheless, there is a limit on a trial court's jurisdiction to enter an order concerning an issue which is pending on appeal.[13] Section 42-351(2) does not grant a trial court authority to hear and determine anew the very issues then pending on appeal and to enter permanent orders addressing these issues during the appeal process.[14]

In the instant case, Mark's motion sought to change the decree and court-ordered parenting plan concerning custody and parenting time even though those were issues pending on appeal. In *Becher I*, the appeal of the dissolution decree, Sonia and Mark both assigned errors related to the district court's award of custody and parenting time.[15] During that appeal,

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[12] *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016).

[13] See *id.*

[14] *Id.*

[15] See *Becher I, supra* note 1.

we considered the validity of the custodial arrangement and award of parenting time, the interpretation of terminology used concerning the custodial arrangement and award of parenting time, and whether the decree was contradicted by the parenting plan. The resolution of these issues on appeal potentially could have had an effect on the summer parenting time explained in the parenting plan which prohibited communication between the parent not exercising the parenting time and the children. Specifically, that section of the plan stated that "the parent who is not exercising parenting time is to have no communication of any nature with their children" and further explained that "the parent not having parenting time is not to accept or respond to any attempt by any child to communicate with them."

The order currently on appeal also addressed parent-child communication. As between Mark and Cristina, the order provided: "[Mark] may, at his sole expense, provide a cellular telephone for . . . Cristina . . . . While [Sonia] may restrict use of the cellular telephone, [Sonia] may not restrict any contact or communication between [Mark] and Cristina . . . through the use of the cellular phone." This order did not limit the contact between Mark and Cristina, including during those times when Sonia would be exercising summer parenting time. Instead, the order stated that Sonia could not act to restrict any communication through the cell phone and permitted Mark to contact Cristina without limitation. Such provision is at odds with the section of the parenting plan governing summer parenting time, the review of which was still pending, that explicitly stated the nonexercising parent is prohibited from attempting communication with the children. As stated above, this provision was included in the parenting plan section governing custody and parenting time and was at issue in the initial appeal. Mark filed his motion for specific parenting time after the release of our opinion in *Becher I*, but before the issuance of the mandate. Thus, at that point, the district court did not have jurisdiction to enter a permanent order affecting parenting time.

Mark argues that the district court retained jurisdiction, because any order entered during the pendency of the initial appeal was implicitly temporary and expired upon the issuing of the mandate. Mark argues that as a temporary order, any change of parenting time scheduling or communication would not affect contradictory provisions of the decree on appeal, because such modification would expire once the original decree was affirmed, and that the original decree's provisions would control.

However, Mark offers no support for such assertion and we find none. The language of § 42-351(2) does not state that any order issued through its operation is temporary. As a result, we cannot say that an order is always temporary even if there is no limiting language when the underlying motion seeks to affect the rights of the parties while an appeal on those rights is pending.

Moreover, while Mark's counsel mentioned the motion was pursuant to § 42-351 during the hearing, Mark's motion and the district court's order failed to indicate that it was a § 42-351(2) motion. The order issued by the court contained no temporal limit, and Mark's motion failed to describe that it sought only a temporary order. As such, the court's order providing Mark the ability to communicate with Cristina without restriction was not implicitly temporary and its issuance conflicted with the decree's provision on parent-child communication.

Because we find that during the pendency of the initial appeal, the district court lacked jurisdiction to enter a permanent order and erred in awarding Mark unrestrained cell phone communication with Cristina, we need not address Sonia's remaining assignments.

CONCLUSION

We conclude Sonia's assignments concerning the award of specific summer 2018 parenting time between Mark and Cristina are moot, because the period during which the

parenting time was awarded has passed. As such, these assignments are dismissed. Regarding Sonia's assignments concerning the order awarding Mark unrestrained cell phone communication with Cristina, the district court lacked subject matter jurisdiction during the appeal of the dissolution decree. As a result, we vacate the order of the district court on this issue and dismiss this appeal.

Vacated and dismissed.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Habacuc Quintero Chairez, appellant.

924 N.W.2d 725

Filed March 29, 2019. No. S-18-646.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
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. **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, in order to preserve such claim. Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.
5. **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.

6. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the crime.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

Timothy S. Noerrlinger for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, Joe Meyer for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

I. NATURE OF CASE

Pursuant to a plea agreement with the State, the defendant entered no contest pleas and was subsequently convicted of possession of a firearm by a prohibited person, a Class ID felony, in violation of Neb. Rev. Stat. § 28-1206(3) (Supp. 2017); attempted first degree assault, a Class IIA felony, in violation of Neb. Rev. Stat. §§ 28-201 and 28-308 (Reissue 2016); and use of a firearm to commit a felony, a Class IC felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 2016). The lower court imposed an aggregate sentence of 42 to 55 years in prison. The central issues on appeal are whether the defendant's sentences were excessive and whether his assistance of trial counsel was ineffective for failing to meet with the defendant with an interpreter present, investigate witnesses and exculpatory evidence, and file a motion to suppress the defendant's statements to law enforcement officers.

II. FACTS

On June 11, 2017, at approximately 12:20 p.m., Habacuc Quintero Chairez, while driving on Interstate 80 in Lancaster

County, Nebraska, used a firearm to shoot at another vehicle four times, hitting the targeted vehicle at least twice. The vehicle was occupied by a man and his 15-year-old son; however, no one was injured. The man called the 911 emergency dispatch service and provided an account of the incident, including a description of the vehicle that Chairez was driving.

State troopers located Chairez in his vehicle on Interstate 80, partially blocking one lane of traffic. When the state troopers initiated contact with Chairez, he displayed a handgun outside of the driver's-side window. He was then ordered out of his vehicle at gunpoint and taken into custody.

Chairez was eventually advised of his *Miranda* rights and interviewed by a member of the Nebraska State Patrol with the assistance of an interpreter. Chairez admitted to having fired the gun at the vehicle, stating that he thought the vehicle was following him. During the interview, he further admitted that he purchased the firearm and acknowledged that he was a convicted felon on federal parole.

Chairez was originally charged with possession of a firearm by a prohibited person under § 28-1206(3), discharge of a firearm near a vehicle under Neb. Rev. Stat. § 28-1212.04 (Reissue 2016), attempted first degree assault under §§ 28-201 and 28-308, and use of a firearm to commit a felony under § 28-1205(1). Pursuant to a plea agreement with the State, Chairez appeared with counsel and entered pleas of no contest to the charges of possession of a firearm by a prohibited person, attempted first degree assault, and use of a firearm to commit a felony. In exchange for the pleas, the State agreed to dismiss the charge of discharge of a firearm near a vehicle. The State also agreed to not file additional charges in the matter or seek any habitual criminal enhancements, which would have exposed Chairez to several significant mandatory minimum sentences if he were convicted.

During Chairez' plea hearing, the district court judge and Chairez engaged in a thorough colloquy in assessing the

validity of his pleas. When questioned by the judge, he admitted, among other things, that (1) he had no difficulty understanding the proceedings before him, (2) he understood that he was waiving his right to present witnesses in his case, (3) his attorney spoke to him and he understood the immigration consequences of his pleas and convictions, (4) his counsel was competent, and (5) his counsel did not refuse or fail to do anything Chairez asked of him throughout his representation during this case.

Although an interpreter was present throughout the proceeding, Chairez chose not to utilize the interpreter at all, immediately answering each question in English when asked in English by the judge. The judge further inquired regarding Chairez' responding in English without the use of the interpreter. Chairez indicated that when he answered in English, he was doing so because he understood and was comfortable communicating with the judge in English. In an abundance of caution, the judge encouraged Chairez to use the interpreter if he needed to as they continued through the proceedings. Chairez acknowledged the judge's statement that interpretive service would continue to be available and then continued through the remainder of the proceedings using English.

Based on the evidence presented and the answers provided by Chairez in the assessment of his pleas, the district court found that Chairez had entered his pleas freely, knowingly, voluntarily, and intelligently, and found Chairez guilty beyond a reasonable doubt on all charges in the amended information. After a subsequent sentencing hearing, the court sentenced Chairez to an aggregate sentence of 42 to 55 years in prison, with credit for 368 days served.

Chairez appeals. He is represented by different counsel on appeal.

III. ASSIGNMENTS OF ERROR

Chairez assigns that the district court erred in affirming the county court's excessive sentences. Chairez also assigns on appeal that he received ineffective assistance of trial counsel.

IV. STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[1] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[2] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[3] an appellate court reviews such legal determinations independently of the lower court's decision.[4]

[2] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[5]

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[6]

V. ANALYSIS

1. Ineffective Assistance of Counsel

We first address Chairez' arguments that he received ineffective assistance of trial counsel. Chairez argues that his trial counsel was ineffective because counsel failed to (1) utilize an interpreter when meeting with Chairez; (2) investigate, collect evidence from, and meet with Chairez' wife and mother, who allegedly had digital evidence to corroborate that Chairez had

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[1] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[2] *Id.*

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

[4] *State v. Filholm, supra* note 1.

[5] *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017).

[6] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

been recently threatened by members of a Mexican drug cartel; and (3) file a motion to suppress Chairez' statements made to state troopers when he was under the influence of methamphetamine. We find that the record is sufficient on direct appeal to address Chairez' first two contentions. However, the record is insufficient to address his third claim.

[4] 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, in order to preserve such claim.[7] Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.[8]

[5] We have said that the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[9] This is because the trial record reviewed on appeal is generally "'devoted to issues of guilt or innocence'" and does not usually address issues of counsel's performance.[10] The determining factor is whether the record is sufficient to adequately review the question.[11] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[12]

If the record is sufficient to address the ineffective assistance of counsel claim, an appellate court reviews the factual findings of the lower court for clear error.[13] With regard to the questions of counsel's performance or prejudice to the defendant

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[7] See, *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). See, also, *State v. Filholm, supra* note 1.

[8] *State v. Abdullah, supra* note 7.

[9] *State v. Filholm, supra* note 1.

[10] *Id.* at 769, 848 N.W.2d at 578.

[11] *State v. Filholm, supra* note 1.

[12] *State v. Abdullah, supra* note 7.

[13] See *State v. Filholm, supra* note 1.

as part of the two-pronged test articulated in *Strickland*,[14] an appellate court reviews such legal determinations independently of the lower court's decision.[15] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[16] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[17]

(a) Failure to Use Interpreter During Meetings With Trial Counsel

First, Chairez argues that his trial counsel was ineffective because he neglected to utilize an interpreter when meeting with Chairez. He contends that although he speaks some English, his native language is Spanish. Chairez further contends that he did not understand many of the legal terms that his trial counsel used during their conferences prior to Chairez' pleas. In addition, Chairez argues that because of the language barrier, Chairez' trial counsel failed to comprehend that Chairez was asking him to investigate a potential affirmative defense and Chairez was not properly advised as to the mandatory minimum charges and immigration consequences of his crimes prior to entering his pleas.

These assertions lack merit. During the plea colloquy, Chairez, answering in English, admitted that he had no difficulty understanding the judge or the proceedings before him. He also admitted that the judge did not use any word or phrase that he did not understand throughout the colloquy. Chairez expressly acknowledged during the plea colloquy that his counsel did not neglect or refuse to do anything that Chairez requested him to do during counsel's representation of Chairez.

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[14] *Strickland v. Washington, supra* note 3.

[15] *State v. Filholm, supra* note 1.

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

[17] *Id.*

He further expressly acknowledged to the judge that his trial counsel performed competently and advised him of all of his rights, including his immigration consequences, as well as the mandatory minimum sentence requirements of his charges. Even further, the court advised Chairez of both the immigration consequences of his pleas, as well as the mandatory minimum sentences associated with Chairez' charges.

Throughout his plea hearing, Chairez clearly stated that counsel did not (1) act incompetently, (2) fail to investigate anything that Chairez requested of him, or (3) fail to properly advise Chairez as to the mandatory minimum charges and immigration consequences of his crimes prior to entering his pleas. Because these statements in the record affirmatively refute Chairez' claim that his counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area, we find trial counsel's performance was not deficient for failing to utilize an interpreter during Chairez' attorney-client meetings. Chairez does not challenge the knowingness and voluntariness of his admissions and responses during his colloquy with the district court. We conclude the record on direct appeal sufficiently shows that Chairez' counsel's failure to utilize an interpreter during their meetings did not render counsel's performance deficient.

(b) Failure to Collect Evidence and Interview Exculpatory Witnesses

Second, Chairez contends that trial counsel was ineffective because counsel failed to investigate, collect evidence from, and meet with exculpatory witnesses regarding an affirmative defense. Specifically, Chairez asserts that though he indicated to counsel that his wife and mother had digital evidence to corroborate that a recent threat on Chairez' life had been made by a Mexican drug cartel, counsel failed to investigate this assertion and interview these witnesses as related to this affirmative defense. As a result, Chairez was prejudiced because this defense could have been used at trial or as a mitigating factor in sentencing to explain why he fired into the vehicle.

The record on appeal refutes this contention. As stated above, Chairez explicitly stated during his plea colloquy that he had told his attorney everything he knew about the cases, there was nothing that could help him in connection with the case that he had not shared with his attorney, he was satisfied with the job of his counsel, and there was nothing that Chairez asked him to do that counsel failed or refused to do. Again, Chairez does not challenge the knowingness and voluntariness of his responses in his plea colloquy. Based on his admission that counsel did not neglect or refuse to do anything that Chairez asked of him, we must find that Chairez' counsel was not ineffective, because based on Chairez' clear and unchallenged admissions in the record, his counsel's performance was not deficient as a matter of law.

(c) Failure to File Motion to Suppress

Lastly, Chairez argues that trial counsel was ineffective by failing to file a motion to suppress his statements made to state troopers. Chairez contends that his *Miranda* waiver was involuntarily made because he was under the influence of methamphetamine at the time and that he had informed counsel of that fact. The State concedes that the record is not sufficient to make a determination on this claim. The record on appeal provides no indication of the circumstances and facts surrounding Chairez' *Miranda* waiver on the day of his arrest. Nor is the record indicative of any potential trial strategy utilized by trial counsel by rejecting to file a motion to suppress Chairez' statements to the state troopers on the day of his arrest. In similar circumstances, we have found the trial record insufficient to determine the merits of a claim on direct appeal that counsel was ineffective for failing to file a motion to suppress.[18] We find that the record is insufficient to make

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[18] See, *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007); *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994); *State v. Balvin*, 18 Neb. App. 690, 791 N.W.2d 352 (2010); *State v. Heslep*, 17 Neb. App. 236, 757 N.W.2d 386 (2008); *State v. Greer*, 7 Neb. App. 770, 586 N.W.2d 654 (1998).

a determination as to whether trial counsel was ineffective for failing to file a motion to suppress.

2. Excessive Sentences

We turn next to Chairez' contention that the district court erred by imposing excessive sentences. When a trial court's sentence is within the statutory guidelines, the sentence will be disturbed by an appellate court only when an abuse of discretion is shown.[19]

Chairez admits that the sentences he received were within the statutory limits. Therefore, Chairez' sentences will be disturbed only upon a finding of abuse of discretion. 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.[20]

[6] Chairez argues that the court abused its discretion because it failed to fashion sentences that fit Chairez, "given [his] history, character, and condition."[21] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the crime.[22] 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.[23]

Based on the record before us, the sentencing court did not consider any inappropriate or unreasonable factors in

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[19] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[20] *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

[21] Brief for appellant at 15.

[22] *State v. Huff, supra* note 19.

[23] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

determining the sentences. The presentence investigation revealed that Chairez had a "troubling, violent criminal history," including charges of attempted murder, murder, and kidnapping. We find that the court did not make its decision based upon reasons that are untenable or unreasonable, nor was its action clearly against justice or conscience, reason, and evidence.

VI. CONCLUSION

For the foregoing reasons, we find that Chairez' ineffective assistance of counsel assertions regarding his counsel's failure to utilize an interpreter when meeting with Chairez and counsel's failure to investigate, collect evidence, and interview witnesses are meritless. However, we find that the record is insufficient to address whether Chairez' assistance of trial counsel was ineffective for failing to file a motion to suppress regarding Chairez' statements. Lastly, we find that the district court did not abuse its discretion when sentencing Chairez. Therefore, we affirm the decision of the district court.

Affirmed.

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

Claudia Vasquez and Cesar Moreno Tinoco, appellants, v. CHI Properties, LLC, appellee.

925 N.W.2d 304

Filed April 5, 2019. No. S-17-1287.

1. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Actions: Pleadings: Notice.** 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 and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
4. **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.
5. **Statutes: Legislature: Intent.** In construing statutes, legislative intention is to be determined from a general consideration of a whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and intent so deduced from the whole will prevail over that of a particular part considered separately.
6. **Actions: Landlord and Tenant: Leases: Words and Phrases.** A tenant who accepts possession and lives on the property for several months thereafter does not have a claim under Neb. Rev. Stat. § 76-1418 (Reissue 2018), because the duties described in § 76-1418 pertain to the "commencement" of the lease term.

7. **Election of Remedies: Estoppel: Claim Preclusion.** The doctrine of election of remedies is a somewhat vague notion lying somewhere between the areas occupied by the doctrines of equitable estoppel and claim preclusion.
8. **Election of Remedies: Proof.** When the election is between remedies with different elements of proof under the same complaint, a plaintiff can attempt to prove both theories and need only elect one for the purpose of recovery in the event that the trier of fact finds both theories were proved.
9. **Election of Remedies: Pleadings.** So long as the plaintiff does not ultimately obtain two recoveries for the same harm, the doctrine of election of remedies does not generally prevent the plaintiff from pleading remedies that are mutually exclusive.
10. **Election of Remedies.** Election of remedies applies only when there are inconsistent remedies for redress of the same single injury.
11. **Landlord and Tenant: Contracts: Notice: Injunction: Damages: Time.** So long as a tenant has given notice when required by Neb. Rev. Stat. § 76-1419 (Reissue 2018), a tenant can seek damages or injunctive relief under Neb. Rev. Stat. § 76-1425(2) (Reissue 2018) without sending notice under § 76-1425(1) specifying that the rental agreement will terminate upon a date not less than 30 days after receipt of the notice of the breach, if not remedied within 14 days.
12. **Landlord and Tenant: Election of Remedies: Injunction: Damages: Words and Phrases.** The reference in the conjunctive to "damages" and "injunctive relief" in Neb. Rev. Stat. § 76-1425(2) (Reissue 2018) serves to vest a tenant with two distinct options for relief and does not require that both be pursued in order to pursue either.
13. **Actions: Landlord and Tenant: Contracts.** Neither Neb. Rev. Stat. §§ 76-1430 and 76-1439 (Reissue 2018) nor any other provision of the Uniform Residential Landlord and Tenant Act, Neb. Rev. Stat. §§ 76-1402 to 76-1449 (Reissue 2018), indicates that a separate action for termination of a rental agreement is a prerequisite to termination under the act.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed in part, and in part reversed.

Katelyn Cherney, of Milton R. Abrahams Legal Clinic, for appellants.

Mark S. Dickhute for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

Tenants brought a complaint against their landlord under the Uniform Residential Landlord and Tenant Act (URLTA), Neb. Rev. Stat. §§ 76-1402 to 76-1449 (Reissue 2018). They alleged that numerous code violations materially affecting their health and safety were present at the time they commenced physical possession of the property, but were not discovered until later. The tenants asked the City of Omaha Planning Department's housing division (Housing Division) to conduct an inspection of the property, which eventually led to the Housing Division's declaring the property unsafe and unfit for human occupancy and ordering the tenants to immediately vacate the premises. The landlord failed to perform repairs to make the property habitable even after months of repeated notices and demands by the Housing Division and the tenants. During much of this time, the tenants continued to pay utilities. The tenants eventually gave their landlord 5 days' notice of their intention to terminate the rental agreement. The landlord refused to return the tenants' security deposit or reimburse them for utilities paid. The landlord also refused to return rent paid for the 2 months that the tenants were mostly unable to occupy the premises, which the landlord allegedly had demanded in retaliation for the tenants' reporting to the Housing Division. The district court dismissed the complaint under Neb. Ct. R. Pldg. § 6-1112(b)(6), and the tenants appeal. The question presented is whether the alleged facts state a claim for relief under the URLTA.

BACKGROUND

Complaint

Claudia Vasquez and Cesar Moreno Tinoco (tenants) filed a complaint against CHI Properties, LLC (CHI). After their first

complaint was dismissed, they were granted leave to amend. The amended complaint alleged the following.

On or about May 10, 2016, tenants entered into a written agreement to rent property owned by CHI for $850 per month and to pay $850 as a security deposit. During the first 8 weeks of the lease term, after tenants began living at the property, they noticed a water leak in the bathroom that was causing mold formation. CHI sent a plumber to repair the leak, but the repair was not effective.

CHI failed to adequately respond to tenants' concerns regarding surface mold in the home. In July 2016, tenants' minor child was treated for mold exposure and the Douglas County Health Department was contacted.

By letter dated October 4, 2016, the health department issued written recommendations to CHI for resolving an active water leak and visible mold. As of November 18, CHI made no efforts to follow the recommendations or otherwise resolve the water leak and mold.

Tenants contacted the Housing Division, requesting a housing inspection for possible housing code violations. The Housing Division inspected the property on October 7, 2016, and issued a "'Notice of Property Violation'" to CHI by mail on October 14.

When CHI received the violation notice on or around October 17, 2016, CHI demanded, in retaliation for tenants' complaint to the Housing Division, that tenants vacate the property within 2 weeks.

Around that same time, CHI accepted a payment by tenants in the amount of $850 for November's rent. Tenants had made all prior rent payments since the inception of the rental agreement.

On or around November 14, 2016, the Housing Division found that CHI had not cured the previously cited violations, and additional violations were discovered. There were 31 code violations in total, 13 of which were considered to be of a "'high' severity level."

On or around November 17, 2016, a major electrical hazard at the property was detected by the Housing Division and the Omaha Public Power District. This major electrical hazard put tenants at risk of serious harm. This hazard existed at the commencement of the rental agreement, although tenants were unaware of it at that time.

The Housing Division declared the property unsafe and unfit for human occupancy and ordered tenants to immediately vacate the property. A placard "'Danger-Closed,'" along with a description of the penalties for occupancy, was posted on the property by the Housing Division on November 18, 2016.

That same day, CHI spoke with tenants and assured them that repairs would be completed within a few days. Tenants stayed with family members. There is no allegation that they paid rent to their family members.

On or around December 16, 2016, tenants sent written notice to CHI demanding performance of the rental agreement. The details of this notice are not otherwise described in the complaint. Tenants remained barred from the property by the Housing Division.

On or around December 19, 2016, the Housing Division again inspected the property. It found that CHI was working on the electrical issue, but it was not completed, and that CHI had not remedied any of the other 30 code violations.

During an inspection on December 28, 2016, the Housing Division found that the "'water is off and the water heater is being re-installed.'" The Housing Division notified CHI and tenants that no one could occupy the premises until the water heater was properly installed.

At some point, despite the Housing Division's no-occupancy order, CHI threatened that if tenants did not resume occupancy, it would treat them as if they had abandoned the property and dispose of their personal belongings.

On January 9, 2017, tenants mailed a second written notice to CHI, demanding that it complete all repairs and inspections necessary so that they could resume occupancy.

The Housing Division removed the placard from the property on February 3, 2017, and tenants moved back in on February 5. However, tenants immediately discovered that the water was off and major plumbing repairs were in progress. Tenants had not paid rent for December 2016 or January 2017, but they had paid for television and internet services until approximately January 10 and had paid all utility bills until March 14.

On February 6, 2017, CHI demanded and tenants paid $850 for the February rent. Through a notice posted on February 2, CHI had threatened to bring a restitution action if tenants failed to pay February's rent.

The following day, on February 7, 2017, the Housing Division issued a new order to vacate and the property was replacarded. The Housing Division ordered CHI to hire a licensed plumber to correct noncompliant plumbing work and complete necessary plumbing inspections within 30 days. CHI failed to comply. CHI did not refund tenants their February rent payment.

Tenants "terminated their lease effective March 12, 2017, and demanded return of all prepaid rent and security after tendering five days' written notice under Neb. Rev. Stat. § 76-1426(1) for [CHI's] failure to deliver possession of fit and habitable premises." Tenants had been excluded from the property for nearly 4 months due to CHI's refusal to complete repairs and inspections necessary to have the property released for occupancy by the Housing Division.

CHI failed to return tenants' "prepaid rent" and security deposit following written demand. The property remained under an active vacate order as of May 1, 2017, the date tenants filed their amended complaint.

Tenants' amended complaint alleged causes of action under the URLTA. They cited to §§ 76-1426, 76-1419, 76-1430, and 76-1439, which corresponded to actions for (1) failure to deliver possession, (2) failure to maintain fit premises, (3) unlawful ouster, and (4) retaliation. Tenants sought return of their security deposit, which is provided for by § 76-1416(2),

as well as other provisions of the URLTA, damages, and attorney fees.

Motion to Dismiss

CHI moved to dismiss the complaint under § 6-1112(b)(6) for failure to state a claim.

CHI asserted, first, that there was no allegation that possession had not been delivered. Thus, according to CHI, there was no breach of the duty set forth in § 76-1418 and the remedies of § 76-1426 do not apply, including the 5-day notice to terminate.

Second, CHI asserted that because there was no allegation that tenants had delivered a "14/30 day Notice to Cure," tenants could not make any claim for damages under § 76-1425. Nor, according to CHI, did tenants assert any facts showing damages, "because they procured substitute services and deducted them from the rent, as provided in Neb. Rev. Stat. §76-1427 (1)" or "secured substitute housing and abated the payment of rent, the remedy allowed to them under Neb. Rev. Stat. §76-1427(2)." CHI asserted that tenants' allegations that they resorted to the remedy of abatement precluded them, pursuant to § 76-1427(2), from pursuing damages or attorney fees.

CHI asserted that tenants failed to state claims under § 76-1430 or § 76-1439 for retaliation or ouster, because there was no allegation that tenants had either recovered possession or lawfully terminated the rental agreement.

At the hearing on the motion to dismiss, CHI submitted, without objection, a printout from Nebraska's online trial court case management system, known as JUSTICE, for the court to take judicial notice of, which demonstrated that tenants did not file a separate action to terminate the lease.

Order of Dismissal

The district court concluded that tenants failed to state a claim for breach of the duty to deliver, because §§ 76-1418 and 76-1426 did not apply when tenants accepted

physical possession of the property at the commencement of the rental period.

Regarding the alleged failure to maintain fit and habitable premises, the court stated that tenants' failure to allege that they had delivered to CHI a "14/30 day Notice to Cure or terminate the lease" prevented their claim. The court also cited to the exhibit demonstrating that tenants did not bring a separate action to terminate the lease. The court reasoned, further, that damages under § 76-1425 were not available for any breach of a duty to maintain fit premises, because damages are available under the statute only "when an action for injunctive relief has also been brought." Finally, the court reasoned that because tenants resorted to the remedy of abatement pursuant to § 76-1427(2), they were precluded from recovering damages and attorney fees under § 76-1425(2).

The court concluded that tenants failed to state claims for ouster or retaliation under §§ 76-1430 and 76-1439(2), because there was no allegation that tenants either recovered possession or lawfully terminated the rental agreement.

The court granted CHI's motion to dismiss. Tenants elected to stand on the amended complaint and sought entry of a final judgment. The court dismissed the complaint "with / without prejudice," and tenants timely appealed.

ASSIGNMENT OF ERROR

Tenants assign, summarized, that the district court erred in dismissing their complaint.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[1]

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[1] *Eadie v. Leise Properties*, 300 Neb. 141, 912 N.W.2d 715 (2018); *Burklund v. Fuehrer*, 299 Neb. 949, 911 N.W.2d 843 (2018).

ANALYSIS

[2] Nebraska is a notice pleading jurisdiction.[2] 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 and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.[3] The rationale for this liberal notice pleading standard in civil actions is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage.

[3,4] Thus, to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[4] 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.[5] We review the district court's determination as to whether the plaintiff has stated a claim de novo, accepting as true all facts that are well pled and the proper and reasonable inferences of law and fact that may be drawn therefrom, but not the plaintiff's conclusions.[6]

[5] Tenants attempted to enforce at least four different rights and obligations set forth by at least four different statutes of the URLTA. However, according to CHI, none of the provisions of the URLTA allow tenants to recover under the facts pled or the proper and reasonable inferences of law and fact that may be drawn therefrom. In order to determine whether tenants stated a claim under the URLTA, we must determine the meaning of

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[2] *Id.*

[3] *Id.*

[4] See *id.*

[5] *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

[6] See, *Eadie v. Leise Properties, supra* note 1; *Burklund v. Fuehrer, supra* note 1.

the URLTA statutes independently of the trial court.[7] In construing statutes, legislative intention is to be determined from a general consideration of a whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and intent so deduced from the whole will prevail over that of a particular part considered separately.[8] The 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.[9]

The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.[10] In accordance with the mandate of § 76-1402, we must liberally construe and apply the URLTA to promote its underlying purposes and policies to (1) simplify and modernize the law, (2) encourage both the landlord and tenant to maintain and improve the quality of housing, and (3) make uniform the law among those states that enact it.

While we agree with the district court that tenants failed to state a claim for breach of the duty to deliver possession under § 76-1418, we hold that tenants stated plausible claims for breaches of the duties to put and keep the rental premises fit and habitable under § 76-1419, for wrongful ouster under § 76-1430, and retaliatory conduct as described by § 76-1439. These correspond to what tenants labeled as their second, third, and fourth causes of action. We also hold that the alleged facts do not present an insuperable bar to relief in the form of return of their security deposit under § 76-1416(2) "[u]pon termination of the tenancy . . ." through means not specifically described by the URLTA. Which precise remedies will be available to tenants under the URLTA in the event they prove

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[7] See *Pan v. IOC Realty Specialist*, 301 Neb. 256, 918 N.W.2d 273 (2018).

[8] *Id.*

[9] *Id.*

[10] *Id.*

the alleged breaches of the duties set forth by the URLTA was not the proper subject of a motion to dismiss, so long as some remedy was available under the statutory scheme. We find no merit to CHI's assertion that tenants lack any remedy under the URLTA for the breaches alleged.

Duty to Deliver Possession

We first address the duty under § 76-1418 to deliver possession and its corresponding remedy set forth in § 76-1426. We agree with CHI and the district court that these provisions of the URLTA do not apply to the facts alleged. The district court thus did not err in dismissing tenants' first cause of action.

Section 76-1418 sets forth a duty of the landlord to deliver possession at commencement of the rental term:

> At the commencement of the term the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and section 76-1419. The landlord may bring an action for possession against any person wrongfully in possession and may recover the damages provided in subsection (3) of section 76-1437. If the landlord makes reasonable efforts to obtain possession of the premises, he shall not be liable for an action under this section.

Section 76-1426 describes remedies for a landlord's failure to deliver possession:

> If the landlord fails to deliver possession of the dwelling unit to the tenant as provided in section 76-1418, rent abates until possession is delivered and the tenant shall:
>
> (1) Upon at least five days' written notice to the landlord terminate the rental agreement and upon termination the landlord shall return all prepaid rent and security; or
>
> (2) Demand performance of the rental agreement by the landlord and, if the tenant elects, maintain an action for possession of the dwelling unit against any person wrongfully in possession or wrongfully withholding possession and recover the damages sustained by him.

> If a person's failure to deliver possession is willful and not in good faith, an aggrieved person may recover from that person an amount not more than three months' periodic rent or threefold the actual damages sustained by him, whichever is greater, and reasonable attorney's fees.

Tenants argue that the duty to deliver possession under § 76-1426 is a duty to deliver possession to premises that are fit and habitable. They point out that § 76-1426 refers to "possession of the dwelling . . . as provided in section 76-1418" and that § 76-1418 describes "possession of the premises . . . in compliance with . . . section 76-1419," which describes the landlord's duty to put and keep the premises in a fit and habitable condition. They argue that the allegations stated a claim that CHI breached its obligations under § 76-1418 to deliver fit and habitable premises.

CHI does not deny that the URLTA requires landlords to deliver possession of habitable property, but argues that § 76-1426 pertains only to the commencement of the lease without possession and not to some later moment in time after tenants have accepted possession. After commencement and acceptance of possession, CHI asserts that tenants' rights related to lack of habitability are governed by §§ 76-1419, 76-1425, and 76-1427.

[6] We agree with CHI. A tenant who accepts possession and lives on the property for several months thereafter does not have a claim under § 76-1418, because the duties described in § 76-1418 pertain to the "commencement" of the lease term. In contrast, the duties set forth in § 76-1419 to comply with minimum housing codes materially affecting health and safety and to "put and keep" the premises in a fit and habitable condition are not limited under the plain language to conditions arising after commencement of the lease term.

For obvious public policy reasons, the URLTA discourages occupancy of premises that are not fit and habitable. Accordingly, the modifiers "in compliance with . . . . section

76-1419" or "as provided in section 76-1418" of "possession" are not contained in either the abatement provisions or the treble damages provisions of § 76-1426. Instead, § 76-1426 describes that "rent abates until possession is delivered" and nowhere provides the remedy of rent abatement after possession is delivered.

Reading §§ 76-1418 and 76-1426 together and in pari materia with other sections of the URLTA, we conclude that when a landlord attempts to deliver uninhabitable premises, § 76-1426 provides that the tenant may refuse possession and that rent abates until possession in compliance with both the rental agreement and § 76-1419 is delivered. The tenant who has thus refused possession may either terminate the rental agreement with 5 days' notice or demand performance. But a tenant who accepts possession and lives in uninhabitable premises does not have a claim under § 76-1418 and instead must proceed under other provisions of the URLTA.

In this case, tenants alleged that possession of the rental property was delivered and that they lived there for approximately 6 months. Under the facts alleged, the remedies provided in §§ 76-1418 and 76-1426 do not apply. Habitability issues occurring or discovered during occupancy are addressed by §§ 76-1419, 76-1425, and 76-1427. We turn next to these statutes.

Duty to Maintain Fit and Habitable Premises

Section 76-1419 describes the duties of a landlord to keep the rental premises fit and habitable. It states in relevant part:

> (1) The landlord shall:
>
> (a) Substantially comply, after written or actual notice, with the requirements of the applicable minimum housing codes materially affecting health and safety;
>
> (b) Make all repairs and do whatever is necessary, after written or actual notice, to put and keep the premises in a fit and habitable condition;

> . . . .
>
> (d) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him or her;
>
> . . . .
>
> (f) Supply running water and reasonable amounts of hot water at all times . . . .
>
> If there exists a minimum housing code applicable to the premises, the landlord's maximum duty under this section shall be determined by subdivision (1)(a) of this section. The obligations imposed by this section are not intended to change existing tort law in the state.

The facts alleged in tenants' complaint demonstrate breaches of CHI's duties under § 76-1419. While § 76-1419(1)(a) and (b) require "written or actual notice" in order to establish the duty under those subsections, tenants alleged both written and actual notice of numerous housing code violations "materially affecting health and safety"[11] and which CHI failed to repair so as to "put and keep the premises in a fit and habitable condition."[12] Furthermore, tenants alleged that CHI failed to maintain plumbing and electrical "in good and safe working order and condition," as required by § 76-1419(d), or supply "running water and reasonable amounts of hot water," as required by § 76-1419(f). Those provisions do not set forth notice as a precondition to those duties.

CHI does not dispute that tenants sufficiently alleged that it breached its duties under § 76-1419, but argues that tenants have no remedy for the alleged breaches. CHI elaborates that tenants elected their statutory remedy under § 76-1427 and that they received such remedy in full when they chose to not pay rent in December 2016 and January 2017 while they lived with

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[11] § 76-1419(1)(a).

[12] § 76-1419(1)(b).

relatives. CHI also argues that tenants failed to allege necessary statutory predicates to the remedies set forth in § 76-1425. We find no merit to these arguments.

Section 76-1405 provides:

> (1) The remedies provided by the [URLTA] shall be so administered that the aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages.
>
> (2) Any right or obligation declared by the [URLTA] is enforceable by action unless the provision declaring it specifies a different and limited effect.

Section 76-1425 provides remedies for material noncompliance by the landlord either with the rental agreement or with § 76-1419 materially affecting health and safety. Section 76-1425 states:

> (1) Except as provided in the [URLTA], if there is a material noncompliance by the landlord with the rental agreement or a noncompliance with section 76-1419 materially affecting health and safety, the tenant may deliver a written notice to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days, and the rental agreement shall terminate as provided in the notice subject to the following. If the breach is remediable by repairs or the payment of damages or otherwise and the landlord adequately remedies the breach prior to the date specified in the notice, the rental agreement will not terminate. If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six months, the tenant may terminate the rental agreement upon at least fourteen days' written notice specifying the breach and the date of termination of the rental agreement. The tenant may not terminate for a condition caused by the deliberate or negligent act or omission of

> the tenant, a member of his or her family, or other person on the premises with his or her consent.
>
> (2) Except as provided in the [URLTA], the tenant may recover damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or section 76-1419. If the landlord's noncompliance is willful the tenant may recover reasonable attorney's fees. If the landlord's noncompliance is caused by conditions or circumstances beyond his or her control, the tenant may not recover consequential damages, but retains remedies provided in section 76-1427.
>
> (3) The remedy provided in subsection (2) of this section is in addition to any right of the tenant arising under subsection (1) of this section.
>
> (4) If the rental agreement is terminated, the landlord shall return all prepaid rent and security recoverable by the tenant under section 76-1416.

However, if the material noncompliance with § 76-1419 involves the deliberate or negligent failure to supply running water, hot water, heat, or essential services, then, alternatively to the remedies set forth in § 76-1425, the tenant may proceed under § 76-1427. Section 76-1427 states in full:

> (1) If contrary to the rental agreement or section 76-1419 the landlord deliberately or negligently fails to supply running water, hot water, or heat, or essential services, the tenant may give written notice to the landlord specifying the breach and may:
>
> (a) Procure reasonable amounts of hot water, running water, heat and essential services during the period of the landlord's noncompliance and deduct their actual and reasonable cost from the rent;
>
> (b) Recover damages based upon the diminution in the fair rental value of the dwelling unit; or
>
> (c) Procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant is excused from paying rent for the period of the landlord's noncompliance.

> In addition to the remedy provided in subdivisions (a) and (c), if the failure to supply is deliberate, the tenant may recover the actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent, and in any case under this subsection reasonable attorney's fees.
>
> (2) If the tenant proceeds under this section, he may not proceed under section 76-1425 as to that breach.
>
> (3) The rights under this section do not arise until the tenant has given written notice to the landlord or if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent. This section is not intended to cover circumstances beyond the landlord's control.

CHI is correct that the list of possible remedies in § 76-1427(1)(a), (b), and (c) are listed in the alternative and that § 76-1427(2) provides that a tenant who proceeds under § 76-1427 "may not proceed under section 76-1425 as to that breach." But to the extent CHI's motion to dismiss sufficiently asserted the affirmative defense of election of remedies,[13] we conclude that the doctrine does not support the dismissal of tenants' complaint.

[7] Election of remedies is an ancient doctrine created by the courts.[14] The doctrine of election of remedies is a somewhat vague notion lying somewhere between the areas occupied by the doctrines of equitable estoppel and claim preclusion.[15] It is largely a rule of policy to prevent vexatious litigation.[16] It requires a plaintiff to choose between inconsistent remedies for

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[13] See *deNourie & Yost Homes v. Frost*, 295 Neb. 912, 893 N.W.2d 669 (2017).

[14] *Porter v. Smith*, 240 Neb. 928, 486 N.W.2d 846 (1992).

[15] See *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 342 N.W.2d 191 (1983).

[16] *Id.*

redress of a single injury.[17] The basic purpose of the doctrine of election of remedies is to prevent a plaintiff from receiving double recovery for a single injury or compensation that exceeds the damages sustained.[18] It is considered a harsh rule which should not be applied in an oppressive manner.[19]

The doctrine of election of remedies normally does not provide grounds for dismissing a complaint under § 6-1112(b)(6) for failure to state a claim. A claim to relief consists of (1) a primary right possessed by the plaintiff, (2) a corresponding primary duty devolving upon the defendant, (3) a delict or wrong done by the defendant which consisted in a breach of such primary right and duty, (4) a remedial right in favor of the plaintiff, (5) a remedial duty resting on the defendant springing from this delict, and (6) the remedy or relief itself.[20] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.[21] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[22] While one of multiple alleged causes of action may be dismissed for failure to state a claim,[23] one of multiple remedies pled for a single

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[17] *Porter v. Smith, supra* note 14.

[18] See, *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001); *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[19] *Vowers & Sons*, *Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998).

[20] *City of Alliance v. Cover-Jones Motor Co.*, 154 Neb. 900, 50 N.W.2d 349 (1951).

[21] *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015).

[22] *Id.*

[23] See, e.g., *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

breach within the context of a single cause of action is not the proper subject of dismissal under § 6-1112(b)(6) for failure to "state a claim."

[8,9] It is true that at the pleading stage in a lawsuit, a party may be required to elect between two inconsistent theories of recovery, such as when rescission of a contract would preclude damages for breach of the contract.[24] But there was no order in this case requiring tenants to elect a theory of recovery.[25] Moreover, when the election is between remedies with different elements of proof under the same complaint, we have held that a plaintiff can attempt to prove both theories and need only elect one for the purpose of recovery in the event that the trier of fact finds both theories were proved.[26] This is because a futile attempt to assert a nonexistent remedy does not, under the doctrine of election of remedies, preclude a resort to a legal remedy or operate as an estoppel to assert it.[27] So long as the plaintiff does not ultimately obtain two recoveries for the same harm,[28] the doctrine of election of remedies does not generally prevent the plaintiff from pleading remedies that are mutually exclusive.

CHI nevertheless proposes that tenants' act of living rent free with relatives while not paying rent to CHI was an election of the remedy of abatement under § 76-1427, which tenants have already fully realized, and thus they can no longer state any claim for relief. There are several problems with this argument.

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[24] See *Platte Valley Fed. Sav. & Loan Assn. v. Gray*, 226 Neb. 135, 409 N.W.2d 617 (1987).

[25] See *Southwest Trinity Constr. v. St. Paul Fire & Marine*, 243 Neb. 55, 497 N.W.2d 366 (1993).

[26] See *Genetti v. Caterpillar, Inc., supra* note 18. See, also, 28A C.J.S. *Election of Remedies* § 6 (2008).

[27] *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955).

[28] See Stephen S. Ashley, Bad Faith Actions Liability & Damages § 7:17 (2d ed. 2018), Westlaw (database updated Sept. 2018).

First, pursuing a remedy is an irrevocable election only if pursued to a determinative and advantageous conclusion to the irreparable injury of the other party.[29] Even commencing suit for one remedy has been held not to be a manifestation of the plaintiff's choice of that remedy, "'so long as the defendant has not so altered his position as to make it unjust to permit the change.'"[30] Tenants' act of finding suitable housing from November 18, 2016, until March 12, 2017, when the Housing Division would not allow anyone to occupy the rental property, and not paying rent during that time, was not an irrevocable election of the remedy of abatement under § 76-1427(1)(c).

Nor is it true that under the alleged facts, the remedies provided under § 76-1427 were fully realized. Section 76-1427(1)(c) expressly states that tenants are "excused from paying rent for the period of the landlord's noncompliance." Yet, CHI allegedly demanded that tenants pay rent for November 2016 and February 2017, and tenants alleged that they did so, even though during approximately one-half of November and nearly all of February, they were living in substitute housing. CHI fails to explain how tenants have no right to enforce the provision in § 76-1427(1)(c) that they be excused from paying rent while living in substitute housing and while CHI deliberately or negligently failed to supply running water, hot water, heat, or essential services. CHI also fails to explain why tenants did not sufficiently allege facts showing that they could recover reasonable attorney fees pursuant to § 76-1427(1).

[10] Furthermore, tenants' complaint alleges more than one breach and more than one injury with respect to the duties set forth by § 76-1419. Election of remedies applies only when there are inconsistent remedies for redress of the same single

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[29] See *Porter v. Smith, supra* note 14. See, also, *Bratt v. Wishart*, 136 Neb. 899, 287 N.W. 769 (1939).

[30] *Bratt v. Wishart, supra* note 29, 136 Neb. at 904, 287 N.W. at 771.

injury.[31] Likewise, § 76-1427(2) states that resort to the remedies of § 76-1427 precludes proceeding under § 76-1425 "*as to that breach.*" (Emphasis supplied.) Before tenants were allegedly forced to vacate the premises because of a major electrical hazard and other code violations, they allegedly lived for approximately 6 months with water leaks and mold. The mold exposure allegedly caused medical complications for tenants' child. The allegations indicate that tenants notified CHI of the problem, as did the Douglas County Health Department. Tenants did not seek alternative suitable housing during that time. Instead, they paid full rent and otherwise did not exercise any of the remedies set forth in § 76-1427.

In fact, as to the water leak and mold, such noncompliance with § 76-1419 was not a failure to supply "running water, hot water, or heat, or essential services," such that § 76-1427(1) could even apply. Therefore, as to CHI's failure to correct the water leak and mold, tenants do not have a choice between §§ 76-1427 and 76-1425, which could lead to an election of remedies. Instead, they are limited to § 76-1425.

And we disagree with the district court's conclusion that the complaint presented an insuperable bar to any relief under § 76-1425. First, tenants' failure to provide CHI with a "14/30 day Notice" of termination does not preclude all relief under § 76-1425.

The underlying conclusion regarding the lack of a 14/30-day notice appears to have been that tenants cannot recover their security deposit pursuant to § 76-1416 if the lease was not terminated under the URLTA. We pause to note that while tenants did not allege facts constituting a 14/30-day notice, "termination of the tenancy" referred to in § 76-1416(2) can occur in many ways other than the process described by § 76-1425. For instance, a tenant who claims a breach of § 76-1419, but cannot show termination through a 14/30-day

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[31] See *Porter v. Smith, supra* note 14. See, also, *deNourie & Yost Homes v. Frost, supra* note 13.

notice, can nevertheless recover the security deposit once the term of the lease has expired, so long as the security deposit has not been forfeited.

In any event, there are other remedies provided by § 76-1425 which do not require a 14/30-day notice. Section 76-1425(2) provides that "the tenant may recover damages . . . for any noncompliance by the landlord with the rental agreement or section 76-1419." Further, "If the landlord's noncompliance is willful the tenant may recover reasonable attorney's fees."[32] Under the plain language of the statute, these remedies are "in addition to any right of the tenant arising under subsection (1)."[33] To the extent the district court reasoned that a 14/30-day notice is a prerequisite to damages or attorney fees under § 76-1427(2), it erred. Nothing in subsection (2) indicates that the particular notice described in subsection (1) is a prerequisite for the relief described in subsection (2).

[11] Interpreting § 76-1425(2) as requiring a 14/30-day notice as a prerequisite to damages and attorney fees is not only inconsistent with the plain language of § 76-1425(2), which does not require a 14/30-day notice, but also with § 76-1419, which requires written or actual notice before a landlord has a duty to comply with applicable minimum housing codes materially affecting health and safety or to make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition. It would be a strained reading of the statutory scheme to imply that, in addition to the written or actual notice under § 76-1419, a tenant must give a 14/30-day notice—not just to terminate the lease, but also to have a right to damages and attorney fees under § 76-1425(2). We hold that so long as a tenant has given notice when required by § 76-1419, a tenant can seek damages or injunctive relief under § 76-1425(2) without sending notice under § 76-1425(1)

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[32] § 76-1425(2).

[33] § 76-1425(3).

specifying that the rental agreement will terminate upon a date not less than 30 days after receipt of the notice of the breach, if not remedied within 14 days.

[12] We also conclude that the district court erred in reading § 76-1425(2) as providing the remedy of damages only if the tenant also seeks injunctive relief. Section 76-1425(2) states in relevant part that "the tenant may recover damages and obtain injunctive relief for any noncompliance." While the district court was correct that "and" is a conjunction and its function is to indicate a connection or addition[34] between "damages" and "injunctive relief," it does not follow that the tenant must choose to pursue both in order to pursue one. Rather, we agree with tenants that the conjunctive "and" in § 76-1425(2) "serves to vest a tenant with two distinct options for relief" and does not require that both be pursued in order to pursue either.[35]

At most, the meaning of § 76-1425(2) in this regard is ambiguous. In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.[36] Neither CHI nor the lower court has explained how it would be just to require tenants to obtain injunctive relief in order to recover damages when a landlord breaches the duties set forth in § 76-1419 relating to fitness and habitability. We can envision situations where damages have been incurred but where, for example, injunctive relief is moot by the time a tenant brings an action under the URLTA. To interpret a tenant's right to damages under § 76-1425(2) as contingent upon injunctive relief and injunctive relief as contingent upon an award of damages would allow landlords to fortuitously escape liability for breaches of § 76-1419. Such a reading would thus be contrary

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[34] See "And," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/and (last visited Mar. 27, 2019).

[35] Brief for appellants at 17.

[36] *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001).

to the purpose of the URLTA to encourage the landlord to maintain and improve the quality of housing.

We find that the complaint presents no insuperable bar to relief for any of the claimed breaches of the duties set forth by § 76-1419.

Retaliation

We turn to tenants' cause of action for retaliation under § 76-1439. The complaint alleged that the rental property is still under a vacate order and that CHI, in retaliation for tenants' complaints to the Douglas County Health Department and the Housing Division, demanded tenants vacate or pay rent during periods they were unable to live on the premises. We hold that tenants thereby alleged sufficient facts to state a cause of action for retaliation under § 76-1439.

Section 76-1439 provides:

> (1) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or *threatening to bring an action for possession* after:
>
> (a) The tenant has complained to a government agency charged with responsibility for enforcement of a minimum building or housing code of a violation applicable to the premises materially affecting health and safety[.]
>
> . . . .
>
> (2) If the landlord acts in violation of subsection (1), the tenant is entitled to the remedies provided in section 76-1430 and has a defense in action against him for possession . . . .
>
> (3) Notwithstanding subsections (1) and (2), a landlord may bring an action for possession if:
>
> (a) The violation of the applicable minimum building or housing code was caused primarily by lack of reasonable care by the tenant or other person in his household or upon the premises with his consent;
>
> (b) The tenant is in default in rent; or

> (c) Compliance with the applicable minimum building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of use of the dwelling unit.
>
> The maintenance of the action does not release the landlord from liability under subsection (2) of section 76-1425.

Section 76-1430, referred to by § 76-1439, describes that

> the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount equal to three months' periodic rent as liquidated damages, and a reasonable attorney's fee. If the rental agreement is terminated the landlord shall return all prepaid rent and security recoverable under section 76-1416.

[13] Nothing in these sections requires a specific notice of termination of a rental agreement. CHI argues, and the district court seemed to believe, that termination under § 76-1439 cannot be recognized without a separate action for termination. It was undisputed that tenants did not recover possession. Neither §§ 76-1430 and 76-1439 nor any other provision of the URLTA indicates that a separate action for termination of a rental agreement is a prerequisite to termination under the URLTA. The only reference to maintenance of an action in the URLTA is the reference to an action for possession by the landlord against a tenant wrongfully in possession or by a tenant against another party wrongfully in possession.[37]

Other than setting forth the right to terminate a rental agreement under various sections already discussed and providing in § 76-1405(2) that "[a]ny right or obligation declared by the [URLTA] is enforceable by action unless the provision declaring it specifies a different and limited effect," the URLTA nowhere refers to an "action" for termination. Indeed, we have never recognized a separate cause of action for termination of a rental agreement, as such. To the contrary, in

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[37] See § 76-1439.

the context of determining when the statute of limitations begins to run for actions for possession, we have referred to termination of a lease as arising as a factual matter pursuant to the provisions of the URLTA before any action has been brought.[38] Similarly, under common law, leases terminated automatically upon various defaults under self-executing contractual provisions without any action being required by lessor or lessee.[39] Statutes that effect a change in common law or take away a common-law right should be strictly construed, and a construction that restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.[40]

Tenants' complaint does not present an insuperable bar to relief under § 76-1439. Therefore, the district court erred in dismissing tenants' alleged fourth cause of action.

Ouster

Finally, we find that the district court erred in concluding that tenants failed to state a claim for ouster in violation of § 76-1430. Section 76-1430 provides in relevant part that a tenant may take action "[i]f the landlord unlawfully removes or excludes the tenant from the premises or willfully and wrongfully diminishes services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant . . . ." The allegations indicate that water services were interrupted as a result of plumbing repairs which were in progress. Tenants also alleged that CHI had unlawfully told them to vacate in October 2016 in retaliation for their reports to the Housing Division. These allegations do not demonstrate an insuperable bar to relief under § 76-1430.

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[38] See *Blankenau v. Landess*, 261 Neb. 906, 626 N.W.2d 588 (2001). See, also, *Pollock v. Whipple*, 33 Neb. 752, 51 N.W. 130 (1892).

[39] See *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953).

[40] See *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007).

CONCLUSION

Accepting as true all facts that are well pled and the proper and reasonable inferences of law and fact that may be drawn therefrom, the complaint states plausible claims for relief under §§ 76-1419, 76-1430, and 76-1439 of the URLTA for retaliatory conduct, ouster, and failure to maintain fit and habitable premises, but not under §§ 76-1418 and 76-1426 for failure to deliver possession. We affirm the district court's order of dismissal as to tenants' first cause of action, but reverse as to their alleged second, third, and fourth causes of action.

Affirmed in part, and in part reversed.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Ronald J. Palagi, P.C., LLC, and Edrie Arlene Wheat, appellants, v. Prospect Funding Holdings (NY), LLC, appellee.

925 N.W.2d 344

Filed April 5, 2019. No. S-18-193.

1. **Judgments: Arbitration and Award: Federal Acts: Appeal and Error.** In reviewing a decision to vacate, modify, or confirm an arbitration award under the Federal Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.
2. **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.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Arbitration and Award: Federal Acts: Contracts.** Arbitration in Nebraska is governed by the Federal Arbitration Act if it arises from a contract involving interstate commerce; otherwise, it is governed by Nebraska's Uniform Arbitration Act.
5. **Arbitration and Award: Federal Acts: Statutes: Contracts.** When determining if an arbitration clause is governed by Nebraska's Uniform Arbitration Act or the Federal Arbitration Act, the initial question is whether the parties' contract evidences a transaction "involving commerce" as defined by the Federal Arbitration Act.
6. **Arbitration and Award: Contracts: Motions to Vacate.** When arbitration has already occurred and a party seeks to vacate, modify, or

confirm an award, a court's role is limited by the act governing the agreement.

7. **Summary Judgment: Motions for Continuance: Affidavits.** Neb. Rev. Stat. § 25-1335 (Reissue 2016) provides a safeguard against an improvident or premature grant of summary judgment.
8. ____: ____: ____. As a prerequisite for a continuance, or additional time or other relief under Neb. Rev. Stat. § 25-1335 (Reissue 2016), a party must submit an affidavit stating a reasonable excuse or good cause for the party's inability to oppose a summary judgment motion. Such affidavits should specifically identify the relevant information that will be obtained with additional time and indicate some basis for the conclusion that the sought information actually exists.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

Ronald J. Palagi and Donna S. Colley, of Law Offices of Ronald J. Palagi, P.C., L.L.C., for appellants.

Adam W. Barney, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

Heavican, C.J., Cassel, Stacy, Funke, and Freudenberg, JJ., and Pirtle and Bishop, Judges.

Stacy, J.

After selling an interest in her personal injury claim to Prospect Funding Holdings (NY), LLC (Prospect), Edrie Arlene Wheat settled her claim. Thereafter, a dispute arose over the amount due Prospect. Prospect initiated arbitration proceedings against Wheat and the law firm representing her, identified in this case as Ronald J. Palagi, P.C., LLC (Palagi). Neither Wheat nor Palagi participated in the arbitrations, and awards were eventually entered against each of them in favor of Prospect. Wheat and Palagi brought this interpleader action against Prospect in the district court for Douglas County, but did not seek to vacate, modify, or correct the arbitration awards. Prospect filed a motion to confirm the arbitration awards and a motion for summary judgment,

and the district court granted both. Wheat and Palagi appeal. We affirm.

BACKGROUND

Agreement

At all relevant times, Palagi represented Wheat in connection with her personal injury claim. On July 5, 2016, with Palagi's knowledge, Wheat and Prospect entered into what was captioned a "Sale and Repurchase Agreement." Under that agreement, Wheat sold Prospect the rights to any sums recovered on her personal injury claim, up to $23,120, in exchange for a net payment of $5,000. The agreement included a "[r]epurchase [s]chedule" which allowed Wheat to repurchase the proceeds of her claim for a set amount that increased every 6 months, up through January 1, 2020. The repurchase schedule applied a 60-percent annual percentage rate. As relevant here, Wheat could have repurchased the proceeds of her claim on or before January 1, 2017, for $8,840.

In the event of a breach, the agreement called for liquidated damages "in the amount of twice the prospect ownership amount regardless of the outcome of the legal claim or the amount of the proceeds. In addition, [the] breaching party shall pay for all collection costs, including reasonable attorney's fees and expenses of [the] non-breaching party." The agreement also contained an arbitration provision which expressly referenced the Federal Arbitration Act (FAA)[1] and provided in relevant part:

> The parties waive the right to trial by jury and waive any right to pursue disputes on a class wide basis in any action or proceeding instituted with respect to this agreement. The parties agree that the issue of arbitrability shall be decided by the arbitrator and not by any other person. That is, the question of whether a dispute itself is subject to arbitration shall be decided solely by

[1] 9 U.S.C. §§ 1 through 16 (2012).

> the arbitrator and not, for example, by any court. In so doing, the intent of the parties is to divest any and all courts of jurisdiction in disputes involving the parties, except for the confirmation of the award and enforcement. The [FAA] applies to this agreement and arbitration provision. We each agree that the FAA's provisions—not state law—govern all questions of whether a dispute is subject to arbitration. Any dispute or disagreement between these parties arising under this agreement or otherwise of any nature whatsoever including, but not limited to, those sounding in constitutional, statutory, or common law theories as to the performance of any obligations, the satisfaction of any rights, and/or the enforceability hereof, shall be resolved through demand by any party and/or interested party to arbitrate the dispute in New York in and under the laws of the State of New York and shall submit the same to a neutral arbitration association for resolution pursuant to its single arbitrator, expedited rules. . . . The arbitration decision shall be final and binding in all respects and shall be non-appealable. Any person may have a court of competent jurisdiction confirm the arbitration award as a judgment of such court and enter into its record the findings of such arbitrators for all purposes, including for the enforcement of the award. The prevailing party in any dispute shall be entitled to all reasonable attorneys' fees and costs, expenses and disbursements with respect to such dispute.

The agreement, which was signed by Wheat as the "seller" and a Prospect representative as the "purchaser," included the following paragraph which was signed by Palagi:

> [Palagi] hereby certifies to [Prospect] that [Palagi] has reviewed the terms and conditions of this Sales [sic] and Repurchase Agreement and explained such terms and conditions to [Wheat], including all costs and fees and including [Wheat's] ability to repurchase the Prospect

> Ownership Amount according to the Repurchase Schedule and Amount of Repurchase. I have a written fee agreement with [Wheat] to pay my fees contingent on the outcome of the case. I agree that all disputes regarding this agreement will be resolved via arbitration and I have explained this to [Wheat]. All proceeds of the legal claim will be disbursed via the attorney's trust account and the attorney is following the written instructions of [Wheat] with regard to this Sale and Repurchase Agreement, and Irrevocable Letter of Directions which [the] attorney has acknowledged.

When Wheat signed the agreement, she also signed an "Irrevocable Letter of Direction" addressed to Palagi. This letter generally instructed Palagi, after payment of all legal fees, to disburse any recovery amounts to Prospect up to the amount covered in the contract before disbursing the remainder to Wheat. The letter also directed that if any dispute arose as to the amount owed to Prospect, Palagi was to pay the nondisputed amount to Prospect and hold the disputed amount in his client trust account until the dispute was resolved through arbitration. The letter included an attorney acknowledgment of all instructions contained therein, and Palagi signed that acknowledgment.

Settlement

In December 2016, Wheat settled her personal injury claim for an amount which is not disclosed in the record. Palagi set aside $8,840 of the settlement proceeds—an amount equal to the repurchase amount at that time—in his client trust account and disbursed the remainder of the settlement funds. The record is unclear regarding any attempts made by Wheat or Palagi thereafter to repurchase the proceeds under the terms of the agreement. However, once Prospect learned it would not be paid the full amount due under the agreement, it initiated separate arbitration proceedings—one against Palagi and the other against Wheat.

Arbitration Proceedings and Award

After arbitration proceedings were initiated, "Arbitration Resolution Services" sent an email to Wheat, advising that Prospect had initiated arbitration proceedings and that Wheat "ha[d] failed to sign into the [arbitrator's] website and verify [her] participation in the arbitration." The email warned, "Unless you do so by Feb[.] 02, 2017, the arbitration will proceed without your involvement and an arbitration award may be entered against you." An attorney with the Palagi law firm responded to this email, arguing generally that the agreement was void under Nebraska law. Neither Wheat nor Palagi otherwise participated in the arbitrations, and they were found by the arbitrator to have provided "no response."

On June 8, 2017, the arbitrator issued an award in favor of Prospect and against Palagi in the sum of $23,120. Thereafter, on August 3, 2017, the arbitrator issued an award in favor of Prospect and against Wheat in the sum of $46,240, a sum that represented the amount of liquidated damages due under the agreement. The arbitrator found the agreement between Wheat and Prospect was valid and enforceable and had been breached.

Interpleader Action

Eight days after the first arbitration award was issued, Wheat, still represented by Palagi, filed what was styled an interpleader action in the district court for Douglas County. The complaint alleged Palagi was in possession of $8,840 to which both Wheat and Prospect claimed entitlement. The complaint also alleged the agreement between Wheat and Prospect was invalid and unenforceable for a variety of reasons, including that Prospect was not registered to transact business in Nebraska, the agreement did not comply with Nebraska's Nonrecourse Civil Litigation Act,[2] and the

[2] Neb. Rev. Stat. §§ 25-3301 to 25-3309 (Reissue 2016).

interest rate charged was usurious. The complaint requested an order directing the disputed sums to be deposited with the court pending further determination of the proper allocation of the funds, and also asking the court to determine the validity of the agreement and enjoin Prospect's collection efforts in the meantime. Palagi amended the complaint on June 27, 2017, to include the Palagi law firm as a party plaintiff and filed a second amended complaint on November 16 to correct Prospect's legal name. Neither the original, amended, nor second amended complaint mentioned the arbitration proceedings, and none requested the awards be vacated, modified, or corrected.

On November 20, 2017, Prospect filed an answer raising the affirmative defense of "[a]rbitration and [a]ward" and, in a counterclaim, seeking judicial confirmation of the arbitration awards. At the same time, Prospect filed a motion to confirm the arbitration awards pursuant to 9 U.S.C. § 9 of the FAA. Prospect also moved for summary judgment on the amended complaint, arguing that there was no genuine issue of material fact and that Prospect was entitled to judgment as a matter of law on its affirmative defense of arbitration and award.

A hearing on Prospect's motions was held January 22, 2018. Prospect offered an affidavit which included the agreement, the arbitration notices, and the arbitration awards. This evidence was received without objection, and no evidence was offered in opposition. Neither Wheat nor Palagi argued they lacked notice of the arbitration proceedings or awards.

During the hearing, the judge observed that the operative complaint appeared to be focused on rescinding or voiding the agreement, remarking, "I'm concerned . . . about why the arbitration award was not addressed within the appropriate time frame." Wheat's counsel responded it was the plaintiffs' position that "the overall contract . . . was void" and that therefore, Prospect "could not go forward with arbitration on a void contract." The court received the parties' briefing and took the motions under advisement.

Seven days later, while the motions were still under submission, Palagi filed a motion to withdraw as Wheat's counsel, citing a conflict of interest. At the same time, Wheat and Palagi filed a motion seeking leave to further amend their complaint "to make it clear that [Wheat and Palagi have] been and [are] moving the Court to vacate, modify or correct the arbitration award as described in the [FAA]." The motion for leave to amend was noticed for hearing on February 13, 2018, but did not ask the court to defer ruling on Prospect's motions for confirmation and summary judgment.

On February 2, 2018, the district court entered an order granting Prospect's motion to confirm the arbitration awards and also granting Prospect's motion for summary judgment. The court found the agreement was governed by the FAA, reasoning that it involved interstate commerce and that the parties had expressly agreed the FAA would apply. The court went on to hold:

> [Wheat and Palagi] do not contend that they sought to vacate, modify, or correct the arbitration award within the three months provided by the FAA. Instead, [they] argue that there is a genuine issue of material fact as to whether the . . . [a]greement is void under Nebraska law. However, attempts to challenge the arbitration awards are required to have been filed within three months of the awards. [Wheat and Palagi] did not do so. [Their] Complaint ignores the arbitration clause and awards in their entirety. [They] did not seek to have the arbitration awards set aside within the time limits prescribed by the FAA. They have waived any defenses to enforcement of the arbitration awards and the arbitration awards are subject to confirmation.

The court thus granted both the motion to confirm and the motion for summary judgment on the operative complaint. The court's February 2 order provided:

> [Prospect's] Motion to Confirm Arbitration Awards and Motion for Summary Judgment are granted. The Court

> orders that judgment be entered in the amount of $46,240 in favor of Prospect . . . and against Wheat and in the amount of $23,140 in favor of Prospect . . . and against Palagi. [Prospect's] motion for summary judgment on [Wheat and Palagi's] claim is granted. [Wheat and Palagi's] claim is dismissed with prejudice.

The February 2, 2018, order did not address Palagi's pending motion to withdraw as Wheat's counsel or the pending motion to further amend the complaint, neither of which had yet proceeded to hearing. But 11 days later, on February 13, a hearing on both these motions was held as originally scheduled. At that hearing, Wheat and Palagi also moved the court to alter or amend the February 2 judgment.

In an order entered February 15, 2018, the district court overruled all pending motions. It overruled the motion to amend the complaint, finding that the proposed amendment would not create a triable issue of fact. It overruled the motion to alter or amend the judgment entered February 2, reasoning the motion was not brought within 10 days as required by Neb. Rev. Stat. § 25-1329 (Reissue 2016). And it found Palagi's motion to withdraw was moot because the case was effectively concluded.

A timely notice of appeal was filed, and we moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Wheat and Palagi assign, restated, that the trial court erred in (1) granting Prospect's motion for summary judgment before discovery was concluded and (2) failing to find the agreement was invalid and unenforceable for any of the following reasons: (a) Prospect was not properly registered to transact business in Nebraska, (b) the agreement is usurious and violates Neb. Rev. Stat. § 45-105 (Reissue 2010), (c) the agreement's liquidated damages provision violates public policy, (d) the agreement does not comply with the Nonrecourse Civil

Litigation Act,[3] and (e) the agreement is champertous and violates public policy.

STANDARD OF REVIEW

[1] In reviewing a decision to vacate, modify, or confirm an arbitration award under the FAA, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law.[4] However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.[5]

[2,3] 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.[6] 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.[7]

ANALYSIS

[4] Before addressing the arbitration issues raised by the parties, we must decide whether our analysis is governed by Nebraska's Uniform Arbitration Act (UAA), or by the FAA. Arbitration in Nebraska is governed by the FAA if it arises from a contract involving interstate commerce; otherwise, it is governed by the UAA.[8]

[5] When determining if an arbitration clause is governed by the UAA or the FAA, the initial question is whether the parties'

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[3] See §§ 25-3301 to 25-3309.

[4] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995).

[5] *Id.*

[6] *Colwell v. Mullen*, 301 Neb. 408, 918 N.W.2d 858 (2018).

[7] *Id.*

[8] *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (2009).

contract evidences a transaction "'"involving commerce"'" as defined by the FAA.[9] That is because the FAA applies to any "written provision in . . . a contract evidencing a transaction involving commerce."[10]

The U.S. Supreme Court has "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."[11] Because Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce where in the aggregate the economic activity in question would represent a general practice subject to federal control, the same must be said for application of the FAA.[12] This concept was reinforced by the Court in *Citizens Bank v. Alafabco, Inc.*,[13] which held the FAA applies "if in the aggregate the economic activity in question would . . . bear on interstate commerce in a substantial way."

In the instant case, we agree with the district court that the FAA governs the parties' agreement. Neither party argues to the contrary. The parties specifically contracted for the FAA to apply, and "[n]o elaborate explanation is needed . . ."[14] to show that an agreement between a foreign company and a Nebraska resident to purchase rights involving personal injury settlement funds affects interstate commerce.

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[9] *Wilczewski v. Charter West Nat. Bank*, 295 Neb. 254, 260, 889 N.W.2d 63, 68 (2016) (quoting *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 757 N.W.2d 205 (2008), quoting 9 U.S.C. § 2).

[10] 9 U.S.C. § 2.

[11] *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995)).

[12] *Wilczewski, supra* note 9.

[13] *Citizens Bank, supra* note 11, 539 U.S. at 57.

[14] *Id.*, 539 U.S. at 58. See, also, *Wilczewski, supra* note 9.

We thus consider the issues raised in this appeal within the framework of the FAA. We first consider the challenges to the validity and enforceability of the agreement and then address the argument that summary judgment was entered prematurely.

Judicial Confirmation

In all but their first assignment of error, Wheat and Palagi argue the underlying agreement between Wheat and Prospect was invalid and unenforceable. They assert a number of reasons why the agreement was unenforceable, only some of which were presented to the district court. Due to the procedural posture of this case, we do not address the merits of any of these arguments because, as explained below, the validity and enforceability of the underlying agreement was not before the district court on the motion to confirm arbitration.

This is not a case in which the district court was asked to consider the enforceability of the arbitration provisions in the context of a motion to compel arbitration or a request to stay litigation pending arbitration. Instead, as the district court found, the arbitration agreement was not mentioned at all in this case until after the arbitration proceedings had been completed and awards had been entered. Given that procedural posture, the court's role regarding the arbitration was limited.

[6] When arbitration has already occurred and a party seeks to vacate, modify, or confirm an award, a court's role is limited by the act governing the agreement.[15] Where, as here, the FAA governs the agreement, the court's role is strictly confined by 9 U.S.C. §§ 9 through 11 of that act.[16] As the U.S. Supreme Court has explained, 9 U.S.C. §§ 10 and 11 provide the exclusive regimes of judicial review for agreements governed by

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[15] See *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008).

[16] *Id.*

the FAA.[17] And motions to vacate, modify, or correct an award pursuant to §§ 10 or 11 are governed by 9 U.S.C. § 12, which states in part that "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

The second amended complaint was filed November 16, 2017, several months after the arbitration awards were issued, yet it did not mention the arbitration proceedings or seek to modify, correct, or vacate the awards. Neither the original complaint, the amended complaint, nor the second amended complaint mentioned the arbitration proceedings at all, and none sought any relief related to the arbitration proceedings.

Instead, the first time arbitration was raised in this litigation was on November 20, 2017, when Prospect filed its answer alleging the arbitration awards as an affirmative defense and simultaneously moved to confirm the awards and moved for summary judgment on the interpleader complaint. By this time, the 3-month time limit for moving to judicially vacate, modify, or correct the arbitration awards had lapsed, and no one contends otherwise. Rather than moving to vacate the arbitration awards, Wheat and Palagi continued to focus their efforts on litigating the validity and enforceability of the overall agreement. Eventually, while the motions to confirm the awards and grant summary judgment were under submission, Wheat and Palagi sought leave to amend their operative complaint to include a request to vacate the arbitration awards, but the district court denied such amendment as futile, and no error has been assigned to that ruling on appeal.

If Wheat and Palagi had filed a timely motion to vacate the awards, the legal analysis required by the district court would have been different. But this case does not require analysis

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[17] *Id.*

of whether any grounds exist for vacating the awards against Wheat and Palagi, because there has been no timely motion seeking such relief. As such, the district court correctly found it was constrained by § 9 of the FAA, which states in relevant part:

> [A]t any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

The U.S. Supreme Court has said § 9 "carries no hint of flexibility."[18] It has explained that pursuant to § 9:

> On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies.[19]

Thus, when Prospect moved to confirm the arbitration awards, the district court was required to grant that motion "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."[20]

In *Hartman v. City of Grand Island*,[21] a case governed by the UAA, we considered similar circumstances. There, we affirmed a district court order confirming an arbitration award where the party opposing the confirmation had not filed a timely motion to vacate, modify, or correct the award as permitted under the UAA. We noted the limited role of the court was to confirm

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[18] *Hall Street Associates, L. L. C., supra* note 15, 552 U.S. at 587.

[19] *Id.*

[20] 9 U.S.C. § 9.

[21] *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003).

the award under such circumstances,[22] and we did not address the merits of challenges being raised to the validity or enforceability of the award. We explained that where arbitration is concerned, "'"the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication."'"[23]

Similar provisions under the FAA required the district court to confirm the arbitration awards when no timely motion to vacate, modify, or correct the awards had been filed.[24] On this record, the district court correctly found that Prospect was entitled to confirmation of the arbitration awards, and no error has been assigned to that confirmation on appeal.

Instead, Wheat and Palagi's assignments of error focus on a myriad of legal challenges to the validity and enforceability of the underlying agreement. But they ignore that these issues have already been resolved against them in binding arbitration, and they did not thereafter seek to vacate, modify, or correct the arbitration award within the time period permitted under the FAA. Given the procedural posture of this case, the assignments of error raised by Wheat and Palagi challenging the validity and enforceability of the underlying agreement lack merit and are premised on a fundamental misunderstanding of the limited role of the court once an arbitration award is entered, a motion to confirm is filed, and there has been no timely motion to vacate, modify, or correct the award.

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[22] *Id.* at 437, 657 N.W.2d at 645 ("'[w]ithin sixty days of the application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 25-2613 and 25-2614,'" quoting Neb. Rev. Stat. § 25-2612 (Reissue 2016)).

[23] *Id*. at 437-38, 657 N.W.2d at 645-46.

[24] 9 U.S.C. § 9.

Summary Judgment Was Not Premature

In their remaining assignment of error, Wheat and Palagi claim the district court erred in granting summary judgment before discovery had been completed. They argue generally that the motion was ruled on before they had "the opportunity to complete reasonable, relevant discovery,"[25] but they do not identify what discovery was incomplete or otherwise challenge the granting of summary judgment. We confine our analysis accordingly.

[7] Neb. Rev. Stat. § 25-1335 (Reissue 2016) provides a safeguard against an improvident or premature grant of summary judgment,[26] but Wheat and Palagi did not, at any time before the court ruled on the summary judgment motion, seek to invoke the protections of that statute, which provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[8] We have explained that "[a]s a prerequisite for a continuance, or additional time or other relief, a party is required to submit an affidavit stating a reasonable excuse or good cause for the party's inability to oppose a summary judgment motion."[27] Such affidavits should specifically identify the relevant information that will be obtained with additional time and indicate some basis for the conclusion that the sought information actually exists.[28]

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[25] Brief for appellants at 6.

[26] See *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

[27] *Gaytan v. Wal-Mart*, 289 Neb. 49, 55-56, 853 N.W.2d 181, 191 (2014).

[28] *Lombardo, supra* note 26.

Here, no such motion or showing was made before Prospect's motion for summary judgment was submitted to and ruled on by the district court. We can find no abuse of discretion in failing to grant a continuance that was never requested. This assignment of error is meritless.

CONCLUSION

Wheat and Palagi assert assignments of error challenging the validity and enforceability of the agreement between Wheat and Prospect. But the validity and enforceability of that agreement was determined in binding arbitration. Wheat and Palagi did not participate in the arbitration or ask the district court to enjoin the arbitration, and once awards were entered against them, they did not move to vacate, modify, or correct those awards within the time permitted by the FAA. As such, when Prospect moved to confirm the arbitration awards under § 9 of the FAA, the district court was required by the FAA to do so. Finding no merit to the assignments of error, we affirm the judgment of the district court.

Affirmed.

Miller-Lerman and Papik, JJ., not participating.

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

Eric H., appellant, v. Ashley H., now known as Ashley E., appellee.

925 N.W.2d 81

Filed April 5, 2019. No. S-18-253.

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. ____: ____. 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. **Modification of Decree: Words and Phrases.** A material change of circumstances constituting grounds for modification of a dissolution decree 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. **Pleadings.** Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet.
5. **Pleadings: Appeal and Error.** Decisions regarding the scope and meaning of pleadings are reviewed for an abuse of discretion.
6. **Modification of Decree: Child Custody.** Before the district court considers whether a change of custody is in the best interests of the children, it must first find that there has been a material change of circumstances that has occurred since the entry of the prior order.
7. **Modification of Decree: Child Custody: Proof.** The party seeking modification of a custody order must prove a material change in circumstances by a preponderance of the evidence.
8. **Evidence: Words and Phrases.** Competent evidence is evidence that is admissible and tends to establish a fact in issue.

Appeal from the District Court for Hall County: John H. Marsh, Judge. Affirmed in part, and in part reversed and remanded with directions.

Samuel R. O'Neill, of Svehla Law Offices, P.C., L.L.O., for appellant.

Stephen T. Knudsen, of Grafton Law Office, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

I. NATURE OF CASE

A father appeals from the district court's denial of his motion to modify custody of a minor child after the child reported that her stepfather was sexually abusing her. The district court found that the father had failed to prove that the reported abuse had occurred. We conclude that the district court applied the correct standard of proof and did not abuse its discretion in its determination of the scope and meaning of the father's complaint. However, we also conclude that the court made an error of law in finding there was "no competent evidence" of sexual abuse by the stepfather. Consequently, we affirm in part, and in part reverse and remand with directions to consider all competent evidence adduced at trial.

II. BACKGROUND

Eric H. and Ashley H., now known as Ashley E., were divorced in 2015. One minor child, M.H., was born to the marriage. Pursuant to a prior joint stipulation to modify, the district court entered an order in November 2016 providing for joint legal and physical custody, with a parenting schedule that gave each parent equal time with M.H.

1. May 24, 2017, Ex Parte Order

On May 24, 2017, Eric moved for an ex parte order giving him full custody of M.H. until a sexual assault investigation

could be concluded. Eric averred that M.H., 6 years old at that time, had reported that Matthew E., Ashley's husband and M.H.'s stepfather, sexually assaulted her. The district court issued an ex parte order that same date, suspending Ashley's parenting time until further order of the court.

2. Deferral of Jurisdiction to Juvenile Court

On June 6, 2017, the district court entered an order declining to exercise further jurisdiction until the juvenile court was no longer exercising jurisdiction under a petition to adjudicate pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016).

The juvenile case pertaining to the allegations of sexual abuse was dismissed on September 15, 2017. It was undisputed that Matthew had not been arrested in relation to M.H.'s report or charged with any crime, though law enforcement did investigate. A medical examination conducted during the juvenile investigation showed no signs of abuse.

3. Complaint to Modify

On September 22, 2017, Eric filed in the district court an amended complaint to modify the November 2016 order of joint physical and legal custody and award Eric primary custody subject to reasonable parenting time by Ashley. The complaint described the material change of circumstances as:

> [Ashley] has remarried to Matthew . . . . [Matthew] was the subject of an investigation in York County, Nebraska for the sexual assault of the minor child. The case was in the Juvenile Court of York County, Nebraska located at case number JV 17-28. The case was dismissed on September 15, 2017.

4. September 26, 2017, Ex Parte Order

The same day that Eric filed to modify custody, he also moved for a new ex parte order suspending Ashley's parenting time with M.H. In an affidavit attached to the motion, Eric described the reasons why, despite the dismissal of the juvenile

case, he still believed that "something happened" and that M.H. would be in danger if she had unsupervised visitation with Ashley. Eric's wife, Cassie H., also submitted an affidavit in support of the motion.

The affidavits described that M.H. had reported to Eric and Cassie that Matthew pulled her pants down and touched her inappropriately. Further, M.H. had patted Eric's private parts and told him that Matthew had said it was "ok" to do that. Eric and Cassie described that M.H. was wetting the bed and otherwise "not acting normal" when she first reported the abuse. They alleged that M.H. had improved during the time that visitation with Ashley was suspended.

The ex parte order was granted pending a hearing on October 4, 2017. After the October 4 hearing, the court vacated the ex parte order.

In vacating the ex parte order, the court concluded that Eric had failed to prove by a preponderance of the evidence that M.H., by that time 7 years old, was the victim of sexual abuse or was otherwise endangered in Ashley's home. The court noted that the initial interview of M.H., in which she first disclosed any inappropriate behavior by Matthew, was conducted by Cassie, an interested party. Cassie was employed by the Department of Health and Human Services (DHHS) and had completed a course in interviewing children. The court observed that subsequent to the initial interview with Cassie, M.H. attended weekly therapy and it was the therapist's opinion that M.H.'s reports of sexual abuse were made in an "'authentic'" manner consistent with congruent emotions and symptoms. However, the court also stated that testimony that a child is credible has been disapproved in *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993).

The court further noted that M.H. did not testify at the hearing, and it considered the evidence of sexual abuse to be "problematic":

> The Court is left with hearsay statements of a 7-year-old child made to her step-mother and to her counselor.

> Offenses committed and against children too young to testify are troubling in that in many cases, the only witness is unable to testify under established rules of evidence. The Court is however constrained by rules of law and must respect a parent's constitutionally protected relationship with the child, as well as protecting the best interest of the child.
>
> The initial interview of the minor child [by Cassie] is problematic, in that it was not conducted by a neutral party. The Court can find no established hearsay exception to the child's statements. It is uncertain whether this initial interview and continued residence with the stepmother influenced the child's statements to the counselor.

5. Hearing on Motion to Modify

The hearing on the complaint to modify was held on February 8, 2018. Ashley, Eric, and Cassie testified. Additionally, a mental health practitioner, Lisa Pattison, testified, and the notes from another mental health practitioner, Cynthia McDowell, were entered into evidence. Finally, the court conditionally accepted into evidence notes from an interview of M.H. conducted by a child advocacy center, subject to its ruling on Ashley's hearsay objection. A caseworker with DHHS who was assigned to M.H. during the juvenile investigation testified mainly for the purpose of establishing foundation for the interview notes. M.H. did not testify at the hearing.

(a) Bed-Wetting and Other Behaviors

Eric and Cassie testified that, generally, on the day that M.H. transitions from Ashley's custody to Eric's custody, M.H. will act differently than she normally does, staring off into space and crying easily. After a "good night's sleep," however, she is usually fine.

During the week of May 20, 2017, M.H. wet the bed while at Eric and Cassie's house. She had also had an accident at Ashley's house that week.

Cassie testified that the last time M.H. had wet the bed at their home was in December 2016. Ashley testified that M.H. stopped wetting the bed regularly when she was 4 years old, but that she would occasionally still wet the bed. According to Ashley, bed-wetting occurred most frequently when M.H. had a urinary tract infection. According to Ashley, M.H. had a urinary tract infection the week of May 20, 2017.

According to Eric and Cassie, from May until the end of June 2017, M.H. continued to wet the bed at Eric's house, a total of approximately 23 times. Eric and Cassie also described that M.H. started having frequent nightmares about a monster.

M.H. started mental health counseling in June 2017, which was arranged by Eric during his parenting time. Eric and Cassie testified that after M.H. began counseling, M.H. stopped wetting the bed or having nightmares. Eric and Cassie did not dispute that in July 2017, during the time that M.H. was in Eric and Cassie's sole physical placement pending the conclusion of an investigation by DHHS, she was diagnosed with a urinary tract infection.

(b) M.H.'s Initial Reports of Abuse by Matthew

During the week of May 20, 2017, when Cassie learned of M.H.'s bed-wetting, she obtained Eric's permission to ask M.H. some questions. She explained that she had child interview training. Cassie testified without objection that when Cassie asked M.H. some questions, M.H. told Cassie that Matthew had pulled her pants down and touched her private parts. Eric reported this to Ashley.

Ashley testified that she was shocked when Eric told her that M.H. had reported abuse by Matthew. She had no prior knowledge of any abuse or reports of abuse. She did not see any signs at home that M.H. might be experiencing abuse. But she supported Eric's decision to call Child Protective Services, because she "wanted to know what the truth was."

Ashley stated that she fully cooperated with the investigation. Matthew and Ashley at all relevant periods of time have continued living together. Ashley noted that M.H. was upset that she was not allowed to see Matthew during supervised visitation while the juvenile case was pending.

When asked whether she believed M.H.'s allegations, Ashley explained that she did not know what had happened. She testified, "I'm not saying that she's lying, but it's just based on what I see at home and what [M.H.] tells me just — I don't know what the truth is." She explained further, "I don't see the signs of what I would see for somebody that would be sexually abused." Ashley was "not saying [M.H. was] lying, but just all the stories I was told, they don't add up to what I see [M.H.] do."

(c) M.H.'s Reports of Abuse by Classmates

According to Ashley, the same week that M.H. reported Matthew had sexually assaulted her, she told Ashley that some boys at school had come up behind her, pulled her pants down, and touched her. DHHS investigated the report. According to Cassie, who was familiar with the allegations as well, a boy was expelled in relation to the incident. But, according to a caseworker with DHHS who was assigned to M.H. during the juvenile investigation, M.H. and a boy were "playing a game" and the boy "patted her — popped her on the butt a little bit, but there was nothing else other than that."

(d) Counseling

Mental health counseling for M.H. was arranged by Eric and Cassie without Ashley's knowledge or consent. M.H. began her counseling with McDowell. Later, McDowell became ill. She was unable to testify at the hearing.

(i) Exhibit 16: Counseling Notes

Exhibit 16, which contained McDowell's progress notes from 19 sessions with M.H., was entered into evidence over

Ashley's foundation objection. Ashley did not object on hearsay grounds. In those notes, McDowell described that M.H. had disclosed to her consistent details of sexual abuse by Matthew, as well as coaching by Ashley not to disclose the abuse.

According to McDowell, M.H. had described to her that Matthew "'puts his hands on my private parts'" and "'puts his potty on my potty and it bled.'" M.H. also reported to McDowell that Matthew had "'hit my potty with his potty'" and that she "'pee[ed] in my pants.'"

M.H. reportedly told McDowell that the first time Matthew took off her clothes, she was lying in bed for a nap, Matthew came in and took off her pants, and "'[H]e had a glass and he dropped it and then he picked it up and put it inside my potty.'" M.H. told McDowell that it hurt and that M.H. had screamed. According to M.H., Ashley came in and "'put some napkins on it.'"

(ii) Pattison's Testimony

M.H. began seeing Pattison in November 2017. Without objection, Pattison testified that she had seen M.H. seven times since then. She testified that M.H. had consistently told her that she had been touched inappropriately by Matthew. M.H. did not go into details other than to say that it happened in her room, that there was glass involved, and that it hurt. According to Pattison, M.H. told her that Ashley was working on making sure that it was safe for her to go home.

When Pattison raised the possibility of M.H.'s having to testify in the juvenile proceedings, Pattison observed M.H. become "very, very frightened that her mom and her stepdad would be in the room." Pattison testified, further, that after a joint session with Ashley, Eric, and Cassie, M.H. seemed more reluctant to talk with her. On January 11, 2018, after that joint session, M.H. reported to Pattison that a boy had touched her at school.

Pattison explained that bed-wetting often coincides with child sexual abuse. She acknowledged that it is inappropriate

for an interested person, such as a stepparent, to conduct a sexual abuse interview. However, she did not see any signs that M.H. had been coached to make the report of sexual abuse. Pattison opined that Matthew had sexually abused M.H.

(e) Exhibit 19: Child Advocacy Center Interview Notes

During the hearing, the court provisionally accepted into evidence exhibit 19, over Ashley's hearsay objection. M.H. was interviewed by a child advocacy center forensic interviewer on May 22, 2017, and exhibit 19 contained the notes from that interview. In the interview, M.H. made reports of sexual abuse similar to those described above.

6. Order Denying Modification

The court dismissed the amended complaint to modify. The court found that a "fair implication" of the material change of circumstances alleged in the complaint to modify was that "the stepfather had actually sexual [sic] abused the child." The court also stated that finding a material change of circumstances based upon the "mere fact of filing the June the [sic] juvenile petition, which was then dismissed without adjudication may violate due process." The court thus limited its inquiry to whether Eric had proved that Matthew had abused M.H.

The court concluded that Eric had failed to prove by a preponderance of the evidence that Matthew had sexually abused M.H. It explained:

> The Court received records of mental health practitioners which include a diagnosis of adjustment disorder with mixed disturbance of emotions and conduct. While the Court can make no finding that the stepfather sexually abused the child counseling records indicate that his presence appears to be a source of stress for the child. The father and stepmother's testimony suggests that the child the [sic] better during the time that the child had limited contact with her mother.

. . . .

> . . . As noted the court finds no competent evidence that the stepfather has such [sic] abused the minor child.

In making these findings, the court did not consider exhibit 19. The court found that exhibit 19 was inadmissible hearsay.

The court found that while the counseling records indicated that Matthew's presence "appears to be a source of stress for the child," "the pleadings did not provide [Ashley] with notice reasonably calculated to inform her that custody would be changed on a basis other than the sexual abuse investigation and subsequent filing and dismissal of a juvenile petition."

Eric appeals.

III. ASSIGNMENTS OF ERROR

Eric assigns that the district court (1) erred in concluding that he had to prove by a preponderance of the evidence that Matthew sexually abused M.H., (2) erred in concluding that the pleadings did not provide Ashley with notice reasonably calculated to inform her that custody could be changed on a basis other than the sexual abuse investigation and subsequent filing and dismissal of a juvenile petition, and (3) abused its discretion when it failed to grant Eric's motion to modify the custody decree.

IV. 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. *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

[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. *Id.*

V. ANALYSIS

[3] Prior to the modification of a child custody order, two steps of proof must be taken by the party seeking the modification. 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. *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016). See, also, *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *Hopkins v. Hopkins, supra.* The issue in this appeal is whether the court erred in finding that Eric had failed to show the occurrence of the alleged material change in circumstances. The court did not proceed beyond this first step to address whether a change in custody was in M.H.'s best interests. A material change of circumstances constituting grounds for modification of a dissolution decree 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. *Collett v. Collett*, 270 Neb. 722, 707 N.W.2d 769 (2005).

1. Scope of Modification Proceeding

As a threshold matter, Eric asserts that the material change of circumstances considered by the district court was too narrow in scope. Eric suggests that the court erroneously focused on whether actual abuse had occurred instead of considering the possibility that the allegations against Matthew, whether or not true, constituted a material change in circumstances. Eric's argument appears to be that the court should have considered modifying custody based on M.H.'s stress in relation to her contact with Matthew, which was demonstrated by the allegations of abuse. Eric argues in full:

> [Eric's] complaint clearly made allegations that [Ashley's] marriage to Matthew . . . , [Matthew's] behavior, and his proximity to the minor child were at issue. If

> the complaint is liberally construed in [Eric's] favor, the court must consider all aspects relating to [Matthew's] contact with the minor child. This includes all evidence of stress that [Matthew] causes the minor child as noted the district court's order. . . . In addition, other pleadings including the original Motion for Ex-Parte Order and second Motion for Ex-Parte Order, and Affidavits in Support of the Motion for Ex-Parte Order clearly indicated that behavior of [Matthew] would be an issue at trial. . . . There is no question that [Ashley] had notice reasonably calculated to inform her that custody could be changed on a basis other than the sexual abuse allegations against [Matthew].

Brief for appellant at 17 (citations omitted).

Neb. Rev. Stat. § 42-364(6) (Reissue 2016) provides that "[m]odification proceedings relating to . . . custody . . . shall be commenced by filing a complaint to modify. . . . Service of process and other procedure shall comply with the requirements for a dissolution action." In certain respects, these statutes specify special pleading requirements. See, e.g., Neb. Rev. Stat. § 42-353 (Reissue 2016). But otherwise, the ordinary rules of pleading apply to proceedings to modify custody. Cf. *Whitesides v. Whitesides*, 290 Neb. 116, 858 N.W.2d 858 (2015). We have explained that a pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases. *Id.*

[4] Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet. *Id.* See, also, *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). A court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). While the concept of due process defies precise definition, it embodies and requires fundamental fairness. *Id.* Generally, procedural due

process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker. *Id.*

[5] The district court determined that the scope of Eric's complaint was limited to the alleged sexual abuse of M.H. as the material change of circumstances justifying modification. The court determined that the pleadings did not provide Ashley with notice reasonably calculated to inform her that custody could be changed on any other basis. Decisions regarding the scope and meaning of pleadings are reviewed for an abuse of discretion. See *Taxpayers Against Casinos v. State*, 478 Mich. 99, 732 N.W.2d 487 (2007).

The district court did not abuse its discretion in its determination of the scope and meaning of Eric's complaint. The complaint alleged that the material change of circumstances was that Ashley had married Matthew and that Matthew was "the subject of an investigation in York County, Nebraska for the sexual assault of the minor child," resulting in a juvenile court case that was eventually dismissed. But neither remarrying nor being the "subject of an investigation" which led to the dismissal of the juvenile proceeding is a circumstance that is inherently material. As the court noted, the material change of circumstances alleged by implication in the complaint was that Matthew had actually sexually assaulted M.H.

The complaint did not allege more. It did not refer to M.H.'s "stress" or any other aspect of her relationship with Matthew. The complaint did not even make direct reference to M.H.'s reports of abuse. At no point did Eric seek to amend the complaint.

Furthermore, while issues not raised by the pleadings may be tried by express or implied consent of the parties, see Neb. Ct. R. Pldg. § 6-1115(b) and *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015), there was neither evidence of such consent nor evidence that Eric attempted to try any issue other than the allegation of actual sexual abuse. The evidence presented at the hearing focused on whether Matthew had actually sexually abused M.H. Eric did not present evidence of any reason why M.H. would have made false reports. And there is no indication that the issues presented in relation to the ex parte order were any different. The district court did not err in concluding that any change of circumstances different from the alleged sexual abuse was outside the scope of the modification proceeding.

2. Standard of Proof for Sexual Abuse

Eric also asserts that the district court's determination that he had to prove the allegations of sexual abuse by a preponderance of the evidence imposed an "improper and unworkable burden." Brief for appellant at 9. Eric elaborates that whether the abuse actually occurred was the "wrong inquiry," because "the movant need not prove that some material change—be it abuse and neglect or alcohol abuse—actually occurred (or did not occur). Rather, the court must consider the evidence in the totality and determine whether, in the best interest of the child, modification is warranted." *Id.* at 10.

[6] Eric misunderstands our statements regarding the paramount nature of children's best interests. We have repeatedly held that before the district court considers whether a change of custody is in the best interests of the children, it must first find that there has been a material change of circumstances that has occurred since the entry of the prior order. See, *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016); *Hoschar v. Hoschar*, 220 Neb. 913, 374 N.W.2d 64 (1985), *disapproved on other grounds, Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989). See, also, *Schrag v. Spear*,

290 Neb. 98, 858 N.W.2d 865 (2015). Proof of a change of circumstances is not an optional element to a modification proceeding. Proof of a material change of circumstances is the threshold inquiry in a proceeding on a complaint to modify, see *id.*, because issues determined in the prior custody order are deemed res judicata in the absence of proof of new facts and circumstances, see *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). Furthermore, limiting custody changes to material changes in circumstances avoids extensive and repetitive litigation and unnecessary, potentially harmful fluctuations in the child's life. 67A C.J.S. *Parent and Child* § 145 (2013). A custody order will not be modified absent proof of new facts and circumstances arising since it was entered. See *Rauch v. Rauch, supra*.

If we were to accept Eric's premise that the parent filing the complaint to modify need not prove that some material change actually occurred, then every unproven allegation of new material facts and circumstances would open the door for a new best interests custody inquiry and custody change. We find no merit to Eric's argument that the court conducted the wrong inquiry by focusing on whether he had proved that the alleged material change of circumstances actually occurred.

[7] It does not appear that Eric is challenging the preponderance of the evidence as the applicable burden in establishing the material change of circumstances. At least, Eric does not suggest a different burden of proof. For the sake of clarity, though, we reiterate that the party seeking modification of a custody order must prove a material change of circumstances by a preponderance of the evidence. See, *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966); *Young v. Young*, 166 Neb. 532, 89 N.W.2d 763 (1958). See, also, 67A C.J.S., *supra*; Linda D. Elrod, Child Custody Practice and Procedure § 17:4 (rev. ed. 2019). A preponderance of the evidence is the equivalent of "'the "greater weight"'" of the evidence. *Flores v. Flores-Guerrero*, 290 Neb. 248, 253, 859 N.W.2d 578, 583 (2015).

3. De Novo Review of Evidence of Sexual Abuse

We turn, finally, to the underlying question of whether the court erred in finding that Eric did not prove by a preponderance of the evidence that Matthew sexually abused M.H. In doing so, we do not address whether the court, in finding the evidence of abuse unpersuasive, should have considered exhibit 19. We likewise do not address whether the court should have considered any opinions of mental health practitioners that M.H.'s reports of abuse were credible. On appeal, Eric does not assign these rulings as error. But because we conclude that the court made an error of law in finding there was "no competent evidence" of sexual abuse by Matthew, we reverse, and remand for consideration of all the evidence.

[8] Competent evidence is evidence that is admissible and tends to establish a fact in issue. *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 906 N.W.2d 285 (2018). Here, the record contains a considerable amount of evidence which meets this definition.

The fact at issue in this modification trial was whether the child had been subjected to sexual abuse by her stepfather, and evidence at trial, if believed, tended to establish that such sexual abuse had occurred. As noted above, a clinical psychologist testified she had met with the child seven times and the child consistently reported that her stepfather had sexually abused her in her bedroom and that it hurt. Also admitted were treatment notes from a licensed independent mental health practitioner who saw the child 19 times, which notes document that the child consistently reported her stepfather had sexually abused her and that her mother told her not to disclose the abuse. The evidence also showed that the child was experiencing symptoms consistent with sexual abuse and that those symptoms improved during the time the court prevented the stepfather from having contact with her.

In addition to tending to establish a fact in issue, the foregoing evidence was admissible. The child's statements to mental

health professionals, in particular, were admissible under Neb. Rev. Stat. § 27-803(3) (Reissue 2016), because they were made for the purpose of psychological treatment. See *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005). And there was no evidentiary bar to the parents' testimony concerning M.H.'s symptoms.

As demonstrated above, Eric introduced competent evidence that Matthew sexually abused M.H. The district court, however, found that there was "no competent evidence that the stepfather has . . . abused the minor child" and, on that basis, concluded that "[t]he father has failed to prove by a preponderance of the evidence that the stepfather has sexually abused the child."

The district court's earlier order vacating the ex parte order suggests the possibility that the district court found the evidence was not competent, because it was concerned the child's statements to the mental health professionals may have been influenced by the child's father and stepmother during the period of the child's temporary sole physical custody with them after the initial report of abuse. But even if the district court was concerned that the child's statements to mental health professionals had been influenced by her father and stepmother, such a concern would properly go to the weight and credibility to be afforded this evidence, not to whether it is competent. The district court's finding of "no competent evidence," and the absence of any reference to the child's statements, indicates that the district court, rather than considering the weight the statements should be given, did not consider them at all.

It is true that in a bench trial, appellate courts presume that a trial court considers only competent and relevant evidence in rendering its decision. See *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007), *modified on denial of rehearing* 274 Neb. 267, 759 N.W.2d 113. But we do not believe that presumption applies here. This is not a case in which the trial court's order is silent as to the evidence it did and did not rely upon. Rather,

this is a case in which the district court explicitly stated that there was "no competent evidence" of a fact in dispute when, as we have explained, there plainly was.

A de novo review of the record clearly shows there was competent evidence adduced that, if believed, tended to establish the child was sexually abused by her stepfather. Because the record contains competent evidence of sexual abuse, it was an error of law for the court to find there was no competent evidence. We cannot review this record de novo for an abuse of discretion, when the trial court, in reaching its decision, relied on an incorrect understanding of the law. See, *State v. McGuire*, 301 Neb. 895, 911, 921 N.W.2d 77, 88 (2018) ("[t]o the extent that the court's ruling was based upon an incorrect understanding of the law, it is not possible for us to review it for an abuse of discretion"); *State v. Myers*, 301 Neb. 756, 919 N.W.2d 893 (2018).

Accordingly, we reverse, and remand with directions. Given the passage of time since the original hearing on the motion to modify, we leave to the district court's discretion whether to appoint a guardian ad litem or to otherwise allow for the expansion of the existing record. In any case, the court is directed to consider all competent evidence adduced before deciding whether Eric has proved a material change in circumstances.

VI. CONCLUSION

For the foregoing reasons, we affirm in part, and in part reverse and remand with directions to consider all competent evidence adduced at trial.

Affirmed in part, and in part reversed and remanded with directions.

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

State of Nebraska, appellee, v. Gary L. Mann, appellant.

925 N.W.2d 324

Filed April 5, 2019. No. S-18-333.

1. **Jury Instructions: Appeal and Error.** When a party assigns as error the failure to give an unrequested jury instruction, an appellate court will review only for plain error.
2. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
4. **Statutes.** Statutory interpretation is a question of law.
5. **Criminal Law: Trial: Jury Instructions: Proof.** In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged.
6. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
7. **Jury Instructions.** Jury instructions are not prejudicial if they, when taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence.
8. **Criminal Law: Statutes: Legislature.** In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.

9. **Criminal Law: Statutes.** Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
10. ____: ____. Effect must be given, if possible, to all parts of a penal statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
11. **Criminal Law: Due Process: Proof.** Due process requires a prosecutor to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.
12. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.
13. **Jury Instructions: Appeal and Error.** A jury instruction that omits an element of a criminal offense from the jury's determination is subject to harmless error review.
14. **Criminal Law: Statutes.** Courts strictly construe criminal statutes.
15. **Constitutional Law: Criminal Law: Due Process: Presumptions: Proof.** Under the Due Process Clause of the 14th Amendment to the U.S. Constitution and under the Nebraska Constitution, in a criminal prosecution, the State must prove every element of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming that element upon proof of the other elements of the offense.
16. **Criminal Law: Weapons: Intent.** Under Neb. Rev. Stat. § 28-1212.03 (Reissue 2016), the absence of an intent to restore a firearm to the owner is a material element of the crime of possession of a stolen firearm.
17. **Verdicts: Juries: Appeal and Error.** Harmless error review ultimately looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
18. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
19. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
20. ____: ____: ____. 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.

21. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a party's requested instruction where the substance of the requested instruction was covered in the instructions given.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Reversed and remanded for a new trial.

Joseph D. Nigro, Lancaster County Public Defender, Timothy M. Eppler, and Melissa Figueroa, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

Gary L. Mann appeals from a conviction and sentence, pursuant to jury verdict, for possession of a stolen firearm in violation of Neb. Rev. Stat. § 28-1212.03 (Reissue 2016). The primary issue is whether the "intent to restore" clause of § 28-1212.03 is an essential element of the crime, such that the failure to so instruct was plain error. We conclude that it was and that the error was not harmless. We reverse, and remand for a new trial.

II. BACKGROUND

On February 26, 2017, Mann was living with his half brother, James Barnes. On that day, Barnes had asked Mann to move out of the house. In Barnes' bedroom, Barnes kept a .40 caliber pistol stored in a cloth gun case.

A few hours later, Barnes received the following text message from Mann, "I am not at the house sorry I took your pistol with me you probably won't get it back for a while I love you so much brother pray for my sins to be forgiven so I don't

burn in hell." Concerned that Mann might hurt himself, Barnes notified the Cass County sheriff's office. That office, in turn, requested assistance from the Lincoln Police Department in locating Mann. Two Lincoln police officers responded, and one of them located Mann. After investigating and detaining Mann for several hours, one of the officers obtained a search warrant for Mann's car. Upon searching the car, the officer found the firearm and another officer arrested Mann.

The State filed an information charging Mann with possession of a stolen firearm. Mann pled not guilty.

At trial, Mann testified that when he took the firearm, he believed he had permission. He stated that "[a]bout a week prior" to the incident, Barnes had given him permission to use the firearm. Mann testified that he had intended to commit suicide and have the State return the firearm to Barnes. When asked about the firearm by one of the police officers, Mann denied having possession of the firearm, because he "had a bottle of Xanax in the center console directly next to the [firearm] and did not want to get in trouble for it." During cross-examination, Mann admitted that when the police officer questioned him, it would have been the "perfect" opportunity to return the firearm. On redirect examination, he explained that he did not do so because "then [he] would have a narcotics charge."

At the formal jury instruction conference, Mann made several objections to the instructions. Mann first objected to instruction No. 3 (which included the "elements" instruction) and argued that the jury should be instructed on an affirmative defense. He proposed instructing the jury, "'If you find that [Mann] possessed, received, or disposed of a firearm with the intent to restore to the owner,' . . . that would be a defense." The court overruled Mann's objection and his request for the affirmative defense instruction. Later, Mann objected to the court's definition of "stolen" in instruction No. 4 and argued that the definition should mimic Neb. Rev. Stat. § 28-511(1) (Reissue 2016). Thus, he argued that instruction No. 4 should state that "'stolen' means 'to take or exercise control over

movable property of another with the intent to deprive him or her thereof.'" The court overruled both his objection and his requested change.

As given by the district court, the elements portion of instruction No. 3 stated:

> Regarding the crime of Possession of a Stolen Firearm, the elements of the State's case are:
>
> 1. That [Mann] did possess, receive, retain, or dispose of a stolen firearm, knowing that it had been stolen or believing it had been stolen; and
>
> 2. That [Mann] did so on or about February 26, 2017, in Lancaster County, Nebraska.

In the pertinent part of instruction No. 4, the jury was instructed, "'Stolen' means to have been taken without permission or authority, to deprive the owner thereof."

The jury found Mann guilty. The court sentenced Mann to 2 to 6 years' imprisonment.

Mann filed a timely appeal, which we moved to our docket.[1] After oral argument, we requested supplemental briefing by the parties to address

> whether, in light of the State's submission in [original] briefing that the phrase in . . . § 28-1212.03 . . . stating "unless the firearm is possessed, received, retained, or disposed of with intent to restore it to the owner" is a material element of the offense and [Mann's] adoption at oral argument of that submission, the failure to instruct the jury of this material element in Instruction No. 3 constituted plain error, and the reasoning flowing from that answer to a proper disposition of this appeal.

The parties filed supplemental briefs, which we have considered.

III. ASSIGNMENTS OF ERROR

Mann assigns, restated and reordered, that (1) the jury instructions were prejudicial, (2) he received ineffective assistance of trial counsel, (3) the district court erred in admitting

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[1] Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

or precluding evidence that resulted in prejudice, and (4) the district court abused its discretion by imposing an excessive sentence.

IV. STANDARD OF REVIEW

[1,2] When a party assigns as error the failure to give an unrequested jury instruction, an appellate court will review only for plain error.[2] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[3]

[3,4] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[4] Statutory interpretation is also a question of law.[5]

V. ANALYSIS

We begin by reciting the text of § 28-1212.03, because it is central to our decision. It states:

> Any person who possesses, receives, retains, or disposes of a stolen firearm knowing that it has been or believing that it has been stolen shall be guilty of a Class IIA felony *unless the firearm is possessed, received, retained, or disposed of with intent to restore it to the owner*.[6]

We will refer to the emphasized wording as the "intent to restore clause."

We have not previously identified the essential elements of this statute. Consequently, in crafting the instructions here, the district court did not have the benefit of our guidance.

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[2] *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016).

[3] *State v. Thompson*, 301 Neb. 472, 919 N.W.2d 122 (2018).

[4] *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

[5] See *State v. Wal, ante* p. 308, 923 N.W.2d 367 (2019).

[6] § 28-1212.03 (emphasis supplied).

In asserting that the jury instructions were prejudicially erroneous, Mann presents three arguments. First, the instructions omitted an essential element of § 28-1212.03 by failing to instruct on the intent to restore clause. Second, the court refused his requested instruction on the statutory definition of "deprive." Third, Mann contends that the court erroneously overruled his objection for the instruction of the statutory definition of "stolen."

1. Elements of § 28-1212.03

(a) General Principles

[5-7] We recall several familiar principles governing the duty to instruct a jury in a criminal case. In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged.[7] It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.[8] Jury instructions are not prejudicial if they, when taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence.[9]

[8-10] To determine the elements of a crime, we look to the text of the statute. In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.[10] Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought

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[7] *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999).

[8] *State v. Rask*, 294 Neb. 612, 883 N.W.2d 688 (2016).

[9] *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

[10] *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

to be served.[11] Effect must be given, if possible, to all parts of a penal statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.[12]

[11,12] The omission of an essential element from the jury raises due process concerns. Due process requires a prosecutor to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.[13] The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.[14] The U.S. Supreme Court has held that the "Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."[15]

[13] Yet, a jury instruction that omits an element of the offense from the jury's determination is subject to harmless error review.[16] With these principles in mind, we turn to the parties' arguments.

(b) Arguments of Parties

In the district court, both parties took the position that the intent to restore clause was an affirmative defense. Thus, in Mann's initial brief on appeal, he argued that the trial court should have instructed the jury regarding his affirmative defense.

In its responsive brief, the State "submit[ted] that [the intent to restore clause] appears to be an element of the offense rather than an affirmative defense."[17] Noting the similarity of

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[11] *Nebraska Account. & Disclosure Comm. v. Skinner*, 288 Neb. 804, 853 N.W.2d 1 (2014).

[12] *Id.*

[13] *Hinrichsen, supra* note 2.

[14] *Id*.

[15] *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

[16] *State v. Merchant*, 288 Neb. 440, 848 N.W.2d 630 (2014).

[17] Brief for appellee at 16.

§ 28-1212.03 to Neb. Rev. Stat. § 28-517 (Reissue 2016) and our decision in *State v. Hubbard*[18] determining that similar language was an element of the offense and not an affirmative defense, the State argued that it could "conceive of no reason to construe the [intent to restore clause] in § 28-1212.03 differently than the language in § 28-517."[19] This was particularly so, the State argued, because other statutes in the same chapter expressly provided for affirmative defenses. The State argued that instructions Nos. 3 and 4, when read together, properly instructed the jury on the elements of the offense.

At oral argument, the State maintained its position that the intent to restore clause was a material element of the offense. And during the argument, Mann adopted the State's view. After argument, as noted above, we requested supplemental briefing.

Mann's supplemental brief adhered to the State's original position: The intent to restore clause was a material element of the offense. He argued the district court committed plain error when it failed to instruct on that element. Mann noted that although trial counsel incorrectly characterized the element as an affirmative defense, he clearly objected to the failure to include missing language in the jury instructions. Mann contended that by failing to include the element, the court shifted the burden of proof of a material element to him and made it impossible for him to meet that burden. Additionally, he reminded us that it was undisputed at oral argument that intent to restore is an element.

The State's supplemental brief "adhere[d] to its initial position."[20] However, it offered an "alternative interpretation"[21] suggesting that the placement of the intent to restore clause after the penalty language could mean that it was "fairly

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[18] *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

[19] Brief for appellee at 17.

[20] Supplemental brief for appellee at 1.

[21] *Id.*

characterized as an affirmative defense."[22] But the State then argued that assuming that intent to restore was an essential element, the failure to include it in instruction No. 3 was not plain error. The State reasoned that the instructions, read as a whole, adequately covered the element. And even if they did not, the State next argued, the omission was harmless beyond a reasonable doubt, because the evidence would not support a finding that Mann intended to restore the firearm to Barnes. This followed, according to the State, because Mann intended to use the firearm to commit suicide and merely assumed that the State would return it to Barnes. The State reasoned that here, an intent to restore required the intent to "control the [firearm's] disposition."[23]

(c) Material Element

As stated above, in Nebraska all crimes are statutory, and we look to the text to define the elements. As the U.S. Supreme Court said in another context, "All that counts . . . are 'the elements of the statute of conviction.'"[24]

[14] Courts strictly construe criminal statutes.[25] We concluded in *State v. Hubbard* that the identical intent to restore clause in § 28-517 was an element of the offense.[26] We reasoned that because the statute was identical to the Model Penal Code[27] and because the commentaries therein intended the clause to be an element, it was an element.

In the State's supplemental brief, it argued that intent to restore could be characterized as an affirmative defense. The

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[22] *Id*. at 2.

[23] *Id*. at 3.

[24] *Mathis v. United States*, 579 U.S. 500, 509, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016).

[25] *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017).

[26] See *Hubbard, supra* note 18.

[27] A.L.I., Model Penal Code and Commentaries § 223.6, comment 4(a) (1980).

State cited a proposition from *State v. Minor*[28]: "'In a criminal prosecution, if a negative is an essential element of the crime, and is "peculiarly within the knowledge of the defendant," it devolves upon him to produce the evidence, and upon his failure to do so, the jury may properly infer that such evidence cannot be produced.'"

But two problems are obvious. First, the proposition itself characterizes the "'negative'" as an "'essential element.'"[29] If, as *Minor* says, the negative is an essential element, it cannot simultaneously be an affirmative defense. It is either one or the other. Here, the intent to restore clause is the "negative"; under *Minor*, it must be an essential element. Second, the State's argument ignores a robust constitutional imperative.

[15] Under the Due Process Clause of the 14th Amendment to the U.S. Constitution and under the Nebraska Constitution, in a criminal prosecution, the State must prove every element of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming that element upon proof of the other elements of the offense.[30] In *In re Winship*,[31] the U.S. Supreme Court pronounced that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Later, in *Mullaney v. Wilbur*,[32] the Court concluded that under Maine's homicide law, the burden of proving that a killing occurred in the heat of passion in sudden provocation could not constitutionally be placed on the defendant. The Court reasoned that proving lack of heat of passion was similar to proving any other intent. "And although intent is typically considered a fact

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[28] *State v. Minor*, 188 Neb. 23, 26, 195 N.W.2d 155, 156-57 (1972).

[29] *Id*. at 26, 195 N.W.2d at 156.

[30] *State v. Lester*, 295 Neb. 878, 898 N.W.2d 299 (2017).

[31] *In re Winship*, 397 U.S 358, 364, 90 S. Ct. 1068, 25 L. Ed 2d 368 (1970).

[32] *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him."[33] This conclusion, we think, rules out the State's argument premised on the quotation from *Minor*.

[16] We are not persuaded by the State's interpretation. According to the State, if a defendant possesses, receives, maintains, or disposes of a firearm, knowing or believing it has been stolen, then it is presumed the defendant did not have an intent to restore. But this is contrary to the plain language. We hold, as the State anticipated, that under § 28-1212.03, the absence of an intent to restore a firearm to the owner is a material element of the crime of possession of a stolen firearm.

(d) Adequately Covered

En route to its harmless error argument, the State submits that read together, instructions Nos. 3 and 4 properly instructed the jury regarding the elements of the offense. We disagree. We have quoted them above. We simply cannot discern the intent to restore element from the instructions given, and we do not read *Hubbard*[34] to dictate otherwise.

The State relies on our statement in *Hubbard* that "[t]he use of the term 'deprive' encompassed a lack of intent to restore the property to the owners."[35] Because the definition of stolen in instruction No. 4 included the word "deprive," the State argues, the instructions were sufficient to convey the lack of intent to restore.

But in *Hubbard*, we addressed a claim that the *information* was deficient. There, we applied the rule that an information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. Only in that context did

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[33] *Id.*, 421 U.S. at 702.

[34] *Hubbard, supra* note 18.

[35] *Id.* at 323, 673 N.W.2d at 575.

we characterize the term "deprive" as encompassing a lack of intent to restore the property to the owners. Here, we review jury instructions. The use of the word "deprive" in the definition of "stolen" did not instruct the jury that the absence of an intent to restore the property was a material element of the crime.

(e) Harmless Error

Because the intent to restore clause was an element of the crime, the court should have instructed the jury on the element.[36] It did not. The jury instructions omitted an essential element.

[17] Nonetheless, we must determine whether the omission was harmless error. Harmless error review ultimately looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[37]

We cannot characterize this instructional error as harmless. That is, we cannot say beyond a reasonable doubt that the jury would still have found Mann guilty had it been required to find whether he possessed the firearm with the intent to restore it to the owner. As we concluded in *State v. White*,[38] "where the jury has not been instructed as to a material element of a crime, there is no verdict within the meaning of Neb. Const. art. I, § 11." Consequently, there must be an actual jury finding of guilt and not appellate speculation of hypothetical jury actions. Mann presented evidence tending to show that, in the language of § 28-1212.03, he possessed the firearm "with intent to restore it" to Barnes, and we cannot

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[36] See *Tucker, supra* note 7.

[37] *State v. Smith, ante* p. 154, 922 N.W.2d 444 (2019).

[38] *State v. White*, 249 Neb. 381, 389, 543 N.W.2d 725, 731 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

conclude beyond a reasonable doubt that the jury would have disregarded this evidence if they had been instructed on all the material elements. We cannot conclude beyond a reasonable doubt that the jury would have found he lacked the intent to restore.

And here, even though Mann did not object on the precise ground, the error prejudicially affected his substantial right and leaving it uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. Because the omission of the intent to restore clause was plainly erroneous and cannot be characterized as harmless, we must reverse the judgment and remand the cause for a new trial.

Thus, typically, the elements of possession of a stolen firearm would consist of the following: (1) that the defendant did possess, receive, retain, or dispose of a stolen firearm; (2) that he did so knowing or believing the firearm was stolen; (3) that he did so on or about (date) in (county), Nebraska; and (4) that he did not possess, receive, retain, or dispose of the firearm with the intent to restore it to the owner. Of course, depending on the facts, it may be appropriate to alter the wording.

[18] For the most part, we need not address Mann's other assignments of error. But an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[39] We briefly address two matters that, at least to some extent, may be likely to recur.

2. Definition of Deprive

Mann contends that the court erred in failing to define "deprive" in the jury instructions. As stated above, the district court included that word in its definition of "stolen." Because the court failed to instruct the jury on the definition of "deprive" under Neb. Rev. Stat. § 28-509(1) (Reissue 2016),

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[39] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

Mann argues the instructions allowed the jury to embrace a broad definition that unduly prejudiced him. He argues that the term "deprive" alone is not sufficient to encompass the intent to restore element and ignores the substantial prejudice that occurred at trial.

But we have already rejected the State's argument that the use of the word "deprive" in the definition of "stolen" was sufficient to adequately instruct the jury on the missing material element from § 28-1212.03: the absence of an intent to restore the firearm to its owner. We anticipate that upon remand, the district court will instruct the jury regarding that element. In that sense, the question seems unlikely to recur on remand.

Mann complains about a failure to define a word that appears nowhere in the operative statute. He relies upon the definition of "deprive" in § 28-509(1). But § 28-509 defines that term only "[a]s used in sections 28-509 to 28-518." And this is not a prosecution for theft by receiving stolen property under § 28-517 (which would be within that range); rather, it arises under § 28-1212.03 for possession of a stolen firearm. Mann does not direct us to any case law holding that in a prosecution under § 28-1212.03, the trial court must instruct the jury on the definition of "deprive" under § 28-509(1). And because the language of § 28-1212.03 does not employ the word anywhere, the argument seems somewhat odd. Under these circumstances, we find no error.

3. Definition of Stolen

Mann argues that the court erred in overruling his objection to the definition of "stolen." While on appeal he also complains that the court's instruction should have reflected the language in § 28-509(8), he did not submit a proposed instruction to that effect. At the district court's instruction conference, Mann contended only that the definition of "stolen" should have mimicked the statutory language under § 28-511(1). Specifically, he requested that the jury be instructed that

"'stolen' means 'to take or exercise control over movable property of another with the intent to deprive him or her thereof.'"[40] On appeal, he argues that the district court erred in refusing that instruction.

[19,20] 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.[41] 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.[42]

We are not persuaded that in the context of § 28-1212.03, Mann's requested instruction was a correct statement of the law or was warranted by the evidence. "When employing a definition, whether alone, with the term defined, or as a separate definition, a judge should provide only that portion of the definition relevant to the facts of the particular case."[43] His instruction proposed the phrase "movable property of another," but in this prosecution under § 28-1212.03, the only property involved was a firearm. Mann's proposed instruction would have introduced language that easily could have confused the jury.

[21] Moreover, we see no prejudice from the definition of "stolen" in instruction No. 4 or the refusal of Mann's requested alternative. As given, instruction No. 4 defined "stolen" to "mean[] to have been taken without permission or authority, to deprive the owner thereof." It is not error for a trial court to refuse to give a party's requested instruction where

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[40] See § 28-511(1).

[41] *Mueller, supra* note 4.

[42] *Id.*

[43] NJI2d Crim., ch. 4, comment.

the substance of the requested instruction was covered in the instructions given.[44] Mann does not explain how the difference between the instruction given and the one he requested actually prejudiced him. And we can discern no obvious prejudice. In the absence of any showing of prejudice, it appears to us that the instruction of "stolen" given by the court adequately covered the substance of the requested statutory instruction. Therefore, we find no error.

VI. CONCLUSION

We conclude that the district court plainly erred in failing to instruct the jury on an essential element of the crime and that the error was not harmless and warrants reversal. Therefore, we reverse the judgment of the district court and remand the cause for a new trial.

Reversed and remanded for a new trial.

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[44] *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

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

In re Estate of Wayne L. Ryan, deceased. Shadow Ridge Limited Partnership, a Nebraska limited partnership, appellant, v. Steven Ryan, Personal Representative of the Estate of Wayne L. Ryan, deceased, appellee.

925 N.W.2d 336

Filed April 5, 2019. No. S-18-799.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a trial court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the claim's substantive merits.
3. ____: ____. To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
4. **Decedents' Estates: Claims: Time.** The Nebraska Probate Code requires that all claims, whether absolute or contingent, be presented within certain time periods or be barred against the estate.
5. **Actions: Charities: Contracts: Consideration.** An action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, generally cannot be successfully defended on the ground of lack of consideration.
6. **Charities: Contracts: Intent.** Charitable subscriptions often serve the public interest by enabling projects which otherwise could not occur and are thus construed, if reasonably possible, to support recovery.
7. **Contracts: Estoppel.** Recovery on a theory of promissory estoppel is based upon the principle that injustice can be avoided only by enforcement of a promise.
8. **Forbearance: Estoppel.** Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action

or forbearance is binding if injustice can be avoided only by enforcement of the promise.

9. **Estoppel.** Under Nebraska law, the doctrine of promissory estoppel does not require that the promise giving rise to the cause of action must meet the requirements of an offer that would ripen into a contract if accepted by the promisee.

Appeal from the County Court for Douglas County: Lawrence E. Barrett, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas M. Locher and Kevin J. Dostal, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant.

Marnie A. Jensen and Kamron T.M. Hasan, of Husch Blackwell, L.L.P., and William J. Lindsay, Jr., and John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellee.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

In a decedent's probate proceeding, a golf course partnership sought to enforce a claim based upon an unfulfilled pledge agreement, relying alternatively upon contract and promissory estoppel theories. The probate court dismissed both theories for failure to state a claim. Because the partnership is not a charitable, educational, or like institution, it failed to state a claim based on contract. But because it alleged having expended substantial funds in reliance upon the pledge—which must be accepted as true—it stated a claim based upon promissory estoppel. We affirm in part, and in part reverse and remand for further proceedings.

BACKGROUND

Pledge Agreement

In 2016, Wayne L. Ryan entered into a written "Pledge Agreement" with Shadow Ridge Limited Partnership, a

Nebraska limited partnership (Shadow Ridge). The signature block identified Ryan as "Donor" and Shadow Ridge as "Donee." According to the agreement, Ryan would make a total gift of $20 million so that Shadow Ridge could make improvements to the golf course it operated. In the agreement, Ryan stated that he had resided along the golf course for 23 years and had "great pride and affection" for it. His intent in providing funds, as stated in the agreement, was to "develop the golf course into one of the top-rated golf courses in the entire Midwest" and to make it "become a significant asset to the City of Omaha in much the same manner as the Omaha Henry Doorly Zoo, the TD Ameritrade Ball Park and other similar civic improvements which attract people to visit and reside in the City of Omaha."

According to the pledge agreement, "[Ryan] has discussed a number of improvements which [Shadow Ridge] would like to make to the Shadow Ridge Golf Course in order to provide the underwriting that is appropriate to meet the goals and objectives generally set forth in this Pledge Agreement." The improvements were set forth in an attachment to the pledge agreement and were incorporated by reference. The 11-page attachment detailed $12.5 million in capital improvements. Because recognizing Ryan's contributions would "be paramount to this endeavor," Shadow Ridge would construct and name a golf performance center after Ryan and place a bronze statue in Ryan's honor at the first tee.

The pledge agreement stated that "in consideration of the foregoing Recitals and the mutual promises hereinafter set forth, [Ryan] hereby agrees to provide the gratuitous transfers hereinafter described . . . , subject to the conditions set forth in paragraph 3 below." Paragraph 3, titled "Conditions," stated that the intended transfers were "specifically subject to" two conditions. One condition was the resolution of specified litigation in Sarpy County, Nebraska, and the eventual sale of the stock or assets of "Streck, Inc.," to an independent third party for fair value. The other condition was the

agreement of Shadow Ridge "to pay the anticipated transfer taxes attributable to the transfers contemplated by this Pledge Agreement (gift taxes reportable on IRS Forms 709) so that the practical result of the intended transfers is that they will be properly characterized as a net gift for federal gift tax purposes."

Probate Proceedings

Ryan died in 2017. Shadow Ridge filed a statement of claim against the estate of Wayne L. Ryan (estate) for the $20 million pledge agreement. The claim disclosed that payment was contingent on the resolution of the Sarpy County case. The estate denied the claim.

Shadow Ridge filed a petition for allowance of claim and attached the pledge agreement. According to the petition, Ryan "enjoyed 'Founding Membership' status with Shadow Ridge at the time of the execution of the Pledge Agreement." Shadow Ridge alleged that in reliance upon Ryan's pledge, it had incurred expenses in beginning improvements specified in the agreement. It claimed that the pledge agreement was an enforceable obligation that was binding against the estate. Alternatively, Shadow Ridge alleged that the petition should be granted under a promissory estoppel theory. Shadow Ridge conceded that the contingency in the pledge agreement concerning the Sarpy County case had not occurred, but asserted that it would likely occur prior to the distribution of the estate.

Dismissal

The estate moved to dismiss the petition for failure to state a claim. The probate court thereafter dismissed the petition with prejudice, finding that the petition failed to state a claim upon which relief may be granted and that no future amendments to the petition would be successful. The court's order stated: "The conclusion of the . . . litigation in Sarpy County is a prerequisite before the intended gifts could be made by . . . Ryan. [He]

has died and no gifts were made to [Shadow Ridge] before his death."

Shadow Ridge filed a timely appeal, and we granted the estate's petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Shadow Ridge assigns that the court erred in dismissing its contract claim based upon the pledge agreement and in dismissing its claim based upon a promissory estoppel theory.

STANDARD OF REVIEW

[1] An appellate court reviews a trial court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[1]

ANALYSIS

Principles of Law Regarding Motion to Dismiss

[2,3] We begin by recounting principles governing motions to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the claim's substantive merits.[2] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[3] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of

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[1] See *Sandoval v. Ricketts, ante* p. 138, 922 N.W.2d 222 (2019).

[2] See *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

[3] *Eadie v. Leise Properties*, 300 Neb. 141, 912 N.W.2d 715 (2018).

the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[4] At this stage, the question boils down to whether, after accepting the well-pleaded facts as true, Shadow Ridge's petition stated either a claim on a contract or a claim for promissory estoppel.

Contingent Claims

The transfers of money set forth in the pledge agreement were subject to two conditions. The estate argues that Shadow Ridge's claims fail due to the nonoccurrence of conditions precedent. Here, we disagree.

A condition precedent includes a condition which must be fulfilled before a duty to perform an existing contract arises.[5] There is no dispute that the conditions set forth in the agreement have not occurred. But this was not an action against Ryan to compel payment of an obligation; here, Shadow Ridge seeks to preserve its claims against Ryan's estate in the probate proceeding resulting from Ryan's death.

[4] The Nebraska Probate Code requires that all claims, whether absolute or contingent, be presented within certain time periods or be barred against the estate.[6] Neb. Rev. Stat. § 30-2492 (Reissue 2016) specifically addresses the disposition of contingent claims:

> (a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.
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> (b) In other cases the personal representative or, on petition of the personal representative or the claimant in a

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[4] *Burklund v. Fuehrer*, 299 Neb. 949, 911 N.W.2d 843 (2018).

[5] *Weber v. North Loup River Pub. Power*, 288 Neb. 959, 854 N.W.2d 263 (2014).

[6] See Neb. Rev. Stat. § 30-2485 (Reissue 2016).

> special proceeding for the purpose, the court may provide for payment as follows:
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> (1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;
>
> (2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

This statute treats contingent claims differently, depending upon whether the contingency is resolved before distribution of the estate. If it is, the claim is paid pursuant to the rules governing payment of claims of the same class.[7] If not, the statute anticipates that the probate court will craft an equitable solution to dispose of the contingent claim.[8]

Here, it is not clear which subsection of § 30-2492 may ultimately apply. Shadow Ridge alleged that the contingency of the resolution of the litigation would likely occur prior to distribution of the estate. But it asserted that if the contingency had not occurred prior to the distribution of the entire estate, the claim should be paid under § 30-2492(b). To the extent Shadow Ridge argues that it must then be paid even if the contingencies have not been met, we disagree. If a claim's contingencies remain unmet at the time of an estate's distribution, § 30-2492(b) provides a probate court with a wide range of tools to achieve a just result. And depending upon the situation then, a contingency may be so unlikely of being performed as to justify only minimal provision for future payment.

Regardless of which subsection may apply, our probate code compelled Shadow Ridge to assert its claim against the estate even though it remained contingent. Thus, the contingencies'

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[7] See Neb. Rev. Stat. § 30-2487 (Reissue 2016) (classifying claims).

[8] See § 30-2492(b).

unfulfilled status did not automatically defeat the claim. We turn to the alternative theories raised by Shadow Ridge.

Contract

Typically, a promise to make a gift in the future is not legally enforceable.[9] Long ago, this court recognized that a promise to make a gift in the future is ordinarily unenforceable, even when put in the form of a promissory note.[10] But in charitable giving cases, courts frequently find such future promises to be enforceable as a pledge or subscription.[11] "A 'subscription contract' or 'subscription,' as it is often called, is not a gift, but is a contract, oral or written, by which one engages to contribute a sum of money for a designated purpose, gratuitously, as in the case of subscribing to a charity."[12]

[5] Here, Shadow Ridge sought to have the pledge agreement enforced as a contract. A contract requires an offer, acceptance, and consideration.[13] The general rule is that a subscription to a charitable or other institution must be supported by a consideration in order to be a binding obligation.[14] But an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, generally cannot be successfully defended on the ground of lack of consideration.[15] In such cases, although the note is characterized as a gift or donation, the expenditure of money or assumption of liability by the

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[9] See *Ferer v. Aaron Ferer & Sons Co.*, 273 Neb. 701, 732 N.W.2d 667 (2007).

[10] See *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

[11] See William A. Drennan, *Charitable Naming Rights Transactions: Gifts or Contracts?* 2016 Mich. St. L. Rev. 1267 (2016).

[12] 83 C.J.S. *Subscriptions* § 1 at 615 (2010).

[13] See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[14] *Trustees of Baker University v. Clelland*, 86 F.2d 14 (8th Cir. 1936).

[15] *Ricketts v. Scothorn, supra* note 10.

donee in reliance on the promise constitutes a valuable and sufficient consideration.[16]

[6] Charitable subscriptions often serve the public interest by enabling projects which otherwise could not occur and are thus construed, if reasonably possible, to support recovery.[17] This court has found valid consideration for a pledge or subscription note to an educational institution[18] and to a church.[19]

Shadow Ridge did not plead that it is a "church, college, or other like institution."[20] Rather, it is a Nebraska limited partnership that operates a golf course known as Shadow Ridge Country Club. There is no allegation that Shadow Ridge is open to the public or is a nonprofit entity. By definition, a country club often has restricted membership.[21]

Our research did not uncover any cases addressing the enforceability of a pledge agreement in favor of a for-profit entity. Shadow Ridge cited an Illinois case[22] involving a golf and country club, but it is distinguishable. In that case, which involved securities regulation, the promisor already held a life membership in the club and pledged money to protect his own property. There is no allegation that Ryan held a similar ownership interest in Shadow Ridge.

We conclude that the absence of cases enforcing pledge agreements in favor of profitmaking entities is not mere

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[16] See *id*.

[17] See 83 C.J.S., *supra* note 12, § 3.

[18] See, *Nebraska Wesleyan University v. Estate of Couch*, 170 Neb. 518, 103 N.W.2d 274 (1960); *In re Estate of Luce*, 137 Neb. 846, 291 N.W. 562 (1940); *In re Estate of Griswold*, 113 Neb. 256, 202 N.W. 609 (1925).

[19] See *Continental Co. v. Eilers*, 134 Neb. 278, 278 N.W. 497 (1938).

[20] See *Ricketts v. Scothorn, supra* note 10, 57 Neb. at 56, 77 N.W. at 366.

[21] "Country club," Oxford English Dictionary Online, http://www.oed.com/view/Entry/381763 (last visited Mar. 29, 2019).

[22] *Blomgren v. Cowley*, 282 Ill. App. 166 (1935).

happenstance. "[F]rom early times academies, colleges, missionary enterprises, churches, and other similar institutions for the public welfare, have been established and often maintained upon private donations and subscriptions."[23] Some early cases advanced the view that "a subscription to charity was purely gratuitous,—a nudum pactum, not enforceable at law,—and performance was left to the conscience and honor of the subscriber."[24] But many courts, including this court, began to enforce eleemosynary subscriptions.[25] This change flowed from a commendable regard for public policy and a desire to give stability and security to institutions dependent on charitable gifts.[26]

Because Shadow Ridge is not an entity for the public good like a charitable or educational institution, its petition premised on contract principles failed to state a claim upon which relief may be granted. We conclude the probate court did not err in granting the motion to dismiss as to the contract claim.

Promissory Estoppel

[7,8] Shadow Ridge alternatively alleged that its claim should be granted under a promissory estoppel theory. Recovery on a theory of promissory estoppel is based upon the principle that injustice can be avoided only by enforcement of a promise.[27] Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[28]

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[23] Annot., 38 A.L.R. 868, 869 (1925).

[24] *Id*. at 869.

[25] See *In re Estate of Griswold, supra* note 18.

[26] See 38 A.L.R., *supra* note 23.

[27] *Blinn v. Beatrice Community Hosp. & Health Ctr., supra* note 13.

[28] *Id.*

[9] Under Nebraska law, the doctrine of promissory estoppel does not require that the promise giving rise to the cause of action must meet the requirements of an offer that would ripen into a contract if accepted by the promisee.[29] Under this theory, the main focus is on reasonable reliance. And here, we are reviewing only a dismissal for failure to state a claim.

At this stage, we must view the facts alleged by Shadow Ridge as true and draw all reasonable inferences in its favor. Shadow Ridge alleged that Ryan promised to give it $20 million "for the purposes specified in the Pledge Agreement." It claimed that Ryan reasonably expected the promise of money to induce Shadow Ridge to incur expenses for the purposes identified in the pledge agreement, that it was foreseeable Shadow Ridge would incur substantial expenses in reliance upon Ryan's promise, and that Shadow Ridge reasonably relied on the promise to incur substantial expenses.

Shadow Ridge's last allegation—that it had incurred substantial expenses in reasonable reliance upon Ryan's pledge agreement—is the heart of this theory. Based upon its assertion of facts supporting promissory estoppel, Shadow Ridge has adequately stated a claim on its alternative pleading. The probate court erred in dismissing the claim in the petition based on promissory estoppel.

CONCLUSION

Because Shadow Ridge is not a charitable, educational, or like institution, its attempt to enforce the pledge agreement as a contract fails. And we affirm the probate court's order to that extent. However, accepting as true all well-pleaded facts and drawing all reasonable inferences in Shadow Ridge's favor, Shadow Ridge has stated a claim upon which relief may be granted under a promissory estoppel theory. Of course, the truth of Shadow Ridge's allegations, as well as any defenses

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[29] *Id.*

the estate may assert, has not been determined. Contingencies admittedly exist. Our decision today should not be misunderstood to mean that Shadow Ridge's claim must ultimately prevail. Its success or failure depends upon the proceedings that will follow our remand. We reverse the probate court's dismissal as to the promissory estoppel theory of Shadow Ridge's claim and remand the cause for further proceedings.

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

Miller-Lerman, J., not participating.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellant, v. Jason T. Gibson, appellee.

925 N.W.2d 678

Filed April 12, 2019. No. S-17-1272.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **Sentences: Probation and Parole: Appeal and Error.** When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court.
3. **Sentences: Appeal and Error.** There is not a different standard of review for sentences when the State appeals a sentence as excessively lenient or when a defendant appeals a sentence as excessive; an appellate court reviews for an abuse of discretion in either case.
4. **Judgments: Appeal and Error.** 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. **Sentences: Appeal and Error.** The trial court's sentencing determination and an appellate court's review of that determination for an abuse of discretion are not formulaic or simply a matter of doctrine.
6. **Sentences.** The sentencing court is not limited in its discretion to any mathematically applied set of factors.
7. ____. 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.

8. ____. Evidence regarding a defendant's life, character, and previous conduct, as well as prior convictions, is highly relevant to the determination of a proper sentence.
9. **Sentences: Appeal and Error.** It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate.
10. **Sentences.** A sentence should fit the offender and not merely the crime.

Petition for further review from the Court of Appeals, Pirtle, Riedmann, and Bishop, Judges, on appeal thereto from the District Court for Sarpy County, Stefanie A. Martinez, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Phil Kleine, Deputy Sarpy County Attorney, for appellant.

Donald L. Schense, of Law Office of Donald L. Schense, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

The defendant was convicted of attempted sexual assault of a child in violation of Neb. Rev. Stat. § 28-319.01(1)(b) (Reissue 2016). The presentence investigation report (PSI) indicates that the defendant believed the child to be 18 years old. The defendant has no criminal record. The question presented in this appeal is whether the district court abused its discretion in sentencing the defendant to 5 years' probation with 180 days of jail time as a condition of probation. The State asserts that the sentence was excessively lenient and involved inappropriate consideration of an irrelevant factor. The Nebraska Court of Appeals, in a split decision, agreed. We granted further review. We reverse the Court of Appeals' decision and remand the matter with directions to affirm the sentence of the district court.

BACKGROUND

Jason T. Gibson was initially charged with first degree sexual assault of a child in violation of § 28-319.01(1)(b), a Class IB felony which is punishable by 20 years' to life imprisonment, with a mandatory minimum of 15 years' imprisonment. In exchange for his plea of no contest, the State amended the charge to attempted first degree sexual assault of a child, in violation of § 28-319.01(1)(b) and Neb. Rev. Stat. § 28-201 (Cum. Supp. 2018), a Class II felony. A Class II felony is punishable by 1 to 50 years' imprisonment, but no mandatory minimum is required. There was no agreement between the parties regarding their recommendations to the court as to sentencing.

A violation of § 28-319.01(1)(b) occurs when an actor 25 years of age or older subjects another person who is at least 12 years of age but less than 16 years of age to sexual penetration. As the factual basis for the crime, the State described that another person, DeArch Stubblefield, was prostituting out the victim, E.L., who was 15 years old. Between December 1, 2016, and January 31, 2017, Gibson picked up E.L. and Stubblefield and drove them to his house, where Gibson engaged in the sexual penetration of E.L. Money was given to Stubblefield by Gibson after the sexual intercourse.

According to the PSI, Stubblefield, who was 18 years old, attended the same high school as E.L. He and E.L. were engaged in a sexual relationship for approximately 6 months when Stubblefield began seeking sexual encounters through "Craigslist." Without consulting with E.L., Stubblefield decided to post on Craigslist that he and E.L. were looking for someone to have a "threesome with." Stubblefield eventually told E.L. that he had arranged a sexual encounter for the two of them and asked her to participate. E.L. agreed, not knowing exactly what was going to happen.

This began a series of three sexual encounters with three different men, arranged by Stubblefield. During these encounters,

Stubblefield directed E.L.'s actions and the men sexually penetrated E.L. Stubblefield also participated in the sexual activities to varying degrees.

Gibson was one of the men who responded to Stubblefield's Craigslist posting. Gibson picked up E.L. and Stubblefield and drove them to his house, where the sexual penetration occurred. Gibson described that he believed that both E.L. and Stubblefield were 18 years old. According to Gibson and Stubblefield, the Craigslist posting stated that E.L. and Stubblefield were both 18 years old. Also, according to Gibson, E.L. and Stubblefield told him that E.L. was 18 years old.

All communication leading up to the day of the sexual contact was between Gibson and Stubblefield. Gibson told Stubblefield that he did not wish to engage in a threesome and was only interested in the young woman. Stubblefield was in the room during the sexual penetration of E.L. by Gibson. There were conflicting reports as to Stubblefield's involvement while in the room.

After the sexual contact and before Gibson took E.L. and Stubblefield home, Stubblefield asked Gibson for $40. Stubblefield claimed he needed the money either to fix a tire on his car or to buy gasoline. Gibson gave the money to Stubblefield, who later split the money with E.L.

The PSI showed that Gibson has no criminal record. A search of his electronic devices confiscated as part of the investigation failed to reveal any involvement in activities similar to those for which he was convicted, or any other crime. Gibson admitted to law enforcement that he had previously engaged in at least one other sexual encounter and had chatted with people through other websites, but alleged that these activities were between consenting adults and not for money.

Gibson has served for 16 years as a linguist in the U.S. Air Force with consistently exemplary performance reviews and numerous awards and decorations. Over 30 letters were

submitted to the district court attesting to Gibson's good character and reputation. These letters described Gibson as a person of integrity and character who consistently puts others before himself. He was described as truthful, honest, dedicated, honorable, hardworking, good natured, and mild mannered. Clinical psychological evaluations concluded that Gibson was not classified as a pedophile. He participated in several psychological assessments that concluded Gibson was at a low overall risk to reoffend.

The PSI indicated that Gibson was upfront and honest with law enforcement from the beginning of the investigation. Gibson immediately accepted responsibility for his actions. Further, he expressed to the court that he was extremely remorseful for what E.L. and her family must be going through.

The State argued for a period of incarceration, while defense counsel sought probation with no incarceration. Before pronouncing its sentence, the district court noted the severity of the crimes that had been committed against E.L. The court said that it was a case that "is extremely difficult for the Court, for the victim, for her family, and for the community." The court continued:

> There is no sentence that I'll be able to give to you that will make [E.L.] whole again. I can hope that the system does what it is designed to do, and in my reading of the presentence investigation report, it indicates to me that this . . . Stubblefield has, in large part, the majority of the responsibility, from the materials I've received. And my hope is that he — [E.L.] is given some sort of justice in that sentence, most significantly.

Turning to mitigating factors, the district court noted that Gibson had demonstrated an appreciation for the seriousness of his actions and had accepted responsibility for the crime he committed.

The court pronounced that Gibson would have to serve a term of incarceration at the county jail for 180 days and that

"[t]here will be a term of probation for five years to be served upon completion of that jail time." The subsequent written order of probation included a condition that Gibson serve 180 days in the Sarpy County jail, and an order of commitment followed. We agree with the Court of Appeals' majority opinion that this written sentence imposed probation in lieu of incarceration and imposed 180 days' jail time as a valid condition of probation under the authority conferred by Neb. Rev. Stat. § 29-2260 (Reissue 2016). It was not a sentence to incarceration below the minimum set forth in Neb. Rev. Stat. § 28-105 (Reissue 2016). Neither party challenges that the written order controls and sets forth a statutorily valid sentence. To the extent that the district court appeared to pronounce at the sentencing hearing a period of incarceration, as opposed to jail time as a condition of probation, we agree that the written order controlled over the invalid orally pronounced sentence.[1]

Besides 180 days in jail, the order of probation subjected Gibson to numerous other general and individualized conditions. Gibson was also subject to the Sex Offender Registration Act, Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2016).

The State appealed Gibson's sentence under Neb. Rev. Stat. § 29-2321 (Reissue 2016) as excessively lenient. The Court of Appeals, in a split decision, held that the court's sentence was excessively lenient.[2] The Court of Appeals reasoned that although the record demonstrated an unlikelihood that Gibson would reoffend, the district court's decision to impose probation in lieu of incarceration under § 29-2260(2) depreciated the seriousness of the crime. Furthermore, the Court of Appeals found that the district court had based its sentencing

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[1] Compare *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009), with *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995).

[2] *State v. Gibson*, 26 Neb. App. 559, 921 N.W.2d 161 (2018) (Bishop, Judge, dissenting).

decision in part on the impermissible and irrelevant factors of Stubblefield's culpability and probable sentence for his involvement in the crime.

We granted Gibson's petition for further review.

ASSIGNMENTS OF ERROR

In his brief in support of further review, Gibson asserts that the Court of Appeals erred in (1) finding that the district court abused its discretion by imposing an excessively lenient sentence, (2) finding that the district court considered an irrelevant factor when imposing its sentence, and (3) vacating the district court's sentence and remanding the cause to the district court with directions that a different district court judge impose a greater sentence.

STANDARD OF REVIEW

[1] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.[3]

ANALYSIS

[2-4] When the State appeals from a sentence, contending that it is excessively lenient, this court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court.[4] There is not a different standard of review for sentences when the State appeals a sentence as excessively lenient or when a defendant appeals a sentence as excessive; an appellate court reviews for an abuse of discretion in either case.[5] Whether an appellate court is reviewing a sentence for

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[3] *State v. Kennedy*, 299 Neb. 362, 908 N.W.2d 69 (2018).

[4] *State v. Hoffman*, 246 Neb. 265, 517 N.W.2d 618 (1994).

[5] *Id.*

its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.[6] 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.[7]

In reviewing whether a sentencing court abused its discretion in imposing a sentence that was excessively lenient, we are guided by the factors set forth by Neb. Rev. Stat. § 29-2322 (Reissue 2016), as well as by the statutory guidelines set out for the direction of the sentencing judge in imposing or withholding imprisonment.[8]

Section 29-2322 provides that in determining whether the sentence imposed is excessively lenient, an appellate court shall have regard for:

> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> (4) Any other matters appearing in the record which the appellate court deems pertinent.

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[6] *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008).

[7] *State v. Spang, ante* p. 285, 923 N.W.2d 59 (2019).

[8] See *State v. Hoffman, supra* note 4 (citing § 29-2260).

Gibson was convicted of a Class II felony punishable by 1 to 50 years' imprisonment,[9] but with no mandatory minimum. Section 29-2260(2) allowed the district court to impose a period of probation in lieu of incarceration upon its assessment of certain criteria set forth therein. Section 29-2260 provides in part:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.
>
> (3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;
>
> (d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

[9] See § 28-105(1).

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

(4) When an offender who has been convicted of a crime is not sentenced to imprisonment, the court may sentence him or her to probation.

The Court of Appeals held that imprisonment of Gibson is necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. The Court of Appeals also held that the district court based its sentencing decision on the improper consideration of Stubblefield's greater culpability. We agree with the majority opinion's assessment of the severity of the crime committed against E.L. Nevertheless, in light of the evidence pertaining to the numerous other relevant factors under the district court's consideration at sentencing, we cannot conclude that Gibson's sentence was untenable, unreasonable, or clearly against justice or conscience, reason, and evidence. Further, we find that the district court did not impermissibly factor into its sentencing decision the relative culpability of Stubblefield and Gibson.

[5-8] While certain guidelines are set forth by statute, neither the trial court's sentencing determination nor our review of that determination for an abuse of discretion is formulaic or simply a matter of doctrine.[10] The sentencing court is not limited in its discretion to any mathematically applied set of factors.[11] 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.[12] Evidence regarding a defendant's life, character, and previous conduct, as well as prior convictions, is highly relevant to the determination of a proper sentence.[13]

[9] It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate.[14] The standard is not what sentence we would have imposed.[15] If it were, we might reach a different result.

This was a very serious crime. The PSI contains little to indicate that E.L. shared Stubblefield's enthusiasm for experimentation or wished for her body to be marketed and controlled by another. More to the point, a 15-year-old is not of a legal age to consent to such activities. A person of that age who is subjected to sexual penetration by an adult is a victim of sexual assault.

Whether or not Gibson was aware of it, E.L. was being trafficked by Stubblefield, who both arranged the contact with adult men and directed E.L.'s activities with those men. There is no justification for Gibson's ignorance of this abuse. Gibson

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[10] See *State v. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007).

[11] *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

[12] *State v. Ralios*, 301 Neb. 1027, 921 N.W.2d 362 (2019).

[13] See *id*. See, also, e.g., *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999).

[14] *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

[15] *State v. Thompson, supra* note 10.

arranged through Craigslist to have sex with a young woman who looked young enough to prompt him to seek assurances of her actual age. Gibson made all the arrangements for this sexual encounter with another stranger who advertised the young woman and alleged to speak for her. This should have alerted Gibson to the potential serious criminal implications of his continued participation.

[10] Still, the seriousness of the crime committed against E.L., which weighs in favor of imprisoning Gibson under statutory guidelines setting forth a minimum period of imprisonment of 1 year, does not, by itself, lead to the conclusion that the district court abused its discretion in sentencing Gibson to 5 years' probation in lieu of incarceration. The crime committed by Gibson was serious, and that fact should not be diminished. However, a sentence should fit the offender and not merely the crime.[16]

In other cases involving Class II felonies of first degree sexual assault and sexual assault of a child, a sentence of 5 years' probation with strict and demanding terms has been held not to be excessively lenient when the defendants were considered to be neither pedophiles nor sexual predators, had generally otherwise been law-abiding citizens, were remorseful, and were at a low risk to reoffend.[17] This is in contrast to *State v. Hoffman*,[18] in which we found the sentence of 5 years' probation for the defendant convicted of first degree sexual assault of a child was excessively lenient given the defendant's lengthy history of other sexual assaults upon the victim, which included violence; two prior theft convictions; an evaluation that indicated the defendant was at risk of engaging in additional criminal conduct during a period of probation;

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[16] *State v. Harrison, supra* note 14.

[17] See, *State v. Antoniak*, 16 Neb. App. 445, 744 N.W.2d 508 (2008); *State v. Thompson, supra* note 10.

[18] *State v. Hoffman, supra* note 4.

and the fact that the defendant had expressed no remorse for his actions.

The PSI demonstrates that before this incident, Gibson led an exemplary life. He served in the U.S. Air Force with numerous awards and decorations. His family and friends attested to his good character. And the court was able to evaluate Gibson's character during its observations of Gibson throughout the judicial process. Gibson has no criminal record, and his psychological assessment shows a low risk to reoffend. Though he was wrong and should have known better, there was no evidence that Gibson actually contemplated at the time of his actions that he was committing a crime or causing anyone harm. Gibson was upfront and cooperative with law enforcement from the beginning of the investigation and was by all accounts shocked when he learned E.L.'s real age. He expressed that he was ashamed and extremely remorseful for what E.L. and her family were going through as a result of his crime.

"While there is a temptation on a visceral level to conclude that anything less than incarceration depreciates the seriousness of crimes [involving sexual assault of a child], it is the function of the sentencing judge, in the first instance, to evaluate the crime and the offender."[19] As stated, evidence regarding a defendant's life, character, and previous conduct, as well as prior convictions, is highly relevant to the determination of a proper sentence.[20] The district court's sentence was within the statutorily prescribed limits, and the district court did not abuse its discretion.

As for the conclusion by the majority opinion of the Court of Appeals that the district court based its decision on irrelevant considerations, we disagree that the district court's

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[19] *State v. Thompson, supra* note 10, 15 Neb. App. at 787-88, 735 N.W.2d at 835.

[20] See cases cited *supra* note 13.

comments regarding Stubblefield's punishment improperly influenced its sentencing decision. The district court appeared to be merely commenting on the severity of all the crimes against E.L. The court noted that E.L. deserved justice not just for the crime committed by Gibson, but also for crimes committed against her by Stubblefield. While the court indicated its belief that Stubblefield had greater responsibility in the overall scheme of the exploitation of E.L., there is no indication that the court reduced Gibson's punishment for his crime because Stubblefield might justly be punished more severely for his own crimes that played an important role in the abuse.

The sentence imposed by the district court was lenient, but we cannot conclude that the court abused its discretion by issuing a sentence that was excessively lenient. In light of all the relevant sentencing considerations, the sentence was not untenable, unreasonable, or clearly against justice or conscience, reason, and evidence.

CONCLUSION

For the foregoing reasons, we reverse the Court of Appeals' decision and remand the matter with directions to affirm the sentence of the district court.

Reversed and remanded with directions.

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

Betty Jane Bower-Hansen, appellant, v. Nebraska Department of Health and Human Services et al., administrative agencies of the State of Nebraska, and the State of Nebraska, appellees.

925 N.W.2d 665

Filed April 12, 2019. No. S-17-1278.

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. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction. Instead, the terms of the contract are to be accorded their plain and ordinary meaning.
4. ____. Courts do not have the power to rewrite a contract to provide terms contrary to those that are expressed.
5. ____. It is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Affirmed.

Nicholas J. Welding, of Norby & Welding, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Ryan C. Gilbride for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

After the Nebraska Department of Health and Human Services (DHHS) terminated the employment of Betty Jane Bower-Hansen as a teacher at the Youth Rehabilitation and Treatment Center in Kearney, Nebraska, Bower-Hansen sought to challenge the termination. She initiated grievance proceedings provided by the governing collective bargaining agreement (CBA). Those proceedings concluded when the State Personnel Board (Personnel Board) dismissed her grievance appeals. Bower-Hansen sought review of that decision in district court, and the district court affirmed the Personnel Board's decision. Bower-Hansen now appeals the district court's decision. We affirm.

BACKGROUND

June 3, 2016, Meeting.

The facts relevant to this dispute begin with a June 3, 2016, meeting between Bower-Hansen; John McArthur, the principal at the treatment center; and LaDene Madsen, the human resources manager at the center. Bower-Hansen was a member of the bargaining unit represented by the State Code Agency Teachers Association (SCATA) at the time, and representatives of SCATA were also present at the meeting. During the meeting, Bower-Hansen was issued a notice of discipline advising her that her employment was terminated for cause, effective immediately.

Bower-Hansen claims that one of her union representatives asked where Bower-Hansen should file a grievance challenging her termination of employment and that Madsen said that it should be filed with Douglas Weinberg, the director of the Division of Children and Family Services at DHHS. DHHS apparently does not contest Bower-Hansen's account of the June 3, 2016, meeting.

SCATA Grievance Procedures.

The terms and conditions of employment for SCATA members were set forth in a CBA entered into between SCATA and the State of Nebraska. Because terms of the CBA are central to the arguments and issues in this case, we discuss them here.

The CBA allows teachers to file a grievance if they believe there has been a violation, misinterpretation, or misapplication of the CBA. It establishes a three-level grievance procedure. The first level (level one) requires the employee to submit the grievance to the "decision maker." There is apparently no dispute that the "decision maker" with respect to the termination of Bower-Hansen's employment was McArthur.

The CBA further provides that if the grievance is not resolved to the employee's satisfaction at level one, the employee may file a grievance with the "Agency Director" within 10 workdays of the receipt of the response at level one. Again, there is apparently no dispute that the "Agency Director" was Weinberg.

If a satisfactory resolution is not reached at the second level (level two), the CBA allows the employee to seek review from the Personnel Board. The Personnel Board is required to then hold a grievance hearing and issue a written response to the grievance. The Personnel Board's written response constitutes the final administrative decision of DHHS.

Importantly, section 7.7 of the CBA provides in part:

> The failure of the grievant to proceed to the first or subsequent steps of this grievance procedure within the time limits specified shall indicate that the grievant has elected not to file a grievance or has accepted the response previously rendered, and shall constitute a waiver of any future appeal.

Grievance Proceedings.

Less than a week after the June 3, 2016, meeting, Bower-Hansen, with the assistance of counsel, completed a grievance form challenging her termination. Rather than sending the

grievance to McArthur as the CBA required, Bower-Hansen sent the grievance to Weinberg in accordance with what she claims Madsen told her at the June 3 meeting.

After several weeks had passed without receiving a response, on June 29, 2016, Bower-Hansen proceeded to the third level (level three) of the grievance procedure and submitted a level three grievance to the Personnel Board. She claims she did so under the belief that she was allowed to skip level one and file her initial grievance at level two and that when she did not receive a timely response, she was entitled to proceed to level three. On July 1, however, Bower-Hansen received a level one grievance response from McArthur. The level one grievance response confirmed that McArthur had received the grievance. It denied the grievance and the relief sought, finding that there was just cause for the termination of Bower-Hansen's employment.

Bower-Hansen then submitted a level two grievance, objecting to McArthur's denial of her grievance at level one. DHHS received it on July 20, 2016. DHHS later rejected Bower-Hansen's level two grievance on the grounds that she did not file it within 10 workdays of her receipt of the level one response on July 1.

Bower-Hansen then filed another level three grievance with the Personnel Board. DHHS filed a motion to dismiss Bower-Hansen's grievance in its entirety. The Personnel Board appointed a hearing officer to conduct a hearing and recommend a decision. The parties then stipulated to the admission of various documents for the hearing officer to consider in resolving DHHS' motion to dismiss.

The hearing officer later issued a recommended order on DHHS' motion to dismiss. His recommended order found that Bower-Hansen's grievance should be dismissed because she failed to file her initial grievance with McArthur as required by the CBA. The Personnel Board later unanimously adopted the recommended decision of the hearing officer and dismissed Bower-Hansen's grievance.

District Court.

Bower-Hansen sought review of the dismissal of her grievance in the district court. The district court affirmed the Personnel Board's dismissal of her grievance. The district court agreed with the hearing officer's finding that Bower-Hansen had failed to comply with the CBA when she submitted her initial grievance to Weinberg rather than McArthur.

In addition, the district court found that even if Bower-Hansen's initial filing with Weinberg was appropriate, her subsequent grievance appeals were untimely under the CBA. The district court explained that after Bower-Hansen received McArthur's decision denying her level one grievance, she did not timely file her level two appeal within 10 workdays.

Bower-Hansen appealed the district court's decision.

ASSIGNMENT OF ERROR

Bower-Hansen assigns multiple errors to the district court's decision, but they can be effectively consolidated and restated into one: that the district court erred by affirming the decision of the Personnel Board dismissing her grievance.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

Bower-Hansen Was Required to Submit Level One Grievance.

In her primary argument on appeal, Bower-Hansen contends that she was not required to submit a level one grievance

and could begin the grievance process at level two. If her initial grievance is understood as a valid level two grievance, the argument goes, it was properly filed with Weinberg and her subsequent challenges to her termination were timely raised. As we will explain, however, we disagree with Bower-Hansen's position that she was entitled to skip level one of the grievance process provided by the CBA.

Bower-Hansen offers multiple reasons for her belief that she was entitled to file her grievance at level two. She first points us to Nebraska's Classified System Personnel Rules, found at title 273 of the Nebraska Administrative Code. She contends that a provision of those rules, 273 Neb. Admin. Code, ch. 15, § 008 (2006), applies to her and allowed her to proceed directly to level two. And, indeed, those rules do refer to a three-level grievance procedure similar to that set forth in the SCATA CBA and do contain a provision allowing for the initiation of grievances at level two "[i]f the grievance involves an involuntary separation . . . ." 273 Neb. Admin. Code, ch. 15, § 008.

As promising for Bower-Hansen's position as the provision quoted above may initially sound, the argument collapses upon further scrutiny. As Bower-Hansen concedes, the terms and conditions of her employment were provided by the CBA. This is relevant because the Classified System Personnel Rules provide as follows: "Employees subject to certified Collective Bargaining Agreements as prescribed in Section 81-1373 and 1374 are not covered by these rules to the extent that wages, hours and other terms and conditions of employment are provided for by contract." 273 Neb. Admin. Code, ch. 1, § 004.03 (2006). Neb. Rev. Stat. § 81-1373 (Reissue 2014) refers to a number of units created by statute for collective bargaining purposes. Among them, there is a unit composed of "employees required to be licensed or certified as a teacher." § 81-1373(1)(k). In the CBA, the State recognizes SCATA as the collective bargaining agent for teachers employed by the State. Because the terms and conditions of

Bower-Hansen's employment are provided in the CBA, the Classified System Personnel Rules do not, of their own force, apply to Bower-Hansen.

We recognize that the CBA incorporates some sections of the Classified System Personnel Rules by reference, but it does not incorporate the provision allowing employees to skip level one of the grievance process. Moreover, that provision is flatly inconsistent with the provision of the CBA providing that the failure of the grievant to proceed to the first step or subsequent steps of the grievance process constitutes a waiver of the right to any future appeal. The provision in the Classified System Personnel Rules allowing for some grievances to be filed at level two does not apply to Bower-Hansen.

Bower-Hansen next argues that she was entitled to initiate her grievance at level two, because Madsen advised her that she could do so at the June 3, 2016, meeting. But, in fact, there is no allegation that Madsen told Bower-Hansen that she could initiate her grievance at level two; Bower-Hansen and her union representatives allege only that she was told she should submit her initial grievance to Weinberg. We question whether Bower-Hansen could ever rely on Madsen's advice rather than the terms of the CBA, but she certainly could not rely on something Madsen is not even alleged to have said. Given the absence of any allegation or evidence that Bower-Hansen was told she could proceed directly to level two of the grievance process, we find no basis to conclude that a statement made at the June 3 meeting allowed her to do so.

Bower-Hansen Failed to Comply With CBA.

Because Bower-Hansen was not entitled to initiate her grievance at level two, either she did not file a level one grievance or she submitted one, but to the wrong official. In either case, Bower-Hansen failed to comply with the grievance procedures in the CBA. As we have already explained, the CBA explicitly provides that employees cannot skip levels in the

grievance process. If Bower-Hansen's initial grievance was a level two grievance, she ran afoul of this language.

Bower-Hansen can make different arguments if her initial grievance is treated as a level one grievance sent to the wrong official. Here, Bower-Hansen could contend that Madsen told her to file her grievance with Weinberg. Additionally, Bower-Hansen could point out that DHHS, at least for a time, overlooked the fact that she submitted her grievance to the wrong official. After all, even though Bower-Hansen submitted the initial grievance to Weinberg, she received a response from McArthur, who considered her grievance and denied it, not because it was submitted to the wrong official, but because he found her termination of employment was supported by good cause.

But even assuming these facts could excuse Bower-Hansen's submission of the grievance to the wrong official, they cannot excuse the fact that she did not timely file a level two grievance after receiving McArthur's denial at level one. DHHS did not receive Bower-Hansen's challenge to McArthur's response at level one until July 20, 2016. Even Bower-Hansen does not contend on appeal that this was timely under the provision in the CBA requiring level two grievances to be filed within 10 workdays of the receipt of a denial at level one.

Bower-Hansen Waived Her Right to Continue to Pursue Her Grievance.

As demonstrated above, whether Bower-Hansen's initial grievance is treated as a level one or level two grievance, she failed to comply with the CBA. Bower-Hansen argues that even if she failed to comply with the terms of the CBA, her grievance could not be dismissed on this basis. For reasons we will explain, we disagree.

As we have noted, section 7.7 of the CBA provides that the failure of an employee to "proceed to the first or subsequent

steps of this grievance procedure within the time limits specified shall indicate that the grievant has elected not to file a grievance or has accepted the response previously rendered, and shall constitute a waiver of any future appeal." Whether Bower-Hansen skipped level one or failed to timely file a level two grievance, she failed to proceed to the required steps of the grievance procedure in the time limits specified. The CBA provides that such a failure constitutes a waiver of future appeals.

Bower-Hansen urges us to find that she did not waive her claims under the terms of the CBA. She claims that a finding of waiver results in the dismissal of her grievance on "technical" grounds. Brief for appellant at 10. According to Bower-Hansen, such a dismissal runs contrary to principles governing the interpretation of collective bargaining agreements. In support of her argument that a finding of waiver would be an impermissible "technical" dismissal of a grievance, Bower-Hansen invokes language from a 1934 opinion from this court. In that opinion, we quoted language from another court stating that collective bargaining agreements "'ought to be construed not narrowly and technically but broadly and so as to accomplish its evident aims.'" *Rentschler v. Missouri P. R. Co.*, 126 Neb. 493, 500, 253 N.W. 694, 698 (1934), quoting *Yazoo & M. V. R. Co. v. Webb*, 64 F.2d 902 (5th Cir. 1933).

[3] The language Bower-Hansen relies on does not preclude a collective bargaining agreement from providing for the waiver of claims for the failure to comply with procedural steps. At most, it adopts a rule of construction for collective bargaining agreements. Even if that rule of construction might apply in some circumstances, it would have no bearing here. When the terms of a contract are clear, a court may not resort to rules of construction. *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015). Instead, the terms of the contract are to be accorded their plain and ordinary meaning. See *id*. We have previously applied this familiar rule when presented with a collective bargaining agreement. See *Murphy*

v. City of Lincoln, 245 Neb. 707, 515 N.W.2d 413 (1994). Here, section 7.7 of the CBA provides that if an employee fails to timely follow all of the steps of the grievance process, the employee waives the right to future appeals. Given these clear terms, rules of construction do not come into play.

The language in the CBA providing that the failure to timely follow all of the steps of the grievance process constitutes a waiver of the right to future appeals also distinguishes this case from *Parent v. City of Bellevue Civil Serv. Comm.*, 17 Neb. App. 458, 763 N.W.2d 739 (2009), a Nebraska Court of Appeals opinion cited by Bower-Hansen. In *Parent*, a collective bargaining agreement required a city to take disciplinary action against a police officer within 30 days of being notified of a potential cause for discipline. After the city terminated the employment of an officer outside the 30-day deadline and the officer challenged his termination, the district court held that the city could not validly terminate the officer's employment. The Court of Appeals reversed. It explained that the collective bargaining agreement provided a timeline for an investigation, but "no explicit recourse for the employee in the case of a delay." *Id.* at 464, 763 N.W.2d at 745. Based on the absence of any language precluding the city from imposing discipline outside the 30-day deadline, the Court of Appeals held that the city's failure to adhere to the deadline did not deprive it of the power to impose discipline.

[4,5] Unlike the collective bargaining agreement in *Parent*, the CBA in this case explicitly and plainly provided a consequence for the failure to proceed to each of the required steps of the grievance procedure by the specified deadlines: waiver of the right to future appeals. Bower-Hansen can prevail only if this language is not enforced. Courts do not, however, have the power to rewrite a contract to provide terms contrary to those that are expressed. See *Berens & Tate v. Iron Mt. Info. Mgmt.*, 275 Neb. 425, 747 N.W.2d 383 (2008). Nor is it the province of a court to rewrite a contract to reflect the court's view of a fair bargain. *Id.*

Because Bower-Hansen waived the right to continue to pursue her grievance under the terms of the CBA, the district court did not err in affirming the Personnel Board's dismissal of her grievance.

CONCLUSION

We find that the district court did not err in affirming the order of the Personnel Board dismissing Bower-Hansen's grievance. We therefore affirm the order of the district court.

Affirmed.

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

Mick E. Bayne, appellant, v. Brittney J. Bayne, appellee.

925 N.W.2d 687

Filed April 12, 2019. No. S-18-382.

1. **Divorce: Judgments: Appeal and Error.** The meaning of a divorce decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
2. **Divorce: Property Settlement Agreements: Final Orders.** A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself.
3. **Judgments: Final Orders.** It is inherent to a judgment's finality that all are bound by the original language used, and all ought to interpret the language the same way.
4. **Divorce: Judgments: Intent.** The meaning of a decree must be determined from all parts thereof, read in its entirety, and must be construed as a whole so as to give effect to every word and part, if possible, and bring all of its parts into harmony as far as this can be done by fair and reasonable interpretation.
5. **Contempt.** Civil contempt requires willful disobedience as an essential element.
6. **Judgments: Intent.** Doubtful or ambiguous judgments are to have a reasonable intendment to do justice and avoid wrong.
7. **Divorce: Property Settlement Agreements: Equity: Appeal and Error.** When interpreting an ambiguous dissolution decree, an appellate court bears in mind that an action for divorce sounds in equity and that the division of property, specifically, is based on equitable principles.
8. **Equity.** Equity looks through forms to substance; a court of equity goes to the root of a matter and is not deterred by forms.

9. ____. Equity seeks the real and substantial rights of the parties and applies the remedy in such a manner as to relieve those having the controlling equities.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

John A. Kinney, of Kinney Mason, P.C., L.L.O., for appellant.

James M. Buchanan, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

This is an appeal from a declaratory judgment action in which the ex-husband sought a declaration that he was entitled to one-half of the proceeds of a home awarded to the ex-wife in the divorce decree and sold approximately 2 years later when she decided to remarry. At issue is the meaning of a provision in the dissolution decree stating that the ex-wife would "have the home refinanced into her own name within 12 months of entry of this decree" and that should she be "unable to refinance the home into her own name within 12 months, [the] house shall be listed for sale and the parties shall equally divide any costs or proc[e]eds from the sale of the home." The provision also provided that it "shall be enforceable by the contempt powers of this court." The ex-wife had refinanced the home approximately 13 months after the entry of the dissolution decree. The ex-wife was approved for refinancing within 1 year of the entry of the dissolution decree, but the bank did not schedule closing on the refinance until approximately 13 months from the entry of the dissolution decree.

BACKGROUND

Mick E. Bayne and Brittney J. Bayne were divorced on December 9, 2015, pursuant to a consent decree. In August

2017, Mick brought this declaratory judgment action seeking a judgment declaring that he was entitled to one-half of the proceeds from the sale of the marital house that was awarded to Brittney, pursuant to a contingency refinancing provision. The provision stated in relevant part:

> The parties agree that [Brittney] shall receive the property as her sole and separate property, holding [Mick] harmless from any and all claims on the property. The parties shall cooperate in executing any and all documentation to effectuate the transfer of possession of the home. [Brittney] shall have the home refinanced into her own name within 12 months of entry of this decree. This provision shall be enforceable by the contempt powers of this court. Should [Brittney] be unable to refinance the home into her own name within 12 months, [the] house shall be listed for sale and the parties shall equally divide any costs or proc[e]eds from the sale of the home.

Brittney pled the defenses of bad faith and unclean hands.

The evidence at trial demonstrated that the marital house was purchased for $151,500 in 2012. At the time of the divorce, the mortgage on the house was approximately $140,000. Brittney believed the house was worth approximately $150,000 to $160,000 at the time of the divorce. It was undisputed that Mick had caused damage to the house before he vacated it. Brittney described that Mick had "trashed" the house. Brittney cleaned up and paid for repairs or replacement due to the damage to the drywall, flooring, railings, doors, and furniture allegedly all caused by Mick and represented by various photographs entered into evidence.

In the property division of the dissolution decree, approving Brittney and Mick's settlement agreement, Brittney's retirement account was split equally and the marital debt was divided between Brittney and Mick. Mick kept several dirt bikes worth $4,000 in total and a truck with approximately $12,000 in equity. Brittney kept her car that was worth $3,000

and was given the house pursuant to the provision set forth above. Brittney had obtained approval for refinancing within 12 months after entry of the dissolution decree, but did not close on the refinancing until January 13, 2017, approximately 1 month after the 1-year anniversary of the dissolution decree. Brittney testified that she did not set the closing date, which was set by the bank.

Brittney explained that she began the process of refinancing in August 2016. She explained that the delay from August 2016 to January 2017 was due to the need to improve her credit score before the bank would approve her application to refinance. According to Brittney, her credit score had been damaged by Mick's failure to make payments on a credit card account in both their names, which account had been assigned to Mick in the dissolution decree. From August until closing, Brittney was in weekly contact with her mortgage broker. It was not until December that her credit score finally qualified her for refinancing.

At the time of closing for the refinancing, the house was appraised to be worth $170,000, and it was refinanced for what was owed at that time, which was $136,000. Brittney incurred $4,510.64 in closing costs for the refinance.

In addition to repairing damage caused by Mick, after the divorce, Brittney made several other repairs and improvements, which she opined had "increased the value of the house massively." In total, Brittney spent approximately $25,000 on repairs and updates for the house. She replaced all the appliances; made various cosmetic improvements, such as painting and adding new flooring; and added a bedroom and a bathroom to the house. The repairs of the damage caused by Mick, as well as the bedroom and bathroom additions, were completed before Brittney refinanced. Brittney apparently paid all mortgage payments and repairs to the house from the time of the divorce.

Brittney testified that she informed Mick of the refinance sometime around January 18, 2017, and there was evidence that Mick acknowledged the refinance through a social media posting on that date. Despite this, in April 2017, Mick filed a contempt action to enforce the refinance provision of the dissolution decree. According to Brittney, the court dismissed the contempt action on the ground that the house was already refinanced. That order is not in the record, and Brittney did not plead or argue issue preclusion.

Around the same time as the contempt action, Brittney became engaged to be married. Brittney and her fiance determined that the house would not accommodate all of their respective children, and they decided to sell the house. The house sold in June 2017 for $194,000. After deducting $12,385.81 in closing costs and adding $1,817.05 in adjustments for taxes already paid, Brittney received $44,998.39 from the sale.

The district court declared that Brittney had timely refinanced the house and that therefore, Mick was not entitled to one-half of the proceeds from its later sale. The court reasoned that nothing in the decree indicated that time was of the essence and that the provision "[s]hould [Brittney] be unable to refinance the home into her own name within 12 months" does not mean that she had to have the refinance "completed" within a year. Brittney, the court noted, was able to obtain approval for the refinance within 1 year of the decree and was able to close on the refinancing a little over a year after the decree. Mick appeals.

ASSIGNMENTS OF ERROR

Mick assigns that the district court erred (1) by construing the language of the decree in a manner other than its plain meaning and (2) by failing to declare that the decree could only be interpreted from the four corners of the documents, that there was no ambiguity, and that Mick was entitled to one-half of the proceeds from the sale of the property.

STANDARD OF REVIEW

[1] The meaning of a divorce decree presents a question of law, in connection with which we reach a conclusion independent of the determination reached by the court below.[1]

ANALYSIS

Mick asserts that the district court looked outside the four corners of the dissolution decree and, regardless, that it erred in its interpretation of the refinance provision. Mick did not assert below and does not assert on appeal that Brittney failed to obtain refinancing within a reasonable time of the specified 12-month deadline, that her failure to refinance by the 1-year anniversary of the dissolution decree was willful, or that he was damaged by the 1-month delay. Nor does he challenge the district court's finding that Brittney was able to refinance the home into her own name within 1 year of the decree.

At the outset, we note that Brittney, for her part, has not challenged whether declaratory judgment was the proper remedy for Mick to enforce the refinance provision. We will assume, without deciding, that it was proper for the district court to entertain Mick's request for declaratory judgment.[2]

[2,3] A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself.[3] It is inherent to a judgment's finality that all are bound by the original language used, and all ought to interpret the language the same way.[4]

Even when our determination involves "interpretation" of the judgment or decree,[5] its meaning is determined, as a

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[1] *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (2014).

[2] See *Carlson v. Carlson*, 299 Neb. 526, 909 N.W.2d 351 (2018).

[3] *Rice v. Webb, supra* note 1.

[4] See *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990).

[5] See *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008).

matter of law, by its contents.[6] Unlike disputes over the meaning of an ambiguous contract, the parties' subjective interpretations and intentions are wholly irrelevant to a court's declaration, as a matter of law, as to the meaning of an ambiguous decree.[7] The Nebraska Court of Appeals' opinion in *Boyle v. Boyle*[8] is disapproved to the extent that it holds differently.

We find no merit to Mick's assertion that the district court looked outside the four corners of the dissolution decree and improperly considered the parties' subjective intentions and interpretations. While there was testimony submitted by both parties, without objection, pertaining to the negotiations leading up to the property settlement agreement, there is no indication the court relied on such testimony in reaching its conclusion. Moreover, even if the district court had improperly relied on the parties' subjective understandings of the decree, it would be of little consequence on appeal, as we reach our conclusion as to the meaning of the decree as a matter of law independently from the reasoning below.[9]

[4] We also find no merit to Mick's assertion that the district court wrongly interpreted the decree. The meaning of a decree must be determined from all parts thereof, read in its entirety, and must be construed as a whole so as to give effect to every word and part, if possible, and bring all of its parts into harmony as far as this can be done by fair and reasonable interpretation.[10] Effect must be given to every part thereof, including such effect and consequences that follow

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[6] See *Kerndt v. Ronan, supra* note 4.

[7] See *Carlson v. Carlson, supra* note 2.

[8] *Boyle v. Boyle*, 12 Neb. App. 681, 684 N.W.2d 49 (2004).

[9] See *Rice v. Webb, supra* note 1.

[10] See 50 C.J.S. *Judgments* § 742 (2009). See, also, *Whaley v. Matthews*, 136 Neb. 767, 287 N.W. 205 (1939); *Hays v. Christiansen*, 114 Neb. 764, 209 N.W. 609 (1926); 27A C.J.S. *Divorce* § 458 (2016).

the necessary legal implication of its terms, although not expressed.[11]

The real property provision of the decree provided in relevant part that Brittney "shall have the home refinanced into her own name within 12 months of entry of this decree," that "[t]his provision shall be enforceable by the contempt powers of the court," and "[s]hould [Brittney] be unable to refinance the home into her own name within 12 months, [the] house shall be listed for sale and the parties shall equally divide any costs or proc[e]eds from the sale of the home." The district court found that the forced sale provision of the decree did not apply, because Brittney was "able" to refinance and was approved for refinancing within 12 months.

We cannot say that the district court erred by finding that Mick was not entitled to relief under the forced sale provision. As the district court pointed out, the forced sale provision applied only if Brittney was "unable" to refinance the house into her own name within 1 year. The district court found Brittney was "able" to refinance the house into her own name, and Mick does not challenge this determination on appeal.

Instead, Mick responds that the decree makes logical sense only if the forced sale provision was triggered by Brittney's failure to actually complete the refinancing of the home into her own name within 1 year. Mick contends that if the decree is not read in this way, Brittney could have refused to refinance the home into her own name and he would have been left without recourse so long as she was "able" to refinance. This, Mick argues, would render the requirement that Brittney refinance the home into her own name within 12 months meaningless.

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[11] See, *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), and *disapproved on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012); *Whaley v. Matthews, supra* note 10.

[5] Even if we could ignore the fact that Mick's argument is not supported by the terms of the decree, we are not persuaded by his argument that it is illogical or unfair for the forced sale provision to apply only if Brittney was unable to refinance. The decree set forth three provisions with respect to refinancing the home into Brittney's name: (1) that Brittney was required to do so within 12 months, (2) that this requirement was enforceable by the contempt powers of the court, and (3) that if Brittney was unable to refinance within 12 months, the forced sale provision applied. When these three terms and the fact that civil contempt requires willful disobedience as an essential element[12] are considered together, it becomes clear that the decree is neither illogical nor unfair to Mick.

If after 12 months, Brittney was willfully refusing to refinance the home into her own name despite being able to do so, Mick could bring an action for contempt, and the court could, on pain of contempt, order her to refinance. The contempt remedy would obviously be of no help if Brittney, for whatever reason, did not refinance because she was unable to do so, and that is where the forced sale provision comes into play. If Brittney was unable to refinance within 12 months, the house could be sold and the proceeds split. Together, these provisions would accomplish the obvious goal of removing Mick's responsibility for the debt on the home in a reasonably timely fashion.

Perhaps uncertainty could have been avoided if the decree had been explicit that the court could use its contempt powers to compel Brittney to refinance if she willfully refused to do so. Instead, the forced sale provision was limited to situations where Brittney was unable to refinance. Even so, we see no basis to find that this decree required a forced sale merely because Brittney did not complete refinancing within 12 months.

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[12] See *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

[6-9] Even if we were to find the decree ambiguous as to what "refinance," "unable," or other terms might mean, it would not be construed differently. "Doubtful or ambiguous judgments are to have a reasonable intendment to do justice and avoid wrong."[13] When interpreting an ambiguous dissolution decree, we bear in mind that an action for divorce sounds in equity[14] and that the division of property, specifically, is based on equitable principles.[15] Equity looks through forms to substance; a court of equity goes to the root of a matter and is not deterred by forms.[16] Equity seeks the real and substantial rights of the parties and applies the remedy in such a manner as to relieve those having the controlling equities.[17]

As explained by the court in *Mihalyak v. Mihalyak*,[18] delays in refinancing of the marital home are frequent and, if reasonable in duration, are generally tolerated. As illustrated by the facts of this case, the process of refinancing can become complicated by factors outside the applicant's control and the applicant cannot unilaterally set the closing date. Thus, the court in *Mihalyak* held that a sale penalty was not triggered despite the fact that the decree stated the wife "'shall'" pay the husband a certain amount representing his share of the equity in the house awarded to the wife, "'on or before'" a set date after the wife's refinancing of the mortgage, and the wife paid the husband his share after that date.[19]

Brittney has the controlling equities in this case. There was no evidence that Brittney willfully failed to complete the refinance of the home within 12 months. Instead, Brittney made

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[13] 50 C.J.S., *supra* note 10, § 742 at 68.

[14] *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991).

[15] *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

[16] *Miller v. School Dist. No. 69*, 208 Neb. 290, 303 N.W.2d 483 (1981).

[17] *National Mortgage Loan Co. v. Hurst*, 120 Neb. 37, 231 N.W. 519 (1930).

[18] *Mihalyak v. Mihalyak*, 11 Conn. App. 610, 529 A.2d 213 (1987).

[19] *Id.* at 612, 529 A.2d at 215.

a good faith effort to complete refinancing within 12 months. She was approved for the refinancing within 12 months and was not in that sense "unable" to refinance her home within 12 months of the decree. Brittney did not control the closing date, and there was no evidence that Mick incurred any harm as a result of the 1-month delay in closing.

It would offend both the plain language of the real property provision of the decree as well as equity and justice to construe it as requiring the sale of the house and equal division of the proceeds under these facts.

CONCLUSION

For the foregoing reasons, we affirm the judgment below.

Affirmed.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Robert E. Glasson, appellant, v. Board of Equalization of the City of Omaha and the City of Omaha, appellees.

925 N.W.2d 672

Filed April 12, 2019. Nos. S-18-472, S-18-474.

1. **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 decision made by the lower court.
2. **Special Assessments: Municipal Corporations: Appeal and Error.** An appeal from a special assessment by a metropolitan-class city taken as specified in Neb. Rev. Stat. § 14-813 (Reissue 2012) means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means an appeal is taken by a petition in error and the review is solely of the record made before the tribunal whose action is being reviewed.
3. **Statutes: Special Assessments: Words and Phrases: Appeal and Error.** As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion. Therefore, based on a plain reading of the statute, unless, as contemplated by Neb. Rev. Stat. § 14-101 (Reissue 2012), the Legislature or a city of the metropolitan class alters the procedure for a claimant or appellant to challenge a decision regarding an assessment, the procedure shall follow that which is specified in Neb. Rev. Stat. § 14-813 (Reissue 2012).
4. **Statutes: Appeal and Error.** When a provision of a statute is plain and unambiguous on its face, an appellate court must apply the provision as written.

Appeals from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Jason E. Troia, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

Ryan J. Wiesen, Assistant Omaha City Attorney, for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

This case involves a consolidated appeal in which Robert E. Glasson challenges the decision of the Douglas County District Court. The district court found that it lacked jurisdiction over the assessment decision made by the Board of Equalization of the City of Omaha exercising a quasi-judicial function pursuant to Neb. Rev. Stat. § 14-547 (Reissue 2012). The district court found that as a result of Glasson's failure to file an appeal bond with the city clerk within 20 days as required by Neb. Rev. Stat. § 14-813 (Reissue 2012), the court lacked jurisdiction over the appeal. We affirm.

BACKGROUND

On December 5, 2017, the city council for the City of Omaha sat as a board of equalization pursuant to § 14-547 to hear and determine complaints, to equalize assessments, and to correct special assessments as the law authorizes. The city council, while sitting as a board of equalization zoning board of appeals, approved special ordinance No. 10224. The special ordinance approved funding for the removal of litter from various parcels of real property located within the City of Omaha, Nebraska, including one parcel owned by Glasson involving two separate assessments: (1) "Item L-20 (Dump Fee)—Case No. CI 18-51 and CI 18-1316" (No. 428773) and (2) "Item L-21 (Litter-Structure)—Case No. CI 18-52 and CI 18-1318" (No. 392788).

Glasson personally appeared before the board of equalization on December 5, 2017, to protest the proposed special

assessment to be levied on his property. The board denied Glasson's protest. Following the board's denial, Glasson filed an appeal on January 3, 2018, regarding proposed assessments Nos. 428773 and 392788, under cases Nos. CI 18-51 and CI 18-52, before the city council had enacted the ordinance regarding the assessment.

On January 23, 2018, the city council for the City of Omaha, pursuant to its authority under § 14-547, levied the special assessment, by ordinance, on Glasson's property.

In addition to the public hearing held December 5, 2017, at which Glasson was present, the Douglas County treasurer sent Glasson a letter dated February 6, 2018. The letter was entitled "Special Assessment Levy Notification" and informed Glasson that he had until March 15 to remit payment of $978.

Upon receipt of the Douglas County treasurer's "Special Assessment Levy Notification" letter, Glasson attempted to file an appeal at the Omaha city clerk's office on February 13, 2018, 21 days after the ordinance levying the property had passed. Glasson's filing was denied by the city clerk as untimely. On February 20, Glasson filed a petition in error and notice of appeal with the district court under cases Nos. CI 18-1316 and CI 18-1318.

In reviewing Glasson's appeal, the district court found that there was one assessment of $978 for a dump fee (No. 428773) and one assessment of $1,305 for litter removal (No. 392788), but that Glasson had filed four separate appeals regarding the two assessments. The court noted that assessments Nos. 428773 and 392788 were each assessed on January 23, 2018. Upon motion by the City of Omaha, the district court consolidated the four cases (cases Nos. CI 18-51, CI 18-52, CI 18-1316, and CI 18-1318) into one appeal. However, it does not appear that the court designated a specific docket number under which the cases were to continue.

The district court noted that with regard to Glasson's January 3, 2018, appeals, docketed as cases Nos. CI 18-51 and CI 18-52, those appeals were filed before the ordinance

assessing the levy was enacted. Because the ordinance had not been passed at the time of the January 3 filing, there was no final, appealable order upon which the court could exercise jurisdiction. The court then dismissed that portion of the consolidated action.

The court went on to note that with regard to Glasson's February 20, 2018, appeal for cases Nos. CI 18-1316 and CI 18-1318, no appeal bond had been filed with the city clerk within 20 days, as required by § 14-813. The court further noted that Neb. Rev. Stat. § 14-548 (Reissue 2012) gives a property owner, aggrieved by an assessment ordinance, the right to appeal the decision to the district court, and indicated that § 14-547 equates an ordinance to a final order. However, the district court stated that in order to pursue that remedy, the aggrieved party must file an appeal bond with the city clerk within 20 days of the date of the contested order. Because Glasson had failed to comply with § 14-813 by not filing an appeal bond with the city clerk within 20 days, the district court dismissed that portion of the action, ultimately dismissing Glasson's now consolidated appeal for lack of jurisdiction. Glasson appealed the consolidated cases to the Nebraska Court of Appeals under two separate cases, which we moved to our docket on our own motion,[1] and have consolidated.

ASSIGNMENT OF ERROR

Glasson's sole assignment of error is that the district court erred in granting the City's motion to dismiss.

STANDARD OF REVIEW

[1] 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 decision made by the lower court.[2]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[2] *Pestal v. Malone*, 275 Neb. 891, 750 N.W.2d 350 (2008).

[2] An appeal from a special assessment by a metropolitan-class city taken as specified in § 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means an appeal is taken by a petition in error and the review is solely of the record made before the tribunal whose action is being reviewed.[3]

ANALYSIS

The thrust of Glasson's argument is threefold. First, Glasson argues that § 14-813 does not require an appeal bond to be filed within 20 days of a final order. Next, Glasson contends that no bond is required on the basis that an indigent party need not file a bond. Lastly, Glasson argues that he was not given notice of the final judgment until day 14 of the 20 days in which he had the opportunity to file a bond.

Requirements for Filing Under § 14-813.

Glasson contends that § 14-813 contains permissive language that removes the requirement of filing within 20 days. The language of § 14-813 provides in relevant part:

> Whenever the right of appeal is conferred by this act, the procedure, unless otherwise provided, shall be substantially as follows: The claimant or appellant shall, within twenty days after the date of the order complained of, execute a bond to such city with sufficient surety to be approved by the clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs adjudged against the appellant. Such bond shall be filed in the office of the city clerk.

Glasson directs our attention to the opening proviso of § 14-813, which states that "[w]henever the right of appeal is conferred by this act, the procedure, *unless otherwise provided*, shall be

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[3] See *Jackson v. Board of Equal. of City of Omaha*, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

substantially as follows . . . .” Glasson argues that if language providing otherwise is absent, then the procedure identified in § 14-813 need only be substantially followed. Accordingly, Glasson proposes that under the Omaha Municipal Code,[4] there is no requirement that a filing be made with the city clerk within 20 days.

Glasson contends that the Omaha City Council altered the filing procedure set forth in § 14-813 when it enacted Omaha Mun. Code § 26-121. Glasson argues that the city council altered the process by omitting the 20-day filing requirement set forth in § 14-813. Section 26-121 of the Omaha Municipal Code provides in part:

> Any person who has filed a written complaint before the board of equalization shall have the right to appeal to the district court of the county within which such city is located, by filing a good and sufficient bond in the sum of not less than $50.00 and not more than double the amount of the assessment complained of, conditioned for the faithful prosecution of such appeal, and, if the judgment of special assessment is sustained, to pay the amount of such judgment, interest and cost. Such bond shall be approved and appeal taken as specified in R.R.S. 1943, § 14-813, as amended.

Glasson fails to account for the fact that the language of the municipal code specifically states that “[s]uch bond shall be approved and appeal taken as specified in . . . § 14-813 . . . .”[5] This language requires that appellants adhere to the procedure outlined in § 14-813.

[3] Under our jurisprudence, as a general rule, the word “shall” in a statute is considered mandatory and is inconsistent with the idea of discretion.[6] Therefore, based on a plain reading of the statute, unless, as contemplated by Neb. Rev. Stat.

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[4] Omaha Mun. Code, ch. 26, art. II, § 26-121 (1980).

[5] *Id.*

[6] *State v. Irish*, 298 Neb. 61, 65, 902 N.W.2d 669, 672 (2017).

§ 14-101 (Cum. Supp. 2018) the Legislature or a city of the metropolitan class alters the procedure for a claimant or appellant to challenge a decision regarding an assessment, the procedure shall follow that which is specified in § 14-813.

Under the plain language of § 14-813, an appellant has 20 days from the date of the final order to "execute a bond to such city with sufficient surety to be approved by the clerk." According to § 14-547, the passage of "[t]he ordinance levying a special assessment shall be final and binding as the final order or judgment of a court of general jurisdiction." Therefore, the date of the final order in this case was January 23, 2018, the date the city council approved the ordinance.

Here, Glasson attempted to execute a bond with the city clerk on February 13, 2018, 21 days after the ordinance operating as a final order had passed. This court addressed a similar fact pattern in *Black v. State*,[7] in which we stated, "'[T]he filing of an approved bond is a jurisdictional requirement. Its filing is a condition precedent to the initiation of the appellate process.'"

In *Black*, the appellant, William Black, appealed an order of the director of the Department of Motor Vehicles regarding an implied consent proceeding which resulted in revocation of his driver's license for 1 year. According to the statute in *Black*, the applicant, licensee, or appellant was required to execute a bond within 20 days from the date of the final order complained of, with costs to the State of Nebraska in the sum of $200 with sufficient surety to be approved by the auditor of public accounts.

Black's attorney sent a check, drawn on the trust account of the attorney's firm, to the director of the department. The department then notified Black's attorney that it could not accept a cash bond and that a surety bond had to be filed within 20 days after the license revocation date. Black then executed a surety bond to the department; however, we noted that the

[7] *Black v. State*, 218 Neb. 572, 575, 358 N.W.2d 181, 183 (1984).

bond was not received until 21 days after the revocation. As a result of Black's failure to file within the prescribed manner and time limits, we found that the district court properly dismissed his petition for lack of subject matter jurisdiction.

[4] When a provision of a statute is plain and unambiguous on its face, this court must apply the provision as written.[8] Here, § 14-813, even when read together with Omaha Mun. Code § 26-121, is plain and unambiguous on its face. Glasson was required to execute a bond to the City of Omaha, with sufficient surety to be approved by the clerk, within 20 days after the date of the order complained of. Glasson, like Black, failed to file within the allotted time.

Indigent Status and Filing Requirements.

Glasson next argues, for the first time on appeal, that no bond is required on the basis that an indigent party need not file a bond. The record does not demonstrate that Glasson even attempted to follow the procedure for the waiver of the bond based on indigent status, nor does Glasson argue here that he qualifies for such status. Therefore, we need not address this argument.

Notice.

Glasson also argues that the City of Omaha did not provide him with adequate notice of its ultimate decision concerning the assessments. Glasson contends that the city council passed the ordinance for the special assessments on January 23, 2018, at which point it became a final, appealable order, but that he was not given notice of the decision until on or about February 8, when he received notice from the Douglas County treasurer dated February 6, 2018. Glasson asserts that the government's failure to provide notice of the decision deprived him of the 20-day period in which to file, but

[8] See *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984).

specified in his briefs the basis of his arguments regarding notice. During oral argument of this case, Glasson raised for the first time his contention that his statutory right to notice by mail, as provided in the Omaha Municipal Code,[9] was violated in this case.

The record refutes Glasson's claim that he lacked notice of the City of Omaha's intended action. As the district court noted in its order dismissing Glasson's consolidated appeal, Glasson filed his first appeal on January 3, 2018, following the board of equalization's December 5, 2017, decision denying his protest to the proposed assessments. Moreover, Glasson was present at the December meeting and was given an opportunity to protest the special assessments. Additionally, there is no indication in the briefs or in the record that public notice of the Omaha City Council's January 23 meeting was not given according to statute.[10] The record demonstrates that Glasson was provided notice of the assessments by the Douglas County treasurer's office prior to the expiration of the 20 days.

As for Glasson's contention that he did not receive notice by mail, we observe that this issue was not raised below. As such, the issue is not appropriately before this court and we need not address it further.

Glasson's assignment of error is without merit.

CONCLUSION

The statutory scheme requires that an appellant execute a bond with the city clerk within 20 days of the final order, which Glasson did not do. The decision of the district court dismissing Glasson's consolidated appeal for lack of jurisdiction is affirmed.

Affirmed.

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[9] See Omaha Mun. Code, ch. 26, art. II, § 26-123 (1980).

[10] See § 14-547.

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

In re Interest of Reality W., a child under 18 years of age. State of Nebraska, appellee, v. Reality W., appellant.

925 N.W.2d 355

Filed April 12, 2019. No. S-18-629.

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. **Statutes: Appeal and Error.** Appellate courts will adhere to the plain meaning of a statute absent a statutory indication to the contrary.
4. **Juvenile Courts: Parental Rights.** The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law.
5. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.

Appeal from the Separate Juvenile Court of Lancaster County: Roger J. Heideman, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Margene M. Timm for appellant.

John M. Ward, Deputy Lancaster County Attorney, and, on brief, Julie Mruz for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Reality W. appeals from the order of the separate juvenile court of Lancaster County adjudicating her as being "habitually truant [from] school."[1] Reality argues that she has defenses to adjudication under Neb. Rev. Stat. §§ 79-209(2)(b) (Reissue 2014) and 43-276(2) (Reissue 2016). Because we do not find either statutory defense to be applicable based on the record, we affirm.

BACKGROUND

On April 12, 2018, the State filed a petition alleging that Reality, then age 15, was habitually truant from school between September 1, 2017, and March 7, 2018. Reality, along with her mother, Marketa S., appeared before the court on May 8, 2018, and entered a denial of the allegations. The court held a formal adjudication hearing on June 18 at which all parties were present. Two employees of the Lincoln Public Schools were called by the State as witnesses to testify regarding the school district's attendance policy and practices, Reality's attendance record, and the steps that were taken to address Reality's attendance issues before referring the matter to the county attorney's office.

School's Policy and Practice

The State offered testimony from a school attendance technician. She explained that the school uses an administrative computer program called Synergy, which maintains student records, attendance records, and records of contacts made with students and parents. Synergy also contains a registry of addresses and telephone numbers for students and parents, information which parents report to the school district at the beginning of each school year.

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[1] See Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2016).

The teachers use Synergy to record a student's attendance at the beginning of each class period. The Synergy program utilizes attendance codes for truancy, tardiness, parent-acknowledged absence, administrator or counselor meeting, medical, school activity, or illness. Absences for truancy and illness and parent-acknowledged absences are considered unexcused absences. Synergy generates and sends automated "[s]tage letters" to parents when a student accumulates 5, 10, 15, and 20 days of unexcused absences. In addition, Synergy sends an automated telephone call to parents on the day a student has an unexcused absence for one or more classes. The call is sent to the telephone number provided by the parents and stored by the school in Synergy.

The State also offered testimony from Lucas Varley, a school counselor who works with attendance issues. He testified that once a student accumulates 5 to 10 days of unexcused absences, Varley will make personal telephone calls to the student's parent for the purpose of scheduling a collaborative plan meeting. He calls the telephone number from Synergy that the parent has provided. He testified that when he calls a student's home, he identifies himself, explains that he is calling to set up a meeting to address the student's attendance issues, and leaves his contact information.

He testified that he makes three attempts to call a student's home to schedule a collaborative plan meeting with a parent. If a meeting has not been scheduled with a parent after the third telephone call, Varley attempts to schedule a meeting by preparing a letter that the school attendance technician sends to the home. If a parent is unwilling to answer or respond to the efforts to schedule a meeting, Varley will hold a collaborative plan meeting without the parent or guardian present.

During a collaborative plan meeting, the attendees discuss the student's barriers to attendance and possible resources to address the barriers. They do so while utilizing a collaborative plan report prepared by Lincoln Public Schools and a community resource letter provided by the Lancaster County

Attorney's office. If a parent or guardian attends the meeting, he or she will sign the collaborative plan report and receive a copy of the community resource letter. If a parent or guardian does not attend the meeting, the collaborative plan report and community resource letter are mailed to the parent or guardian. Varley will then again attempt to contact the parent or guardian after the meeting is held by sending a letter which explains that he would like to hold a meeting at the school and asks the parent or guardian to contact him immediately. Varley records his efforts to contact parents and guardians on a Synergy contact log, which was received into evidence; in addition, he records his efforts on a separate county contact log, which was received into evidence as a separate exhibit.

Reality's Attendance Record

According to the Synergy attendance report received into evidence, between September 1, 2017, and March 7, 2018, Reality had unexcused absences in 274 class periods. Synergy converts periods into days by dividing the number of unexcused absences by the number of classes in which the student is enrolled. Reality was enrolled in 4 class periods per day during this time, and therefore, the 274 class periods of unexcused absences equated to 68½ days of unexcused absences. From this total, 67½ days were classified as truancies and 1 day was classified as a parent-acknowledged absence.

The court received into evidence additional Synergy records which indicated that "Stage one, two, three, [and] four letters" were sent to Reality's home on September 25, October 5 and 24, and November 1, 2017, respectively. In addition, Varley testified that he called Reality's home on December 5 and left a message; that he called Reality's home on December 19 and spoke with Marketa, confirming that the school had the correct telephone number for Reality's home, but Varley was unable to address the attendance issue with Marketa; and that he called Reality's home on December 21 and left another message.

After these attempts to schedule a meeting with Marketa were unsuccessful, Varley held a collaborative plan meeting with Reality on January 9, 2018, when he observed Reality in the school hallway attempting to skip class. Varley acknowledged that the meeting was spontaneous and that he did not attempt to call Marketa prior to the meeting. During the meeting, Varley and Reality discussed barriers contributing to Reality's unexcused absences, which included her schedule and transportation issues. Prior to the meeting, Reality already had her daily school schedule shortened from a full day of 7 periods to 4 periods and had an individual education plan in place. The school also provided Reality a bus pass to assist with her transportation issues. Varley offered Reality family and individual therapy, which she declined. Varley and Reality also discussed available community resources set forth in the community resource letter. Though Varley could not remember if he gave Reality a copy of the community resource letter at the meeting, he assumed that he did so. Varley and Reality signed the collaborative plan report.

The following day, January 10, 2018, the collaborative plan report and community resource letter were mailed to Marketa. The mailing of the plan and letter to Marketa was documented in both the Synergy contact log and the county contact log. Thereafter, Reality continued to amass unexcused absences. On January 17 and 29, Varley attempted to again meet with Reality during scheduled class periods, but his attempts were unsuccessful because she was truant.

Adjudication and Order

On June 18, 2018, the court held a formal adjudication hearing on the State's petition. Following the hearing, the court entered an order adjudicating Reality under § 43-247(3)(b). The court found that the "[e]vidence establishes by proof beyond a reasonable doubt that [Reality] has been habitually truant." The court further found that "multiple attempts to schedule a collaborative plan meeting as required by [§] 79-209(2)(b) were

made by authorized school personnel with [Marketa] with no response from [her]." The court found that although the collaborative plan meeting took place without Marketa's presence, the school had fulfilled its requirements to document its efforts to conduct the meeting under § 79-209(3). The court concluded that Reality had no defense under § 79-209(3) to adjudication for habitual truancy. Lastly, the court found the evidence established that the county attorney made reasonable efforts to refer Reality and her family to community-based resources and that as a result, Reality had no defense to adjudication under § 43-276(2).

Reality perfected an appeal to this court.

ASSIGNMENTS OF ERROR

Reality assigns that there is insufficient evidence the school met the requirements under § 70-209(2)(b) and that there is insufficient evidence the county attorney made reasonable efforts to refer her and her family to community-based resources prior to filing a petition, as required under § 43-276(2).

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[2] The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.[3]

ANALYSIS

Under the Nebraska Juvenile Code, a juvenile court may exercise jurisdiction over a juvenile who is habitually truant from school under § 43-247(3)(b). Although the juvenile code does not define "habitually truant," we have previously said that "truancy" is a word of common knowledge, and we

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[2] *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014); *In re Interest of Hla H.*, 25 Neb. App. 118, 903 N.W.2d 664 (2017).

[3] *In re Interest of Hla H., supra* note 2.

have referred to the dictionary definition of "'truant'" as being "'a pupil who stays away from school without permission.'"[4] We qualified this definition by stating that under Nebraska's compulsory attendance law, only school authorities have the authority to grant a juvenile permission to be absent from school.[5] We have held that the mere fact that a juvenile is not complying with the compulsory education statutes without being first excused by school authorities establishes truancy and grants the juvenile court jurisdiction under § 43-247(3)(b).[6] In *In re Interest of Samantha C.*,[7] we found that the fact that a juvenile had accrued 27 days of unexcused absences was sufficient to show that the juvenile was not compliant with compulsory education statutes and thereby established beyond a reasonable doubt the juvenile's status as being habitually truant under § 43-247(3)(b).

Reality's appeal does not challenge the sufficiency of the evidence to adjudicate her as habitually truant under § 43-247(3)(b). Instead, her appeal focuses on the availability of defenses to adjudication, whether the school had fulfilled the requirements under § 79-209(2) and (3), and whether the county attorney fulfilled the requirements under § 43-276(2) before filing the petition. We address each of Reality's claimed statutory defenses in turn.

No Defense Under § 79-209

Reality contends that the school failed in its obligation to address barriers to attendance under § 79-209. Specifically, she argues that, pursuant to § 79-209(2)(b), as amended by 2014 Neb. Laws, L.B. 464, § 34, the school is required to hold a

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[4] *In re Interest of K.S.*, 216 Neb. 926, 929, 346 N.W.2d 417, 419 (1984) (superseded by statute as stated in *In re Interest of Kevin K.*, 274 Neb. 678, 742 N.W.2d 767 (2007)).

[5] *Id.* See Neb. Rev. Stat. § 79-201(2) (Reissue 2014).

[6] *In re Interest of Samantha C., supra* note 2.

[7] *Id.*

collaborative plan meeting with at least a parent or guardian before referring the case to the county attorney. Because only Varley and Reality participated in the collaborative plan meeting and because Varley did not call Marketa on the date of the meeting to have her attend or participate by telephone, Reality suggests the school district did not meet its statutory duty. Section 79-209 provides, as pertinent here:

> (2) All school boards shall have a written policy . . . to address barriers to attendance. Such services shall include . . . :
>
> (b) One or more meetings between, at a minimum, a school attendance officer, a school social worker, or a school administrator or his or her designee, the person who has legal or actual charge or control of the child, and the child, when appropriate . . . .
>
> . . . .
>
> (3) The school may report to the county attorney . . . when the school has documented the efforts it has made as required by subsection (2) of this section that the collaborative plan to reduce barriers identified to improve regular attendance has not been successful and that the child has been absent more than twenty days per year. . . . *Failure by the school to document the efforts required by subsection (2) of this section is a defense to . . . adjudication for . . . habitual truancy under subdivision (3)(b) of section 43-247*.

(Emphasis supplied.)

It is true that the plain language of § 79-209(2)(b) requires that the school hold a meeting between a school official and a parent or guardian to address a juvenile's barriers to attendance. Section 79-209(2)(b) indicates that it may be appropriate to hold "[o]ne or more meetings." Here, it is undisputed that only one collaborative plan meeting took place and that Reality's parent or guardian did not attend the meeting. In addition, Varley testified that if a parent does not respond after he has made three attempts to contact the parent by telephone,

he typically makes another attempt to schedule a collaborative meeting with the parent by sending a letter. There is no evidence that the school sent Marketa a letter after the third telephone call prior to the meeting. Further, although the school attendance technician and Varley testified that Synergy sends an automated telephone call home on the evening that a student has had an unexcused class period, there was no specific testimony that these calls were in fact made to Marketa.

[3] Having acknowledged these evidentiary shortcomings, it is clear that Reality lacks a defense to adjudication under § 79-209, because the plain language of the statute does not provide that a parent's absence at the collaborative plan meeting is a defense to adjudication. Instead, § 79-209(3) provides that "[f]ailure by the school to document the efforts required by subsection (2) of this section is a defense to . . . adjudication for . . . habitual truancy under subdivision (3)(b) of section 43-247." We will adhere to the plain meaning of a statute absent a statutory indication to the contrary.[8] Therefore, a defense to adjudication under § 79-209 is available only if the school failed to document its efforts to address her barriers to attendance and improve her regular attendance, consistent with the school's attendance policy. In addition, § 79-209(3) requires the school to document that its efforts to improve regular attendance have been unsuccessful and that the child has been absent more than 20 days per year.

The record is replete with evidence that the school district documented its efforts to comply with § 79-209(2), reduce Reality's barriers to attendance, and improve her regular attendance. In addition, the school documented the fact that its efforts had not successfully improved Reality's regular attendance and that Reality had been absent more than 20 days per year.

The attendance report generated by Synergy shows that Reality's truancies began on September 1, 2017. According to

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[8] *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

the normal practice described by the school employees, since Reality had three truancies on September 1, Marketa would have received an automated telephone call that day indicating that Reality had been truant. Even if we disregard the evidence concerning the automated calls, Marketa would have been aware of Reality's attendance issues as early as September 25, when she received the "Stage one" attendance letter. Reality then accumulated numerous truancies in a short amount of time; Marketa received "Stage one, two, three, [and] four letters" all within a 6-week period.

In addition, the school documented Varley's attempts to hold a collaborative plan meeting with Marketa. Varley first called Marketa on December 5, 2017, and left a message about setting up a meeting. Varley made two other related telephone calls to Marketa that month. Varley spoke with Marketa on the second call and left a message on the third call, but he was not successful in getting Marketa to participate in the meeting. Varley held the meeting with Reality on January 9, 2018. The record therefore shows that Marketa was aware of Reality's attendance issues 3 months in advance of the meeting and that Marketa had more than 1 month to return Varley's first call about setting up a meeting. Varley again sought Marketa's participation after he held the meeting with Reality. Both contact logs show that the collaborative plan report and community resource letter were mailed to Marketa on January 10. Reality continued to accumulate unexcused absences after the January 9 collaborative meeting. Varley twice attempted to again meet with Reality at a time he knew she should have been in class, but his attempts were unsuccessful because she was truant. By March, Reality had 68½ days of unexcused absences. The petition was not filed by the county attorney until April.

[4] In addition, the foremost purpose and objective of the juvenile code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental

relationship is proper under the law.[9] The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests.[10] With these purposes and objectives in mind, we must reject Reality's position that a parent's refusal to participate can forestall the processes designed to improve a juvenile's attendance under § 79-209(2). A parent's absenteeism cannot defeat the juvenile court's authority to promote and protect a juvenile's best interests under § 43-247(3)(b).

As indicated, the language of the defense that Reality asserts under § 79-209(3) states that "[f]ailure by the school to document the efforts required by subsection (2) of this section is a defense . . . ." Section 79-209(2) requires efforts to identify barriers to attendance and to improve regular attendance. The contact logs and consistent testimony from school employees prove that the school documented its efforts to hold a collaborative plan meeting to fulfill requirements under § 79-209(2) and to secure Marketa's attendance at that meeting. The school documented the facts that its efforts to meet with Marketa were not successful and that Reality had over 20 days of unexcused absences. Marketa's decision not to participate does not negate the conclusion that the school documented the efforts required under § 79-209(2). Upon our de novo review, we agree with the juvenile court's conclusion that Reality does not have a defense to adjudication under § 79-209(3).

No Defense Under § 43-276(2)

[5] Next, Reality argues she has a defense to adjudication under § 43-276(2), because there is insufficient evidence that the county attorney made reasonable efforts to refer her to community-based resources. In her argument, she asserts that the community resources letter provided by the county attorney should not have been received into evidence. However, Reality

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[9] *In re Interest of Samantha C., supra* note 2.

[10] *Id.*

did not assign that the court erred in admitting the letter. 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]

Reality's remaining arguments regarding her defense under § 43-276(2) are that Reality and Marketa never received the letter and that the letter by itself is not enough to establish that reasonable efforts were made. Section 43-276(2) provides:

> 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.

Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[12] Section 43-276(2) requires the county attorney to make reasonable efforts to refer the juvenile and family to community-based resources.

In the context of this case, the record shows that the county attorney's efforts are part of a coordinated effort with the school to refer a student and her family to community-based resources in order to improve regular attendance so that the filing of a petition in juvenile court may be avoided. The primary evidence of the county attorney's efforts to refer Reality and her family to community-based resources is the community resource letter attached to the collaborative plan report, which the court received as an exhibit.

The typewritten letter was addressed to the "Parent(s) or Guardian(s) of Reality [W.]" The letterhead indicated it was

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[11] *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018).

[12] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

from "Joe Kelly[,] Lancaster County Attorney," and it bore the seal of Lancaster County. The letter concluded with a signature block again indicating it was from "Joe Kelly[,] Lancaster County Attorney." The letter was signed by "Bruce J. Prenda[,] Chief Deputy/Juvenile Division[,] Lancaster County Attorney's Office."

In her brief, Reality asserts "there was no evidence that the community based resource letter was given or sent to [her] or [Marketa]."[13] However, the record disproves Reality's assertion. Although Varley could not definitively remember whether he provided Reality a copy of the letter during the meeting on January 9, 2018, he stated he assumed that he did, and he testified that he sent the letter to Reality's home the following day. Varley testified that he prepared the letter, but mistakenly dated it as January 10, 2017, which he acknowledged was a typographical error on his part. As discussed above, both the Synergy and county contact logs confirmed that the letter was mailed to Reality's home on January 10, 2018. In addition, there is evidence in the record that the letter was addressed to Reality's parents, was mailed to Marketa's address, and was mailed 3 months prior to the filing of the petition. There is no contrary evidence in the record to support Reality's assertion that she and Marketa did not receive the letter. As a result, based on the record, we conclude that the argument that Reality and her family did not receive the letter is without merit.

Reality also argues the community resource letter by itself does not satisfy the county attorney's responsibilities under § 43-276(2) to make reasonable efforts to refer the juvenile and family to community-based resources. However, the letter provides two different resources a parent may use to obtain information about programs to help students and families. First, the letter directs families to community resource guides

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[13] Brief for appellant at 13.

found on websites for the Department of Health and Human Services, Lincoln Public Schools, and the Lancaster County Attorney's office. The letter states, "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." Second, the letter encourages the family to contact the truancy resource specialist at the "Lincoln/Lancaster County Human Services Office" in order to determine the best available resource to address the specific problem at hand. The letter provides the telephone number and office hours of the truancy resource specialist. As a result, Reality's argument that the letter from the county attorney failed to notify her and Marketa of the community-based resources is without merit.

CONCLUSION

For the reasons stated above, we find Reality does not have a defense to adjudication under § 43-247(3)(b) for being habitually truant from school.

Affirmed.

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

Mark Diamond, appellant, v. State of Nebraska, Department of Insurance, appellee.

926 N.W.2d 71

Filed April 19, 2019. No. S-17-1107.

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.** An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Insurance: Sales.** The Insurance Producers Licensing Act, Neb. Rev. Stat. §§ 44-4047 to 44-4069 (Reissue 2010 & Cum. Supp. 2018), authorizes disciplinary actions against licensed insurance producers.
6. **Actions: Jurisdiction: Insurance: Sales: Time.** Under Neb. Rev. Stat. § 44-4065 (Reissue 2010), if an insurance producer fails to report a civil action taken against the producer in another jurisdiction, within 30 days of the final disposition of the civil action, the producer violates the reporting requirement of § 44-4065(1).
7. **Statutes: Appeal and Error.** When statutory interpretation is one of first impression, the 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.

8. **Insurance: Sales: Fraud: Words and Phrases.** Under Neb. Rev. Stat. § 44-4059(1)(g) (Cum. Supp. 2018), "fraud" of an insurance producer means any act, omission, or concealment which involves a breach of legal or equitable duty, trust, or confidence justly reposed, and injurious to another or by which an undue and unconscientious advantage is taken of another.
9. **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.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Timothy P. Sullivan, of Sullivan Law, and Arthur W. Leach, of Law Office of Arthur W. Leach, for appellant.

Douglas J. Peterson, Attorney General, and John L. Jelkin for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

This appeal presents our first opportunity to consider the Insurance Producers Licensing Act.[1] Addressing the regulatory effect of a consent judgment previously entered against Mark Diamond, a licensed insurance producer, the Nebraska Department of Insurance determined that he had violated three provisions of the act and imposed an administrative fine. On review,[2] the district court upheld the department's order. On appeal to this court, he contests only one violation—arguing

[1] Neb. Rev. Stat. §§ 44-4047 to 44-4069 (Reissue 2010 & Cum. Supp. 2018).

[2] See Neb. Rev. Stat. § 84-917 (Reissue 2014) (judicial review under Administrative Procedure Act).

that his confession of liability in the consent judgment did not "admit[]" to "fraud" within the meaning of § 44-4059(1)(g). Applying settled rules of statutory interpretation, we reject Diamond's argument. Accordingly, we affirm the district court's judgment.

BACKGROUND

Colorado Litigation

In February 2012, the United States of America and the State of Colorado filed a civil action in the U.S. District Court for the District of Colorado against Bella Homes, LLC, and individuals within the company, including Diamond. The complaint alleged violations of Mortgage Assistance Relief Services (MARS)[3] rules and related claims.

According to the complaint, Bella Homes intended to buy homes from individuals who were struggling to make their mortgage payments and provide a 3- to 7-year repayment plan. Essentially, it was expected to purchase the homeowner's mortgage from the existing lender and enter into a lease with the homeowner, where the homeowner would pay 40 to 60 percent of their mortgage payment in "rent" to Bella Homes. It never purchased a home loan from a mortgage lender. Nor did it stop any foreclosure against a homeowner. It did take over $3 million in "rent" from more than 450 customers nationwide.

Diamond was the chief executive officer and president of Bella Homes. He formed Bella Homes at the request of Daniel Delpiano, who developed the idea for that enterprise. Because Delpiano had twice been convicted of fraud, he was prohibited from being a fiduciary or handling another's finances.

In March 2012, Diamond entered into a stipulated consent judgment and permanent injunction, wherein he "confess[ed] liability" to counts 6 and 7 of the complaint. Each of these two counts consisted of two numbered paragraphs. The first

[3] See 12 C.F.R. § 1015 (2018) (previously found at 16 C.F.R. § 322 (2012)).

paragraph under each count incorporated the allegations in paragraphs 1 through 184 of the complaint. Those paragraphs described an "ongoing foreclosure-rescue scheme to defraud distressed homeowners nationwide," "fraudulently obtain[ing] approximately $3,000,000 from over 450 homeowners," "numerous material misrepresentations to convey the false and fraudulent impression that homeowners will be able to remain in their home," and "misrepresentations to convey the false impression that Bella Homes will stop any foreclosure on the home." The second paragraph under each count alleged that "[b]y virtue of the foregoing [allegations in paragraphs 1 through 184]," Diamond and others were violating a particular rule in a specified manner.

Thus, the second paragraph of count 6 asserted that Diamond was "violating [§ 1015.3(c)] of the MARS Rule" and that he did so "by making a representation, expressly or by implication, about the benefits, performance, or efficacy of any mortgage assistance relief service without competent and reliable evidence that substantiate[d] that the representation [was] true." The second paragraph of count 7 asserted that Diamond was "violating [§ 1015.5(a)] of the MARS Rule," which makes it a violation to "'Request or receive payment of any fee or other consideration until the consumer has executed a written agreement between the consumer and the consumer's dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer.'" In the consent judgment, Bella Homes admitted to the allegations in the complaint and acknowledged its role in defrauding homeowners.

Nebraska Administrative Action

In December 2016, more than 4 years after the entry of the consent judgment, the Department of Insurance brought a petition against Diamond for violations of §§ 44-4065(1) and 44-4059(1)(g) and (h). After a hearing, the director found

that because Diamond admitted that he failed to report the consent order within 30 days of disposition, he violated § 44-4065(1). The director reasoned that although Diamond may not have been complicit in the fraudulent scheme, lending his reputation and partnering with someone convicted of fraud showed irresponsibility in business and violated § 44-4059(1)(h). The director also determined that because Diamond admitted to violating MARS rule § 1015.3(c), he admitted liability to a count that included fraud and therefore, had violated § 44-4059(1)(g). The director concluded that because several years had passed and no Nebraska insurance consumers had been harmed, revocation of Diamond's license was not warranted. The director levied an administrative fine of $2,500.

Diamond appealed to the district court. In disposing of the appeal, the court reasoned that Diamond clearly violated § 44-4065(1), because he admitted that he did not report his involvement in the Colorado civil action within 30 days of the consent judgment. The court found that in the consent judgment, Diamond admitted to paragraphs 1 through 184 of the Colorado complaint, to forming Bella Homes, to paying Delpiano through another company he owned, and to receiving plane ticket reimbursement. This, the court reasoned, provided credible evidence of fraud in violation of § 44-4059(1)(g) and (h). The court explained that it would be an abrogation of the department's duty to disregard the substance of the consent decree and not exercise its disciplinary authority. For these reasons, the court affirmed the department's order.

Diamond filed a timely appeal, which we moved to our docket.[4]

ASSIGNMENT OF ERROR

Diamond assigns that the district court erred in affirming the department's decision to levy a fine against him, because

[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

the decision was "predicated on a finding that [Diamond] was involved in fraud, which [was] incorrect as a matter of law."

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 may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[5] 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.[6] An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.[7]

[4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[8]

ANALYSIS

[5] The Insurance Producers Licensing Act governs the qualifications and procedures for the licensing of insurance producers.[9] An insurance producer is defined as "a person required to be licensed under the laws of this state, including the Insurance Producers Licensing Act, to sell, solicit, or negotiate insurance."[10] The act is intended to "improve efficiency,

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[5] *Leon V. v. Nebraska Dept. of Health & Human Servs., ante* p. 81, 921 N.W.2d 584 (2019).

[6] *Id.*

[7] *Id.*

[8] *Patterson v. Metropolitan Util. Dist., ante* p. 442, 923 N.W.2d 717 (2019).

[9] § 44-4048(1).

[10] Neb. Rev. Stat. § 44-103(10) (Reissue 2010); § 44-4049(5).

permit the use of new technology, and reduce costs associated with issuing and renewing insurance licenses."[11] Diamond does not dispute that he is an insurance producer subject to the act or that the act authorizes disciplinary actions against licensed insurance producers.

In Diamond's brief, he contended that the district court inappropriately predicated the determination of whether he violated § 44-4065 on a finding of fraud. There, he argued that what both the department's hearing officer and the district court "ignored" was that "there was never an admission of 'fraud' made by [Diamond] sufficient to find him in violation of . . . § 44-4065 (1)(g) which would have triggered the reporting requirements of section 1 of that statute."[12] Because § 44-4065 does not have a subsection (1)(g), Diamond's argument in his brief was difficult to follow.

At oral argument, Diamond conceded that he does not contest the district court's determinations that he violated §§ 44-4065(1) (failing to report) and 44-4059(1)(h) (irresponsibility in business). As clarified at oral argument, his sole contention on appeal is that the district court erred in finding that in the consent judgment, he admitted to fraud within the meaning of § 44-4059(1)(g). We disagree.

[6] Before turning to that argument, we briefly address Diamond's failure to report. Under § 44-4065(1), "An insurance producer shall report to the director any administrative action taken against the producer in another jurisdiction, . . . by another governmental agency within thirty days of the final disposition of the matter." For purposes of § 44-4065(1), an "administrative action" includes, but is not limited to, "any arbitration or mediation award, disciplinary action, civil action, or sanction taken against or involving an insurance producer."[13] Diamond no longer contends

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[11] § 44-4048(1).

[12] Reply brief for appellant at 4.

[13] § 44-4065(4).

that in order to violate § 44-4065(1), the underlying action must be predicated on fraud. We hold that under § 44-4065, if an insurance producer fails to report a civil action taken against the producer in another jurisdiction, within 30 days of the final disposition of the civil action, the producer violates the reporting requirement of § 44-4065(1). It is abundantly clear from the record that Diamond failed to report the consent judgment within 30 days and therefore violated § 44-4065(1). And at oral argument, he conceded that he had done so.

Now, we turn to Diamond's remaining argument: The district court erred in finding that in the consent judgment, Diamond admitted to fraud within the meaning of § 44-4059(1)(g). Diamond contends that because he never specifically admitted to fraud under MARS rule § 1015.3(c), nor was the word "fraud" used in that count, the court could not find that he admitted to fraud. We reject this argument.

We recall the controlling statutory language. Under § 44-4059(1):

> The director may suspend, revoke, or refuse to issue or renew an insurance producer's license or may levy an administrative fine in accordance with subsection (4) of this section, or any combination of actions, for any one or more of the following causes:
>
> . . . .
>
> (g) Having admitted or been found to have committed any insurance unfair trade practice, any unfair claims settlement practice, or fraud.

Here, resolution of Diamond's argument requires us to consider two matters: the meaning of "fraud" under § 44-4059(1)(g) and the scope of his "admi[ssion]" in the consent judgment.

The meaning of "fraud" in § 44-4059(1)(g) flows from the Nebraska act and not from another jurisdiction's characterization of a particular violation of a law or regulation. Thus, the meaning of "fraud" under § 44-4059(1)(g) is purely a

question of statutory interpretation. And settled principles of law dictate how we interpret this statute.

[7] When statutory interpretation is one of first impression, the 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.[14] Here, we consider the meaning of "fraud" under § 44-4059(1)(g) for the first time. Thus, we look to the plain and ordinary meaning of the word "fraud" as used in the context of the act.

The Legislature adopted the Insurance Producers Licensing Act in 2001 as a response to the federal Gramm-Leach-Bliley Financial Services Modernization Act.[15] The act was crafted and promulgated by the National Association of Insurance Commissioners as the Producer Licensing Model Act.[16] Although neither the model act nor the Nebraska enactment expressly defined "fraud," the meaning of the word has long been understood in Nebraska insurance law. Over three-quarters of a century ago, we relied upon two definitions of "fraud" in order to determine the meaning of that word under another insurance statute.[17] In the first definition, fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his or her right, or in some manner to do him or her an injury, and, as distinguished from negligence, is always positive, intentional.[18] The second definition noted that fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence

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[14] *Pan v. IOC Realty Specialist*, 301 Neb. 256, 918 N.W.2d 273 (2018).

[15] Committee Statement, L.B. 51, Committee on Banking, Commerce and Insurance, 97th Leg., 1st Sess. (Jan. 23, 2001).

[16] Floor Debate, 97th Leg., 1st Sess. 449 (Jan. 29, 2001).

[17] See *Gillan v. Equitable Life Assurance Society*, 143 Neb. 647, 10 N.W.2d 693 (1943).

[18] See *id*.

justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[19]

In § 44-4059(1)(g), context matters. This subsection groups the word "fraud" with the phrases "any insurance unfair trade practice" and "any unfair claims settlement practice."[20] Significantly, the Legislature did not limit "fraud" to insurance fraud or claims fraud in the way that it did with the other two phrases. In this context, the word "fraud" works broadly and not in a narrow technical sense.

[8] But more important, a broad definition of "fraud" comports with an obvious goal of the Insurance Producers Licensing Act: to protect the public from the unscrupulous behavior of licensees. Thus, we use the broad definition to fulfill that goal rather than to frustrate it. We hold that under § 44-4059(1)(g), "fraud" of an insurance producer means any act, omission, or concealment which involves a breach of legal or equitable duty, trust, or confidence justly reposed, and injurious to another or by which an undue and unconscientious advantage is taken of another.

Having defined "fraud" under § 44-4059(1)(g), we turn to the scope of the "admi[ssion]" made by Diamond's confession of liability in the consent judgment. If the allegations of paragraphs 1 through 184 of the complaint are included in the scope of the admission, this is an easy call. Those paragraphs described an "ongoing foreclosure-rescue scheme to defraud distressed homeowners nationwide," "fraudulently obtain[ing] approximately $3,000,000 from over 450 homeowners," "numerous material misrepresentations to convey the false and fraudulent impression that homeowners will be able to remain in their home," and "misrepresentations to convey the false impression that Bella Homes will stop any foreclosure on the home." Those paragraphs described a blatantly fraudulent scheme.

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[19] *Id.*

[20] § 44-4059(1)(g).

But even without relying on those, Diamond's confession of liability in the consent judgment admitted to fraud within the meaning of § 44-4059(1)(g). Under the consent judgment, he confessed liability under count 6 in the complaint, which stated, "Defendants are violating [§ 1015.3(c)] of the MARS Rule by making a representation, expressly or by implication, about the benefits, performance, or efficacy of any mortgage assistance relief service without competent and reliable evidence that substantiates that the representation is true." Diamond does not dispute that he was one of the "defendants" described in count 6. We apply the meaning of the word "fraud" as used in § 44-4059(1)(g) to Diamond's confession of liability for a violation of § 1015.3(c) of the MARS rule. Our conclusion is: Diamond admitted to an omission in violation of a legal duty by which an undue and unconscientious advantage was taken of another. Accordingly, the district court did not err when it determined that Diamond admitted to fraud in violation of § 44-4059(1)(g).

Diamond also argues that evidence produced after the consent judgment showed that Diamond was merely a "dupe" of Delpiano. We do not believe that Diamond may collaterally attack the substance of his admission in the consent judgment. Moreover, adopting this argument would effectively permit an insurance producer to blindly act as a front man for a fraudulent scheme. This calls to mind the maxim of the three wise monkeys who see no evil, hear no evil, and speak no evil. We do not believe that when the Legislature regulated insurance producers, it intended to condone a producer's blind and deaf participation in a fraudulent scheme.

[9] We address one final matter. At least in Diamond's brief, he argues that "[b]y making a finding of fraudulent conduct, the Department acted arbitrarily and capriciously, exceeding its authority under the Administrative Procedure[] Act."[21] To be considered by an appellate court, an alleged error must be

[21] Brief for appellant at 17.

both specifically assigned and specifically argued in the brief of the party asserting the error.[22] As this argument was not specifically assigned, nor was it specifically argued beyond the single sentence, we will not address the argument.

CONCLUSION

Because Diamond did not report the consent judgment taken against him in another jurisdiction within 30 days of the final disposition of the civil action, he violated § 44-4065(1). The department had the authority to levy an administrative fine. And within the meaning of § 44-4059(1)(g), Diamond's confession of liability in the consent judgment constituted an admission of fraud.

The decision of the district court conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable. Accordingly, we affirm the judgment of the district court.

Affirmed.

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[22] *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018).

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

Sharon B. Leners, appellant, v. Stacy M. Leners, appellee.

925 N.W.2d 704

Filed April 19, 2019. No. S-18-072.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In a marital dissolution action, 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. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Divorce: Property Division: Pensions.** In dissolution proceedings, the trial court has broad discretion in valuing and dividing pension rights between the parties.
4. **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.
5. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
6. **Judges: Words and Phrases.** 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.
7. **Courts: Attorney Fees.** Courts have the inherent power to award attorney fees in certain unusual circumstances amounting to conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith.

Appeal from the District Court for Gage County: Ricky A. Schreiner, Judge. Affirmed.

Philip B. Katz and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellant.

Megan M. Zobel, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

Sharon B. Leners appeals from a decree dissolving her marriage to Stacy M. Leners. Although the district court may have overstated Sharon's entitlement to a divorced spouse annuity in connection with Stacy's railroad pension, it did not abuse its discretion in awarding Stacy his entire pension in equitably dividing the marital estate. Having reviewed the record de novo, we cannot say that the court's determinations regarding custody, parenting time, child expenses, and attorney fees were untenable. We affirm the decree.

BACKGROUND

The parties married in 1997. In 2016, Sharon filed a complaint to dissolve the marriage. At that time, the parties had two minor children, one born in 1998 and the other in 2002.

On July 31, 2017, the court entered a temporary order awarding the parties joint custody of the children. Because Stacy's employment takes him to different locations around the country from the 1st through the 8th day of the month and then the 16th to the 23d day of each month, the court provided him parenting time every month on the 9th to the 15th day and on the 24th to the last day of the month.

Three weeks later, the court conducted a trial. We summarize only the evidence relevant to the issues on appeal.

Custody

The custody issue focused on the 15-year-old child, because the other child soon would be turning 19 years old (and did shortly before entry of the decree). The 15-year-old child testified in camera, and the court sealed her testimony. We consider this testimony in our de novo review, but decline to summarize it.

Both parties described a positive relationship with the child. Stacy requested shared legal and physical custody of the child, but Sharon asked for sole custody. According to Sharon, the temporary custody and parenting time arrangement was not in the child's best interests, because it caused the child to cry and to be irritable and argumentative. Sharon did not believe that joint physical custody would work on a permanent basis. She anticipated having difficulty obtaining the child's compliance and did not "feel [she] should have to force a 15[-]year-old" to comply with the parenting plan. Stacy testified to a willingness to put aside personal differences and work with Sharon even though he had been unable to do so in the past.

The parties offered different parenting time plans for the court's consideration. Sharon proposed that Stacy have parenting time every other weekend from after school on Friday until 10 a.m. on Sunday and on Thursdays each week from after school until 8 p.m. But Stacy testified that such a plan would leave him little one-on-one time with the child due to the child's activities and Stacy's work schedule. Stacy essentially asked for an extension of the temporary plan.

Pensions

Sharon is a registered nurse, and her proposed child support worksheets show her monthly income to be $3,693. Through her employer, she has a 401K account and a pension. She also has a Nebraska Public Employees Retirement Systems account. In Sharon's proposed property division, she included the latter account and the 401K under her column at a total value of $38,301.28. Stacy's proposed property division additionally

included Sharon's pension from her employer at a value of $250 per month.

Stacy has worked for Union Pacific Railroad for nearly 12 years. He is a "system semi driver," and his proposed child support worksheet showed his monthly income to be $5,208. Stacy did not have a thorough understanding of his railroad pension, but he believed that the tier I component was not divisible, while the tier II component was. According to Stacy, Sharon was eligible to receive a payment from his railroad pension and she would receive some of his pension after they were divorced even without any order from the court. Stacy's proposed property division suggested that Sharon receive a divorced spouse benefit of unknown value and that he would receive his 401K valued at $49,290. Sharon's proposed property division showed that the "Railroad Retirement Board Creditable Compensation" of unknown value should be divided by a qualified domestic relations order.

The court received a "Statement of Railroad Employee's Actual or Estimated Railroad Retirement Benefits" dated January 19, 2017, which was furnished for use in connection with a divorce. The statement reflected an estimate of Stacy's current monthly benefit based upon employment with the railroad through December 1, 2015, assuming that he were now retired and entitled to payment of benefits. It showed the following monthly railroad benefit amounts:

> Tier I railroad retirement benefit component . . . $956.00
> Divisible railroad retirement benefit components
> (Tier II, supplemental annuity, dual benefits) . . . $253.50
> Total monthly railroad retirement benefits . . . $1,209.50
>
> **Caution**: The Tier I benefit component is not subject to division, and the Railroad Retirement Board will not recognize any property division made with respect to it.

The statement contained a section addressing the "Railroad Retirement Divorced Spouse Benefit Estimate." That section provided: "Assuming current entitlement under the Railroad Retirement Act, the divorced spouse benefit for the spouse

of this railroad employee would be an estimated $441.00 per month, effective May 1, 2037, minus any social security benefits for the same month."

Attorney Fees

Sharon informed Stacy that she was "not going to deal with him" and that any communications had to go through their attorneys. According to Sharon, the parties cannot "get along" and the police had been called five or six times to "keep the peace." Stacy testified that he had incurred significant attorney fees to obtain parenting time and to obtain access to personal property. He testified he incurred attorney fees unnecessarily, and an exhibit showed his fees to be $14,982.50 prior to trial. Sharon's attorney fees amounted to $13,867.75.

Decree

The court dissolved the parties' marriage. It specifically found Stacy's testimony to be more credible than the testimony of Sharon. The court characterized the matter as "extremely contentious," explaining:

> The parties have involved law enforcement multiple times, they have each requested temporary relief from the court including motions for temporary custody, parenting time, access to the marital home, possession of personal property, payment of expenses and support issues. They have each said and done things not becoming including but not being limited to name calling. The parties have made it very clear to one another, and to the Court, that they are not able to get along.

The court awarded the parties shared legal and physical custody of the children. It adopted the parenting time schedule proposed by Stacy, which awarded Stacy regular parenting time on the same days set forth in the temporary order. The court ordered each party to be responsible for one-half of the reasonable and necessary medical expenses of the child and of any mutually agreed-upon expenses for the child's activities.

The court awarded Sharon as her sole and separate property her 401K and pension and her Nebraska Public Employees Retirement Systems account. It awarded Stacy as his sole and separate property his Union Pacific Railroad pension and his 401K. The court entered judgment in favor of Sharon in the amount of $50,019 and ordered that Sharon pay Stacy $9,000 for his attorney fees.

Following the court's denial of Sharon's timely motion for new trial and motion to alter or amend, she brought this timely appeal. We moved the case to our docket.[1]

ASSIGNMENTS OF ERROR

Sharon assigns that the court erred in (1) interpreting federal law regarding retirement benefits that may be available for equitable distribution, (2) awarding joint custody and equal parenting time, (3) failing to allocate child expenses, and (4) awarding attorney fees to Stacy.

STANDARD OF REVIEW

[1] In a marital dissolution action, 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. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.[2]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[3]

ANALYSIS

Retirement Benefits

Retirement pensions for railroad employees are governed by federal law. The Railroad Retirement Act of 1974[4] provides

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[1] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[2] *Wiedel v. Wiedel*, 300 Neb. 13, 911 N.W.2d 582 (2018).

[3] *Gerber v. P & L Finance Co.*, 301 Neb. 463, 919 N.W.2d 116 (2018).

[4] 45 U.S.C. § 231 et seq. (2012).

two tiers of benefits.[5] Tier I benefits correspond to those an employee would receive if covered by the Social Security Act.[6] Tier II benefits are like a private pension, and the benefits are tied to earnings and career service.[7] "In the past, courts were prohibited from awarding one spouse an interest in benefits to which the other spouse became entitled under the Railroad Retirement Act."[8] But Congress amended the act, and the Railroad Retirement Board must "honor a decree of divorce characterizing tier II benefits as property subject to distribution."[9] Tier I benefits remain excluded from consideration as divisible marital property.[10]

[3] In dissolution proceedings, the trial court has broad discretion in valuing and dividing pension rights between the parties.[11] Here, the court awarded each party his or her own 401K and pension as that party's sole and separate property. Sharon argues that the court erred in interpreting federal law regarding retirement benefits available for equitable distribution and that the court should have equitably divided Stacy's tier II pension benefits. But it appears that the court's awarding each party his or her own pension was an effort to equitably divide the entire marital estate: an effort unaided by any evidence as to a present dollar value for either pension. The record does reflect that Sharon's pension would amount to approximately $250 per month, while the tier II component of Stacy's pension would be $253.50 per month for "reduced age" or $360 per month for "full age and service annuity." The record does not show whether Sharon's

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[5] See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

[6] See *id.*

[7] See *id.*

[8] *Shearer v. Shearer*, 270 Neb. 178, 181, 700 N.W.2d 580, 584 (2005).

[9] *Id.*, citing 45 U.S.C. § 231m(b)(2) (2000), and 20 C.F.R. § 295.1 (2005).

[10] See *McGraw v. McGraw*, 186 W. Va. 113, 411 S.E.2d 256 (1991).

[11] *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006).

monthly pension amount is "reduced age." Either way, we find no abuse of discretion by the court in awarding Stacy his railroad pension.

Sharon also contends that the court erroneously assumed she would receive a divorced spouse annuity. In connection with awarding each party his or her own pension, the court explained:

> In so ordering, the Court notes that as it currently stands, [Sharon] shall receive a substantial sum from Union Pacific as a divorced spouse pension. [Stacy's] pension (employee annuity) amount shall be his and his alone. To allow [Sharon] to receive her entire share of the divorced spouse pension (ranging between $441 and $679), plus half of his pension ($1209 divided by 2 = $604.50 or $17[1]9 divided by 2 = $859.50) would result in her pension payout being nearly 2/3s of the total. Such a result is inequitable. In reaching this conclusion, the Court has taken into account that [Sharon] shall receive all of her $250 monthly pension from [her employer].

We agree with Sharon that there is no guarantee she will receive "a substantial sum from Union Pacific as a divorced spouse pension." To be eligible, a divorced wife must not be married[12] and must not be entitled to Social Security benefits greater than the divorced spouse annuity.[13] This error favored Stacy. But, on the other hand, the court's calculation of the divisible portion of Stacy's pension erroneously favored Sharon. Because federal law precludes marital division of tier I benefits, the correct numbers for Stacy's tier II pension would have been between $253.50 and $360 instead of $1,209 and $1,719. Thus, even assuming that Sharon would be entitled to no divorced spouse annuity, we find no abuse of discretion in the court's equitable division of the marital estate.

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[12] See 45 U.S.C. § 231a(c)(4)(ii).

[13] See, 45 U.S.C. § 231a(f)(2); 20 C.F.R. § 226.30(f) (2018).

Custody and Parenting Time

The court awarded the parties shared legal and physical custody and equal parenting time. Sharon argues that the arrangement is not in the younger child's best interests and that the court should have awarded her primary custody and parenting time.

[4] Nebraska law explicitly provides that a court shall consider "[t]he 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."[14] We have held 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.[15] In our de novo review, we have considered the child's age, her preference, and her reasoning. Her testimony concerning her relationship with each parent and custody preference did not contradict the parties' testimony that they each had a good relationship with the child.

[5,6] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[16] In a marital dissolution action, we conduct such a review to determine whether the trial judge abused its discretion.[17] 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.[18]

Here, both parties are fit and proper parents. The court attempted to fashion a parenting time schedule that would

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[14] Neb. Rev. Stat. § 43-2923(6)(b) (Reissue 2016).

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

[16] *Connolly v. Connolly*, 299 Neb. 103, 907 N.W.2d 693 (2018).

[17] See *id.*

[18] *Id.*

accommodate Stacy's rather unusual work schedule, minimize the communication and coordination between the parties, and still serve the child's best interests. The court observed that Sharon's parenting plan—which would allow Stacy parenting time on four overnights twice a month but would vary on days of the week and days of the calendar—would require the parties to frequently communicate and cooperate in order to avoid conflict. The court reasoned:

> It is in the best interest of the minor children that they have a good, strong, positive relationship with each parent. To have the same, it is necessary for each parent to have significant periods of time with the minor children. The best way to ensure the fewest exchanges for the minor child and minimize the contact between the parties is to set a schedule based on the known factors including [Stacy's] work schedule. By doing so, it is established exactly what the parenting time schedule is and eliminates the strong possibility of further conflict or disagreement between the parties.

Although the court referred to "children," from the context, it is clear that the court's decree addressed only the younger child.

Here, the court decreed "shared" rather than "joint" custody. But, at least here, that seems to be a matter of semantics. And we recognize that we have said 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.[19] While generally sensible, this is not a hard-and-fast rule. A statute specifically provides that a court may order joint custody "if

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[19] See *Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017).

the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent."[20] And we have affirmed a trial court's decision not to modify an award of joint legal custody even though the evidence showed that the parties continued to have difficulty communicating and cooperating with one another.[21] In light of Stacy's unusual work schedule, the court's favorable contrast of his credibility and reasonableness to Sharon's, and the child's relationship with both parents, we cannot say that the court's award of shared custody and parenting time is untenable.

Allocation of Expenses

Because we are affirming the award of shared custody, we consider Sharon's claim that the court erred in failing to allocate expenses. Sharon argues that except for medical expenses provided in the decree, the court did not require that "all reasonable and necessary expenses of the child, including but not limited to clothing and extracurricular activities, be equally divided and not require any mutual agreement."[22]

A statute requires a decree to address the parties' responsibility for certain child expenses. "A decree of dissolution . . . shall incorporate financial arrangements for each party's responsibility for reasonable and necessary medical, dental, and eye care, medical reimbursements, day care, extracurricular activity, education, and other extraordinary expenses of the child and calculation of child support obligations."[23] And Neb. Ct. R. § 4-212 (rev. 2011) provides that when child support

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[20] See Neb. Rev. Stat. § 42-364(3)(b) (Cum. Supp. 2018).

[21] See *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

[22] Brief for appellant at 23 (emphasis in original).

[23] Neb. Rev. Stat. § 42-364.17 (Reissue 2016).

is to be calculated using worksheet 3, "all reasonable and necessary direct expenditures made solely for the [child] such as clothing and extracurricular activities shall be allocated between the parents."

The decree, together with attachments, allocated the necessary expenses. As Sharon observes, the decree ordered the parties to each be responsible for one-half of the reasonable and necessary medical expenses. The parenting plan additionally required the parties to each "be responsible for the clothing, personal property, food and entertainment of the children during their own parenting time" and to "pay one-half of any mutually agreed upon expenses for activities of the minor children so long as the same is clearly stated and agreed to in writing prior to such expense being incurred."

Although Sharon's brief was not entirely clear, she confirmed that she was arguing that the district court should not have made any of the expenses for extracurricular activities subject to mutual agreement. Or, stated another way, that the decree should have required one parent to pay one-half of the child's expenses for extracurricular activities authorized solely by the other parent. We do not agree that § 4-212 requires a trial judge to grant one parent carte blanche to compel the other parent to pay (either wholly or partially) for every conceivable extracurricular activity for a child. Certainly, the parties may agree to divide extracurricular activities in that way.[24] But here, they did not agree.

Section 4-212 contemplates allocation between the parents of "all reasonable and necessary direct expenditures made solely for the [child] such as . . . extracurricular activities." The record here does not establish that all of the child's potential expenses for extracurricular activities met that standard. And given the acrimonious dispute on virtually every issue and the court's assessment of Sharon's credibility regarding an

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[24] See *Moore v. Moore, ante* p. 588, 924 N.W.2d 314 (2019).

extracurricular activity, the court could reasonably anticipate that the reasonableness and necessity of such expenses would be another source of contention—particularly if the court permitted Sharon to unilaterally dictate which activities would be permitted. Although Sharon filed a motion to alter or amend the decree, her motion did not specify any particular expenses to be so allocated. The tenor of the court's decree shows that it trusted Stacy, but not Sharon, to be reasonable. If subsequent events show that Stacy responds unreasonably, the court has the tools to compel an equitable solution. We conclude that the court did not abuse its discretion in allocating reasonable and necessary expenses of the child.

Attorney Fees

Sharon contends that the court abused its discretion by ordering her to pay Stacy $9,000 in attorney fees. Stacy requested such an award, but the decree did not specifically explain why the court imposed these fees. Nonetheless, from the court's specific findings, we discern a legal rationale.

[7] Courts have the inherent power to award attorney fees in certain unusual circumstances amounting to conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith.[25] The decree set forth specific findings identifying Sharon's conduct.

The court found that Sharon "doused in diesel fuel" some of Stacy's clothing and destroyed Stacy's grandmother's dishes by "intentionally shooting [them] with a gun." Sharon admitted that at the beginning of the proceeding, she told Stacy repeatedly in text messages that because he was the one who left, he was going to have to "pay for it." Clearly, this conduct was, and was intended to be, vexatious. There was evidence that Stacy incurred attorney fees attempting to obtain parenting time and access to personal property and relating to the filing of tax returns.

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[25] *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

The court's decree provided a number of examples why it found Stacy's testimony to be more credible, recounting numerous instances where Sharon's testimony was unfounded. According to the decree:

> [Sharon's] testimony regarding the creation of the calendars she purported to have been created simultaneously with the events proved to be inaccurate in that the calendars were printed in March of 2017 and purported to reflect events dating back six months prior[, and] was not credible. [Sharon's] testimony regarding her lack of knowledge of the birthdate, approximate age or address of the gentleman she had been dating for seven months prior was suspect. [Sharon's] testimony that [the older child] lived in the marital home through the date of trial was admitted to be false on cross examination when she admitted that [the older child] had not stayed overnight in the home since May of 2017. [Sharon's] testimony that [the older child] has never stayed overnight with [Stacy] since separation was admitted to be false on cross-examination. [Sharon's] testimony that she did all of the transporting of [the younger child] during the marriage was also admitted to be false on cross examination when she admitted that when [Stacy] was not working, he picked [the child] up from school each day. [Sharon's] testimony in her affidavit for temporary custody and her matching testimony at trial that [Stacy] promised to pay one-half of the current cheer bill of $260 a month was also admitted by her on cross examination to be false when she admitted that [Stacy] told her he could not afford to pay the increased fee of $260 a month (compared to the $110 a month) for [the cheer bill] and further she admitted that he had never agreed to pay it.

The record supports Stacy's testimony that the attorney fees he incurred were often unnecessary and resulted from Sharon's vexatious, unfounded, and dilatory conduct. Having

reviewed the record along with the parties' arguments, we cannot say that the court's award of attorney fees was an abuse of discretion.

CONCLUSION

Having reviewed the record de novo, we conclude that the court did not abuse its discretion in awarding Stacy his railroad pension, ordering shared custody and parenting time, addressing reasonable and necessary child expenses, and awarding attorney fees. We therefore affirm the decree.

Affirmed.

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

State of Nebraska, appellee, v. Timothy L. Fuentes, appellant.

926 N.W.2d 63

Filed April 19, 2019. No. S-18-122.

1. **Postconviction: Evidence: Appeal and Error.** 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. An appellate court upholds the trial court's factual findings unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's conclusion.
4. **Constitutional Law: Due Process: Trial: Judges.** The right to an impartial judge is guaranteed under the Due Process Clauses of the U.S. and Nebraska Constitutions, the parameters of which are coextensive.
5. **Constitutional Law: Trial: Judges: Proof.** In order to show a constitutional violation of the right to an impartial judge, a defendant must prove actual bias or structural error.
6. **Trial: Judges: Words and Phrases.** Structural error occurs when the defendant shows that a judge has such a strong personal or financial interest in the outcome of the trial that he or she was unable to hold the proper balance between the State and the accused.
7. **Postconviction: Trial: Presumptions: Appeal and Error.** Although structural error requires automatic dismissal if brought on direct appeal,

not all structural error will result in a presumption of prejudice when raised in a motion for postconviction relief.

8. **Judges: Recusal.** Instances in which the judge's impartiality might reasonably be questioned specifically include where the judge has a personal bias or prejudice concerning a party or a party's lawyer.
9. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
10. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
11. **Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.
12. ____. The factors to be considered in determining whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification.

Appeal from the District Court for Scotts Bluff County: Andrea D. Miller, Judge. Affirmed.

Leonard G. Tabor for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, Derek Bral, Senior Certified Law Student, and, on brief, Sarah E. Marfisi for appellant.

Heavican, C.J., Cassel, Stacy, Funke, and Papik, JJ.

Heavican, C.J.

INTRODUCTION

Timothy L. Fuentes was convicted of third degree sexual assault of a child, second offense, and sentenced to 50 to 50 years' imprisonment. His conviction and sentence were

affirmed on direct appeal. Fuentes filed a motion seeking postconviction relief. Following an evidentiary hearing, the district court denied Fuentes' motion. He appeals. We affirm.

FACTUAL BACKGROUND

The facts leading to Fuentes' conviction show that on August 21, 2012, Fuentes visited the upstairs apartment of a converted house. The victim, Analicia B., was outside of the house at the time of Fuentes' visit. Analicia's family lived in the basement apartment of the same house. Analicia testified that Fuentes arrived at the home while her stepfather, Gabriel T., had been outside. Analicia further testified that Fuentes went into the upstairs apartment and that Gabriel went into the basement apartment, leaving Analicia and her sister outside. Fuentes left the upstairs apartment approximately 5 minutes later, while Gabriel was still in the basement apartment. Analicia testified that as he left, Fuentes "slid his finger" of his right hand up and then sideways on Analicia's genital area over her clothing.

Analicia immediately reported the touching to her parents, and law enforcement was contacted. A few days later, Analicia identified Fuentes out of a photographic array (photo array) that included photographs of Fuentes and five other individuals.

Fuentes was charged with third degree sexual assault of a child. A first jury trial ended in a mistrial because of a deadlocked jury; Fuentes was convicted following the second trial. His conviction and sentence were affirmed on direct appeal in a memorandum opinion filed by the Nebraska Court of Appeals on February 26, 2014, in case No. A-13-340.

Fuentes subsequently filed a pro se motion seeking postconviction relief. Fuentes was represented by an attorney from the Scotts Bluff County public defender's office at trial and on direct appeal, and he is represented by appointed counsel in this appeal. Fuentes asserts that trial counsel was ineffective

at trial and on appeal by failing to (1) argue ineffective assistance of counsel on direct appeal; (2) file a motion to suppress statements; (3) file a motion to recuse the trial judge; (4) file a motion in limine; (5) file a motion to suppress the photo array; (6) investigate and depose Analicia, an unknown adult, and Gabriel; (7) object to jury instructions Nos. 1 and 5; (8) object to exhibit 5; (9) object to the testimony of DelMaria B., Analicia's mother; and (10) file a motion to dismiss at the conclusion of the State's evidence.

Because the trial judge had retired, a new district court judge was appointed. Following an evidentiary hearing, the district court denied Fuentes' motion for postconviction relief. Fuentes appeals.

ASSIGNMENT OF ERROR

Fuentes assigns that the district court erred in denying his motion for postconviction relief.

STANDARD OF REVIEW

[1] 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. An appellate court upholds the trial court's factual findings unless they are clearly erroneous.[1]

[2,3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[2] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[3] an appellate court

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[1] *State v. Huston*, 302 Neb. 202, 922 N.W.2d 723 (2019).

[2] *Id.*

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

reviews such legal determinations independently of the lower court's conclusion.[4]

ANALYSIS

Fuentes contends on appeal that the district court erred in denying his motion for postconviction relief and asserts various grounds in support of his assignment of error. Fuentes argues that counsel was ineffective in failing to (1) file a motion to suppress the photo array and out-of-court identification of Fuentes, (2) investigate and depose a clerk at the liquor store next door to the victim's residence at the time of the alleged sexual assault, (3) investigate and depose an acquaintance of Fuentes who was at the liquor store the day of the incident, (4) investigate and depose a coworker of Fuentes, (5) investigate and depose the unknown male witness at the time of the sexual assault, (6) raise an intoxication defense, (7) seek the recusal of the district court judge, (8) have Fuentes take a polygraph examination, (9) engage in plea negotiations or communicate plea offers from the State to Fuentes, and (10) adequately explore inaccuracies in the testimony of several witnesses.

Several of these assignments of error can be rejected because they were not raised in Fuentes' motion. The motion does not raise an ineffectiveness claim with respect to three witnesses—the liquor store clerk, Fuentes' acquaintance, or his coworker. Nor does that motion assert ineffectiveness with regard to the failure to raise the intoxication defense, seek a polygraph examination, engage in plea negotiations, or communicate plea deals. As such, we turn to the arguments both raised in Fuentes' motion and preserved on appeal.

Failure to Seek Recusal of District Court Judge.

Fuentes contends that the trial judge should have recused himself, because the judge assigned to his case had previously

[4] *Huston, supra* note 1.

represented him on a criminal matter in 1995. Fuentes further contends that trial counsel was ineffective for not seeking such recusal.

[4-7] The right to an impartial judge is guaranteed under the Due Process Clauses of the U.S. and Nebraska Constitutions, the parameters of which are coextensive.[5] In order to show a constitutional violation of the right to an impartial judge, a defendant must prove actual bias or structural error.[6] Structural error occurs when the defendant shows that a judge has such a strong personal or financial interest in the outcome of the trial that he or she was unable to hold the proper balance between the State and the accused.[7] Although structural error requires automatic dismissal if brought on direct appeal, not all structural error will result in a presumption of prejudice when raised in a motion for postconviction relief.[8]

[8,9] In addition to the constitutional right to an impartial judge, the Nebraska Revised Code of Judicial Conduct states that a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.[9] Under the code, such instances in which the judge's impartiality might reasonably be questioned specifically include where "'"[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer . . . ."'"[10] However, a defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[11]

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[5] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[6] *Id.*

[7] *Id.*

[8] See *Weaver v. Massachusetts*, 582 U.S. 286, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017).

[9] *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017).

[10] *Id.* at 314, 893 N.W.2d at 438.

[11] *Buttercase, supra* note 9.

Fuentes essentially acknowledges that this case does not include structural error. Nor does Fuentes argue that his trial judge was aware of confidential information that was harmful to Fuetnes' case. Rather, Fuentes now argues that the trial judge should have recused himself due to the appearance of impropriety. But, as we noted in *State v. Buttercase*,[12] a defendant has a heavy burden to overcome the presumption of judicial impartiality and show that the judge has a personal bias or prejudice concerning the defendant.

In *Buttercase*, the defendant sought to force the removal of a judge who had presided over prior criminal charges filed against him. We rejected the claim, noting that "the fact that the court previously presided over other actions involving the parties and made rulings against one or another of the parties" was insufficient to show bias.[13] We observed that the fact that a judge knows most of the attorneys practicing in his or her district is common, and the fact that a judge knows attorneys through professional practices and organizations does not, by itself, create the appearance of impropriety. We further observed that judicial rulings alone almost never constitute a valid basis for a bias or partiality motion directed to a trial judge.

While *Buttercase* dealt with a judge who had previously overseen charges against a defendant, we are presented here with a judge who, 17 years earlier, apparently represented the defendant in a criminal proceeding. The two cases are, of course, factually distinct, but both touch on whether prior knowledge of a defendant creates an appearance of bias.

Fuentes has not offered any evidence whatsoever to show that the trial judge had access to confidential information or even recalled representing Fuentes; that the trial judge used confidential, personal information in presiding over Fuentes'

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[12] *Id.*

[13] *Id.* at 316, 893 N.W.2d at 439.

trial or in sentencing him; or, indeed, that the trial judge was biased or prejudiced against Fuentes in any way. We also observe that while Fuentes suggested in his deposition that an oral motion seeking the trial judge's recusal was made, there is no record of such an oral motion, let alone a written motion. Fuentes has failed to meet his burden to show that he was prejudiced by the failure of the trial court judge to recuse himself. There is no merit to this argument on appeal.

Failure to File Motion to Suppress Photo Array and Out-of-Court Identification.

Fuentes argues that counsel was ineffective in failing to file a motion to suppress the photo array and in failing to object to all testimony regarding out-of-court identification by Analicia. The basis of his argument appears to be his assertion that Analicia was not given an advisement in advance of identifying him from a photo array and that DelMaria's presence impacted Analicia's identification.

[10-12] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.[14] Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.[15] The factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length

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[14] *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[15] *Id.*

of time between the crime and the identification.[16] We have noted that "an array of five photographs is sufficient to constitute a fair and adequate array when attempting to identify a single perpetrator."[17]

The record contains very little information about the photo array. The photo array itself is not in the record. There is no dispute that a motion to suppress any identification arising from the photo array was not filed, and counsel did not otherwise object to evidence offered on the photo array and Analicia's identification of Fuentes.

The officer who prepared the photo array and showed it to Analicia testified during trial that he was also the officer who first reported to the scene of the alleged assault. He further testified that at the time he met with Gabriel and DelMaria, he did not interview Analicia, because it was policy for child sexual assault victims to be interviewed by individuals trained in appropriate interview techniques.

The officer further testified that at the time he spoke with Gabriel and DelMaria, the couple identified Fuentes as the individual who had been outside their apartment at the time of the alleged assault, because Gabriel had been outside and had seen Fuentes arrive. The officer also testified that Fuentes was not at the scene when he arrived, but that the officer effected a traffic stop of Fuentes a few days later, on August 24, 2012.

The officer additionally testified that he prepared a photo array of photographs of six individuals—Fuentes and five others—and showed it to Analicia, in the presence of DelMaria, on August 26, 2012, at the Scottsbluff Police Department. According to this testimony, DelMaria sat next to Analicia but did not say anything during the process.

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[16] *Id.*

[17] *State v. Swoopes*, 223 Neb. 914, 918, 395 N.W.2d 500, 504 (1986), *overruled on other grounds, State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987).

Analicia testified that the officer showed her the photo array and that she circled the picture of the man who touched her. Analicia also testified at trial that the man who touched her was in the courtroom at the time she was testifying, identifying Fuentes as that person.

Fuentes does not make any particular argument about the makeup of the photo array. Rather, he concentrates his argument on the fact that Analicia did not receive an advisement prior to viewing the photo array and on the fact that DelMaria was present during the showing of the photo array.

There are several problems with Fuentes' contentions on appeal. First, there is no evidence regarding whether Analicia received an advisement prior to looking at the photo array presented to her. Fuentes' trial counsel had passed away prior to the filing of the postconviction motion, but an attorney from the public defender's office testified by deposition about Fuentes' case file. There was no questioning about an advisement during that deposition. The office's file was not offered as an exhibit to the deposition, nor is the police file part of the record before this court. It is not possible to know whether an advisement was actually given, because no one asked that question or offered evidence that might answer that question. Moreover, Fuentes cites to no authority requiring such an advisement; rather, he cites to a memorandum opinion of the Court of Appeals where such an advisement was given.[18]

In addition, a review of the entire record suggests that Fuentes was identified largely because Gabriel was aware that Fuentes had been on the scene at the relevant time and identified Fuentes by name to the investigating officer. The officer had contact with Fuentes for the first time 2 days *prior* to showing Analicia the photo array. In addition, another officer testified that he had contact with Fuentes at the police

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[18] *State v. Fletcher*, No. A-08-723, 2009 WL 2767720 (Neb. App. Sept. 1, 2009) (selected for posting to court website).

department on either August 23 or 24, 2012, because Fuentes had heard officers were looking for him.

Finally, the issue in this case was not who touched Analicia; the issue was whether Analicia was touched. Fuentes does not deny being at the scene at the relevant time. He denied only that he touched Analicia.

Fuentes has not met his burden to show that he was prejudiced by any failure of counsel to suppress the photo array when law enforcement was aware from the time of the alleged incident that it was looking for Fuentes. There is no merit to his argument.

Failure to Adequately Explore Inconsistencies in Witness Testimonies.

Somewhat related to Fuentes' allegations regarding the failure to investigate other witnesses is Fuentes' contention that his counsel was ineffective in failing to adequately cross-examine certain witnesses regarding inconsistencies in their statements at trial.

In his motion, Fuentes alleges inconsistencies of several witnesses, but argues on appeal only that Analicia's testimony was inconsistent. Specifically, Fuentes' brief argues that Fuentes testified at his hearing that Analicia's testimony regarding her identification of Fuentes was inconsistent.

Fuentes' argument is without merit. Fuentes does not explain how he believes Analicia's testimony was inconsistent and does not provide any other evidence to suggest actual inconsistencies in her testimony.

Moreover, our review of Analicia's testimony reveals no inconsistencies of note. Analicia testified that Fuentes walked past her into the residence to visit the people who lived on the main floor of the apartment building and that about 5 minutes later, the same man left the building, touching her, as described above, on his way out. There is no real dispute that Fuentes was the man who entered and exited the home; the only dispute

is whether he touched Analicia as he left—she testified that he did, while Fuentes testified that he did not.

Fuentes did not meet his burden to show that his counsel was ineffective in failing to point out inconsistencies in Analicia's testimony, because it is not at all clear to what inconsistency Fuentes was referring and, in any case, a review of Analicia's testimony reveals no inconsistency. This assignment of error is without merit.

CONCLUSION

The decision of the district court dismissing Fuentes' motion for postconviction relief is affirmed.

Affirmed.

Miller-Lerman and Freudenberg, JJ., not participating.

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

State of Nebraska, appellee, v. Sami S. Mrza, appellant.

926 N.W.2d 79

Filed April 19, 2019. No. S-18-372.

1. **Effectiveness of Counsel: Appeal and Error.** Assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity.
2. ____: ____. Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
3. **Effectiveness of Counsel: Postconviction: Records: 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 in a subsequent postconviction proceeding.
4. **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.
5. **Effectiveness of Counsel: Proof.** Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.

6. ____: ____. To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
7. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
8. **Trial: Effectiveness of Counsel: Presumptions: Appeal and Error.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
9. **Rules of Evidence: Proof.** A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.
10. **Rules of Evidence.** Generally, the foundation for the admissibility of text messages has two components: (1) whether the text messages were accurately transcribed and (2) who actually sent the text messages.
11. ____. The rule of completeness allows a party to admit the entirety of an act, declaration, conversation, or writing when the other party admits a part and when the entirety is necessary to make it fully understood.
12. **Trial: Prosecuting Attorneys: Appeal and Error.** When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, an appellate court will review the record only for plain error.
13. **Appeal and Error.** An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
14. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
15. **Trial: Prosecuting Attorneys: Words and Phrases.** Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
16. **Trial: Prosecuting Attorneys: Juries.** Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.

17. ____: ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
18. **Trial: Prosecuting Attorneys.** In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
19. ____: ____. Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
20. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.
21. **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.
22. **Sexual Assault: Testimony: Proof.** The State is not required to corroborate a victim's testimony in cases of first degree sexual assault; if believed by the finder of fact, the victim's testimony alone is sufficient.
23. **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.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Sanford J. Pollack, of Pollack & Ball, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

Sami S. Mrza appeals his jury conviction and sentencing for first degree sexual assault. Although he assigns multiple errors, we focus on two issues: the authentication requirement for "Snapchat" evidence and the prosecutor's comment on Mrza's use of an interpreter. Because the evidence was properly authenticated, trial counsel did not perform deficiently in failing to object to it. We find no plain error in the prosecutor's closing argument, but determine that the record is not sufficient to address Mrza's related claim of ineffective assistance of trial counsel. We find no error in Mrza's other assignments, and because the record is insufficient, we do not reach other ineffective assistance of counsel claims. Therefore, we affirm.

II. BACKGROUND

Mrza emigrated from Iraq to the United States in December 2014. In the fall of 2016, Mrza met N.W., the victim, in a class at a community college. The conviction flowed from an event on November 12, 2016, which we summarize in more detail later in this opinion.

The State charged Mrza with first degree sexual assault, pursuant to Neb. Rev. Stat. § 28-319 (Reissue 2016). Mrza pled not guilty. The case proceeded to a jury trial. Throughout the trial, Mrza utilized an interpreter. Both N.W. and Mrza testified. The jury found Mrza guilty, and the court sentenced him to 8 to 15 years' imprisonment.

Mrza filed a timely appeal, which we moved to our docket.[1]

III. ASSIGNMENTS OF ERROR

We have reordered and restated Mrza's numerous assignments of error, recognizing two primary issues. The first

[1] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

assigns that because trial counsel did not object to the authenticity of "Snapchat" evidence, counsel was ineffective. The second assigns prosecutorial misconduct for "inflammatory and prejudicial statements made during closing arguments." As an alternative on this second issue, Mrza assigns ineffective assistance of trial counsel in failing to move for a mistrial based on those statements.

His remaining assignments of error assert that the evidence was insufficient, the sentence was excessive, and trial counsel was ineffective in two other instances, by failing to move to suppress Mrza's statements to law enforcement and by "fail[ing] to adequately investigate [Mrza's] defenses and effectively cross-examine witnesses."

[1] We observe that Mrza's last assignment lacked the specificity we demand on direct appeal. We have held that when raising an ineffective assistance claim on direct appeal, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.[2] And we have long held that 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.[3] It follows that we should not have to scour the argument section of an appellant's brief to extract specific allegations of deficient performance.[4] We now hold that assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity.

Although we will not do so in the future, we have synthesized a specific assignment from the argument section of Mrza's brief, which asserts that trial counsel was ineffective in

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[2] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[3] See, e.g., *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (2019).

[4] See *State v. Dill*, 300 Neb. 344, 913 N.W.2d 470 (2018) (declining to scour record in search of facts that might support claim).

failing to investigate the time between the assault and N.W.'s first interview with law enforcement for possible defenses by failing to (1) subpoena cell phone records of N.W. and the friend she called following the event, (2) investigate the relationship between N.W. and her friend, (3) subpoena video from the restaurant where N.W. and Mrza met before the event, and (4) subpoena Snapchat to obtain self-destructing messages from Mrza, N.W., and N.W.'s friend.

IV. ANALYSIS

1. Snapchat Authentication

Mrza argues that his trial counsel was ineffective in failing to object, on the ground of authenticity, to "Snapchat" evidence.

(a) Additional Facts

The night after the incident, Mrza initiated a conversation with N.W. via Snapchat (Snapchat is a photograph- and text-sharing social media application). At trial, the State questioned N.W. about the Snapchat conversation. N.W. testified that Mrza was her "friend" on Snapchat. They became friends when they added each other's "usernames." She knew it was his account because she typed in the username that he told her. Later, when offering the Snapchat conversation as evidence, N.W. stated that she knew the messages were between herself and Mrza, because "it has his name on it." She affirmed that the photographs of the conversation contained a fair and accurate depiction of the conversation. In the conversation, N.W. directly questioned Mrza about why he did certain things to her after she told him to stop. He apologized for his actions and promised not to do it again. After the State offered the evidence, trial counsel did not object and the court admitted it.

(b) Standard of Review

[2] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. In

reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[5]

(c) General Principles Regarding Ineffective Assistance of Counsel

[3,4] 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 in a subsequent postconviction proceeding.[6] 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.[7] Regarding the Snapchat evidence, we conclude that the record is sufficient to address Mrza's claim.

[5-8] Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[8] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[9] To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[10] To show prejudice, the

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[5] *State v. Smith, ante* p. 154, 922 N.W.2d 444 (2019).

[6] *Id.*

[7] *Id.*

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

[9] *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018).

[10] *Id.*

defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[11] In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[12]

(d) Analysis

The parties disagree as to which standard should be applied to the authentication of the Snapchat messages. The State contends that authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[13] Mrza argues instead that the text message standard of authentication should be applied. Specifically, he argues that because Mrza testified that there were more messages to the conversation, the State failed to show that the messages were an accurate transcription of the conversation.

[9] The State's formulation is a correct statement of the evidence rule governing authenticity.[14] This rule does not impose a high hurdle for authentication or identification.[15] A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[16]

[10] Even if Mrza were correct that the text message authentication standard governs messages sent over social media applications, his claim would fail. Generally, the foundation for the admissibility of text messages has two components:

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[11] *Id.*

[12] *State v. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018).

[13] See Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 2016).

[14] See *State v. Savage*, 301 Neb. 873, 920 N.W.2d 692 (2018).

[15] *Id.*

[16] *Id.*

(1) whether the text messages were accurately transcribed and (2) who actually sent the text messages.[17] Mrza does not challenge the second prong of this test, but argues only that the State failed to prove that the messages were accurately transcribed. In that regard, he conflates accuracy with completeness.

[11] Contrary to Mrza's argument, the existence of other messages does not undermine the accuracy of the messages that were offered. Mrza does not argue that the exhibit received in evidence was not accurate as far as it went. Instead, he argues that there were other messages not included in the exhibit. Essentially, his argument attempts to invoke the rule of completeness[18] under the rubric of authenticity. The rule of completeness allows a party to admit the entirety of an act, declaration, conversation, or writing when the other party admits a part and when the entirety is necessary to make it fully understood.[19] The rule of authentication did not require the State to offer all of the Snapchat messages in evidence. Where there is nothing to suggest that the other messages were relevant or the evidence entered was misleading or prejudicial, the State was not required to enter the entirety of the conversation into evidence.[20]

If Mrza believed that other messages were necessary to make the conversation fully understood, it was his obligation to offer them. But this was not a matter of authentication. Because N.W. testified to the accuracy of the Snapchat messages between herself and Mrza, it was sufficient to show that the messages were accurately transcribed and properly authenticated. Therefore, Mrza's trial counsel did not perform deficiently in failing to assert an objection based on authentication.

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[17] *Id.*

[18] See Neb. Evid. R. 106, Neb. Rev. Stat. § 27-106 (Reissue 2016).

[19] *Id.*; *Savage, supra* note 14.

[20] See *Savage, supra* note 14.

2. Prosecutorial Misconduct

Mrza argues that the prosecutor's closing argument discussing Mrza's use of an interpreter was prejudicial misconduct. Mrza also asserts that to the extent his claim of prosecutorial misconduct was not preserved, his trial counsel was ineffective in failing to move for a mistrial.

(a) Additional Facts

In discussing his assignment of ineffectiveness of counsel in failing to move to suppress Mrza's statements, his appellate brief acknowledges that his "ability to speak and understand the English language" was the subject of extensive testimony "[t]hroughout the case."[21] His brief recites that there was concern at a pretrial hearing whether he had "understood his waiver of a preliminary hearing," because he had not been provided an interpreter in the county court.[22] His brief argues that he had an "imperfect grasp" of the English language.[23]

At trial, the parties addressed Mrza's English language proficiency. In the State's opening statement, it foreshadowed evidence about Mrza's college courses taught in English and how he communicated with N.W. only in English. In Mrza's opening statement, he responded by outlining Mrza's testimony about reading his textbooks numerous times when studying and that he did well in his classes.

This continued when evidence was presented. During N.W.'s direct examination, she stated that her classes were taught in English, she communicated with Mrza in English, he understood her when she spoke in English, she understood his English, and his class notes were in English.

The police sergeant who investigated the case stated that he interviewed Mrza in English and that Mrza appeared to understand English. The investigator testified that Mrza never

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[21] See brief for appellant at 32.

[22] *Id.*

[23] *Id.*

indicated he did not understand English and that he did not read Mrza his *Miranda* rights until he determined that Mrza understood English. Both a video and audio recording and a typed transcript of the investigator's interview of Mrza were received in evidence and displayed to the jury.

On direct examination, Mrza stated that he studied English for 3 years at a university in Kurdistan; that his current textbooks were in English, which he read them two or three times to understand; and that he did not feel that he understood English well enough to understand his trial. On cross-examination, Mrza stated he switched from the English "yes" to the Kurdish "yes" because he was "saying almost everything in Kurdish" already; he took four English classes at a community college in Lincoln, Nebraska; all his classes were taught in English; during class, he rarely used the translation application on his cell phone; and he had a "3-plus" grade point average.

Mrza's prosecutorial misconduct argument focuses on the State's closing argument, when the prosecutor argued, "But I'd submit to you, ladies and gentlemen, this interpreter thing that we've got going on here is a charade. And it's done to try to garnish some type of sympathy from you guys." The prosecutor then commented on Mrza's ability to understand English. This comment cited Mrza's academic record and how he took all his classes in English and received high grades. The prosecutor recalled Mrza's use of English slang in the Snapchat conversation and argued that someone who does not understand English could not text in slang. This argument also called attention to Mrza's trial testimony in which he answered the first half of the direct examination with the English "yes," but after lunch switched to the Kurdish equivalent. Mrza's trial counsel did not object or move for a mistrial.

In Mrza's closing argument, his trial counsel responded by arguing that although Mrza understands English, when interviewed by law enforcement, he used "clunky" English and was difficult to understand in the video. Trial counsel rhetorically

questioned who, "in today's political climate," would try to garner sympathy by claiming to be a refugee. In the State's rebuttal closing argument, it briefly responded by arguing that Mrza's inconsistent statements to law enforcement were not from a lack of understanding English, but because he was distracted and thinking about what he did.

In instruction No. 10, the court told the jury that there was evidence that Mrza had made a statement to a law enforcement officer and that it could rely on the statement only if it decided beyond a reasonable doubt that he made the statement, he understood what he was saying, and the statement was freely and voluntarily made under all of the circumstances surrounding its making. Otherwise, the court instructed, the jury must disregard Mrza's statement even if it thought it was true.

(b) Standard of Review

[12,13] When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, we will review the record only for plain error.[24] An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[25] Generally, we will find plain error only when a miscarriage of justice would otherwise occur.[26]

(c) Analysis

Mrza argues that the prosecutor committed misconduct in his closing argument when he argued that Mrza's use of an interpreter at trial was a charade used to garner sympathy from the jury. Mrza contends that the statements were improper, because there was no issue at trial regarding his

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[24] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[25] *Id.*

[26] *Id.*

proficiency in English. Mrza contends that the statements were the expressions of the prosecutor's personal beliefs and were designed to inflame the prejudices of the jurors. In addition to arguing that the prosecutor's closing argument comments were plain error, Mrza argues that counsel was ineffective for failing to object and request a mistrial. We address this issue with Mrza's remaining ineffective assistance of counsel assignments below.

[14] The State responds that Mrza failed to preserve the purported misconduct. The State is correct. A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.[27] Because Mrza did not move for a mistrial, the alleged error was waived. Accordingly, our direct review of this issue is confined to a search for plain error.

[15-18] Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.[28] Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.[29] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[30] In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.[31]

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

Nebraska courts have not discussed the propriety of a prosecutor's comments on the use of or need for an interpreter. We turn to the decisions of federal and other state courts for guidance.

In *Andrade v. U.S.*,[32] the District of Columbia Court of Appeals assessed a similar situation and determined that the conduct did not rise to the level of plain error. There, the appellate court concluded that the prosecutor had arguably transcended the bounds of permissible comment by making comments during cross-examination about the defendant's use of an interpreter and then using these parts of the cross-examination during closing argument to express an opinion about the defendant's veracity. In the prosecutor's cross-examination, she commented on the defendant's use of an interpreter by telling him, "'you are not going to hide behind translation.'"[33] During closing argument, the prosecutor recounted the defendant's testimony during cross-examination denying that his attorney had told him what to say, and then she commented, "'And then he tries to hide behind the interpretation, maybe, maybe she doesn't translate for you. My questions were simple and they were direct and Spanish is not a very complicated language.'"[34] In determining that there was no plain error requiring reversal, the appellate court relied on the trial court's curative steps in ensuring proper interpretation and use of an interpreter.

In *Diaz v. U.S.*,[35] the District of Columbia Court of Appeals discussed a prosecutor's comments during a "relatively long rebuttal"[36] argument regarding a defendant's use of an interpreter. According to the appellate court, the prosecutor had "ignored the factual record, implying that [the defendant]

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[32] *Andrade v. U.S.*, 88 A.3d 134 (D.C. 2014).

[33] *Id.* at 140.

[34] *Id.* at 141.

[35] *Diaz v. U.S.*, 716 A.2d 173 (D.C. 1998).

[36] *Id.* at 180.

lied when he said he didn't understand what [the alleged victim] said to him in English even though he had 'corrected [the translator's] English translation of what he had said.'"[37] Because the comments expressed personal opinion on the veracity and credibility of witnesses, the court concluded the comments, as a whole, were improper. In assessing the prejudicial value of the comments, the court did find that the corrective instructions by the court, instructing the jury about the role of the interpreter and that arguments by counsel are not evidence, ameliorated any harm from the statements. Other factors showed that the comments did not mislead the jury, the case turned on the credibility of witnesses, and there was sufficient evidence without the comments to believe the victim. The appellate court held that the defendant was not prejudiced by improper comments.

In *U.S. v. Ganadonegro*,[38] the U.S. Court of Appeals for the 10th Circuit assessed whether questions asked and objected to on cross-examination about the use of an interpreter amounted to prosecutorial misconduct. In opening statements, defense counsel discussed how the interpretation of "'shaking'" from English to Navajo would be the crux of the trial.[39] When the FBI interviewed the defendant, he had an interpreter present. An expert testified to the defendant's competency in English and how he may have responded appropriately, even if he did not fully understand what was being said. During cross-examination of the defendant, the prosecutor extensively questioned him about his use of an interpreter, which drew several objections from defense counsel. The prosecutor drew a concession when the defendant admitted that he used the interpreter once in his first trial. The court concluded that the prosecutor's conduct was not improper, because the defendant's defense relied heavily on his language proficiency.

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[37] *Id.*

[38] *U.S. v. Ganadonegro*, 560 Fed. Appx. 716 (10th Cir. 2014).

[39] *Id*. at 718.

Therefore, the prosecution was entitled to pursue the theory of the defense.

In *State v. Heredia*,[40] the defendant challenged comments made by the prosecutor during cross-examination and closing argument about his use of an interpreter not under the Due Process Clause, but under the 5th, 6th, and 14th Amendments to the U.S. Constitution. During cross-examination, the prosecutor asked, "'You say that you don't speak English that well?'"; "'You were able to get a social security card, right, this one in your wallet?'"; and "'Are you given any kind of a test when you come to court to decide whether or not you need an interpreter?'"[41] During closing argument, the prosecutor made the following statement: "'And I'd ask you not to be persuaded by his demeanor when he's on the stand, when he leans over and looks, kind of sits down, slouched over, looks up at the interpreter and says, "como, como," like he doesn't know what's going on.'"[42] The Supreme Court of Connecticut reasoned that the comments at issue did not burden the defendant's right to an interpreter, but focused on the conflict between his demeanor on the stand and the dangerous assailant described by the State's witnesses. The court concluded that there was no violation of the defendant's constitutional rights.

We have explained that "a distinction exists between arguing that a defense strategy is intended to distract jurors from what the evidence shows, which is not misconduct, and arguing that a defense counsel is deceitful, which is misconduct."[43] Similarly, we distinguish between the prosecutor's statements directing the jury toward evidence of the defendant's proficiency in English relevant to an issue, which is not misconduct, and a comment which could be construed as attacking the

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[40] *State v. Heredia*, 253 Conn. 543, 754 A.2d 114 (2000).

[41] *Id.* at 551, 754 A.2d at 120.

[42] *Id.*

[43] *State v. Dubray*, 289 Neb. 208, 227, 854 N.W.2d 584, 605 (2014).

defendant as being deceitful or manipulative in his need for an interpreter in court proceedings.

> This does not mean that, in any case in which the defendant avails himself of the services of an interpreter, the state would be free to focus on that fact in a manner that was irrelevant to the issues in the case, or in a manner that unduly casts doubt on the necessity of those services.[44]

We have held that a defendant's inability to comprehend criminal proceedings or communicate in English at such proceedings can result in a violation of the defendant's due process and Sixth Amendment rights.[45] Prosecutors should carefully consider this distinction in commenting on language proficiency.

We agree with Mrza that the prosecutor's "charade . . . to garnish . . . sympathy" comment, viewed in isolation, did not refer to any issue at trial. A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.[46] But Mrza's understanding of the statements that he made to law enforcement officers was at issue. The remainder of the argument, addressing facts pertinent to that understanding, was not improper. Thus, viewing the matter through the prism for plain error, we must assess the extent of prejudice associated with this isolated statement.

[19,20] Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[47] In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks;

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[44] *Heredia, supra* note 40, 253 Conn. at 560, 754 A.2d at 125.

[45] *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

[46] *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016).

[47] *Id.*

(4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.[48]

First, we turn to the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury. Viewed in isolation, that comment could be viewed as an attempt to unduly influence the jury. Regarding Mrza's interaction with N.W., his defense was not predicated on a lack of English proficiency. But his linguistic proficiency did bear on the voluntariness of his statements to law enforcement officers.

Second, we turn to whether the conduct or remarks were extensive or isolated. As we have observed, the "charade . . . to garnish . . . sympathy" comment was isolated. It was brief, particularly in the context of the 60-minute closing argument. During rebuttal argument, the State briefly discussed Mrza's comprehension but only in the context of whether he understood English when interviewed by law enforcement.

Third, we turn to whether defense counsel invited the remarks. Here, we focus specifically on the "charade . . . to garnish . . . sympathy" comment. We cannot say that defense counsel invited this particular comment; to the contrary, it seemed to have been a longstanding concern of the prosecutor.

Fourth, we look to whether the court gave any curative instruction. Mrza did not object to the comments and, accordingly, did not request a curative instruction or a mistrial. The court instructed the jury that comments of attorneys are not evidence and that their decision must be based solely on the evidence. Moreover, instruction No. 10 instructed the jury that in assessing the voluntariness of Mrza's statements, it must consider whether Mrza understood what he said.

Finally, we turn to the strength of the evidence supporting Mrza's conviction. The evidence ultimately presented a classic "she said, he said" situation. In that situation, Mrza's statements to law enforcement officers were important to the State's

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[48] *Id.*

case. Thus, his understanding of those statements was essential to the jury's reliance on his statements. But because the strength of the State's case highly depended upon a comparison of Mrza's credibility to that of N.W., even an isolated comment had the potential for unfair prejudice.

After considering the above factors in the context of a review for plain error, we conclude that the isolated comment did not clearly demonstrate prejudice. Therefore, we do not find plain error in the prosecutor's closing argument.

3. Sufficiency of Evidence

Mrza argues that the evidence was insufficient to support his conviction. We disagree.

(a) Additional Facts

We recite these facts in the light most favorable to the State. On the evening of November 12, 2016, N.W. sent a message via Snapchat asking Mrza to go to dinner with her. They met at 11:30 p.m. at a restaurant on North 27th Street in Lincoln. Around 1 a.m., they finished their meals, but N.W. did not want to go home and suggested that they "cruise O Street." Mrza agreed and offered to drive.

Upon entering Mrza's vehicle, Mrza hugged N.W. with both hands on her mid-back. Mrza began kissing her neck. Mrza pulled down the collar of N.W.'s T-shirt to expose her breast and began kissing her breast. Mrza asked if she liked it, and she responded, "'Yes.'" Mrza began rubbing her vagina on the outside of her pants. Again, he asked if it felt good and she said, "'Yes.'"

Mrza moved his hand underneath her pants. She stated that she "wasn't okay with that" and told him, "'Stop. I don't want to do this.'" Mrza digitally penetrated N.W. N.W. stated that Mrza was "getting frustrated" with her and was forcefully putting his fingers in and out of her vagina. Mrza removed his fingers and aggressively kissed her on the mouth.

Mrza unbuttoned his pants and "pulled out his penis." Mrza grabbed the back of N.W.'s head, pulled it down to his penis,

and inserted his penis in her mouth. He forced her head up and down on his penis. N.W. turned her head and told him, "'Stop. I don't want to do this.'" N.W. pulled her head away.

Mrza tried to digitally penetrate N.W.'s vagina again, but she stopped him. He then pulled her pants down to her midthigh and attempted to perform oral sex on her. She remembered telling him multiple times to stop and that she did not want to do this.

N.W. attempted to open the vehicle door, and Mrza grabbed her shoulder, pulled her into the car, and shut and locked the doors. N.W. recalled that Mrza told her to get in the back seat and that "he wanted to fuck me." She unlocked the door and ran to her car.

A few hours later, N.W. met a friend to tell him about the incident and he called the police. A police officer responded to the call and briefly interviewed N.W. before advising her to go to the hospital for an examination. N.W. went to a hospital with her mother for a sexual assault nurse examination. At the hospital, N.W. gave a detailed statement of the events to the examining nurse and a police sergeant. These statements are nearly identical to the events to which she testified to at trial.

(b) Standard of Review

[21] 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.[49]

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[49] *Smith, supra* note 5.

(c) Analysis

Mrza argues that although Neb. Rev. Stat. § 29-2028 (Reissue 2016) states, "The testimony of a person who is a victim of a sexual assault . . . shall not require corroboration," in this case, the victim's statement lacked corroboration and therefore was insufficient to find Mrza guilty. Mrza contends that N.W.'s inconsistent statements to the police officer, the nurse, and the police sergeant about when she did and did not consent made her testimony not credible and did not provide sufficient evidence for the jury to find Mrza guilty beyond a reasonable doubt.

[22] The State was not required to corroborate N.W.'s testimony. Since 1989, the State has not been required to corroborate a victim's testimony in cases of first degree sexual assault; if believed by the finder of fact, the victim's testimony alone is sufficient.[50] Therefore, if the jury believed N.W., her testimony alone was sufficient. After viewing the facts in the light most favorable to the prosecution and without passing on the credibility of witnesses, there was sufficient evidence for any rational trier of fact to find Mrza guilty beyond a reasonable doubt.

4. Excessive Sentence

Mrza argues that the district court imposed an excessive sentence.

(a) Standard of Review

[23] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[51]

(b) Analysis

Mrza argues that the district court abused its discretion by imposing an excessive sentence of 8 to 15 years' imprisonment,

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[50] See *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

[51] *Id.*

rather than a probationary sentence. Mrza contends that his crime did not cause or threaten serious harm, he had no prior criminal or delinquent history, he has a close and positive family support system, and he was engaged in supporting his local ethnic community. He does not dispute that the sentence was within the statutory limits.

We have recited the principles of law governing such claims so many times that we see no point in doing so again here.[52] Simply put, there was no abuse of discretion in the sentence imposed by the district court.

5. Remaining Ineffective Assistance of Counsel Claims

We have already disposed of Mrza's assignment of ineffective assistance of trial counsel regarding the Snapchat evidence. Three claims remain: the failure to move for a mistrial during the prosecutor's closing argument and the two claims set forth in the second paragraph of the assignments of error section (the latter of those two having been synthesized in the fourth paragraph of that section). We have already recited the standard of review and basic principles of law applicable to such claims.

We recognize his ineffectiveness assignment regarding the prosecutor's closing argument referred by paragraph number to the assignment of excessive sentence. But Mrza's argument in his brief made clear that he meant to refer to the prosecutorial misconduct assignment, and it is equally clear that the mistaken numerical reference was an inadvertent typographical error.

Mrza asserts that his trial counsel was ineffective when he failed to move for a mistrial following inflammatory statements made by the prosecutor during closing argument. We agree that Mrza has sufficiently described the deficiency in

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[52] See *id.*

counsel's conduct and that the record does show that no such motion was made.

But this is not one of the rare instances where a reversal on direct appeal is appropriate.[53] Although Mrza has accurately described *what* was not done, the record does not show *why* trial counsel did not move for a mistrial. And we recall that in determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. Because the undisputed facts in the record cannot conclusively determine whether counsel did or did not provide effective assistance and whether Mrza was prejudiced by the alleged deficient performance,[54] the record is not sufficient to address the claim on direct review.

In response to Mrza's remaining claims of ineffective assistance of trial counsel, the State responds that the record is not sufficient to address them. We agree.

V. CONCLUSION

We conclude that there is no merit to the assignments of error we can reach on direct appeal. Accordingly, we affirm Mrza's conviction and sentence.

Affirmed.

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[53] See, *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *overruled on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[54] See *Smith, supra* note 5.

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

In re Trust known as the Maintenance Fund of the Sunset Memorial Park Chapel Mausoleum Company of Scottsbluff, Nebraska. Bank of the West, formerly known as The Guardian State Bank and Trust Co., Trustee, appellee and cross-appellant, v. Sunset Memorial Park Cemetery Association, Inc., and Myrtle Hughbanks, interested parties, appellants and cross-appellees.

925 N.W.2d 695

Filed April 19, 2019. No. S-18-517.

1. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
2. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
3. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
4. **Decedents' Estates: Trusts: Equity: Appeal and Error.** The removal of a trustee is a question of equity, and therefore an appellate court reviews de novo the question of whether a trustee was properly removed.
5. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
6. **Jurisdiction: Standing.** The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.

7. **Standing: Jurisdiction: Proof.** A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing.
8. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
9. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.
10. **Trusts.** In the case of a special purpose trust, trustees cannot on their own decide that carrying out the trust as originally planned has become impossible or inexpedient.
11. **Trusts: Fees.** A trustee will generally not be allowed to resign if the terms of the trust agreement, agreed to by the settlor and trustee, became inadequate according to the present market value of a trustee's services.

Appeal from the County Court for Scotts Bluff County: James M. Worden, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellants.

John A. Selzer, of Simmons Olsen Law Firm, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Bank of the West, formerly known as The Guardian State Bank and Trust Co. (Trustee), as trustee for a trust fund created for the perpetual care and maintenance of the Sunset Memorial Park Mausoleum, petitioned the county court for Scotts Bluff County to resign as trustee; to be paid trustee fees, expenses, and attorney fees; and to terminate the perpetual care trust due to circumstances not anticipated at the time the trust was created. Several objectors opposed terminating the trust, including

Myrtle Hughbanks, a person who owns a crypt in the mausoleum, and Sunset Memorial Park Cemetery Association, Inc. (Cemetery Association), a nonprofit corporation that owns and operates the surrounding cemetery in which the mausoleum is located. The county court found that the Cemetery Association lacked standing and accepted the resignation of the Trustee. The county court ordered the Trustee to pay trustee fees, attorney fees, costs, and expenses incurred during the prosecution of the petition, which payments would exhaust the balance of the trust fund. The county court denied both parties' motions for attorney fees, and its order did not provide for future trust management. The Cemetery Association and Hughbanks appealed, and the Trustee cross-appealed. We determine that in addition to Hughbanks, the Cemetery Association possesses standing, and that the county court's ruling to the contrary was error. Further, because of the perpetual nature of a mausoleum trust, it was error to grant the Trustee's request for resignation and discharge without the Trustee's having identified and requested the appointment of a successor trustee. Accordingly, we affirm the county court's denial of the parties' motions for attorney fees, but we reverse the order of discharge and associated award of fees and remand the cause for further proceedings.

STATEMENT OF FACTS

The issues in this case must be decided by reference to the mausoleum-related statutes and the Trust agreement. The statutes are found at Neb. Rev. Stat. § 12-601 et seq. (Reissue 2012) and include the following language applicable to this case.

Section 12-613 provides:

> It shall be unlawful for any person, firm, partnership, limited liability company, corporation, or association to sell, transfer, or assign any niche or crypt in a columbarium or mausoleum without establishing a trust fund for the perpetual care and maintenance of such columbarium

or mausoleum as provided by sections 12-603 and 12-606 to 12-618.

Section 12-614 provides in part:

> Any person, partnership, limited liability company, firm, corporation, or association which sells, assigns, or transfers any crypt or niche in a mausoleum or columbarium shall set aside a sum of not less than fifty dollars for each crypt and not less than twenty-five dollars for each niche or ten percent of the sale price of each crypt or niche whichever sum is the greater.

Section 12-616 provides:

> The truste or trustees [of the trust fund] shall have the authority to receive gifts or bequests of money and other personal property and devises of real estate and any interest therein, to be placed in the perpetual care fund. The principal of the perpetual care fund shall be forever held inviolate as a perpetual trust, by said trustee or trustees, and shall be maintained separate and distinct from any other funds. The principal of the perpetual care fund shall be invested and, from time to time, reinvested and kept invested in securities, authorized by the State of Nebraska, for the investment of trust funds, and the income earned therefrom shall be used solely for the general care, maintenance, and embellishment of the mausoleum or columbarium, and shall be applied in such manner as the person or persons owning or operating the mausoleum or columbarium may, from time to time, determine to be for the best interests of such mausoleum or columbarium.

Where relevant, we view these specific mausoleum statutes as controlling our trust analysis. See Neb. Rev. Stat. § 30-3835 (Reissue 2016).

This case concerns a perpetual care and maintenance trust fund known as the Maintenance Fund of the Sunset Memorial Park Chapel Mausoleum Company of Scottsbluff, Nebraska (Trust), associated with the Sunset Memorial Park Mausoleum

in Scotts Bluff County, Nebraska. The Sunset Memorial Park Chapel Mausoleum Company (Mausoleum Company) was created in 1976 as a mausoleum association established as a private corporation under the provisions of § 12-601 et seq. In 1978, the Mausoleum Company acquired property and built the mausoleum building. The mausoleum is located in the Sunset Memorial Park Cemetery. The record suggests that ideally, the Mausoleum Company would manage and care for the mausoleum building.

The Trust.

As required by statute, the Trust was established for the perpetual care and maintenance of the mausoleum. See §§ 12-613 to 12-616. On March 28, 1980, the Trust was executed between the Mausoleum Company and The Guardian State Bank and Trust Co. The Trust agreement provides that the trustee includes not only "THE GUARDIAN STATE BANK AND TRUST CO., of Alliance, Nebraska . . . but also any successor, legal merger, or assignees thereof."

Several portions of the Trust agreement, reflecting compliance with the mausoleum statutes, are relevant to the issues considered at trial. The Trust agreement provides for a "SEPARATE PERPETUAL CARE TRUST" account kept apart from other funds, "to be forever conserved for the perpetual maintenance of [the] mausoleum." See § 12-613. It provided that the principal of the Trust "shall be forever held inviolate as a perpetual trust, by the TRUSTEE." See § 12-616. Income earned from investments "shall be used solely for the general care, maintenance, and embellishment of the mausoleum." The Trust agreement required the Trustee to pay the net income from the Trust semiannually to the "person, firm or corporation, who shall be lawfully in actual possession, management, and operation of said mausoleum at the time a particular semiannual payment is due."

Under paragraph 2(b) of the Trust agreement, the trustee shall be "a disinterested trust company organized to do business

in the State of Nebraska." The trustee "shall derive its authority and be selected by, the officers of the cemetery association, in which [the Mausoleum Company] is a part, namely [the] Cemetery Association." Paragraph 12 of the Trust agreement provides, in part, that the trustee may resign and discharge itself of the duties and obligations of a trustee by applying to the court for the appointment of a successor trustee.

Accounting records show that in 1980, the Trust was seeded with a $5,000 bond contributed by the Mausoleum Company. The total principal contributed to the Trust from the sale of niches and crypts or as a gift, devise, or bequest is approximately $7,500.

Mausoleum Decline.

Shortly after the construction of the mausoleum, the Mausoleum Company took on debt which it was ultimately unable to pay. The Mausoleum Company was forced to replace all but one of its trustees, and a company from outside of the community took control of the Mausoleum Company in an unsuccessful effort to satisfy the debt. The appointed trustees continued to operate the Mausoleum Company to a point after 1990, and thereafter, the Mausoleum Company became inactive. By 2001, several of the officers who had been in control of the Mausoleum Company were deceased. The accountings of the Trustee show that the last distribution of income to the Mausoleum Company was in 1998 and represented the balance of the 1997 income of the Trust. The Trustee has made no distributions to the Mausoleum Company since 1998. Although the evidence establishes that the Mausoleum Company has not been active since July 1, 1998, the Trust remains in existence.

A new mausoleum association was formed in 1993 in an attempt to access the Trust funds, but the new association could not show it was the legal successor to the Mausoleum Company and was unable to acquire ownership of the mausoleum.

Over the years, the administration of the Trust moved from one banking entity to another due to name changes and mergers, and it appears undisputed that Bank of the West is now serving as Trustee. In recent years, the income from the Trust has been insufficient to cover the Trustee's fees and other expenses, and the value of the Trust account has declined. A trust officer of the Trustee testified that in his opinion, the value of the Trust did not justify the cost of administering the Trust and that if the Trust was allowed to continue, it would continue to decline in value. The trust officer also testified that in his opinion, no other entity would accept the trusteeship of the Trust under the present circumstances.

The county court found, and the evidence supports, that the mausoleum property was not actively managed and that over time, the condition of the mausoleum building deteriorated from lack of care and maintenance.

Proceedings to Terminate the Trust.

In 2017, the Trustee filed a petition to terminate the Trust due to circumstances not anticipated at the time of the creation of the Trust. The petition alleged that the mausoleum was abandoned. The Trustee sought authorization from the court for the Trust to pay trustee fees, tax preparation expenses, and attorney fees. The petition suggested that the Trustee be allowed to transfer the remaining assets of the Trust to Scotts Bluff County, Nebraska.

An answer to the petition was filed by the Cemetery Association that owns and operates the cemetery in which the mausoleum building was constructed. The Cemetery Association appeared and asserted it had standing because, inter alia, the Trust agreement provides in paragraph 2 that it selects the Trustee and has served as caretaker of the mausoleum. For completeness, we note that the Cemetery Association claims to be the same entity as the Sunset Memorial Park Cemetery Association, the latter of which is named in the Trust agreement and of which the mausoleum is said to be "a part."

The Cemetery Association asserted various objections and affirmative defenses. The Cemetery Association alleged, summarized and restated, that the Trustee violated the Trust and Nebraska statutes in various ways and that the Trustee allowed niches and crypts to be sold in the mausoleum without recovering money from those sales for the Trust fund. It objected to transferring the trust funds to Scotts Bluff County.

Hughbanks also appeared in the case. She appeared for herself as a person who owns a crypt in the mausoleum and for her late husband who was entombed there after his death in 1993. According to the purchase agreement, the purchase price of the crypt included funds necessary for a perpetual care trust fund. In this regard, we note that paragraph 2(a) of the Trust agreement provides that the greater of $50 or 10 percent of the sale price of each crypt shall be set aside to the Trust fund, as required by statute. See § 12-614. Hughbanks testified that she has been active in the Cemetery Association and was an officer of the 1993 association, but that the 1993 association was not able to acquire the control of the mausoleum. Hughbanks testified that she did not agree with any action which would deplete the Trust and did not agree to terminating the Trust or transferring it to Scotts Bluff County.

Following a trial, the county court determined that the Cemetery Association lacked standing to object to the Trustee's petition. The court reasoned that the Cemetery Association did not have a legal interest in the Trust and was merely an adjacent landowner. Nonetheless, the county court reviewed the Cemetery Association's claims and found them to be without merit.

With regard to the Trustee's petition, the county court found that "[t]here does not appear to be anything preventing the Trustee from resigning and becoming discharged." It stated that "the court finds the Trustee's request for discharge is granted." It further stated that the "Trustee shall retain authority to pay . . . fees, costs, and expenses from the trust property." It found that based on the Trustee's evidence, attorney fees and

expenses for the prosecution of the petition were fair and reasonable. The court otherwise denied both parties' motions to assess attorney fees, costs, and expenses incurred in defending the others' claims. The court stated that "[b]ased upon the current Trust accounting and the above expenses there will not be any funds remaining in the trust" and concluded that the court need not appoint future trust management. The court denied the Trustee's petition to terminate the Trust. The court ordered that the Trustee will be discharged upon filing a final accounting of the payments and disbursements.

The Cemetery Association and Hughbanks appealed, and the Trustee cross-appealed.

ASSIGNMENTS OF ERROR

The Cemetery Association and Hughbanks claim, summarized and restated, that the county court erred (1) when it found that the Cemetery Association lacked standing and (2) and when it directed the Trustee to disburse "inviolate" funds to itself from the principal of the Trust.

The Trustee assigns in its cross-appeal that the county court erred when it failed to (1) order the Cemetery Association to pay the Trustee's attorney fees, costs, and expenses; (2) provide for future trust management; and (3) terminate the Trust.

STANDARDS OF REVIEW

[1,2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018). The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Id*.

[3,4] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record. *In re Henry B. Wilson, Jr., Revocable Trust*, 300 Neb. 455, 915 N.W.2d 50 (2018).

The removal of a trustee is a question of equity, and therefore an appellate court reviews de novo the question of whether a trustee was properly removed. *Id*.

ANALYSIS

Standing.

The county court concluded that the Cemetery Association lacked standing. Because our review of the record shows the Cemetery Association possessed a legal interest in the proceedings under the Trust document, we conclude that the Cemetery Association had standing and that the county court's conclusion to the contrary was error as a matter of law.

[5-9] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy. *Wisner v. Vandelay Investments, supra*. The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Id*. A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing. *Id*. Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. *Eagle Partners v. Rook*, 301 Neb. 947, 921 N.W.2d 98 (2018). Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties. See *id*.

Under the Trust agreement, the legal relationship between the Cemetery Association and the Mausoleum Company is intertwined and consistent with the statutory framework establishing mausoleum perpetual care trusts. Under the Trust agreement, the officers of the entity now known as the Cemetery Association select the trustee. Paragraph 2(b) of the Trust provides that the trustee "shall derive its authority and be selected by, the officers of the [C]emetery [A]ssociation, in which [the Mausoleum Company] is a part, namely Sunset Memorial Park

Cemetery Association." This provision mirrors § 12-615(2), which provides that "[t]he trustee or trustees [of the mausoleum perpetual care trust], as the case may be, shall be selected by the officers of the cemetery association." The Cemetery Association established that it is effectively the successor to the originally established association and that therefore, it has the authority to select the trustee.

The Trustee's petition concerns its resignation as the trustee, and implicates the selection of a new trustee. The petition raises the issue of the potential termination of the Trust itself and, given its allegation of abandonment, the potential reversion to Scotts Bluff County. See Neb. Rev. Stat. § 12-701(1) (Reissue 2012) (providing upon abandonment of mausoleum "[t]he ownership of or right in or to an unoccupied cemetery lot or part of a lot in any cemetery in the state shall . . . revert to the city, village, township, or cemetery association having the ownership and charge of the cemetery containing such lot or part of a lot"). The Cemetery Association has a legal interest in these matters under the Trust agreement and, accordingly, has standing in this case.

Other facts also support our conclusion that the Cemetery Association has standing. The mausoleum is located in the midst of the cemetery, as required by statute. See § 12-606. In the absence of active management of the mausoleum by the Mausoleum Company, the Cemetery Association's agents performed maintenance in and around the mausoleum, as the county court acknowledged. The threat of reversion concerns the Cemetery Association.

The Cemetery Association, responsible for the cemetery, is acting in its own interest and is not merely an actor in the "'public interest'" as asserted by the county court and the Trustee. See *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). Accordingly, the Cemetery Association established standing to assert its various arguments in the county court and on appeal. The county court erred when it concluded otherwise.

Resignation of Trustee.

The Trustee's petition sought an order approving the accounting of the Trustee, discharging it as trustee, and seeking termination of the Trust. As we explain below, the county court erred when it effected the discharge of the Trustee without meeting the terms of paragraph 12 of the Trust agreement requiring consideration and evaluation of appointment of a successor trustee.

The trust at issue in this case is a trust for a specific noncharitable purpose, i.e., care of the mausoleum, and is subject to the mausoleum-related statutes noted above. See Unif. Trust Code § 409, comment, 7D U.L.A. 152-53 (2018). The statutes applicable to this special purpose trust endeavor to facilitate "perpetual care" as opposed to care for a period of years. *Id.* at 153. See §§ 12-613 and 12-616. We take seriously these expressions of the Legislature's intentions to the effect that the structure of the Trust fund be preserved. The terms of the Trust agreement reflect these objectives.

Resignation of a trustee was contemplated by the Trust agreement. Under paragraph 12, a trustee seeking to be discharged from its duties as trustee for the Trust must "apply to [the applicable court] for the appointment of a successor trustee." The nature of the Trust, expressed in this language of the Trust agreement and in the special statutory framework by which it was created, requires that a perpetual care trust have a trustee. See § 12-615. We read paragraph 12 to require consideration of an identifiable successor trustee before a current trustee may resign from its duties. Allowing a trustee to resign without securing a successor trustee or otherwise providing for future management is contrary to the intent of the settlors of the Trust and § 12-615; such disposition is inconsistent with the notion that reasonable steps must be taken to ensure perpetual care. See §§ 12-613 and 12-616.

[10,11] It is generally understood, and we agree, that in the case of a special purpose trust, trustees cannot on their own decide that carrying out the trust as originally planned

has become impossible or inexpedient. See George Gleason Bogert & George Taylor Bogert, Trusts and Trustees § 435 (rev. 2d ed. 1991). We find supporting case law for the proposition that a trustee will generally not be allowed to resign if the terms of the trust agreement, agreed to by the settlor and trustee, became inadequate according to the present market value of a trustee's services. See, *In re Loree*, 24 N.J. Super. 604, 95 A.2d 435 (Ch. Div. 1953); *Town of Cody v. Buffalo Bill Mem.*, 64 Wyo. 468, 196 P.2d 369 (1948); *Empire Trust Co. v. Sample*, 50 N.Y.S.2d 5 (Sup. 1944); Bogert & Bogert, *supra*, § 515 (rev. 2d ed. 1978). Although in recent years the income from the Trust no longer covered or exceeded the Trustee's expenses, the Trustee had accepted the duty of administering the Trust with full knowledge of the situation and the nature of an inviolate fund and voluntarily assumed the duties and obligations of a trustee. The Trust indisputably has a lawful, statutorily authorized purpose, and the county court must determine how it could continue to serve that purpose. See § 12-613.

The Trustee did not fully comply with paragraph 12 of the Trust. Under the circumstances of this case and based on the Trust agreement language, the county court abused its discretion when it allowed the Trustee to resign, without providing for a successor trustee or future management.

It follows that the county court erred when it awarded the Trustee "costs, fees, and expenses incurred as a result of litigation." Under the circumstances of this case, litigation costs incurred by the Trustee's seeking to be discharged in a manner inconsistent with paragraph 12 of the Trust should not have been awarded, nor should the Trustee have been paid from the inviolate Trust. See *Matter of Memory Gardens*, 91 A.D.2d 1163, 458 N.Y.S.2d 737 (1983). We find no error in the denial of awards for attorney fees, but set aside all other orders of the county court raised in this appeal. In view of our disposition of the controlling questions, the issues raised by the Trustee's cross-appeals are moot or without merit.

CONCLUSION

For the reasons explained above, we conclude that the Cemetery Association had standing to assert claims in the county court and on appeal and that the county court erred when it accepted the resignation of the Trustee. The orders of the county court denying attorney fees were not erroneous, but we set aside all other orders of the county court raised in this appeal. We affirm in part, and in part reverse the order and remand the cause for further proceedings consistent with this opinion.

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

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

Brooke Wilkison, individually and on behalf of Brianna Wilkison, a minor child, appellee, v. City of Arapahoe, appellant.

926 N.W.2d 441

Filed April 25, 2019. No. S-18-196.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Ordinances: Zoning: Injunction: Equity.** An action to declare an ordinance void and to enjoin its enforcement is equitable in nature.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Ordinances: Appeal and Error.** Interpretation of a municipal ordinance is a question of law, on which an appellate court reaches an independent conclusion irrespective of the determination made by the court below.
5. **Courts: Statutes: Ordinances.** When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.
6. **Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law which an appellate court reviews de novo.
7. **Federal Acts: Discrimination.** The federal Fair Housing Act, as originally enacted in 1968, prohibited the denial of housing on the basis of race, color, religion, or national origin.
8. ____: ____. The federal Fair Housing Act was amended in 1988 to protect against discriminatory practices on the basis of disability.

9. **Federal Acts: Discrimination: Constitutional Law.** The stated policy of the federal Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States."
10. **Courts: Federal Acts.** When construing the federal Fair Housing Act, courts are to give a generous construction to the act's broad and inclusive language.
11. **Federal Acts.** The federal Fair Housing Act's exemptions must be narrowly construed.
12. **Federal Acts: Discrimination.** The federal Fair Housing Act prohibits both individuals and governmental entities from engaging in proscribed forms of discrimination.
13. ____: ____. Prohibited discrimination under the federal Fair Housing Act includes a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.
14. **Federal Acts: Claims: Proof.** The ultimate burden to prove both the reasonableness and the necessity of a requested accommodation remains always with the plaintiffs asserting a reasonable accommodation claim under the federal Fair Housing Act.
15. **Federal Acts: Discrimination.** To determine whether an accommodation under the federal Fair Housing Act is reasonable, the inquiry is highly fact specific, requires balancing the needs of the parties, and involves assessing both financial and administrative costs and burdens.
16. ____: ____. An accommodation under the federal Fair Housing Act is reasonable if it is both efficacious and proportional to the costs to implement it, and an accommodation is unreasonable if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program.
17. **Federal Acts: Discrimination: Proof.** To show that an accommodation is necessary, a plaintiff in a case under the federal Fair Housing Act must show that the accommodation was indispensable or essential to the plaintiff's equal opportunity to use and enjoy his or her dwelling.

Appeal from the District Court for Furnas County: James E. Doyle IV, Judge. Reversed and remanded.

Kevin D. Urbom, Arapahoe City Attorney, for appellant.

Nathaniel J. Mustion, of Mousel, Brooks, Schneider & Mustion, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

The City of Arapahoe, Nebraska, appeals the declaratory judgment and injunction entered by the district court for Furnas County enjoining Arapahoe from enforcing an ordinance against Brooke Wilkison (Brooke) to prohibit his retention of a Staffordshire terrier at his home within the city limits of Arapahoe. This order, in declaring the ordinance invalid as applied to Brooke, determined that the ordinance would violate the federal Fair Housing Act (FHA)[1] by permitting a discriminatory housing practice and precluding Brooke from mitigating the ill effects of his handicap by living with his emotional assistance animal. Arapahoe, on appeal, claims the FHA does not apply to municipal ordinances, that it should not have been enjoined from enforcing its ordinance against Brooke, and that it was error to determine that it was a reasonable accommodation under the FHA to allow Brooke to keep the dog. For the reasons set forth herein, we reverse, and remand.

BACKGROUND

In 1984, Brooke underwent brain surgery which resulted in partial paralysis to the left side of his body. This paralysis and its effects remain, and Brooke contends that his medical issues cause him to be easily frustrated.

In 2015, Brooke got an American Staffordshire terrier—what is commonly known as a pit bull—and brought him to his home in Arapahoe. Brooke testified that the dog, named "Chewy," is a regular companion and provides him with support for dealing with the frustration he experiences as a result of his physical limitations.

Arapahoe passed an ordinance in December 2016 relating to "dangerous dogs." Section 6-109 of the ordinance defined

[1] See 42 U.S.C. §§ 3601 to 3619 (2012).

a "dangerous dog" as "any dog that has inflicted injury upon a human being that required medical treatment by a physician or any other licensed health care professional." That section also described prohibited certain breeds and stated:

> The following breeds shall be prohibited and or banned from being within the city limits of Arapahoe at any time. These breeds are as follows: Pit Bulls & Staffordshire Terriers, Rottweilers, and any cross breed that contains one or more of those breeds. With reference to those who own these breeds and have been licensed within the City of Arapahoe prior to January 1st, 2017, the animal will be grandfathered in as acceptable, however, in the event that said animal is found to be at large the grandfather status will be revoked and will be deemed prohibited at that time.

Section 6-111 of the ordinance directed that the owner of a prohibited dog is guilty of a Class IIIA misdemeanor, and § 6-112 of the ordinance instructed that a prohibited dog that has inflicted injury "shall be immediately confiscated by an animal control authority, placed in quarantine for the proper length of time, and thereafter destroyed in an expeditious and humane manner."

Brooke's dog was not registered with Arapahoe prior to January 1, 2017. According to Brooke's wife, she attempted to register the dog but was refused due to incorrect paperwork. In January, after the ordinance went into effect, a law enforcement officer informed Brooke he would have to get rid of the dog, because it was one of the prohibited breeds under the ordinance.

Following the interaction with the law enforcement officer, Brooke obtained a statement on a prescription pad from a physician assistant, who is one of Brooke's medical providers, that recommended Brooke be able to keep the dog inside as a therapy animal, given his disability. Brooke, individually and on behalf of his daughter, then filed suit in the district court seeking a declaratory judgment and an injunction to prevent

Arapahoe from implementing and enforcing the ordinance. Brooke asserted three causes of action: (1) that the ordinance violated the FHA which prohibits housing practices that discriminate on the basis of disability; (2) that the ordinance violated the U.S. Constitution's Equal Protection Clause, because it singled out certain breed owners for disparate treatment without any rational purpose for doing so; and (3) that the ordinance violated the U.S. Constitution's Due Process Clause, because it deprived him of property without proof that the dog was a vicious or dangerous animal.

After a trial in this matter, the court issued an order declaring the ordinance invalid as applied to Brooke's retention of the dog in his home and enjoining Arapahoe from enforcing the ordinance against Brooke. The court determined that, if enforced against Brooke, the ordinance would violate the FHA "by permitting a discriminatory housing practice, i.e., precluding Brooke from mitigating the ill effects of his handicap by living with his emotional assistance animal." Thus, the court concluded that the ordinance was "preempted by the FHA in the context of Brooke's use of his emotional support animal." The court rejected Arapahoe's argument that its ordinance was exempted from the operation of the FHA. The court specified that nothing in the injunction or declaratory judgement precludes Arapahoe from requiring licensing of any animal kept within Arapahoe's city limits by Brooke. Because it granted relief based on the FHA, the court did not consider the causes of action based on the Equal Protection and Due Process Clauses.

ASSIGNMENTS OF ERROR

Arapahoe assigns, restated, that the district court erred in entering the declaratory judgment and enjoining the city from enforcing the ordinance by (1) holding that the FHA applies to the ordinance enacted by the city and (2) determining that keeping a specific animal prohibited by the city ordinance is a reasonable and necessary accommodation under the FHA.

STANDARD OF REVIEW

[1-3] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[2] An action to declare an ordinance void and to enjoin its enforcement is equitable in nature.[3] In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[4]

[4-6] Interpretation of a municipal ordinance is a question of law, on which we reach an independent conclusion irrespective of the determination made by the court below.[5] When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.[6] The interpretation of statutes and regulations presents questions of law which we review de novo.[7]

ANALYSIS

Applicability of FHA

[7-10] Arapahoe's first assignment of error centers on the applicability of the FHA. The FHA, as originally enacted in

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[2] *Fredericks Peebles v. Assam*, 300 Neb. 670, 915 N.W.2d 770 (2018).

[3] *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). See, also, *R & S Investments v. Auto Auctions*, 15 Neb. App. 267, 725 N.W.2d 871 (2006).

[4] *Fredericks Peebles, supra* note 2.

[5] *Malone v. City of Omaha*, 294 Neb. 516, 883 N.W.2d 320 (2016).

[6] *Id.*

[7] *Id.*

1968, prohibited the denial of housing on the basis of race, color, religion, or national origin.[8] The FHA was amended in 1988 to protect against discriminatory practices on the basis of disability.[9] The stated policy is "to provide, within constitutional limitations, for fair housing throughout the United States."[10] The U.S. Supreme Court has held that when construing the FHA, courts are to give a generous construction to the FHA's broad and inclusive language.[11]

The FHA defines a discriminatory housing practice as any act that is unlawful under 42 U.S.C. § 3603 (effective dates of certain prohibitions), 42 U.S.C. § 3604 (discrimination in sale or rental of housing and other prohibited practices), 42 U.S.C. § 3605 (discrimination in residential real estate-related transactions), or 42 U.S.C. § 3606 (discrimination in provision of brokerage services) of this title.[12] Under 42 U.S.C. § 3617, "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed . . . any right granted or protected by section[s] 3603, 3604, 3605, or 3606 of this title." Section 3617 sets forth that an interference claim does not demand a substantive violation of §§ 3603 through 3606, but instead requires proof of three elements: (1) that the petitioner exercised or enjoyed "any right granted or protected by" §§ 3603 through 3606, (2) that the

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[8] *Texas Dept. of Housing and Community v. ICP*, 576 U.S. 519, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S. Ct. 1776, 131 L. Ed. 2d 801 (1995).

[9] *Id.*

[10] 42 U.S.C. § 3601.

[11] *Oxford House, Inc., supra* note 8. See, also, *Revock v. Cowpet Bay West Condominium Association*, 853 F.3d 96 (3d Cir. 2017); *U.S. v. University of Nebraska at Kearney*, 940 F. Supp. 2d 974 (D. Neb. 2013).

[12] See 42 U.S.C. § 3602(f).

respondent's conduct constituted interference, and (3) that a causal connection existed between the exercise or enjoyment of the right and the respondent's conduct.[13]

In addition, 42 U.S.C. § 3615 provides:

> Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

In the instant case, Arapahoe does not assign the district court erred in determining the elements of a § 3617 claim existed. Instead, Arapahoe contends that § 3603(b) exempts it from the requirements of the FHA.

The applicable language of 42 U.S.C. § 3603(b)(1) provides that nothing in § 3604 (other than subsection (c)) shall apply to "any single-family house sold or rented by an owner," provided that "such private individual owner does not own more than three such single-family houses at any one time[.]" Arapahoe argues that Brooke's claim based on the FHA cannot proceed, because the exemption under § 3603(b)(1) applies to Brooke's residence as a single-family house whose owner owns less than three such single-family houses at any one time.

[11] As noted above, the FHA must be broadly construed to effectuate its purpose of providing "for fair housing

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[13] See, *Revock, supra* note 11; *Hidden Village, LLC v. City of Lakewood, Ohio*, 734 F.3d 519 (6th Cir. 2013); *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc); *U.S. v. City of Hayward*, 36 F.3d 832 (9th Cir. 1994).

throughout the United States."[14] For the same reason, the FHA's exemptions must be narrowly construed.[15]

[12] The FHA prohibits both individuals and governmental entities from engaging in proscribed forms of discrimination.[16] The statutory provision relied upon by Arapahoe was designed to exempt individuals who own three or less "single-family houses" from the strictures of the FHA, not to shield governmental entities from FHA claims based on generally applicable zoning ordinances on the basis that such claims may involve "single-family houses."[17] If we read § 3603(b) utilizing Arapahoe's offered interpretation, then single-family homeowners would be prohibited from seeking redress under the FHA from local ordinances that discriminate against persons with disabilities, while owners with more single-family houses would retain such right. From a plain reading of § 3603(b), it is clear no such distinction was intended by the FHA. For these reasons, Arapahoe was not exempt and cannot rely on § 3603(b)(1) to defeat the FHA claim.

2. Reasonable and Necessary Accommodation Under FHA

Arapahoe contends that even if the exemption under § 3603(b)(1) does not apply to the case at bar, the district court erred in enjoining enforcement of the ordinance against Brooke. Arapahoe argues that under the FHA, it is required to

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[14] 42 U.S.C. § 3601. See, also, *Oxford House, Inc., supra* note 8; *Revock, supra* note 11; *University of Nebraska at Kearney, supra* note 11.

[15] See 42 U.S.C. §§ 3601 and 3603(b). See, also, *Hogar Agua y Vida en el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994); *Massaro v. Mainlands Section 1 & 2 Civic Ass'n*, 3 F.3d 1472 (11th Cir. 1993); *McKivitz v. Township of Stowe*, 769 F. Supp. 2d 803 (W.D. Pa. 2010); *Whisby-Myers v. Kiekenapp*, 293 F. Supp. 2d 845 (N.D. Ill. 2003).

[16] See, *McKivitz, supra* note 15; *Spieth v. Bucks County Housing Authority*, 594 F. Supp. 2d 584 (E.D. Pa. 2009); *Dr. Gertrude A. Barber Center, Inc. v. Peters Tp.*, 273 F. Supp. 2d 643 (W.D. Pa. 2003).

[17] See 42 U.S.C. § 3603(b)(1). See, also, *McKivitz, supra* note 15; *Trovato v. City of Manchester, N.H.*, 992 F. Supp. 493 (D.N.H. 1997).

provide Brooke an accommodation that is both reasonable and necessary, but that the injunction was neither. Arapahoe notes that the ordinance did not prohibit Brooke from having a service animal, but instead only prohibited ownership of certain dog breeds. Moreover, the ordinance includes an exception for those breeds if the dog was registered prior to the operative date of the ordinance and that such was available to Brooke, who did not fully avail himself of that option.

[13,14] Prohibited discrimination under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[18] The ultimate burden to prove both the reasonableness and the necessity of a requested accommodation remains always with the plaintiffs asserting a reasonable accommodation claim under the FHA.[19]

[15,16] To determine whether an accommodation is reasonable, the inquiry is highly fact specific, requires balancing the needs of the parties, and involves assessing both financial and administrative costs and burdens.[20] An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it, and an accommodation is unreasonable if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program.[21] "'A defendant must incur reasonable costs and take modest, affirmative steps to accommodate the handicapped as long as the accommodations sought do not pose an undue hardship or a substantial burden.'"[22]

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[18] 42 U.S.C. § 3604(f)(3)(B). See, also, *Developmental Services of NE v. City of Lincoln*, 504 F. Supp. 2d 714 (D. Neb. 2007).

[19] See *Hollis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531 (6th Cir. 2014).

[20] See, *Revock, supra* note 11; *Developmental Services of NE, supra* note 18.

[21] See *Developmental Services of NE, supra* note 18.

[22] *Hollis, supra* note 19, 760 F.3d at 542.

Though Arapahoe argues that the dog was not a "service dog" as defined by the Americans with Disabilities Act of 1990, such distinction is inconsequential. Unlike that act, the FHA does not set forth minimum regulatory requirements for animals to qualify as a reasonable accommodation.[23] Under a ruling by the U.S. Department of Housing and Urban Development, emotional support animals do not require task-specific training.[24]

Arapahoe has not argued allowing such accommodation would result in undue financial or administrative burdens. Instead, Arapahoe's arguments center on allegations that such an accommodation would fundamentally alter the ordinance and diminish the ability of the city to limit dangerous animals.

Other courts have found accommodations are reasonable under the FHA, which include the use of an emotional support animal in one's own home, despite the existence of a rule, policy, or law prohibiting such an animal.[25] In those instances, even though the accommodations made exceptions to the general programs, such exceptions were limited in scope and the courts did not find the accommodations fundamentally altered the existing rules, policies, or laws or the ability of the institutions to enact and enforce them.

Similarly, in the case at hand, allowing Brooke to maintain his dog in his house does not undermine Arapahoe's ability to protect its citizens against dangerous animals. Though the U.S. Department of Housing and Urban Development allows for the denial of a reasonable accommodation in the form

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[23] See, 28 C.F.R. app. A, § 35 (2018); *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015).

[24] *Warren v. Delvista Towers Condominium Ass'n, Inc.*, 49 F. Supp. 3d 1082 (S.D. Fla. 2014), citing Pet Ownership for the Elderly and Persons With Disabilities, 73 Fed. Reg. 63,834 (Oct. 27, 2008).

[25] See, e.g., *Castillo Condo. v. U.S. Dept. of Housing*, 821 F.3d 92 (1st Cir. 2016); *Anderson, supra* note 23; *Chavez v. Aber*, 122 F. Supp. 3d 581 (W.D. Tex. 2015); *Bhogaita v. Altamonte Heights Condominium Ass'n*, 765 F.3d 1277 (11th Cir. 2014).

of an assistance animal if the "'animal's behavior poses a direct threat and its owner takes no effective action to control the animal's behavior so that the threat is mitigated or eliminated,'"[26] nothing in the record indicates that Chewy has been dangerous in the past or poses a direct threat to others. The exception extended to Brooke is limited to Chewy's being kept in the house and does not preclude Arapahoe from requiring Brooke to license the dog. The ordinance presently creates an exception for dogs licensed prior to the effective date of the ordinance.

Accommodating Brooke's disability by allowing him to maintain his dog would not fundamentally alter the ordinance and diminish the ability of Arapahoe to limit dangerous animals.

Arapahoe also claims that the accommodation is unnecessary, because Brooke has other dog breed options which are not prohibited by the ordinance. The FHA "links the term 'necessary' to the goal of equal opportunity. . . . Plaintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice."[27] "'[T]he concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability.'"[28] As a result, "[t]he necessity element is, in other words, a causation inquiry that examines whether the requested accommodation or modification would redress injuries that otherwise would prevent a disabled resident from receiving the same enjoyment from the property as a non-disabled person would receive."[29]

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[26] See *Warren, supra* note 24, 49 F. Supp. 3d at 1087.

[27] *Smith & Lee Associates v. City of Taylor, Mich.*, 102 F.3d 781, 795 (6th Cir. 1996).

[28] *Id.*

[29] *Hollis, supra* note 19, 760 F.3d at 541.

[17] But while a plaintiff must show that a requested accommodation enhances the enjoyment of his or her residence, it does not follow that all accommodations that do so are necessary. "The word ['necessary'] implies more than something merely helpful or conducive. It suggests instead something 'indispensable,' 'essential,' something that 'cannot be done without.'"[30] In addition, the "FHA's necessity requirement doesn't appear in a statutory vacuum, but is expressly linked to the goal of 'afford[ing] . . . equal opportunity to use and enjoy a dwelling.'"[31] Put simply, the FHA requires accommodations that are necessary (or indispensable or essential) to achieving the objective of equal housing opportunities between those with disabilities and those without.[32] As the foregoing discussion illustrates, to show that the accommodation was necessary, Brooke was required to show that the accommodation was indispensable or essential to his equal opportunity to use and enjoy his dwelling.

Here, Brooke has presented evidence showing he has a disability stemming from a previous surgery and manifesting in partial paralysis. He has owned his dog since 2015 and testified that the dog is a regular companion that provides support for dealing with the frustration Brooke experiences as a result of his physical limitations. Specifically, Brooke testified that Chewy gets him up and moving around and motivated, because the dog needs to go outside to relieve itself; that an American Staffordshire terrier is "the most loving dog in the world"; and that when Brooke, who is a full-time college student, gets

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[30] *Cinnamon Hills Youth Crisis v. St. George City*, 685 F.3d 917, 923 (10th Cir. 2012), quoting 10 The Oxford English Dictionary 276 (2d ed. 1989). See, also, *Vorchheimer v. Philadelphian Owners Association*, 903 F.3d 100 (3d Cir. 2018).

[31] *Cinnamon Hills Youth Crisis, supra* note 30, 685 F.3d at 923, quoting 42 U.S.C. § 3604(f)(3)(B).

[32] *Id.* See, also, *Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008); *Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597 (4th Cir. 1997).

"brain fog" or "tired of studying," Chewy comes over and nudges Brooke to get his homework done. Brooke also testified that Chewy is like one of the family and that he keeps him calm and helps with Brooke's stress.

However, the evidence indicates that at the time of the hearing, Brooke has suffered from his disability for nearly 35 years and has lived in his current home for 3 years, but has owned Chewy for only the last 2 years. In addition, the evidence indicates that Brooke has owned another dog for almost 5 years. Brooke offered no evidence that but for his requested accommodation of keeping Chewy, he would likely be denied an equal opportunity to enjoy the housing of his choice.

Though Brooke offered the written statement from his physician assistant recommending that given Brooke's disability, he be able to keep the dog inside as a therapy dog, the physician assistant offered no testimony about the specific benefits the dog provides. Further, there is no indication that the physician assistant was aware of Brooke's other dog, or what benefits that dog, or any other dog not covered by Arapahoe's ordinance, could provide Brooke. In addition, the physician assistant conducted no testing of Brooke's mental functioning or emotional well-being to determine what his therapeutic needs may be or how Chewy was uniquely able to meet them.

It is true that the FHA requires reasonable accommodations necessary for a disabled individual to receive the same enjoyment from the property as a nondisabled person would receive, not merely those accommodations that the disabled individual cannot function without or for which no alternative is available.[33] However, the FHA's necessity element requires that an accommodation be essential to the equal enjoyment from the property, not just preferable.[34] The plain meaning

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[33] See, *Anderson, supra* note 23; *Developmental Services of NE, supra* note 18.

[34] *Vorchheimer, supra* note 30.

of "necessary" requires courts to consider the alternatives on offer.[35]

We find that Brooke failed to prove that an accommodation from Arapahoe's ban on certain breeds of dogs was essential to Brooke's equal enjoyment of his property. Assuming without deciding that it is necessary for Brooke to have an emotional support dog, he did not show that to have the equal opportunity to use and enjoy his dwelling, it was essential that he be allowed to keep a dog banned by Arapahoe's ordinance. Brooke already owned another dog, and the ordinance covered only certain breeds of dogs. Brooke failed to prove that other dogs not covered by the ordinance could not provide comparable therapeutic benefit to Brooke with regard to his disability. No evidence was offered that Chewy provided more support than Brooke's other dog or other dogs not covered by the ordinance, and Brooke did not testify that Chewy was a better option, much less essential to his enjoyment of his residence. Nothing in the FHA gives Brooke a right to his preferred option.

Based upon the record before us, Brooke has failed to meet his burden of proof that his requested accommodation is necessary for him to receive the same enjoyment from his home as a nondisabled person would receive.

3. Brooke's Other Claims for Relief

In his complaint, Brooke raised two additional causes of action: violations of the Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution. However, the district court did not address Brooke's constitutional claims, because it found Brooke was entitled to relief on his first claim that the ordinance, as applied, violated his rights under the FHA. As a result, this matter must be remanded to the district court for consideration of the two remaining claims.

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[35] *Id.*

CONCLUSION

In consideration of all the above, the district court erred in entering a declaratory judgment and enjoining Arapahoe from enforcing the ordinance as applied to Brooke. Arapahoe was not exempt by 42 U.S.C. § 3603(b)(1) from Brooke's claims under the FHA; however, Brooke failed to show that allowing him to retain "Chewy" in his home was necessary.

Reversed and remanded.

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

Denali Real Estate, LLC, a Nebraska limited liability company, doing business as Denali Construction and Denali Homes, appellee, v. Denali Custom Builders, Inc., a Nebraska corporation, appellant.

926 N.W.2d 610

Filed April 25, 2019. No. S-18-287.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. ____: ____. On appeal from an equity action, when credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
5. **Rules of the Supreme Court: Pleadings.** Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in interpreting similar Nebraska civil pleading rules.
6. **Rules of the Supreme Court: Motions to Dismiss: Moot Question.** Generally, the denial of a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6) becomes moot after trial.
7. **Pleadings: Judgments: Appeal and Error.** A party who unsuccessfully moves for judgment on the pleadings must either file additional pleadings or go to trial on the issues joined by the original pleadings, and, by saving exception to the action of the trial court in overruling his or her motion, obtain a review thereof on appeal from the final judgment, if adverse.
8. **Pleadings: Judgments.** Even when a party does not move to amend pleadings, a court may constructively amend pleadings on unpleaded issues in order to render a decision consistent with the trial.

9. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence, waives any error in the ruling on the motion.
10. **Names: Words and Phrases.** A designation is "used" as a trade name when the designation is displayed or otherwise made known to prospective purchasers in the ordinary course of business in a manner that associates the designation with the goods, services, or business of the user.
11. **Names: Proof.** In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.
12. **Names.** The evil sought to be eliminated by trade name protection is confusion.
13. **Names: Proof.** The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party. If the similarity is such as to mislead purchasers or those doing business with the company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.
14. **Names.** Among the considerations for determining whether trade name confusion exists are (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.
15. **Corporations: Names.** Under Neb. Rev. Stat. § 87-302 (Cum. Supp. 2018), a corporation engages in a deceptive trade practice when, in the course of its business, it causes the likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services or affiliation, connection, or association with, or certification by, another.
16. **Claims: Names: Deceptive Trade Practices.** While a claim for the misuse of a trade name considers only the trade name seeking protection, a claim for a deceptive trade practice expands the consideration to issues of image and trade dress.
17. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the

existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.

18. ____: ____: ____. One of the basic elements of tortious interference with a business relationship requires an intentional act that induces or causes a breach or termination of the relationship or expectancy.
19. **Actions: Names: Injunction.** Neb. Rev. Stat. § 87-217 (Reissue 2014) authorizes a registrant of a trade name to proceed by suit to enjoin the use or display of imitations of its trade name.
20. **Deceptive Trade Practices: Injunction.** Neb. Rev. Stat. § 87-303(a) (Cum. Supp. 2018) authorizes a court to grant an injunction against a person committing a deceptive trade practice.
21. **Equity.** In an equitable action, the district court is vested with broad equitable powers and discretion to fashion appropriate relief.
22. **Jurisdiction: Appeal and Error.** Once an appellate court acquires equity jurisdiction, it can adjudicate all matters properly presented and grant complete relief to the parties.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Joseph C. Byam, of Byam & Hoarty, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

A company using registered trade names obtained a permanent injunction, statutory damages, and attorney fees against a corporation using a similar name. The corporation appeals, contending that it used only its legal corporate name. But because evidence showed otherwise and actual confusion resulted, the corporation's central argument fails. We first consider whether the denials of the corporation's pretrial motions to dismiss and for judgment on the pleadings survive the trial, reaching only the latter motion. Upon de novo review, we uphold the

judgment on the company's claims of trade name infringement and deceptive trade practices, but not its claim for intentional interference with a business relationship. Otherwise finding no merit to the appeal, we affirm the judgment.

II. BACKGROUND

1. Parties

Denali Real Estate, LLC (DRE), doing business as Denali Construction and Denali Homes, is a Nebraska limited liability company with an office in Omaha, Nebraska. It filed a certificate of organization with the Nebraska Secretary of State in 2014. In September 2015, DRE registered with the Secretary of State the trade names "Denali Construction" and "Denali Homes." That same month, it began building, advertising, and selling new homes under the name "Denali Homes." DRE markets its homes in eastern Nebraska and has built homes in Douglas, Lancaster, and Sarpy Counties.

Denali Custom Builders, Inc. (DCB), is a Nebraska corporation with an office in Lincoln, Nebraska. It filed articles of incorporation and commenced business on February 29, 2016. It builds new homes in Lancaster County.

2. Lawsuit

In July 2016, DRE demanded that DCB stop using the name "Denali Custom Builders, Inc." in its business. DCB continued to use the name, and DRE filed suit in the district court in October.

DRE alleged misuse of trade name, claiming that DCB's "use of the trade name 'Denali Custom Builders, Inc.' has caused confusion, mistake, and deception among purchasers and potential purchasers of homes in Nebraska." DRE sought injunctive relief and damages attributable to DCB's "wrongful use of [DRE's] trade name," including lost profits and reasonable attorney fees.[1]

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[1] See Neb. Rev. Stat. § 87-217 (Reissue 2014).

DRE also alleged deceptive trade practices in violation of the Uniform Deceptive Trade Practices Act.[2] It alleged that DCB's use of DRE's trade name caused confusion and misunderstanding as to DCB's affiliation with DRE. On this claim, DRE sought an injunction and costs.[3]

Finally, DRE alleged interference with a business relationship. It claimed that DCB was "deceiving the members of the public" into believing that DCB's advertising was that of DRE, thereby interfering with DRE's "business relationships with the public generally."

3. Pretrial Proceedings

DCB responded by filing a motion to dismiss, alleging that the complaint failed to state a claim upon which relief may be granted. The district court denied the motion.

After the denial of DCB's motion to dismiss, DCB filed an answer. As an affirmative defense, it alleged that "[t]he Complaint fails to state a claim upon which relief can be granted because 'Denali Custom Builders, Inc.' is [DCB's] legal name, not [DCB's] trade name."

After the close of the pleadings, DCB moved for judgment on the pleadings. The court overruled the motion. In doing so, the court stated that "there is a reasonable dispute as to whether there's a misuse of the trade name or of the names used by [DCB]" and that the factual allegations in the complaint were sufficient to support the causes of action.

Forty-nine days after a pretrial conference, DRE moved to amend its complaint and the joint pretrial conference memorandum. DRE sought to add Roger Watton, a potential homebuyer, as a witness and to add as exhibits two bills from a Lincoln utility. DCB filed an objection, noting that the trial was set to begin in 13 days and that DRE had had more than 1 year to amend its complaint. DCB also alleged that it would

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[2] Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 2014 & Cum. Supp. 2018).

[3] See § 87-303.

be prejudiced by any amendment to the complaint. During a hearing on the motion to amend and the objection, DRE represented that neither the utility bills nor the testimony of Watton were known to DRE at the time of completing the pretrial conference memorandum "because this has just occurred in the last couple weeks." The court overruled the motion to amend the complaint, but sustained the motion to add the witness and exhibits to the pretrial joint conference memorandum.

Two days before trial, DCB moved for attorney fees under Neb. Rev. Stat. § 25-824(2) and (4) (Reissue 2016). It alleged that the action was frivolous and was brought to harass DCB.

4. Trial

The court bifurcated the trial, with the initial portion of the trial addressing liability and a second portion being reserved for consideration of remedies.

By the time of trial, DRE had built approximately 10 homes. It was building a home "within half a mile" of a home that DCB was building. DCB's signage and its website identified it as "Denali Custom Builders" and, according to DRE's managing partner, used the same fonts and colors as DRE.

DRE adduced evidence demonstrating confusion regarding DRE and DCB. Internet searches for "denali construction nebraska" or "denali home construction nebraska" directed the searcher to DCB's website. DRE received a document from a lumber company with which it frequently transacted business that identified DRE as both "Denali Custom Homes" and "Denali Custom Builders." A bill from a utility for one of DRE's projects identified the customer as "Denali Custom Builders." Another time, DRE returned materials to an Omaha furniture store but the store gave the credit to DCB. An employee testified that there was confusion as to which entity should get the credit. An appliance sales associate for the same furniture store testified that an order belonging to DRE ended up in the store's system under DCB, which caused confusion. Watton testified that in September 2017,

he and his wife met with representatives of DRE in Omaha to discuss the process for building a home. The following weekend, Watton and his wife toured some homes in Lincoln and there was a home built by an entity containing the name "Denali." After touring the home, Watton did not know what entity had built it. Watton subsequently spoke with a representative of DRE, who clarified that DRE had not built that particular house.

After DRE presented its case in chief, it asked that the pleadings be amended to conform to the evidence presented. Specifically, DRE wanted the complaint to be amended to show that DCB used names other than its true legal name. DCB objected. The court overruled the motion, because "this is already incorporated into the allegations that have been made and consistent with the matters that we've addressed before." DCB moved for a directed verdict, which the court denied. The only evidence DCB offered was an attorney fee affidavit.

5. Interlocutory Order and Final Judgment

After the first phase of the trial, the court entered an order finding in favor of DRE on the issue of liability. The court found that DRE and DCB were operating the same type of business, which generally consisted of building new homes. It found that both businesses advertised on social media, that they were building homes in Lincoln within a half mile of each other, and that they have signs using "Denali."

Significantly, the court determined that DCB generally did not use its corporate name when conducting business, but, rather, typically removed "'Inc.'" and used "'Denali Custom Builders.'"

The court also determined that DRE's evidence provided a reasonable basis for concluding that there was confusion and that it was likely for such confusion to exist in the future. The court found that DRE's right to use "'Denali'" was superior

to that of DCB, noting that DRE used and registered the trade name for a home construction business first and that it had used the trade name in the ordinary course of business in a manner that associated its business with that name. The court concluded that DRE had met its burden of proof and established its claim for relief for misuse of a trade name.

The court also found that DRE met its burden of proof and established its claim for relief against DCB for engaging in deceptive trade practices. The court noted that both parties were in the home construction business, that both parties transacted business and advertised in Lancaster County, and that there had been actual confusion by suppliers and the consuming public. The court observed that DCB used similar colors, type fonts, images, and design as those used by DRE.

Finally, with regard to interference with business relationships, the court found that DCB's use of "'Denali'" interfered with DRE's business relationships. The court found that DRE had a valid business relationship with its suppliers and an expectancy of a business relationship with the consuming public. The court stated that DCB's "failure to terminate the use of the name after being aware of [DRE's] use creates intentional interference under the law."

Following the second phase of the trial, the court entered judgment. It permanently enjoined DCB from using or displaying "'Denali'" in its business in any manner and gave it a set amount of time to remove "'Denali'" from anywhere it used or displayed that word, including "registration of its corporate name or trade name with the Nebraska Secretary of State and from any signage, website, advertising, social media (including but not limited to Facebook and Twitter)." The court awarded DRE statutory damages of $1,000 under § 87-217, awarded $10,561.45 in attorney fees incurred by DRE, and ordered DCB to pay all of the costs.

Nine days later, DCB filed a number of motions. It moved (1) to suspend the injunction, (2) for a new trial, (3) to set

aside the judgment, (4) to alter or amend the judgment, and (5) to determine the amount for a supersedeas bond. The court granted the motion to determine supersedeas, but denied the other motions.

DCB filed a timely appeal, and our record does not reveal whether it posted the specified supersedeas bond.

III. ASSIGNMENTS OF ERROR

DCB assigns 17 errors. For the sake of clarity, we group them in three categories.

With regard to pretrial matters, DCB alleges that the court erred in denying its pretrial motion to dismiss and its motion for judgment on the pleadings.

DCB assigns several errors relating to the court's determinations on liability, relief, and attorney fees. It alleges that the court erred in (1) denying its motion for directed verdict and in finding for DRE as to its claims, (2) awarding statutory damages and attorney fees to DRE and in enjoining DCB from using or displaying the name "Denali," and (3) failing to award attorney fees to DCB.

DCB assigns 12 errors related to evidentiary issues, which we consolidate and restate. DCB asserts that the court erred in (1) overruling its relevancy objections; (2) overruling its hearsay objections, including to the testimony of a furniture store appliance sales associate and to exhibits 12 through 14, 21 through 24, and 28 through 30; (3) overruling its foundation objections, including to the testimony of furniture store employees and to exhibits 21 through 25 and 27; (4) overruling its authentication objections, including to exhibits 21 through 24 and 27; (5) permitting DRE's managing partner to give opinion testimony and to answer the questions what he was "'asking the court to do today'" and "'why'" he was asking for it; and (6) permitting Watton to testify and in overruling the various objections made during his examination.

IV. STANDARD OF REVIEW

[1-4] An action for injunction sounds in equity.[4] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[5] And in such an appeal, when credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[6] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[7] These standards are central to our review of this appeal, but we set forth other applicable standards below.

V. ANALYSIS

1. Denial of Pretrial Motions

DCB challenges the district court's overruling of its two pretrial motions attacking the pleadings: its motion to dismiss the complaint for failure to state a claim, filed before its answer, and its motion for judgment on the pleadings, filed after the pleadings were completed. A district court's denial of a motion to dismiss is reviewed de novo.[8] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.[9] An appellate court independently decides questions of law.[10]

But we question whether, after a trial on the merits, a party may appeal the denial of a motion to dismiss for failure

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

[5] *Junker v. Carlson*, 300 Neb. 423, 915 N.W.2d 542 (2018).

[6] *Id.*

[7] *Gerber v. P & L Finance Co.*, 301 Neb. 463, 919 N.W.2d 116 (2018).

[8] *D.M. v. State*, 25 Neb. App. 596, 911 N.W.2d 621 (2018).

[9] *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007).

[10] *Burnham v. Pacesetter Corp.*, 280 Neb. 707, 789 N.W.2d 913 (2010).

to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) or a motion for judgment on the pleadings under § 6-1112(c). These appear to be issues of first impression in Nebraska.

Both of these motions have some similarity to a motion for summary judgment, the denial of which is neither reviewable nor appealable after the conclusion of a case.[11] All three attack the sufficiency of the pleadings and are applications for an order intended to result in a judgment.[12] Whether a motion for summary judgment should have been granted generally becomes moot after trial. This is because the overruling of such a motion does not decide any issue, but merely indicates that the trial court was not convinced that the moving party was entitled to judgment as a matter of law. After trial, the merits should be judged in relation to the fully developed trial record, not whether a different judgment may have been warranted on the record at summary judgment.[13] Bearing this similarity in mind, we turn to each motion.

(a) Motion to Dismiss

A motion to dismiss under § 6-1112(b)(6) is generally considered the equivalent of a demurrer under our former code pleading system.[14] And under that jurisprudence, the rule was clear: Where a party answered after an adverse ruling on his or her motion or demurrer, and went to trial on the merits of an issue that party elected to join, he or she waived error, if any, in such ruling.[15]

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[11] See *State ex rel. Peterson v. Creative Comm. Promotions, ante* p. 606, 924 N.W.2d 664 (2019).

[12] See 71 C.J.S. *Pleading* § 600 (2011).

[13] *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013).

[14] See *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

[15] See, *Ivins v. Ivins*, 171 Neb. 838, 108 N.W.2d 99 (1961); *Dinkel v. Hagedorn*, 156 Neb. 419, 56 N.W.2d 464 (1953). See, also, *Buck v. Reed*, 27 Neb. 67, 42 N.W. 894 (1889).

[5] Federal decisions provide some guidance regarding our current rule. Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in interpreting similar Nebraska civil pleading rules.[16] Of course, Fed. R. Civ. P. 12(b)(6) is similar to our § 6-1112(b)(6).

Two decisions are helpful. One federal circuit court declared that as a general rule, a defendant may not, after a plaintiff has prevailed at trial, appeal from the pretrial denial of a motion to dismiss for failure to state a claim, but must instead challenge the legal sufficiency of the plaintiff's claim through a motion for judgment as a matter of law.[17] Another circuit reasoned that when a plaintiff has prevailed after a full trial on the merits, a trial court's denial of a motion to dismiss becomes moot.[18] At that point, "[t]he plaintiff has proved, not merely alleged, facts sufficient to support relief."[19]

[6] We hold that generally, the denial of a motion to dismiss under § 6-1112(b)(6) becomes moot after trial. Here, the district court overruled DCB's motion to dismiss for failure to state a claim upon which relief may be granted and DRE prevailed following a trial on the merits. We conclude that DCB's challenge to the overruling of its motion to dismiss is moot.

(b) Motion for Judgment on Pleadings

A motion for judgment on the pleadings has long been available in Nebraska. It existed under our former code pleading system[20] and is retained in § 6-1112(c) under our notice

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[16] *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[17] See *Clearone Communications, Inc. v. Biamp Systems*, 653 F.3d 1163 (10th Cir. 2011).

[18] See *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996). See, also, *In re Will of McFayden*, 179 N.C. App. 595, 635 S.E.2d 65 (2006); *Simon v. Jackson*, 855 So. 2d 1026 (Ala. 2003).

[19] *Bennett v. Pippin, supra* note 18, 74 F.3d at 585.

[20] See *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

pleading system. Formerly, we said: "'A motion for judgment on the pleadings is in the nature of a demurrer. It is in substance both a motion and a demurrer.'"[21] Like a demurrer, a motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.[22]

Our former jurisprudence on such motions, however, was inconsistent regarding the survival of an adverse ruling after trial. Long ago, we stated that, as with a demurrer, any error on the overruling of a motion for judgment on the pleadings is waived "where the party . . . after motion and waiving demurrer, answers over and goes to trial on the merits of the issue which he has elected to join."[23] But in at least two cases, we considered whether a trial court properly overruled a motion for judgment on the pleadings even though the matter had proceeded to trial.[24]

[7] It appears to be generally accepted elsewhere that the denial of a motion for judgment on the pleadings is reviewable following a trial and decision on the merits.[25] Most jurisdictions adhere to the view that a party who unsuccessfully moves for judgment on the pleadings "must either file additional pleadings or go to trial on the issues joined by the original pleadings, and, by saving exception to the action of the trial court in overruling his motion, obtain a review thereof on appeal from

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[21] *Vaughan v. Omaha Wimsett System Co.*, 143 Neb. 470, 473, 9 N.W.2d 792, 794 (1943).

[22] *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985).

[23] *Becker v. Simonds*, 33 Neb. 680, 684, 50 N.W. 1129, 1131 (1892).

[24] See, *Board of Educational Lands & Funds v. Gillett*, 158 Neb. 558, 64 N.W.2d 105 (1954); *Gilbert v. First National Bank*, 154 Neb. 404, 48 N.W.2d 401 (1951).

[25] See 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1372 (3d ed. 2004 & Supp. 2018).

the final judgment, if adverse."[26] The Eighth Circuit determined that after a jury verdict in favor of the plaintiff, it was required to review the assertion that the trial court erroneously denied the defendant's rule 12(c) motion.[27]

But a treatise has suggested a better solution:

> In most situations the evidence at trial will depart from the pleadings and, in view of Rule 15(b), the pleadings will be deemed amended to conform to the evidence, absent a showing of prejudice to the other party, and the original judgment on the pleadings motion probably rendered moot. When the evidence is consistent with the pleadings, the appellate court should order a judgment entered for the defendant on the ground that the facts elicited at trial demonstrated a good defense to the action rather than because of the defect in the pleadings.[28]

[8] Neb. Ct. R. Pldg. § 6-1115(b) is substantially identical to Fed. R. Civ. P. 15(b).[29] Our rule explicitly provides that

> amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues*.[30]

We have recognized that even when a party does not move to amend pleadings, a court may constructively amend pleadings on unpleaded issues in order to render a decision consistent with the trial.[31]

Under the circumstances here, DCB's motion for judgment on the pleadings is essentially moot. DRE moved to amend its complaint to conform to the evidence that DCB

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[26] Annot., 14 A.L.R.2d 460, 466 (1950).

[27] See *Sinclair Refining Co. v. Stevens*, 123 F.2d 186 (8th Cir. 1941).

[28] 5C Wright & Miller, *supra* note 25, § 1372 at 278.

[29] See *Blinn v. Beatrice Community Hosp. & Health Ctr., supra* note 16.

[30] § 6-1115(b) (emphasis supplied).

[31] See *Zelenka v. Pratte*, 300 Neb. 100, 912 N.W.2d 723 (2018).

used names other than its true legal name, but the district court overruled the motion because the court believed the matter had already been incorporated into the allegations made. The issue of whether DCB used a trade name other than its true name was tried, and under § 6-1115(b), the failure to amend did not affect the result of the trial on the issue. Therefore, DCB's argument premised upon the complaint's allegation became moot. Although the district court's explanation was not precisely tied to § 6-1115(b), the net effect was the same. The result of the trial was not affected by the original allegation that DCB was using the trade name "Denali Custom Builders, Inc." This assignment of error lacks merit.

2. Motion for Directed Verdict

DCB alleges that the district court erred in overruling its motion for directed verdict. 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.[32]

[9] DCB moved for directed verdict at the close of DRE's evidence, but it did not renew the motion after it rested. We have long held that a defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence, waives any error in the ruling on the motion.[33] But here, we conclude the error is not waived, because DCB's evidence—an attorney fee affidavit—was directed not to DRE's case in chief, but only to its own motion for attorney fees. Nonetheless, our analysis of this issue merges into that of the court's finding in favor of DRE on the merits. So we turn to that issue.

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[32] *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[33] *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002). See, also, *Boardman v. McNeff*, 177 Neb. 534, 129 N.W.2d 457 (1964).

3. Finding in Favor of DRE on Merits

DCB quarrels with the court's ultimate judgment in favor of DRE on each of its three causes of action. We begin with the statutory definition of two key terms. Neb. Rev. Stat. § 87-208 (Reissue 2014) provides:

> As used in sections 87-208 to 87-219.01, unless the context otherwise requires:
>
> . . . .
>
> (2) Person means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, unincorporated association, or two or more of the foregoing having a joint or common interest or any other legal or commercial entity;
>
> . . . .
>
> (4) Trade name means every name under which any person does or transacts any business in this state other than the true name of such person.

Based on these definitions, DCB argues that "Denali Custom Builders, Inc." is not a trade name because it is the corporation's true name. DCB's argument—that by using only its true legal name, it cannot be liable for misuse of DRE's trade names—does not necessarily comport with Neb. Rev. Stat. § 87-216 (Reissue 2014). But, here, it is not necessary to decide that question.

[10] Here, the evidence showed that DCB did not limit itself to its legal corporate name: DCB also held itself out to be "Denali Custom Builders." At trial, the court heard evidence that DCB displayed that name on its advertising, social media, website, and signs. In *White v. Board of Regents*,[34] we adopted the following definition for "use" of a trade name from the Restatement (Third) of Unfair Competition: "'[A] designation is "used" as a . . . trade name . . . when the designation is

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[34] *White v. Board of Regents*, 260 Neb. 26, 36, 614 N.W.2d 330, 338 (2000), quoting Restatement (Third) of Unfair Competition § 18 (1995).

displayed or otherwise made known to prospective purchasers in the ordinary course of business in a manner that associates the designation with the goods, services, or business of the user . . . .'" We noted in *White* that at common law, the use of a trade name may be established by its appearance on signs, documents employed in conducting business, mail solicitations, or advertising.[35] The evidence showed that DCB used "Denali Custom Builders" on signs and advertising. Under § 87-208(4), "Denali Custom Builders" is a trade name: It is a name under which DCB transacted business, and it is not DCB's true name.

Thus, DCB's central theme of defense failed. We now turn to DRE's respective claims.

(a) Trade Name Infringement

Under Neb. Rev. Stat. § 87-209(6) (Reissue 2014), protection is given to trade names registered in this state.[36] DRE registered two trade names in Nebraska: "Denali Construction" and "Denali Homes."

[11] In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.[37] This analysis requires two steps.

[12] The first step is to determine whether DRE's trade names are entitled to protection. We disagree with DRE and the district court that "Denali" alone is a valid trade name entitled to protection. The evil sought to be eliminated by trade name protection is confusion.[38] We doubt one would confuse "Denali

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[35] See *id.*

[36] *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

[37] *Id.*

[38] *Id.*

Burgers" or "Denali Clothing" with "Denali Construction" or "Denali Homes." And generic words, whose primary meaning is merely descriptive of the business to which they are applied or which are such as are in common use for that purpose, cannot be exclusively appropriated as a trade name.[39] But each of DRE's trade names, "Denali Construction" and "Denali Homes," is sufficiently distinctive.

The next step is to determine whether there has been an infringement on DRE's trade names. Likelihood of confusion is key.

[13] The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party. If the similarity is such as to mislead purchasers or those doing business with the company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.[40]

[14] Among the considerations for determining whether trade name confusion exists are (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.[41] So, what did the evidence show on these factors?

The answer is clear: DRE's evidence showed confusion between DCB's "Denali Custom Builders" and DRE's registered trade names of "Denali Construction" or "Denali Homes." The entities build new homes, similar in style. They operate in eastern Nebraska, including Lincoln. Businesses building

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[39] *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

[40] *Prime Home Care v. Pathways to Compassion, supra* note 36.

[41] *Id.*

similar new homes in the same city are likely to be in competition with one another. Within 8 months of DCB's incorporation, actual confusion about the entities arose, and DRE filed its complaint.

Confusion can be of a customer and also those likely to do business with the entity, including wholesalers, banks, utility providers, et cetera.[42] Evidence of misdirected mail, including bills from suppliers, is sufficient to indicate actual confusion from similarity of trade names.[43] DRE adduced evidence of actual confusion on the part of a potential purchaser (Watton), a lumber company, two employees of a furniture store, and a utility provider. Further, the names implicate businesses in the home-building industry. Denali Custom Builders sends much the same message as Denali Construction or Denali Homes.

The presence of actual confusion distinguishes this case from previous decisions. In *Dahms v. Jacobs*,[44] we were unable to find that "'The Depot'" and "'The Denim Depot'"—both clothing stores—were so alike as to be likely to cause confusion in the minds of the public. We specifically held that "the plaintiff in this case has failed to show, as he must, either actual or probable confusion."[45] Similarly, in *Nebraska Irrigation, Inc. v. Koch*,[46] in determining that the plaintiff did not prove a clear right to injunctive relief concerning the trade names "'Nebraska Irrigation'" and "'Nebraska Irrigation Sales & Equipment,'" we noted the absence of any specific instances of confusion. The Nebraska Court of Appeals concluded that a

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[42] See *Hong's, Inc. v. Grand China Buffet*, 19 Neb. App. 331, 805 N.W.2d 90 (2011).

[43] See *Powder River Oil v. Powder River Petroleum*, 830 P.2d 403 (Wyo. 1992).

[44] *Dahms v. Jacobs*, 201 Neb. 745, 748, 272 N.W.2d 43, 45 (1978).

[45] *Id*.

[46] *Nebraska Irrigation, Inc. v. Koch, supra* note 39, 246 Neb. at 862, 523 N.W.2d at 681.

plaintiff failed to meet its burden to show actual confusion in the use of the trade names "'China Buffet'" and "'Grand China Buffet.'"[47] But here, DRE showed, by the greater weight of the evidence, actual confusion. Accordingly, DRE was entitled to relief on its trade name infringement claim.

(b) Deceptive Trade Practices

[15] Section 87-302 enumerates deceptive trade practices. As relevant to the facts of this case, a corporation engages in a deceptive trade practice when, in the course of its business, it causes the likelihood of confusion or of misunderstanding as to "the source, sponsorship, approval, or certification of goods or services" or "affiliation, connection, or association with, or certification by, another."[48]

[16] As set forth above, the evidence showed that DCB's use of "Denali Custom Builders" in the course of its business caused confusion regarding the source of goods or services and its affiliation or association with DRE's entities. And within 5 months of DCB's incorporation, attorneys for DRE sent a letter notifying DCB that it was infringing on DRE's trade names and that such infringement was likely to cause confusion in the marketplace. Further, while a claim for the misuse of a trade name considers only the trade name seeking protection, a claim for a deceptive trade practice expands the consideration to issues of image and trade dress.[49] DRE's managing partner testified that DCB's signage and its website used the same fonts and colors as those used by DRE. And, indeed, our examination of the exhibits reveals that these similarities are

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[47] See *Hong's, Inc. v. Grand China Buffet, supra* note 42, 19 Neb. App. at 338, 805 N.W.2d at 97.

[48] See § 87-302(a)(2) and (3).

[49] See *Powder River Oil v. Powder River Petroleum, supra* note 43. See, also, *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 209, 120 S. Ct. 1339, 146 L. Ed. 2d 182 (2000) ("'trade dress'" originally included only product's packaging but had been expanded by lower courts to encompass product's design).

particularly striking. We conclude that DRE met its burden of proof to show that DCB engaged in deceptive trade practices. On this claim, DRE was also entitled to relief.

(c) Interference With Business Relationship

[17,18] To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[50] One of the basic elements of tortious interference with a business relationship requires an intentional act that induces or causes a breach or termination of the relationship or expectancy.[51]

The district court did not make any explicit finding regarding a breach or termination of a business relationship or expectancy. It found that DRE "had a valid business relationship with its suppliers and an expectancy of a business relationship with the consuming public." It then reasoned that DCB "knew or had knowledge that using the trade name could cause interference and that interference was substantially certain to result." The court found that DCB's "use of 'Denali' interfered with the business relationships of [DRE] in the ways claimed by [DRE]."

Our review of the record failed to uncover evidence that DCB's use of "Denali" or "Denali Custom Builders" induced or caused a breach or termination of a business relationship or expectancy. Confusion about identity alone did not satisfy

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[50] *Thompson v. Johnson*, 299 Neb. 819, 910 N.W.2d 800 (2018).

[51] See, *Recio v. Evers*, 278 Neb. 405, 771 N.W.2d 121 (2009); *Pettit v. Paxton*, 255 Neb. 279, 583 N.W.2d 604 (1998); *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 320 N.W.2d 759 (1982), *disapproved on other grounds, Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991).

this element. There was no evidence that the confused lumber supplier, furniture store, or utility ceased its relationship with DRE due to the confusion. Similarly, although Watton and his wife—prospective customers—were confused about whether DRE built a home that they toured, there was no evidence that this confusion led them to end a potential relationship with DRE. We have stated that "when the defendant's interference is directed toward the third party, with whom the plaintiff has contracted, and the interference did not cause the third party to breach the contract, it is difficult to conceive how the plaintiff would prove causation."[52] Here, the record is void of evidence that a business relationship or expectancy of DRE was breached or terminated due to DCB's use of "Denali Custom Builders."

Upon our de novo review, we conclude that DRE failed to establish its claim for interference with a business relationship. But this makes no real difference: The relief ultimately granted was amply supported by DRE's claims for trade name infringement and deceptive trade practices. We turn to the specific elements of this relief.

4. Awarding DRE Statutory Damages and Attorney Fees

A statute sets forth the remedies available for misuse of a trade name. It specifically authorizes damages of $1,000 and reasonable attorney fees:

> Any registrant of a trade name may proceed by suit to enjoin the use, display, or sale of any counterfeits or imitations thereof, and a court of competent jurisdiction may restrain such use, display, or sale on terms which the court deems just and reasonable and may require the defendants to pay to the registrant (1) all profits attributable to the wrongful use, display, or sale, (2) all damages caused by the wrongful use, display, or sale, or (3) both

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[52] *Pettit v. Paxton, supra* note 51, 255 Neb. at 288, 583 N.W.2d at 610.

> such profits and damages, and reasonable attorney's fees. *In lieu of the remedies available in subdivisions (1), (2), and (3) of this section, the court may require the defendants to pay statutory damages of one thousand dollars and reasonable attorney's fees.* The court may order that any counterfeits or imitations in the possession or under the control of any defendant be delivered to an officer of the court, or to the complainant, to be destroyed.[53]

As DCB highlights, § 87-217 does not require a court to make such an award. Nonetheless, the statute clearly permitted the court's award of statutory damages of $1,000 and payment of reasonable attorney fees. And DCB does not contest the amount of fees awarded. The court properly awarded damages and attorney fees. Upon our de novo review, we reach the same conclusion regarding this relief.

5. Injunction

DCB also quarrels with the injunction entered by the court. The court enjoined DCB from "using or displaying the name 'Denali' in its business in any manner whatsoever." Once again, upon de novo review, we reach the same conclusion.

[19,20] DRE proved both misuse of a trade name and deceptive trade practices. Section 87-217 authorizes a registrant of a trade name—which DRE is—to proceed by suit to enjoin the use or display of imitations of its trade name. Similarly, § 87-303(a) authorizes a court to grant an injunction against the person committing the deceptive trade practice. Eliminating "Denali" from "Denali Custom Builders" should suffice to eliminate the confusion between DCB and DRE's trade names.

DCB also challenges the court's order that it "remove the name 'Denali' from any registration of its corporate name or trade name with the Nebraska Secretary of State." It asserts that such an order is "not exactly an injunction" and that "[i]t

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[53] See § 87-217 (emphasis supplied).

is one thing to prohibit [DCB] from doing an act, but quite another to require it affirmatively do an act."[54]

[21,22] However, § 87-303(a) permits a court to "order such additional equitable relief as it deems necessary to protect the public from further violations." In an equitable action, the district court is vested with broad equitable powers and discretion to fashion appropriate relief.[55] And once an appellate court acquires equity jurisdiction, it can adjudicate all matters properly presented and grant complete relief to the parties.[56]

Upon our de novo review and in light of the relief specifically authorized by § 87-303(a), we conclude this equitable relief is necessary to grant complete relief to DRE. Contrary to DCB's argument, we are not compelling a new and distinct affirmative act. Rather, we are prohibiting DCB from perpetuating the confusion resulting from its registration of one name and its later operation under a variant deceptively similar to DRE's previously registered trade names. Under these circumstances, permitting DCB to revert to using only its legal corporate name would reward it for its deceptive conduct. Under the circumstances here, we find no merit to DCB's argument.

6. Remaining Assignments of Error

We have considered DCB's remaining claims—that the court erred in denying its request for attorney fees and in admitting evidence over objections—and find them to be without merit. A point-by-point rejection of each contention would needlessly lengthen our decision without enhancing our existing

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[54] Brief for appellant at 33.

[55] See *State on behalf of Lockwood v. Laue*, 24 Neb. App. 909, 900 N.W.2d 582 (2017). See, also, *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006) (action in equity vests trial court with broad powers authorizing any judgment under pleadings).

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

jurisprudence. Upon our de novo review, we find no error or abuse of discretion in the respects alleged.

VI. CONCLUSION

We summarize our conclusions. The denial of DCB's motion to dismiss under § 6-1112(b)(6) is moot. Its argument regarding the denial of its motion under § 6-1112(c) lacks merit. DRE met its burden of proof regarding its claims for trade name infringement and deceptive trade practices, but it did not establish tortious interference with a business relationship or expectancy. DRE was entitled to statutory damages, attorney fees, and injunctive relief, and this relief is unaffected by our determination that DRE proved only two of its three causes of action. Having found no error or abuse of discretion in the other respects alleged, we affirm the district court's judgment.

Affirmed.

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

Carl Bank and Teresa M. Bank, appellants, v. Jason J. Mickels, M.D., and Omaha Orthopedic Clinic & Sports Medicine, P.C., appellees.

926 N.W.2d 97

Filed April 25, 2019. No. S-18-427.

1. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
2. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
4. **Motions for Mistrial: Appeal and Error.** Decisions regarding motions for mistrial are directed to the discretion of the trial court and will be upheld in the absence of an abuse of discretion.
5. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.
6. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
7. **Trial: Evidence: Witnesses: Impeachment.** A ruling on evidence of a collateral matter intended to affect the credibility of a witness is within the discretion of a trial court.
8. **Statutes: Appeal and Error.** Generally, 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.

9. **Health Care Providers: Informed Consent.** Neb. Rev. Stat. § 44-2816 (Reissue 2010) does not require that informed consent be written.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Jason M. Bruno and Jared C. Olson, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

William M. Lamson, Jr., and William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

I. NATURE OF CASE

Carl Bank and Teresa M. Bank sued Dr. Jason J. Mickels and Omaha Orthopedic Clinic & Sports Medicine, P.C. (collectively Mickels), in the district court for Douglas County for medical malpractice and loss of consortium. Their complaint alleged that Dr. Mickels breached the standard of care because he failed to obtain informed consent before performing an injection and manipulation procedure on Carl's shoulder and failed to diagnose and treat an infection that ultimately caused permanent injury and serious daily pain. During the jury trial, the court made various rulings regarding the admission of evidence, including witness testimony, and jury instructions, with which the Banks take issue. A jury returned a general verdict in favor of Mickels. The court overruled various posttrial motions by which the Banks had requested a new trial. The Banks appeal. We analyze the Banks' assignments of error below and determine that they are without merit. We specifically conclude that Neb. Rev. Stat. § 44-2816 (Reissue 2010) does not require informed consent to be written and that the court's jury instruction to

that effect was a correct statement of the law and warranted by the evidence. We affirm.

II. STATEMENT OF FACTS

Our statement of facts is taken from the evidence presented at trial. Carl's physician referred him to Dr. Mickels, an orthopedic surgeon, for a rotator cuff tear in August 2012. Dr. Mickels performed surgery to repair the rotator cuff in September 2012. Following the surgery, Carl kept his arm in a sling and completed physical therapy and recommended exercises. At the first postoperative visit, on October 2, Carl was recovering as expected. Carl testified that soon after, in early October, he was slammed forward into the passenger restraints in his automobile when his wife braked to avoid colliding with another vehicle. Carl testified that his pain had continued, but not worsened, after the braking incident. He returned to Dr. Mickels to make sure that the near-collision had not affected his shoulder. Carl testified that Dr. Mickels performed x rays and stated that "everything was fine, all the pins were in place and not to worry about it."

According to Carl's testimony, not everything was fine. Carl continued to experience pain when he followed up with Dr. Mickels on November 20, 2012. Dr. Mickels injected a local anesthetic into the shoulder joint to allow him to test the range of motion in Carl's affected shoulder. The purpose of the procedure was to assess the range of motion without pain to determine if Carl's limited range of motion was due to inadequate pain controls. Dr. Mickels testified that he and Carl discussed the risk of increased pain after an injection and range of motion procedure and that they discussed the risk of infection from any injection. Dr. Mickels noted that Carl had tattoos and was not a "stranger to needles," and according to Dr. Mickels, Carl stated he had never had an infection from receiving any of his tattoos. Carl testified that Dr. Mickels did not explain the risks of the manipulation and injection. Carl did not sign an informed consent form for the

procedure and testified that he would not have agreed to go forward with the injection and procedure if the risks had been explained to him. During the range of motion procedure, as Dr. Mickels raised the arm, Carl heard cracking and popping noises in his shoulder. He recalled that Dr. Mickels told him those sounds were "a good sign" of scar tissue breaking down. During the procedure, Dr. Mickels observed that Carl "had a pretty stiff shoulder," so he prescribed additional physical therapy.

Carl testified that his shoulder was more painful after the November 2012 procedure. He reported that his range of motion was continuing to decline and that his pain was severe. At trial, Carl attributed the pain to the November injection and procedure. Dr. Mickels testified that his medical records attributed Carl's worsening pain to the automobile incident in October.

In December 2012, Dr. Mickels ordered x rays and an MRI. Dr. Mickels described the MRI results and testified that the findings pointed to a stress fracture or, less likely, avascular necrosis. He recommended that Carl take a break from therapy and perform exercises at home to rest over the next couple of weeks. At this point, Carl was back to work with restrictions.

Carl returned on December 20, 2012, at which time Dr. Mickels noted some muscular atrophy in Carl's shoulder. Dr. Mickels asked a partner physician to observe Carl to see if he had "any other ideas." Dr. Mickels ordered electrodiagnostic studies to evaluate nerve function, and Carl's results were normal. At the next visit, on January 9, 2013, Dr. Mickels recommended that Carl return to therapy and continued his work restrictions.

At this point, Carl had not improved, and he sought a second opinion from Dr. Charles Rosipal, an orthopedic surgeon, on January 14, 2013. Dr. Rosipal ordered a CT scan and suspected an infection. He requested a radiologist to perform a CT-guided needle aspiration to obtain material to culture and

check for bacteria. However, the culture was negative and Dr. Rosipal noted, "There does not appear to be any active infection in the shoulder."

Dr. Rosipal scheduled shoulder replacement surgery for April 1, 2013, but when he opened Carl's shoulder, he found that a serious infection had eroded essentially all of the cartilage in the joint. Dr. Rosipal installed a temporary joint and prescribed strong antibiotics. A permanent replacement joint was installed in May 2013.

Carl has severe ongoing shoulder pain and stiffness that requires frequent physical therapy treatments and reduces his quality of life. He avoids public places because of the risk of someone's bumping into him.

The Banks brought this action in the district court for Douglas County, claiming medical malpractice and loss of consortium against Mickels. Their complaint alleged that Dr. Mickels breached the standard of care required of medical providers in Omaha, Nebraska, because he failed to obtain informed consent before performing an injection and manipulation procedure on Carl's shoulder and because he failed to diagnose and treat an infection. The Banks alleged that Dr. Mickels' negligence caused the infection to destroy Carl's joint before another doctor could treat it.

Trial was held on December 11 through 14, 2017. Both parties called expert witnesses. The Banks called two experts, Drs. Sonny Bal and Roger Massie, the latter of whom appeared by deposition. Dr. Bal is an orthopedic surgeon from Columbia, Missouri. He testified that Dr. Mickels fell below the standard of care by failing to obtain informed consent for the November 20, 2012, procedure, stating, "There's some question as to whether or not the patient was informed. And if the patient was not told or given the information that a reasonable health care provider would give, that's below the standard of care." According to Dr. Bal, the standard of care required the patient be given information that there was a risk of a fracture and a risk of infection.

Dr. Bal also testified that Dr. Mickels fell below the standard of care because "despite many, many pieces of evidence pointing to an infection, [Carl] never got a workup or evaluation for infection." Dr. Bal testified that Dr. Mickels performed the rotator cuff repair properly, but that Carl's lack of improvement after surgery was a "red flag."

On cross-examination, Mickels' counsel questioned Dr. Bal about the compensation he received for his work as an expert witness in this case. Mickels' counsel offered several bills into evidence that documented Dr. Bal's expert witness fees. These were received without objection. On redirect, the Banks' counsel asked Dr. Bal what he does with the money he earns from expert witness work. Mickels objected on the basis of relevancy. In an offer of proof, the Banks' counsel represented that Dr. Bal donated this money to charity. The district court sustained Mickels' objection to this question.

The Banks also called Dr. Massie, a family physician from Malcolm, Nebraska, whose opinions were generally similar to Dr. Bal's. Dr. Massie explicitly opined that the standard of care required that Dr. Mickels obtain written informed consent from Carl for the November 20, 2012, procedure. Dr. Massie explained that written consent is "a generic form that is signed by the patient that you have in detail explained to the patient the risk, benefits, complications that could accrue to such procedure."

Mickels called Dr. John Wright as an expert witness on the standard of care. Dr. Wright is an orthopedic surgeon who practices general orthopedics in Kearney, Nebraska. Dr. Wright testified to his schooling, training, experience, and publications. Dr. Wright became board certified by the American Board of Orthopaedic Surgery in 2001 and recertified in 2010. His practice predominantly involves joint replacement surgery and sports medicine and includes rotator cuff repairs.

Dr. Wright testified that Dr. Mickels' care and treatment of Carl met the standard of care and that Dr. Mickels obtained appropriate informed consent for the November 20, 2012,

procedure. He testified that the injection into Carl's shoulder "was done according to acceptable techniques and community standards." He opined that the procedure did not cause Carl's infection or fracture. Later in the trial, the Banks unsuccessfully sought to strike Dr. Wright's testimony.

Although the Banks had not objected to the following question during the receipt of evidence, after both parties had rested, the Banks moved for a mistrial, arguing that Dr. Wright had mentioned insurance deductibles during his testimony, which violated an order in limine prohibiting the mention of insurance. The relevant testimony was as follows:

> Q [by Mickels' counsel:] Okay. Do you have any — any operation scheduled where you're going to be replacing either a shoulder or operating on a shoulder or doing a rotator cuff repair?
>
> A [by Dr. Wright:] Several. My surgery schedule is booked full through February right now.
>
> Q Okay. This is usually a busy time of year because of the deductibles and everybody kind of wants to get that elective surgery in, am I right?
>
> A Right.
>
> Q Okay.
>
> A For better, for worse, I don't have a slow time of year anymore.

The district court overruled the Banks' motion for mistrial.

Next, the Banks moved to strike all of Dr. Wright's testimony because they claimed he had not established that he was familiar with the standard of care in Omaha or similar communities. The district court also overruled this motion.

Dr. Mickels also testified as to his treatment and care of Carl. He testified that a rotator cuff repair "is one of the more painful surgeries . . . in orthopedics" and that it takes up to 6 weeks for the shoulder to "heal enough to withstand the individual's own motion and active motion of that arm."

At trial, the Banks requested a jury instruction based on NJI2d Civ. 4.09 regarding the activation or aggravation of a

preexisting condition. The district court refused the proposed instruction. Regarding the jury instructions actually delivered, the court modified NJI2d Civ. 12.03 and advised the jury that "[a] written consent is not required in order for a physician to meet the standard of care."

After the jury returned a general verdict in favor of Mickels, the Banks filed a motion to alter or amend the judgment and a motion for a new trial, which were denied. The Banks appealed.

III. ASSIGNMENTS OF ERROR

The Banks make various claims on appeal which are summarized and restated as follows: With regard to the expert witnesses at trial, the Banks claim that the district court erred when it declined to strike Dr. Wright's testimony for lack of familiarity with community standards and should have permitted Dr. Bal's additional testimony regarding his donative intent for his expert witness fee. They assert that the district court erred when it instructed the jury that written consent is not required for informed consent and when it refused to instruct the jury on the aggravation of a preexisting condition. They further claim that the district court erred when it overruled the Banks' various motions concerning the reference to insurance and the collateral source rule, their motion for mistrial, their motion to alter or amend the judgment, and their motion for new trial.

IV. STANDARDS OF REVIEW

[1] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018).

[2] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *First Nat. Bank North Platte v. Cardenas*, 299 Neb. 497, 909 N.W.2d 79 (2018).

[3] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden

to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[4] Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014).

[5,6] An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion. *Hemsley v. Langdon, supra*. A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id*.

V. ANALYSIS

1. Objections to Expert Witness Testimony

(a) Objection to Dr. Wright's Testimony

The Banks request a new trial because the district court declined to strike Dr. Wright's testimony about the standard of care. They argue that Dr. Wright lacked foundation to opine on the standard of care in Omaha because he practices in Kearney and did not specifically testify he was familiar with the standard of care in Omaha. We reject this assignment of error.

The applicable standard of care for cases arising under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 2010), includes a locality focus. *Hemsley v. Langdon, supra*. To establish the customary standard of care in a particular case, expert testimony by a qualified medical professional is normally required. *Id*. This testimony is premised on the expert's personal knowledge of, and familiarity with, the customary practice among medical professionals in the same or similar locality under like circumstances. *Id*.

In this case, Mickels designated Dr. Wright to testify regarding the standard of care. Dr. Wright testified that "[w]hen [Carl's] shoulder was injected with local anesthetic, it was done according to acceptable techniques and community standards."

Given that Dr. Wright was trained at the national level and, at the time of trial, served on the faculty of the University of Nebraska, there was evidence from which we can assume the jury reasonably found that the locality standard had been satisfied when it returned a general verdict for Mickels. See, also, *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004) (comparing Bellevue, Nebraska, and Lincoln, Nebraska); *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003) (comparing North Platte, Nebraska, and Scottsbluff, Nebraska).

(b) Relevance Objection Regarding Dr. Bal's Expert Witness Fees

The Banks next contend that the district court abused its discretion when it sustained Mickels' objection to testimony meant to rehabilitate Dr. Bal. At trial, Mickels attempted to impeach Dr. Bal's credibility by portraying him as a profiteering "traveling witness," and the Banks wished to show that Dr. Bal donates expert witness fees to charity and that he is worthy of belief.

[7] Given the context of the ruling, we determine that the Banks have failed to demonstrate that they were prejudiced by the court's ruling which excluded additional testimony by Dr. Bal. A ruling on evidence of a collateral matter intended to affect the credibility of a witness is within the discretion of a trial court. *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990). The district court did not abuse its discretion.

2. Jury Instructions

With regard to jury instructions, the Banks claim that the district court erred when it modified a pattern instruction on informed consent and refused to give an instruction on

activation or aggravation of a preexisting condition. Neither claim has merit.

(a) Form of Informed Consent Under § 44-2816

The Banks contend that oral consent alone is not sufficient to satisfy informed consent under § 44-2816 and that the district court erred when, in a modification of pattern jury instruction NJI2d Civ. 12.03, it instructed the jury over objection that "[a] written consent is not required in order for a physician to meet the standard of care." The Banks contend that the modification was contrary to law. We do not agree.

In Nebraska, actions against qualified healthcare providers for failure to obtain informed consent are governed by the Nebraska Hospital-Medical Liability Act. § 44-2801 et seq. Section 44-2816 provides:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

We have said informed consent concerns a doctor's duty to inform his or her patient of the risks involved in treatment or surgery. *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006) (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 (5th ed. 1984)). It is settled that § 44-2816 requires doctors to

> "provide their patients with sufficient information to permit the patient himself to make an informed and

> intelligent decision on whether to submit to a proposed course of treatment or surgical procedure. Such a disclosure should include the nature of the pertinent ailment or condition, the risks of the proposed treatment or procedure, and the risks of any alternative methods of treatment, including the risks of failing to undergo any treatment at all. . . .”

Eccleston v. Chait, 241 Neb. 961, 967, 492 N.W.2d 860, 864 (1992).

Quoting Fay A. Rozovsky, Consent to Treatment: A Practical Guide § 1.0 (2d ed. 1990), the Supreme Court of Kentucky explained, “‘Consent is a process, not a document. Authorization for treatment is the culmination of a discussion . . . . The documentation, the so-called consent form, is not the consent, for that lies instead in the conclusion of the discussion between the patient and the physician . . . .’” *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (1997). We agree with this description of consent and conclude it is consistent with informed consent under § 44-2816.

[8,9] We have not explicitly decided whether informed consent reflecting the receipt of information described in § 44-2816 must be in writing. Generally, 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. *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018). The statutory language of § 44-2816 is not ambiguous, requiring a patient to receive “information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities.” The plain meaning of the language addresses the extent of information to be given. Section 44-2816 does not prescribe the form for providing the information and, to the contrary, states that informed consent may be “express or implied,” suggesting that the requirement of the statute can be met in more than one form. The

Legislature did not require that informed consent be written. Although some states mention written informed consent in their general informed consent statutes, Nebraska does not. See Christine Coughlin, *E-Consent: Can Informed Consent Be Just a Click Away?*, 50 Wake Forest L. Rev. 381 (2015). We will not insert a writing requirement where the Legislature has not restricted the form of informed consent, and we therefore hold that § 44-2816 does not require that informed consent be written.

Our reading of § 44-2816 is consistent with other jurisdictions that have considered the issue under similar informed consent statutes. See, e.g., *Cooper v. U.S.*, 903 F. Supp. 953 (D. S.C. 1995); *Holley v. Huang*, 284 P.3d 81 (Colo. App. 2011); *Rowe v. Kim*, 824 A.2d 19 (Del. Super. 2003), *affirmed* 832 A.2d 1252 (Del. 2003); *Kovacs v. Freeman, supra*; *Yahn v. Folse*, 639 So. 2d 261 (La. App. 1993); *Patterson v. Van Wiel*, 91 N.M. 100, 570 P.2d 931 (N.M. App. 1977).

The court's jury instruction was a correct statement of the law and was warranted by the evidence. Although the court's instruction was triggered by the evidence in the case, we do not rule that this modified instruction must be given in every case. To the extent the Banks suggest they were disadvantaged by the instruction, we reject the argument. The jury heard the testimony of the Banks' witness, Dr. Massie, who urged that informed consent be written, and by its verdict, the jury did not accept that testimony.

(b) Activation or Aggravation of Preexisting Condition Proposed Jury Instruction

At trial, the Banks requested and the district court rejected a jury instruction regarding the activation or aggravation of a preexisting condition, based on NJI2d Civ. 4.09. The district court rejected the proposed instruction. On appeal, the Banks claim the district court erred when it rejected their proposed instruction. We find no merit in this assignment of error.

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018). However, if the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. *Id*.

When the jury returns a general verdict for one party, an appellate court applies the general verdict rule and presumes that the jury found for the successful party on all issues raised by that party and presented to the jury. See *id.* In similar cases, we presumed that the jury found for appellees on all issues presented to it, and we have interpreted the verdict as finding that the plaintiff failed to prove that the defendant was the proximate cause of the plaintiff's injuries. See *id*. A preexisting condition instruction concerns the apportionment of damages. See *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). Here, the jury did not reach a special verdict, and thus, its verdict was a general verdict. See Neb. Rev. Stat. § 25-1122 (Reissue 2016). When it reached a general verdict, the jury presumably decided that Dr. Mickels' conduct was not the proximate cause of Banks' injuries, and the jury never reached the issue of damages or preexisting conditions. The Banks were not prejudiced when the district court rejected their proposed preexisting condition instruction, and they cannot show reversible error.

3. Collateral Source Rule Violation: Reference to Insurance

Finally, the Banks claim that the district court erred when it denied the Banks' motion for mistrial and motion to alter or amend and for a new trial based on a question asked by counsel

for Mickels of Dr. Wright on direct examination. The Banks contend that the question and answer violated both the collateral source rule and the district court's order in limine that prohibited the reference to insurance. See, also, *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). Under the circumstances presented by this case, the brief, casual, and isolated mention of "deductibles" does not warrant a new trial.

The testimony in question was as follows:

> Q [by Mickels' counsel:] Okay. This is usually a busy time of the year because of the deductibles and everybody kind of wants to get that elective surgery in, am I right?
>
> A [by Dr. Wright:] Right.
>
> Q Okay.
>
> A For better, for worse, I don't have a slow time of year anymore.

Our precedent in *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005) (superseded by statute on other grounds as noted in *Kelly v. Saint Francis Med. Ctr.*, 295 Neb. 650, 889 N.W.2d 613 (2017)), is relevant here. Not every casual or inadvertent reference to an insurance company in the course of trial will necessitate a mistrial. *Genthon v. Kratville, supra.* We have stated that "[w]hether the disclosure is such as to constitute error depends essentially upon the facts and circumstances peculiar to the case under consideration." *Id*. at 87, 701 N.W.2d at 347.

The Banks did not object to Mickels' counsel's question or move to strike the answer during the receipt of evidence, but they did move for a mistrial after the parties had rested. Ignoring the issue of whether the "deductibles" reference was inadvertent, the exchange was not emphasized. The reference did not telegraph to the jury information on whether Carl had received the benefits of health insurance which might have reduced his damages in this case. The effect of the question and answer was mitigated by jury instructions that explained

the collateral source rule. Under the circumstances of this case, it was not prejudicial to the Banks and does not warrant a new trial.

VI. CONCLUSION

For the reasons explained above, we find no merit to the Banks' assignments of errors and specifically hold that § 44-2816 does not require that informed consent be written.

Affirmed.

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

Arlys Wehrer, appellant, v. Dynamic Life Therapy and Wellness, P.C., appellee.

926 N.W.2d 107

Filed April 25, 2019. No. S-18-648.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Limitations of Actions: Negligence.** In determining whether the statute of limitations for professional negligence applies to a plaintiff's claim, the court must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based.
4. **Words and Phrases.** In determining whether a particular act or service is professional in nature, the court must look to the nature of the act or service itself and the circumstances under which it was performed.
5. **Limitations of Actions: Negligence: Words and Phrases.** The definition of "profession" for the purpose of determining the professional negligence statute of limitations under Neb. Rev. Stat. § 25-222 (Reissue 2016) is (1) a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods; (2) maintaining by force of organization or concerted opinion high standards of achievement and conduct; and (3) committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.
6. **Licenses and Permits.** A license indicates a person is a professional, but that is not the only prerequisite, nor is it dispositive.

7. **Words and Phrases.** A college degree is not necessarily required in order for a particular occupation to constitute a "profession."
8. **Licenses and Permits: Words and Phrases.** Licensure alone is generally unreliable in determining whether an occupation is a "profession" under Neb. Rev. Stat. § 25-222 (Reissue 2016), because the educational requisites for licensure vary widely.
9. **Limitations of Actions: Negligence: Words and Phrases.** In analyzing whether a particular group or organization meets the definition of a "profession" for purposes of Neb. Rev. Stat. § 25-222 (Reissue 2016), each of the following principal elements must be demonstrated. The occupation is not a "profession" unless: (1) The profession requires specialized knowledge; (2) the profession requires long and intensive preparation; (3) preparation must include instruction in skills and methods of the profession; (4) preparation must include scientific, historical, or scholarly principles underlying the skills and methods of the profession; (5) membership in a professional organization is required; (6) a professional organization or concerted opinion within an organization regulates and enforces standards for membership; (7) the standards for membership include high standards of achievement; (8) the standards for membership include high standards of conduct; (9) its members are committed to continued study; (10) its members are committed to a specific kind of work; and (11) the specific kind of work has for its primary purpose the rendering of a public service.
10. **Words and Phrases.** A massage therapist is not a "professional" for the purposes of applying Neb. Rev. Stat. § 25-222 (Reissue 2016).

Appeal from the District Court for Platte County: Robert R. Steinke, Judge. Reversed and remanded.

George H. Moyer, of Moyer & Moyer, for appellant.

Karen K. Bailey and L. Paige Hall, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

A customer of a massage therapy establishment filed suit for damages incurred when an employee, a licensed massage therapist, allegedly caused the customer to become unconscious

by improperly compressing a nerve in the customer's neck. The massage therapy establishment moved for summary judgment. The district court granted summary judgment on the ground that the customer's cause of action was time barred by the statute of limitations for professional negligence under Neb. Rev. Stat. § 25-222 (Reissue 2016).

FACTS

On February 17, 2017, Arlys Wehrer filed a negligence action against Dynamic Life Therapy and Wellness, P.C. (Dynamic Life). The lawsuit was related to a neck massage Wehrer received from a licensed masseuse, Nicole Jones, at Dynamic Life on September 2, 2014.

Dynamic Life is a licensed massage therapy establishment in Columbus, Nebraska, and has been in practice since 2010. Dynamic Life passed an inspection conducted by the Division of Public Health of the Department of Health and Human Services in 2011 and was issued a license to engage in the practice of massage therapy. Jones completed the required course of study and training, including 1,000 hours of hands-on training, and graduated from the Omaha School of Massage Therapy, an approved massage therapy school, in 2000. Later that year, Jones passed the examination required by the Board of Massage Therapy and became a licensed massage therapist. She has been a licensed massage therapist since 2001 and has been employed by Dynamic Life since 2014. At the time of Wehrer's massage therapy appointment, Jones had completed the continuing competency education credits required of each licensed massage therapist who is in active practice in the State of Nebraska.

During the appointment, Wehrer alleged that she became unconscious and fell out of the massage chair, hitting her head and shoulder on a wall, after Jones left to get Wehrer water 15 minutes into the appointment. Wehrer alleged this occurred because Jones compressed the vagus nerve in Wehrer's neck, causing her to become unconscious, fall out of the massage chair, and sustain injuries.

Wehrer filed a lawsuit against Dyanmic Life, alleging that Wehrer's injuries were caused by Dynamic Life's negligence as Jones' employer. Wehrer argued that Jones knew or should have known that compressing the vagus nerve while performing a neck massage could cause Wehrer to faint, fall, and sustain injuries. Dynamic Life filed an answer, denying Wehrer's allegations and asserting affirmative defenses, including that Wehrer's claim was time barred by the 2-year statute of limitations set forth in § 25-222.

Dynamic Life filed a motion for summary judgment. At some point before the summary judgment hearing, the court permitted Wehrer to file a reply to Dynamic Life's answer. Within her reply, Wehrer denied Dynamic Life's suggestion that Jones was providing professional services under § 25-222. Alternatively, Wehrer alleged that § 25-222 was unconstitutional, because it is vague and it improperly delegates legislative power to the courts by allowing appellate courts to classify who "professionals" are under the statute.

The district court sustained Dynamic Life's motion for summary judgment and entered a judgment dismissing Wehrer's complaint. The court found that based on Nebraska's Massage Therapy Practice Act and relevant Nebraska Administrative Code provisions, massage therapy requires specialized knowledge and skill. The court then concluded that a massage therapist was a "professional" under § 25-222. As a consequence, the court found that there was no dispute of material fact that Wehrer's claim was time barred by the application of § 25-222. Having dismissed the suit as time barred, the district court did not address Wehrer's constitutional arguments.

ASSIGNMENTS OF ERROR

Wehrer assigns that the district court erred by (1) finding that massage therapy is a "profession" and that a massage therapist could claim the benefit of § 25-222, (2) failing to consider the constitutionality of § 25-222, and (3) sustaining Dynamic Life's motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

Wehrer contends that the district court erred in finding that the statute of limitations for actions in professional negligence under § 25-222 applied in this matter. Wehrer argues that the work of a massage therapist does not meet the educational or high standards of achievement and conduct requirements of "professional services" under our jurisprudence. As such, Wehrer contends that the general statute of limitations for negligence actions under Neb. Rev. Stat. § 25-207 (Reissue 2016) applies. We agree.

Section 25-222 provides in relevant part:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action[.]

The Legislature has not provided a general statutory definition of "professional" or specifically stated which occupations provide professional services.

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[1] *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

[2] *Id.*

[3,4] We have held that in determining whether the statute of limitations for professional negligence applies to a plaintiff's claim, the court must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based.[3] In determining whether a particular act or service is professional in nature, we must look to the nature of the act or service itself and the circumstances under which it was performed.[4]

We have previously determined that a physician,[5] an attorney,[6] a physical therapist,[7] an accountant,[8] an engineer,[9] an architect,[10] and a land surveyor[11] were professionals for the purposes of the statute of limitations described in § 25-222. We have held, in contrast, that a real estate broker[12] and a licensed general securities agent[13] were not professionals for the purposes of § 25-222. It is an issue of first impression whether a massage therapist is a professional for the purposes of applying this statute.

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[3] See, *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 830 N.W.2d 53 (2013); *Parks v. Merrill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004); *Reinke Mfg. Co. v. Hayes, supra* note 1.

[4] *Id.*

[5] See *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001).

[6] See *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

[7] *Churchill v. Columbus Comm. Hosp., supra* note 3.

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

[9] *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000); *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988).

[10] *Board of Regents v. Wilscam Mullins Birge, supra* note 9.

[11] *Bixenmann v. Dickinson Land Surveyors*, 294 Neb. 407, 882 N.W.2d 910 (2016).

[12] *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987).

[13] *Parks v. Merrill, Lynch, supra* note 3.

[5] The definition of "profession"[14] for the purpose of determining the professional negligence statute of limitations under § 25-222 is (1) a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods; (2) maintaining by force of organization or concerted opinion high standards of achievement and conduct; and (3) committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.[15] The Legislature, having not attempted to modify this definition for purposes of § 25-222, has acquiesced in our interpretation and determination of the definition of "profession" for the purpose of applying the statute.[16]

[6] We have emphasized that this definition does not rely solely on the possession of a license.[17] To do so would distort the definition, as it would include many occupations that were traditionally not considered to be professions.[18] A license indicates a person is a professional, but that is not the only prerequisite, nor is it dispositive.[19]

[7] The definition of "profession" adopted for purposes of § 25-222 instead "stresses the long and intensive program of preparation to practice one's chosen occupation traditionally associated only with professions."[20] It does not stress

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[14] See Webster's Third New International Dictionary of the English Language, Unabridged 1811 (1993).

[15] See, *Parks v. Merrill, Lynch, supra* note 3; *Tylle v. Zoucha, supra* note 12.

[16] See *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

[17] *Tylle v. Zoucha, supra* note 12.

[18] *Id.*

[19] *Churchill v. Columbus Comm. Hosp., supra* note 3; *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998).

[20] *Tylle v. Zoucha, supra* note 12, 226 Neb. at 480, 412 N.W.2d at 441.

the difference between manual and intellectual labor; which, while a trademark of the traditional professions, would seem to exclude some occupations commonly considered to be professions even though manual or physical.[21] Accordingly, a college degree is not necessarily required in order for a particular occupation to constitute a "profession."[22] Still, we have placed great emphasis on college degrees in considering whether a particular occupation is a profession.[23] This emphasis recognizes that other jurisdictions hold that a "profession" requires at a minimum a college degree in a specific field—though a college degree does not automatically designate the occupation as a professional practice.[24]

Thus, in *Georgetowne Ltd. Part. v. Geotechnical Servs.*,[25] we held that architects and engineers are professionals under § 25-222, emphasizing that the engineers were registered and licensed civil engineers, who had college degrees. We stated that based on this, "[t]here can be no doubt that [the engineers were] rendering professional services as defined by this court."[26] In *Churchill v. Columbus Comm. Hosp.*,[27] we likewise found that physical therapists were professionals under the statute, because the Physical Therapy Practice Act required physical therapists to be licensed and, in order to obtain a

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[21] *Id.*

[22] *Churchill v. Columbus Comm. Hosp., supra* note 3; *Cooper v. Paap*, 10 Neb. App. 243, 634 N.W.2d 266 (2001).

[23] See, *Jorgensen v. State Nat. Bank & Trust, supra* note 19; *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988).

[24] See, e.g., *Chase Scientific Research v. NIA Group*, 96 N.Y.2d 20, 749 N.E.2d 161, 725 N.Y.S.2d 592 (2001); *New York & Presbyterian Hosp. v. Tishman*, 180 Misc. 2d 193, 688 N.Y.S.2d 424 (1999); *Kuntz v. Muehler*, 603 N.W.2d 43 (N.D. 1999); *Garden v. Frier*, 602 So. 2d 1273 (Fla. 1992); *Pierce v. AALL Ins. Inc.*, 531 So. 2d 84 (Fla. 1988).

[25] *Georgetowne Ltd. Part. v. Geotechnical Servs., supra* note 23.

[26] *Id.*, 230 Neb. at 27, 430 N.W.2d at 38.

[27] *Churchill v. Columbus Comm. Hosp., supra* note 3.

license, the physical therapists were required to complete an approved educational program that generally includes some form of college degree and an examination.[28] We found that these requirements indicate that physical therapists complete the "'long and intensive program of preparation'" that is required of professionals.[29] We additionally considered the fact that physical therapists render a public service and are subject to both mandatory continuing education requirements and professional discipline.[30]

[8] In contrast, in *Tylle v. Zoucha*,[31] we held that a real estate agent was not a professional under § 25-222, despite the fact that he was required to complete approved postsecondary coursework and pass a licensing examination before obtaining his license, as well as the fact that the State Real Estate Commission was authorized to investigate and discipline license holders for unfair trade practices. We held that these factors did not transform a licensed occupation into a licensed profession for purposes of § 25-222.[32] Similarly, in holding in *Parks v. Merrill, Lynch*,[33] that a licensed general securities agent was not a professional under § 25-222, we focused on the fact that the requisite training from employers in providing services for clients did not require long and intensive training or preparation on a par with a college degree—or even preparation equivalent to that required for a real estate broker license. We again observed that licensure alone is generally unreliable in determining whether an occupation is a "profession" under

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[28] See, generally, *id*.

[29] *Id*. at 766, 830 N.W.2d at 58, quoting *Tylle v. Zoucha, supra* note 12.

[30] *Churchill v. Columbus Comm. Hosp., supra* note 3.

[31] *Tylle v. Zoucha, supra* note 12. See, also, *Parks v. Merrill, Lynch, supra* note 3.

[32] See *Tylle v. Zoucha, supra* note 12.

[33] *Parks v. Merrill, Lynch, supra* note 3.

§ 25-222, because the educational requisites for licensure vary widely.[34]

We consider each of the elements set forth in the *Tylle* definition of "profession" to be necessary and not merely possible factors for consideration.[35] Therefore, to constitute a "profession" within the meaning of § 25-222, a particular type of endeavor must meet all of the principal elements.

[9] Our case law has discussed many specific factors to be considered in determining whether a particular occupation constitutes a profession.[36] Though the list of factors set forth in *Churchill* is not necessarily complete, we conclude that in analyzing whether a particular group or organization meets the definition of a "profession" for purposes of § 25-222, each of the following principal elements must be demonstrated. The occupation is not a "profession" unless: (1) The profession requires specialized knowledge; (2) the profession requires long and intensive preparation; (3) preparation must include instruction in skills and methods of the profession; (4) preparation must include scientific, historical, or scholarly principles underlying the skills and methods of the profession; (5) membership in a professional organization is required; (6) a professional organization or concerted opinion within an organization regulates and enforces standards for membership; (7) the standards for membership include high standards of achievement; (8) the standards for membership include high standards of conduct; (9) its members are committed to continued study; (10) its members are committed to a specific kind of work; and (11) the specific kind

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[34] *Id.*

[35] See *Tylle v. Zoucha, supra* note 12.

[36] See, e.g., *Churchill v. Columbus Comm. Hosp., supra* note 3 (listing factors to consider in "profession" determination, including college degree, licensing, protection of citizens, public service, board to enforce standards, written examination, verified experience, continuing education requirements, and professional disciplinary authority).

of work has for its primary purpose the rendering of a public service.

When analyzing whether a particular group or organization meets the definition of a "profession" for purposes of § 25-222, one should be able to affirmatively answer each element set forth above. If this cannot be accomplished, then, one should anticipate that the group or organization does not fall within the scope of § 25-222.

Neb. Rev. Stat. § 38-1709 (Reissue 2016) of the Massage Therapy Practice Act requires that any person engaging in the practice of massage therapy must have a license. Neb. Rev. Stat. § 38-1710 (Reissue 2016) requires that in order for a massage therapist to become licensed to practice, "[e]very applicant for an initial license to practice massage therapy shall (1) present satisfactory evidence that he or she has attained the age of nineteen years, (2) present proof of graduation from an approved massage therapy school, and (3) pass an examination prescribed by the board." To receive a credential to practice massage therapy, an individual must have "completed a course of study and training in massage therapy not less than 1,000 hours, distributed over a term of not less than 9 months."[37]

Additionally, pursuant to Neb. Rev. Stat. § 84-906.05 (Reissue 2014), we take judicial notice of the regulations of the Nebraska Administrative Code relevant to the regulation of massage therapy, as the district court did.[38] Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law,[39] and the parties do not dispute that the contents of the current regulations

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[37] 172 Neb. Admin. Code, ch. 81, § 003.01(3) (2010).

[38] See, *Merie B. on behalf of Brayden O. v. State*, 290 Neb. 919, 863 N.W.2d 171 (2015); *JCB Enters. v. Nebraska Liq. Cont. Comm.*, 275 Neb. 797, 749 N.W.2d 873 (2008).

[39] *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002).

denoting the massage therapist licensure requirements are controlling. The Nebraska Administrative Code requires that "[e]ach person holding an active credential within the state must, on or before the date of expiration of the credential, comply with the continuing competency requirements for his/her profession."[40] Specifically, a licensed massage therapist in Nebraska must complete 24 hours of approved continuing competency hours/credits during the preceding 24-month period on or before November 1 of each odd-numbered year.[41] The licensure and discipline of massage therapists in Nebraska is overseen broadly by the Division of Public Health of the Department of Health and Human Services.[42]

[10] These licensing requirements to become a massage therapist do not require long and intensive training or preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, which would be comparable to that of a college degree. Nor does the record show the standards for membership in the occupation of massage therapy include high standards of achievement. Based on the record before us, Dynamic Life has failed to show that the requirements to become a licensed massage therapist demand high standards of training, preparation, and achievement sufficient to render massage therapy a "profession" under the statute.[43] We therefore hold that a massage therapist is not a "professional" for the purposes of applying § 25-222.

The district court erred in concluding that a massage therapist is a professional under § 25-222 and in granting summary judgment in favor of Dynamic Life on that ground. Having found that massage therapists are not "professionals" under

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[40] Neb. Admin. Code, *supra* note 37, § 006.

[41] *Id.*, § 006.01.

[42] See, *id.*, §§ 002(14) and 008; Neb. Rev. Stat. § 38-1715 (Reissue 2016).

[43] See *Parks v. Merrill, Lynch, supra* note 3.

§ 25-222, we need not address Wehrer's alternative assignment of error and argument that the district court erred in failing to consider whether § 25-222 is unconstitutional.

CONCLUSION

For the foregoing reasons, we find that the district court erred in granting summary judgment in favor of Dynamic Life and reverse the decision and remand the cause to the district court accordingly.

Reversed and remanded.

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