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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

MAY 3, 2019 and SEPTEMBER 5, 2019

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCCIII

PEGGY POLACEK

OFFICIAL REPORTER

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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
Andrew C. Butler	Grand Island

Tenth District

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

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

Eleventh District

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

Judges in District	*City*
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*
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
Grant A. Forsberg	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
Joel B. Jay	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*
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 302

Catherine Barnard
Richelle Dawn Beckman Marting
Tessa Brianne Copeland
Kalli Nicole Davis
Erica Christine DeLeon
Elizabeth Deline
Kayla Michelle Gallaway DeLoach
Michelle M. Devitt
Timothy Daniel Ducar
Bradley Scott Eidson
Candice Yasmine Farha
Michael F. Flanagan
Adam Forest
Jonathan Jeffrey Gamm
Brady Holthus Godbout
Keith Matthew Sullivan Graham
Thomas Weaver Griffin III
Derek Anthony Grutsch
Ashley Nicole Hemphill
Jacqueline Elizabeth Horani
Jacob Ray Huju
Ariane Michele Ice
Thomas Erskine Ice
Rebekah Shea Keller
Richard Carlton Keller
Mahmoud Jonathan Khalil
James Kim
Peggy Elizabeth Kozal
Benjamin James Mann
Diana Morales McFarland
Mary Katherine McWhirter
Stephen F. McWhirter
Nicole Arianne Mirmelli
Kyle R. Murray
Nicholas Napolitano
Rachelle Marie Norberg
Kendra Marie Oakes
Eric Donald Peterson
Matthew Dean Quandt
Whittney Shamelle Richardson
Brian G. Sayer
Mallory Kay Schulte
Evan Daniel Stein
Kent Douglas Stejskal
Adrienne Elisa Sula
Adam Robert Tunink
Melissa Lynn Vancrum
Brent William Warren
Rachel Katelyn Wester
Elena Kathleen Whidden
Philip S. Zou

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No. S-18-056: **State v. Hollingsworth**. Affirmed. Stacy, J.

No. S-18-154: **Double B.J. Farms v. Peerless Machine & Mfg**. Affirmed. Stacy, J.

No. S-18-232: **State v. Reed**. Affirmed. Stacy, J.

No. S-18-502: **State v. Rush**. Affirmed. Heavican, C.J. Freudenberg, J., not participating.

No. S-18-736: **Yagodinski v. Sutton**. Reversed and remanded for further proceedings. Per Curiam.

No. S-18-762: **State v. Lin**. Appeal dismissed in part, and in part affirmed. Stacy, J.

No. S-18-913: **Wheeler County v. Howard**. Affirmed. Freudenberg, J.

No. S-18-1103: **State v. Nelms**. Appeal dismissed. Funke, J.

No. S-18-1174: **State v. Yang**. Affirmed. Heavican, C.J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

Nos. S-18-085, S-18-086: **State v. Akol**. Stipulation allowed; appeal dismissed.

No. S-18-557: **State v. Britt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-18-557: **State v. Britt**. Motion of appellant to reinstate appeal sustained. Appeal reinstated.

No. S-18-587: **TransCanada Keystone Pipeline v. Rech**. Affirmed. See § 2-107(A)(1). See, also, *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 908 N.W.2d 60 (2018).

No. S-18-588: **TransCanada Keystone Pipeline v. Schultz Bros. Farms**. Affirmed. See § 2-107(A)(1). See, also, *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 908 N.W.2d 60 (2018).

No. S-18-589: **TransCanada Keystone Pipeline v. Allpress Bros**. Affirmed. See § 2-107(A)(1). See, also, *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 908 N.W.2d 60 (2018).

No. S-18-986: **Swift v. Mehta**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-18-989: **State v. Trice**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-18-1095: **In re Interest of Emily G**. Motion of appellee for summary dismissal sustained. See § 2-107(B)(1).

No. S-19-070: **State ex rel. Counsel for Dis. v. Bogen**. Case dismissed by order of the court.

No. S-19-071: **State ex rel. Counsel for Dis. v. Weeks**. Case dismissed by order of the court.

No. S-19-143: **Doe v. Scottsbluff Pub. Sch. Dist. No. 32**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-19-241: **Applied Underwriters v. Oceanside Laundry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-19-291: **State ex rel. Counsel for Dis. v. Pfanstiel**. Motion of relator to dismiss formal charges sustained.

No. S-19-297: **State v. Bain**. Appeal dismissed. See § 2-108(E).

No. S-19-323: **State v. Fraternal Order of Police, Lodge 88**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-19-357: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-19-713. **State v. Leon**. Appeal dismissed. See § 2-107(A)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-17-909: **Rosberg v. Rosberg**. Petition of appellant for further review denied on August 5, 2019.

No. A-17-918: **In re Estate of Filsinger**, 27 Neb. App. 142 (2019). Petition of appellants for further review denied on July 1, 2019.

No. A-17-1016: **Jonas v. Willman**, 27 Neb. App. 251 (2019). Petition of appellant for further review denied on July 23, 2019.

No. S-17-1116: **Burgardt v. Burgardt**, 27 Neb. App. 57 (2019). Petition of appellee for further review sustained on June 14, 2019.

No. A-17-1134: **Jamison v. Jamison**. Petition of appellant for further review denied on May 17, 2019.

No. A-17-1171: **State v. Perry**. Petition of appellant for further review denied on May 1, 2019. See § 2-102(F)(1).

No. S-17-1193: **State v. Assad**. Petition of appellant for further review sustained on June 10, 2019.

No. A-17-1219: **Voss v. Brown**. Petition of appellant for further review denied on May 2, 2019.

No. A-17-1229: **Rosberg v. Rosberg**. Petition of appellant for further review denied on July 26, 2019.

No. A-17-1254: **Olson v. Koch**. Petition of appellant for further review denied on June 17, 2019. See § 2-102(F)(1).

No. A-17-1257: **Koch v. Lower Loup NRD**, 27 Neb. App. 301 (2019). Petition of appellant for further review summarily denied on July 22, 2019, as being untimely filed.

No. A-17-1275: **Hutchison v. Kula**, 27 Neb. App. 96 (2019). Petition of appellees for further review denied on May 28, 2019.

No. A-18-020: **Applied Underwriters v. Van De Pol Enters**. Petition of appellant for further review denied on May 17, 2019.

No. A-18-052: **State v. Alvarado**, 27 Neb. App. 334 (2019). Petition of appellant for further review denied on August 26, 2019.

No. A-18-073: **Gray v. Nebraska Dept. of Corr. Servs**. Petition of appellant for further review denied on May 13, 2019.

No. A-18-083: **Ewing v. Evans**. Petition of appellee for further review denied on July 30, 2019.

No. S-18-093: **Jones v. Jones**. Petition of appellee for further review sustained on May 16, 2019.

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No. A-18-186: **Clason v. Clason**. Petition of appellant for further review denied on July 3, 2019.

No. A-18-233: **Applied Underwriters v. HKB, Inc**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-267: **Wolter v. Fortuna**, 27 Neb. App. 166 (2019). Petition of appellant for further review denied on July 26, 2019.

No. A-18-284: **ARR Roofing v. Nebraska Furniture Mart**. Petition of appellant for further review denied on August 23, 2019.

No. A-18-288: **In re Trust Created by Turner**. Petition of appellant for further review denied on August 23, 2019.

No. A-18-348: **Applied Underwriters v. RDR Builders**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-350: **State v. Carmenates**. Petition of appellant for further review denied on May 2, 2019.

No. A-18-350: **State v. Carmenates**. Petition of appellant pro se for further review denied on May 2, 2019.

No. A-18-408: **In re Masek Children's Trust**. Petition of appellants for further review denied on August 5, 2019.

No. A-18-456: **Coughlin v. County of Colfax**, 27 Neb. App. 41 (2019). Petition of appellants for further review denied on May 23, 2019.

No. A-18-461: **State v. Smith**. Petition of appellant for further review denied on August 23, 2019.

No. A-18-478: **State v. Ford**. Petition of appellant for further review denied on April 30, 2019.

No. A-18-483: **State v. Weathers**. Petition of appellant for further review denied on May 10, 2019. See § 2-102(F)(1).

No. A-18-487: **Pittack v. Pittack**. Petition of appellee for further review denied on May 28, 2019.

No. A-18-540: **State v. Pelc**. Petition of appellant for further review denied on May 29, 2019.

No. A-18-558: **State v. Dughman**. Petition of appellant for further review denied on July 26, 2019.

No. A-18-573: **Oswald v. Oswald**. Petition of appellant for further review denied on July 8, 2019, as untimely filed. See § 2-102(F)(1).

No. A-18-573: **Oswald v. Oswald**. Petition of appellant for further review denied on August 20, 2019.

No. A-18-592: **State v. Cardona**. Petition of appellant for further review denied on August 5, 2019.

No. A-18-641: **Applied Underwriters v. Adco Roofing**. Petition of appellant for further review denied on June 14, 2019.

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No. S-18-675: **In re Interest of Donald B. & Devin B.**, 27 Neb. App. 126 (2019). Petition of appellant for further review sustained on June 19, 2019.

No. A-18-729: **Taylor v. Compass Group USA**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-733: **In re Interest of Payton P**. Petition of appellant for further review denied on July 26, 2019.

No. A-18-741: **Pope v. Frakes**. Petition of appellant for further review denied on May 28, 2019.

No. A-18-745: **In re Interest of Dreyvin H**. Petition of appellant for further review denied on May 13, 2019.

No. A-18-748: **State v. Cappel**. Petition of appellant for further review denied on August 20, 2019.

No. A-18-797: **State v. McBride**, 27 Neb. App. 219 (2019). Petition of appellant for further review denied on June 28, 2019.

No. A-18-810: **State v. Smith**. Petition of appellant for further review denied on May 3, 2019. See § 2-102(F)(1).

No. A-18-813: **State v. Flores**. Petition of appellant for further review denied on July 26, 2019.

No. A-18-837: **In re Interest of Malcolm S. et al**. Petition of appellant for further review denied on July 12, 2019.

No. A-18-839: **In re Interest of Lilyanna N**. Petition of appellant for further review denied on August 12, 2019.

No. A-18-839: **In re Interest of Lilyanna N**. Petition of appellee Brianna N. for further review denied on August 12, 2019.

No. A-18-851: **In re Interest of Araceli Q. et al**. Petition of appellant for further review denied on June 10, 2019.

No. A-18-897: **State v. Strodtman**. Petition of appellant for further review denied on July 3, 2019.

No. A-18-909: **State v. Castonguay**. Petition of appellant for further review denied on July 3, 2019.

No. A-18-960: **State v. Chavers**. Petition of appellant for further review denied on May 20, 2019.

No. A-18-982: **In re Interest of Brittney Sue P**. Petition of appellant for further review denied on July 26, 2019.

No. A-18-1025: **State v. Feldhacker**. Petition of appellant for further review denied on July 10, 2019.

Nos. A-18-1036 through A-18-1039: **State v. Burger**. Petitions of appellant for further review denied on August 5, 2019.

No. A-18-1054: **State v. Cole**. Petition of appellant for further review denied on August 28, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-18-1134: **Suelter v. Ogden**. Petition of appellant for further review denied on May 31, 2019.

No. A-18-1140: **State v. Ramirez-Bonilla**. Petition of appellant for further review denied on July 10, 2019.

No. A-18-1157: **State v. Huynh**. Petition of appellant for further review denied on June 28, 2019.

No. A-18-1170: **Applied Underwriters v. Amazing Home Care Servs**. Petition of appellant for further review denied on June 14, 2019.

No. A-18-1171: **Priesner v. Starry**. Petition of appellants for further review denied on May 16, 2019.

No. A-18-1199: **Mumin v. Hansen**. Petition of appellant for further review denied on May 2, 2019.

No. A-18-1218: **State v. Riddle**. Petition of appellant for further review denied on July 31, 2019.

No. A-19-002: **State v. Hicks**. Petition of appellant for further review denied on July 10, 2019.

Nos. A-19-023, A-19-033: **State v. Pollard**. Petitions of appellant for further review denied on July 26, 2019.

No. A-19-036: **Applied Underwriters v. Steve Wills Trucking & Logging**. Petition of appellant for further review denied on June 14, 2019.

No. A-19-046: **State v. Carlson**. Petition of appellant for further review denied on June 7, 2019.

No. A-19-068: **Coleman v. Frakes**. Petition of appellant for further review denied on June 20, 2019.

No. A-19-072: **Applied Underwriters v. Kiessling Transit**. Petition of appellant for further review denied on June 14, 2019.

No. A-19-100: **Yanga v. State**. Petition of appellant for further review denied on May 10, 2019, for lack of jurisdiction. See § 2-102(F)(1).

No. A-19-102: **Davis v. Frakes**. Petition of appellant for further review denied on July 12, 2019.

No. A-19-103: **Yanga v. State**. Petition of appellant for further review denied on May 10, 2019, for lack of jurisdiction. See § 2-102(F)(1).

No. A-19-123: **Strawder v. Frakes**. Petition of appellant pro se for further review denied on August 26, 2019.

No. A-19-148: **In re Interest of Hope M. et al**. Petition of appellant for further review denied on June 25, 2019.

No. A-19-165: **Lincoln Homebuyers v. Bacon**. Petition of appellants for further review denied on August 21, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-19-183: **State v. Fedde**. Petition of appellant for further review denied on August 23, 2019.

No. A-19-194: **State v. Seymour**. Petition of appellant for further review denied on May 17, 2019, for lack of jurisdiction.

No. A-19-238: **Nolan v. Fremont Contract Carriers**. Petition of appellant for further review denied on August 23, 2019.

No. A-19-356: **State v. Hall**. Petition of appellant for further review denied on August 12, 2019.

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Cite as 303 Neb. 1

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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Ann Tran, appellant, v. State of Nebraska and Nebraska Department of Health and Human Services, Division of Medicaid and Long-Term Care, appellees.

926 N.W.2d 641

Filed May 3, 2019. No. S-17-1303.

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: Statutes.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Administrative Law: Presumptions: Proof.** When challenging the decision of an administrative agency, the presumption under Nebraska law is that the agency's decision was correct, with the burden of proof upon the party challenging the agency's actions.
7. **Administrative Law: Medical Assistance.** The Department of Health and Human Services may impose sanctions against a Medicaid service provider for (1) presenting any false claim for services for payment,

(2) failing to make available to the department records of services provided to Medicaid clients when requested, and (3) breaching the terms of the Medicaid provider agreement.

8. ____: ____. Sanctions available to the Department of Health and Human Services for a Medicaid service provider violation include termination from the Medicaid program, suspension or withholding of payments, recoupment from future payments, or provider education.
9. ____: ____. The decision of the sanction to be imposed for a Medicaid service provider violation is left to the discretion of the director of the Department of Health and Human Services.
10. ____: ____. The director of the Department of Health and Human Services considers the following factors in determining an appropriate sanction for a Medicaid service provider violation: (1) seriousness of the offenses, (2) extent of violations, (3) history of prior violations, (4) prior imposition of sanctions, (5) prior provision of provider education, (6) provider willingness to comply with program rules, (7) whether a lesser sanction will be sufficient to remedy the problem, and (8) actions taken or recommended by peer review groups and licensing boards.
11. **Administrative Law: Courts: Appeal and Error.** In a de novo review by a district court of the decision of an administrative agency, the level of discipline imposed by the agency is subject to the district court's power to affirm, reverse, or modify the decision of the agency or to remand the case for further proceedings.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Julie A. Jorgensen, of Morrow, Willnauer & Church, L.L.C., 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.

Funke, J.

Ann Tran appeals the order of the district court for Lancaster County affirming the decision of the Nebraska Department of Health and Human Services (DHHS) to terminate her status as a Medicaid service provider. We affirm.

BACKGROUND

Tran immigrated to the United States from Vietnam in 2002. In 2015 and 2016, Tran provided personal assistance services (PAS) to Nebraska Medicaid clients. Tran fulfilled a need for service providers for elderly Vietnamese individuals, especially due to her ability to speak Vietnamese.

On October 7, 2016, DHHS issued a letter to Tran indicating that DHHS was conducting a review of Tran's claims for payment due to overlapping services and that her payments under the Nebraska Medical Assistance Program, also known as Medicaid, had been suspended pending the outcome of the review. The letter stated that the review would be performed "to ensure that funds are only spent on medically necessary and appropriate services." As part of the review, DHHS asked Tran to submit documents, including service needs assessments and authorizations for each client, monthly or weekly work logs, and required billing forms. DHHS advised Tran to conduct a self-audit on all services she provided from May 2015 through October 7, 2016.

At the conclusion of its investigation, DHHS determined that Tran had overlapped services between clients and had failed to provide DHHS documentation of her services. Based on these failures to adhere to the standards for participation in Medicaid, DHHS terminated Tran's provider agreements for good cause. On November 23, 2016, DHHS issued a letter to Tran informing her of her permanent exclusion from the Medicaid program, effective immediately.

Tran timely appealed to DHHS. In her appeal request, Tran admitted she may have overlapped services because of emergency situations. She indicated that her work schedule required flexibility in order to accommodate the special needs of her clientele. Tran further admitted that she did not retain copies of her weekly timesheets. Tran apologized and said that the audit was a learning experience for her.

An administrative hearing was held on March 15, 2017, after which the DHHS director of the Division of Medicaid

and Long-Term Care (Director) issued a written order affirming DHHS' action. The Director found that Tran "billed for overlapping services and when requested to present documents to support billing admitted that she does not keep documentation." The Director found that Tran's actions were contrary to the Medicaid regulations and that DHHS' action was proper. Tran timely filed a petition for review in district court pursuant to the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2014 & Cum. Supp. 2016).

On November 28, 2017, the district court entered an order affirming DHHS' decision to terminate Tran as a Medicaid service provider. The court found that DHHS' decision was supported by the evidence and applicable authority. The court rejected Tran's argument that she was never informed that she was required to retain records of the services she provided. The court found that Tran's (1) presentment of false claims for payment, (2) failure to make available to DHHS her records of services, and (3) breach of the terms of her provider agreements each constituted grounds for sanctions, and that the sanction imposed of permanent exclusion from the Medicaid program was within the Director's discretion. Tran timely appealed from the adverse decision of the district court. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this State.[1]

ASSIGNMENTS OF ERROR

Tran assigns, restated and consolidated, that the district court erred in (1) finding that Tran billed for overlapping services and (2) affirming DHHS' excessive sanction of permanent exclusion from the Medicaid program.

STANDARD 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,

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

vacated, or modified by an appellate court for errors appearing on the record.[2] 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.[3] 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]

ANALYSIS

Tran argues on appeal that (1) the court's finding that Tran billed for overlapping services is not based on competent evidence and (2) DHHS' sanction to permanently exclude Tran from the Medicaid program is arbitrary and capricious.

[4,5] Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[5] 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.[6]

Medicaid is administered by DHHS.[7] DHHS is required by state and federal law to review activities related to the kind, amount, and frequency of Medicaid services billed to ensure that funds are spent only for medically necessary and

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[2] *Leon V. v. Nebraska Dept. of Health & Human Servs.*, 302 Neb. 81, 921 N.W.2d 584 (2019); *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[3] *Leon V., supra* note 2.

[4] *Id.*; *Lingenfelter v. Lower Elkhorn NRD*, 294 Neb. 46, 881 N.W.2d 892 (2016).

[5] See, *Leon V., supra* note 2; *Merie B. on behalf of Brayden O. v. State*, 290 Neb. 919, 863 N.W.2d 171 (2015).

[6] *Id.*

[7] Neb. Rev. Stat. § 68-908(1) (Reissue 2018); 471 Neb. Admin. Code, ch. 1, § 001.01 (2009).

appropriate services.[8] Medicaid covers PAS under the program guidelines and limitations.[9] Medicaid PAS are typically provided in a client's home.[10] These services include, for example, providing assistance with hygiene, toileting, mobility, nutrition, and medications.[11]

To be eligible to participate in Medicaid, each provider must have an approved service provider agreement (SPA) with DHHS.[12] Each PAS provider must adhere to the provider standards listed in the SPA.[13] DHHS may terminate a provider's SPA for failing to meet the conditions of the agreement.[14] By signing the SPA, a provider agrees to:

> 1. Fully meet standards established by the federal Department of Health and Human Services, and any applicable state and federal laws governing the provision of their services;
>
> 2. Provide services according to the regulations and procedures of [DHHS].
>
> . . . .
>
> 6. Submit claims which are true, accurate, and complete; [and]
>
> 7. Maintain records for all services provided for which a claim has been made, and furnish, on request, the records to [DHHS].[15]

On July 8, 2015, Tran signed an SPA with DHHS. In doing so, Tran agreed to comply with applicable DHHS regulations, policies, and procedures. Tran assured that she would

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[8] 471 Neb. Admin. Code, ch. 1, § 004.03 (2003).

[9] 471 Neb. Admin. Code, ch. 1, § 002 (2009).

[10] See, 42 C.F.R. 440.167(a)(3) (2018); 471 Neb. Admin. Code, ch. 15, § 001.02 (2004).

[11] 471 Neb. Admin. Code, ch. 15, § 003.01 (2004).

[12] 471 Neb. Admin. Code, ch. 2, § 001.03 (2015).

[13] 471 Neb. Admin. Code, ch. 15, § 006.01 (2013).

[14] 471 Neb. Admin. Code, ch. 2, § 001.03.

[15] *Id.*

document and retain records "to fully disclose the extent of the services provided to support and document all claims, for a minimum period of six years," and allow "[state] offices responsible for program administration or audit to review services records." Tran executed an addendum to the agreement in which she agreed to provide PAS for Medicaid recipients and assured that she would "bill only for services which are authorized and actually provided." On July 17, 2016, Tran electronically signed and submitted a new SPA, in which she agreed to adhere to all conditions of the Nebraska Medicaid regulations and acknowledged that she may be terminated from the program if any of the conditions were violated. From May 2015 through October 2016, Tran provided PAS to Medicaid clients pursuant to the DHHS-approved agreements and submitted certified timesheets in support of claims for payment.

Competent Evidence of Overlapping Services

Tran argues the court's determination that she billed for overlapping services is not supported by the record. She claims that she provided her clients services for the full number of hours that were authorized. She argues that DHHS initiated the audit based on inaccurate information and that DHHS failed to account for its "mistaken belief" prior to terminating Tran as a Medicaid service provider.[16]

The administrative record established that DHHS' investigation of Tran began based on a concern that Tran had overlapped her Medicaid service hours with other employment. Tran worked as a substitute teacher at Lincoln Public Schools (LPS) on an on-call basis. On September 30, 2016, DHHS' program integrity unit received a fraud referral concerning Tran's billing practices. The record showed that, for example, Tran submitted claims to DHHS for providing PAS to Medicaid clients on September 24, 2015, from 8 a.m. to noon and 12:30

[16] Brief for appellant at 11.

to 3:30 p.m. Yet, Tran's payroll information at LPS showed that she worked on September 24 from 8:15 a.m. to 3:45 p.m. DHHS submitted audit documents into the record which identified 41 instances, from September 2015 through September 2016, in which Tran overlapped Medicaid service hours with hours worked at LPS.

Upon learning of DHHS' investigation, Tran contacted DHHS' program integrity investigator to inform her that LPS' payroll information did not accurately reflect the hours that Tran had actually worked at LPS. Prior to the hearing, a human resources official for LPS submitted an affidavit informing DHHS of LPS' payroll practices. The official explained that "[w]hen a substitute works 3.75 hours or more it is reflected as a full day on payroll. The time entries displayed on the payroll summaries for our substitutes are therefore not necessarily accurate as to the employee's actual hourly schedule." In addition, a substitute at LPS receives a full day of payment even if the need for the substitute is canceled, and the payroll system would not reflect that a payment had been made for a canceled assignment. On cross-examination, the investigator admitted this meant that portions of DHHS' audit documents which reflected the hours that Tran worked at LPS were not accurate.

Separate from Tran's employment with LPS, DHHS identified several other instances in which Tran had billed for services which overlapped between Medicaid clients. For example, DHHS' audit documents showed that in September 2015, Tran overlapped services between clients M.D. and X.C. for a period of at least 4 hours once a week for 4 consecutive weeks. Tran similarly overlapped services between clients for periods of between 2 and 4 hours on a weekly basis in October 2015. Although less frequent and for shorter periods of time, the record shows instances that Tran overlapped services between clients in November and December 2015 and in January, February, May, and September 2016. These instances were unrelated to Tran's employment with LPS.

Tran testified that she had a practice of completing her service provider timesheets approximately 1 week prior to actually providing services to clients. She admitted that after she provided the services, she did not correct the billing documents prior to submitting them. As a result, the timesheets Tran submitted to DHHS were not an accurate reflection of the time periods she actually provided services to Medicaid clients. Tran testified that the timesheets accurately stated the total number of hours that she worked, but were based on an estimated schedule.

In evaluating Tran's appeal, both DHHS and the district court declined to consider the billing time that overlapped between Tran's Medicaid and LPS work. DHHS' decision to exclude Tran from participating as a Medicaid service provider was instead based, in part, on "overlapping services between clients." The district court affirmed and stated that irrespective of Tran's employment at LPS, "there were several other instances where [Tran] overlapped services for Medicaid clients."

[6] When challenging the decision of an administrative agency, the presumption under Nebraska law is that the agency's decision was correct, with the burden of proof upon the party challenging the agency's actions.[17] Tran disputed that there was any factual overlap in services provided. She testified that she provided all of the hours that were authorized to each of her clients, provided additional hours free of charge, and even after the audit continued to provide services to her clients without pay. Each of her four Medicaid clients submitted affidavits stating that "[Tran] always completed the allotted number of hours for me even if the actual times the services were provided were slightly different than what was scheduled." Although this evidence supports Tran's position, Tran has not proved that the district court failed to base its

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[17] *Gridiron Mgmt. Group v. Travelers Indemnity Co.*, 286 Neb. 901, 839 N.W.2d 324 (2013).

decision on competent evidence. The court articulated in its order that it considered Tran's evidence and determined that her evidence was "outweighed by the evidence of overlapping services and inaccurate service provider timesheets in the record."

Tran's explanations as to why her billing timesheets showed that she overlapped services do not withstand scrutiny. Her testimony was that she filled out her timesheets in advance based on an estimated schedule. Accepting Tran's testimony as true, the timesheets should not have shown any overlapping of services. The impact of Tran's overlapped billing is that she billed for work that was not performed, because she could not have provided services to two clients in different locations at the same time. Tran argued that her clients were elderly and that servicing two clients within the same timeframe was necessary in emergency situations. However, the PAS regulations indicate the correct response to an emergency is to locate temporary coverage when unable to provide services as scheduled, not to submit bills for both clients.[18]

In short, Tran agreed to comply with DHHS' billing standards and practices, Tran did not comply with these conditions, and Tran admitted in her testimony and briefs that she did not comply with these conditions. As a result, we must conclude that the district court's factual findings that Tran submitted bills which overlapped services between Medicaid clients is supported by competent evidence in the record. Moreover, the record contains independent grounds for terminating Tran's SPA's based on her complete failure to maintain required records and submit those records to DHHS upon request, which Tran does not challenge on appeal. Tran's first assignment of error is without merit.

Evidence Supported Sanction

[7-10] DHHS may impose sanctions against a provider for (1) presenting any false claim for services for payment, (2)

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[18] See 471 Neb. Admin. Code, ch. 15, § 006.05 (2005).

failing to make available to DHHS records of services provided to Medicaid clients when requested, and (3) breaching the terms of the Medicaid provider agreement.[19] The sanctions available to DHHS include termination from the Medicaid program, suspension or withholding of payments, recoupment from future payments, or provider education.[20] The decision of the sanction to be imposed is left to the discretion of the Director.[21] The Director considers the following factors in determining an appropriate sanction: (1) seriousness of the offenses, (2) extent of violations, (3) history of prior violations, (4) prior imposition of sanctions, (5) prior provision of provider education, (6) provider willingness to comply with program rules, (7) whether a lesser sanction will be sufficient to remedy the problem, and (8) actions taken or recommended by peer review groups and licensing boards.[22]

DHHS must notify the provider at least 30 days before the effective date of the sanction, unless extenuating circumstances exist, and shall give the provider an opportunity to submit additional information or to appeal the sanction.[23] The provider must file the appeal within 30 days of the date of the notice of the sanction.[24] When a sanction is imposed, DHHS shall give general notice to the public of the restriction, its basis, and its duration.[25]

Tran argues that DHHS abused its discretion in permanently excluding Tran from the Medicaid program. Tran contends that there was no intent to deceive DHHS and that she fully cooperated with the audit and wanted to bring her billing records into compliance. She argues that under the circumstances, DHHS

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[19] 471 Neb. Admin. Code, ch. 2, § 002.03 (2015).

[20] 471 Neb. Admin. Code, ch. 2, § 002.04A (2015).

[21] 471 Neb. Admin. Code, ch. 2, § 002.05 (2015).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

should have considered lesser sanctions such as requiring provider education.

As indicated, on an appeal from an order of the district court under the APA, we review the court's decision for errors appearing on the record. Our inquiry is whether the court's decision is supported by competent evidence and the law, and is neither arbitrary, capricious, nor unreasonable. Here, the district court concluded that permanently excluding Tran from the Medicaid program was an appropriate sanction based on the applicable law and facts in evidence.

[11] We agree that the sanction imposed against Tran was harsh, and that under the circumstances, we may have imposed a different sanction. However, it is not for this court to fashion the sanction in the first instance and we recognize that reasonable people may disagree regarding the appropriate sanction to impose. As we addressed in *Prokop v. Lower Loup NRD*,[26] a district court's de novo review extends to the entirety of an administrative order, and 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. In a de novo review by a district court of the decision of an administrative agency, the level of discipline imposed by the agency is subject to the district court's power to affirm, reverse, or modify the decision of the agency or to remand the case for further proceedings.[27] Accordingly, pursuant to its de novo review, the district court had the ability to modify the sanction imposed, but concluded the sanction imposed was supported by the evidence.

However, our review is limited to 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; and we will not substitute

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[26] *Prokop v. Lower Loup NRD*, 302 Neb. 10, 921 N.W.2d 375 (2019).

[27] See *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996).

our factual findings for those of the district court where competent evidence supports those findings.[28] Therefore, we find that the district court reasonably concluded the sanction was supported by the evidence and that the sanction was not so disproportionate to rise to the level of arbitrary or capricious action.

Tran is correct that DHHS chose to implement one of the most serious sanctions within its authority by terminating her participation in Medicaid. Though DHHS did not discuss the factors that it considered in determining the sanction, based on the record, it is evident that DHHS gave significant consideration to the extent of Tran's violations. It is undisputed that Tran failed to properly record the times she worked for specific clients which resulted in overlapping billings. Tran admitted that she received nearly $880 in overpayments. Further, Tran failed to maintain proper billing records that were generated throughout her time as a service provider. As a result, Tran was unable to provide DHHS copies of the records when requested. The lack of recordkeeping made it impossible for Tran to conduct the self-audit required by DHHS as part of its review. It was not unreasonable for DHHS to consider these failures to adhere to the requirements under the SPA and DHHS regulations as grounds for expulsion from the program.[29]

While Tran indicated a willingness to comply with program rules, the evidence is clear that Tran did not comply. Tran argued throughout this process that she was unaware of the billing requirements and that she knew of other service providers who did not follow the requirements. However, the SPA and DHHS regulations clearly set forth Tran's duty to comply and the record shows that Tran was aware that breaching the terms of her agreements could result in her termination. It

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[28] *Leon V., supra* note 2.

[29] See, e.g., *Siddiqui v. Com'r, N.Y. State DSS*, 170 A.D.2d 922, 566 N.Y.S.2d 970 (1991); *Matter of Camperlengo v. Perales*, 120 A.D.2d 883, 502 N.Y.S.2d 310 (1986).

would not be unreasonable for DHHS to evaluate the evidence of Tran's billing practices and recordkeeping and conclude that it would be best if Tran no longer participated in the program. Even though Tran is correct that DHHS could have imposed education requirements on Tran rather than terminate her services, the regulations do not mandate that any particular form of sanction be imposed against a service provider who fails to comply with program standards.

We emphasize the highly deferential standard of review applicable to the Director's decision of the appropriate sanction. As explained, we do not find the district court's affirmance of the sanction imposed by DHHS to be arbitrary, capricious, or unreasonable. We will not require DHHS to continue to contract with service providers who have failed to comply with the requirements of the Medicaid program. This assignment of error is without merit.

CONCLUSION

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

Edward Wintroub, appellant, v. Nationstar Mortgage LLC, appellee.

927 N.W.2d 19

Filed May 3, 2019. No. S-18-142.

1. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
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.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Contracts.** The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.
5. **Mortgages.** The priority of a mortgage may be changed by agreement of the parties, rendering subordination agreements enforceable in mortgages under Nebraska law.
6. **Contracts: Mortgages: Intent.** If an instrument executed by parties is intended by them as security for a debt, whatever may be its form or name, it is in equity a mortgage.
7. **Contracts: Mortgages: Words and Phrases.** As with the terms used in describing a mortgage, the Nebraska Supreme Court has repeatedly termed a purchaser's interest under an executory land contract as both a "security" and a "lien" upon the land.
8. **Contracts: Mortgages: Title: Liens.** Because a seller in a land contract retains the title as security for the unpaid purchase money and has an equitable lien on the land to the extent of the debt, a seller has, for all intents and purposes, a purchase-money mortgage.

9. **Contracts: Mortgages.** Subordination agreements are enforceable in land contracts.
10. ____: ____. Nebraska courts apply basic contract principles to determine the enforceability, validity, and meaning of a subordination agreement.
11. **Contracts.** In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous.
12. **Contracts: Words and Phrases.** An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
13. **Contracts: Intent.** If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Melvin C. Hansen and Edward L. Wintroub for appellant.

Brian D. Nolan and Elizabeth Gasaway, of Nolan, Olson & Stryker, P.C., L.L.O., for appellee.

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

Freudenberg, J.

NATURE OF CASE

Purchasers of property entered into a land contract with a seller-trust for the purchase of a residence. Both parties agreed to a provision in the contract that stated: "Until all amounts due hereunder are paid in full, this Land Contract shall be subordinated to any rights held by Seller's Lender." Subsequently, after the purchasers took possession, the seller-trust signed a promissory note and a deed of trust to a bank for a sum of money in order to pay a previously existing mortgage on the purchased property. The note and deed of trust were subsequently assigned to various entities, eventually being assigned to its current holder, a mortgage company who appears as the appellee in this case. At issue is whether the quoted provision in the land contract effectively subordinated the rights of the purchasers to the rights held by later assignees of the note and deed of trust.

FACTS

Appellant, Edward Wintroub, filed an appeal from an order dated January 23, 2018, by the Douglas County District Court, which granted a motion for summary judgment in favor of appellee, Nationstar Mortgage LLC (Nationstar).

Wintroub and his wife entered into a purchase agreement with Landmark Enterprises on January 6, 2006, to purchase a residence being built by Landmark Enterprises on Harney Street in Omaha, Douglas County, Nebraska, for $610,000. At that time, the house had been under construction for about 1 year and the Wintroubs were involved in the design and construction decisions of this house.

On February 23, 2006, the house was completed and the Wintroubs entered into a land contract with the Steve Faller Revocable Trust (Faller Trust) to purchase the residence. On the same day and just prior to the transfer, Landmark Enterprises transferred its interest in this property to the Faller Trust.

Also on February 23, 2006, Steve Faller, as trustee of the Faller Trust, signed a promissory note to Lehman Brothers Bank for $488,000, which was used to pay the existing mortgage on the property with Great Western Bank and a construction lien. The Great Western Bank mortgage had been previously recorded with the Douglas County register of deeds in 2004.

On February 24, 2006, Faller, individually and as trustee of the Faller Trust, signed a deed of trust to Lehman Brothers Bank to secure the above-noted promissory note. The deed of trust was dated February 23, 2006. The deed of trust was filed and recorded with the Douglas County register of deeds on March 8.

The note and deed of trust were assigned to various entities, and the current holder of the note and deed of trust is Nationstar, the appellee in this case. Nationstar filed and recorded its assignment on September 25, 2012, with the Douglas County register of deeds.

According to the February 2006 land contract, the Faller Trust was the grantor of the property and the Wintroubs were the grantees. Pursuant to the terms of the contract, the Wintroubs were required to pay the contract price in full by March 1, 2008. The contract provided: "Until all amounts due hereunder are paid in full, this Land Contract shall be subordinated to any rights held by Seller's Lender." Timely payment was not made by the Wintroubs. Consequently, the parties entered into a new land contract with the same above-quoted provision on August 30, 2010. The new contract explicitly canceled the prior contract and required the Wintroubs to pay the full contract price by July 1, 2012. Timely payment was again not made by the Wintroubs. Neither of the land contracts was recorded.

The Faller Trust eventually defaulted on its loan, and based on this default, a sale of the property was scheduled for June 8, 2015. Wintroub filed suit to enjoin a trustee sale of the property, asserting that his claim to the property was superior to that of Nationstar. Nationstar moved for summary judgment.

Nationstar asserted four different legal theories in support of its motion for summary judgment. The lower court agreed that based on the evidence submitted at the hearing, there was no issue of fact that Nationstar had superior title as a result of the March 2006 deed of trust in favor of its predecessor, Lehman Brothers Bank. The court did not address Nationstar's other theories.

Wintroub argued that because he was in actual possession of the property, Nationstar had a duty to inspect the property to determine if someone was in actual possession of it. He relied on *Grand Island Hotel Corp. v. Second Island Development Co.*,[1] where we held that a purchaser is charged with notice of a tenant's right when the latter is in actual possession of the

[1] *Grand Island Hotel Corp. v. Second Island Development Co.*, 191 Neb. 98, 214 N.W.2d 253 (1974).

real estate at the time it is sold. This notice, Wintroub argued, would negate the original bank's status as a "good faith purchaser" under Nebraska's race-notice statute, see Neb. Rev. Stat. § 76-238 (Reissue 2018). In support of this argument, Wintroub submitted an affidavit that affirmed that he and his wife took possession of the property at issue on February 23, 2006.

Nationstar disagreed and argued that this inspection requirement applies only to a landlord-tenant situation, not a purchase-money mortgage transaction such as this one. Nationstar noted that Nebraska has never applied this requirement to the purchase and sale of private residential buildings.

Ultimately, the district court found that it need not determine whether the rule in *Grand Island Hotel Corp.* might apply in this case, because the two land contracts in question have a similar provision: "Until all amounts due hereunder are paid in full, this Land Contract shall be subordinated to any rights held by Seller's Lender(s)." The court held that this clearly meant that if there were any lenders of the Faller Trust, then those lenders take precedence over and rights or interest of Wintroub. In addition, the court found:

> Because the second Land contract cancelled the first Land Contract, the new interest of [Wintroub] began on August 30, 2010. Thus, the filing with the Register of Deeds of the Lehman Brothers mortgage in March of 2006 takes precedent over any priority the 2010 Land Contract provided to [Wintroub]. This precedence also extends to all of the assignees, which [Nationstar] is such an assignee.

As a result, the court sustained Nationstar's motion for summary judgment and dismissed the case accordingly. Wintroub appeals.

ASSIGNMENT OF ERROR

Wintroub assigns that the district court erred in granting Nationstar's motion for summary judgment where genuine

issues of material fact, and the ultimate inferences that may be drawn from those facts, exist.

STANDARD OF REVIEW

[1-3] Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[2] Under this court's standard of review, 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.[3] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[4]

[4] The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.[5]

ANALYSIS

On appeal, Wintroub contends that the district court erred in sustaining Nationstar's motion for summary judgment. Wintroub primarily argues that genuine issues of material fact remain as to (1) whether Wintroub's interest in the land, pursuant to the land contract, had priority over Nationstar's interest and (2) whether the subordination clause is enforceable against him.

[5-9] We have never specifically addressed the enforceability of subordination agreements in land contracts. However,

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[2] *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997).

[3] *Id.*

[4] *Id.*

[5] *Timberlake v. Douglas County*, 291 Neb. 387, 865 N.W.2d 788 (2015).

we have held that the priority of a mortgage may be changed by agreement of the parties, rendering subordination agreements enforceable in mortgages under Nebraska law.[6] We have also noted that it is generally accepted that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form or name, it is in equity a mortgage.[7] As with the terms used in describing a mortgage, this court has repeatedly termed a purchaser's interest under an executory land contract as both a "security" and a "lien" upon the land.[8] Further, as in a mortgage, the vendor under an installment land contract agrees to accept payments from the purchaser, generally by a series of installments over time, until the purchase price as established by the contract has been paid. When the contract price has been paid, the vendor must deliver a deed of title to the purchaser.[9] Based on these principles and observations, this court has uniformly recognized that because a seller in a land contract retains the title as security for the unpaid purchase money and has an equitable lien on the land to the extent of the debt, a seller has, for all intents and purposes, a purchase-money mortgage.[10] Therefore, it would follow that subordination agreements are enforceable in land contracts, as such agreements are enforceable in mortgages. We hold that generally, a subordination agreement set forth within a contract for the sale and purchase of land is enforceable.

[10-13] We turn next to the terms of the subordination agreement at issue in this case. In construing subordination agreements, many courts have frequently indicated that the principles and rules governing the construction, application, and enforceability of contracts apply to mortgage subordination

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[6] See *Meek v. Gratzfeld*, 223 Neb. 306, 389 N.W.2d 300 (1986).

[7] *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994).

[8] *Id.*

[9] See *id.*

[10] *Id.*

agreements.[11] Nebraska courts take the same approach, applying basic contract principles to determine the enforceability, validity, and meaning of a subordination agreement.[12] In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous.[13] An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[14] If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract.[15] The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.[16]

Both the 2006 and the governing 2010 land contracts between the Wintroubs and the Faller Trust similarly provide: "Until all amounts due hereunder are paid in full, this Land Contract shall be subordinated to any rights held by the Seller's Lender(s)." Applying the foregoing rules of construction or interpretation of a document, we conclude that this subordination clause is unambiguous. Indeed, Wintroub does not assert otherwise. With regard to the relevant contract property, the above-quoted subordination clause plainly means that the rights of any existing lenders of the Faller Trust would take precedence over the Wintroubs' rights or interest in the property until the Wintroubs have paid the contract price "in full."

The Faller Trust's first lender after the 2006 land contract was Lehman Brothers Bank. Any interest or rights that the

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[11] See, e.g., *In re Stambaugh*, 532 B.R. 572 (2015); *Wells Fargo Bank, NA v. SBC IV REO, LLC*, 318 Mich. App. 72, 896 N.W.2d 821 (2016); *KeyBank Natl. v. Southwest Greens of Ohio*, 2013 Ohio 1243, 988 N.E.2d 32 (2013).

[12] See, *Meek v. Gratzfeld, supra* note 6; *Reitz v. Petersen*, 131 Neb. 706, 269 N.W. 811 (1936).

[13] *Porter v. Smith*, 240 Neb. 928, 486 N.W.2d 846 (1992).

[14] *Id.*

[15] *Id.*

[16] *Timberlake v. Douglas County, supra* note 5.

Wintroubs may have had pursuant to the 2006 land contract were subordinated to the lien of Lehman Brothers Bank, which would pass to its successors and assignees, which now includes Nationstar.

Wintroub does not argue that he paid the amounts due and owing as required by the land contract. There is no evidence in the record suggesting a material issue of whether Wintroub has paid the amounts due and owing as required by the land contract. Wintroub simply argues on appeal that he has "equitable title" pursuant to the land contract and Nebraska law. Wintroub fails to explain how having an "equitable title" affects the enforcement of the plain language of the subordination clause.

Even viewing the evidence in the light most favorable to Wintroub and giving him the benefit of all reasonable inferences deducible from the evidence, we find no genuine issues of material fact remaining in this case. As such, the district court did not err in granting Nationstar's motion for summary judgment.

We note, as the court below correctly ascertained, that the merits of any additional issues or arguments raised by the parties on appeal need not be addressed or determined; the unambiguous terms of the subordination clause expressly apply and govern in this case. There is no genuine issue that under the subordination clause, Nationstar's mortgage has priority over Wintroub's interest.

CONCLUSION

Based on the analysis above, we find that the district court did not err in sustaining Nationstar's motion for summary judgment. We therefore 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

LaVeta Winslow, by and through her designated authorized representative The Evangelical Lutheran Good Samaritan Society - Superior, appellant, v. State of Nebraska ex rel. Douglas Peterson, Attorney General, and Department of Health and Human Services, appellees.

926 N.W.2d 629

Filed May 3, 2019. No. S-18-181.

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. **Medical Assistance: Federal Acts: States.** The Medicaid program provides joint federal and state funding of medical care for individuals whose resources are insufficient to meet the cost of necessary medical care.
5. ____: ____: ____. A state is not obligated to participate in the Medicaid program; however, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.
6. **Medical Assistance: Federal Acts: Real Estate.** If a Medicaid applicant is determined to possess real property that is not subject to the home exemption and is considered an available resource, the Nebraska

Department of Health and Human Services is required to make available an "Agreement to Sell Real Estate and Repay Assistance" form to the applicant provided that (1) the applicant has authority to liquidate the property and (2) the applicant would be under the available resource limit if the property is excluded from consideration.

7. **Medical Assistance: Federal Acts: Trusts.** For Medicaid eligibility purposes, available resources can include assets held by trusts if a person establishes that trust with his or her assets and the individual is able to benefit from the corpus of the trust or the income derived therefrom.
8. **Administrative Law: Presumptions: Proof.** When challenging the decision of an administrative agency, the presumption under Nebraska law is that the agency's decision was correct, with the burden of proof upon the party challenging the agency's actions.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Cameron E. Guenzel, of Johnson, Flodman, Guenzel & Widger, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellees.

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

Funke, J.

LaVeta Winslow, by and through her designated authorized representative The Evangelical Lutheran Good Samaritan Society - Superior (Evangelical), appeals the Lancaster County District Court's order affirming the denial of Winslow's September 2016 application for Medicaid benefits. Winslow claims Nebraska's Department of Health and Human Services (DHHS), Division of Medicaid and Long-Term Care, improperly determined she was ineligible for Medicaid due to excess resources, namely a house which was owned by a revocable trust. Winslow further claims DHHS failed to provide her a necessary form so the property could be excluded from her available resources pending sale. For the reasons set forth herein, we affirm.

I. BACKGROUND

Winslow is a current resident of Evangelical, a skilled nursing facility located in Nuckolls County, Nebraska. Prior to moving to Evangelical, Winslow lived in a house in Mankato, Kansas, until she was hospitalized in September 2015. On October 1, 2015, she went from the hospital to Evangelical to receive additional living assistance. Although she was unable to return to the Mankato house beyond occasional visits, she maintained ownership of the home with the goal of her eventual return. While she resided at Evangelical, no one else lived in the house, she did not rent the house to anyone else, and she continued to store personal property there.

The record owner of the Mankato house was the LaVeta Winslow Living Trust dated April 27, 2004, and restated January 8, 2015. The trust identified Winslow as the "'Trustmaker'" and Winslow and her daughter Vycke Garman as trustees. As to the Mankato house and other property held by the trust, § 1.03 thereof required that the trustees administer and dispose of all trust property for Winslow's benefit and the benefit of her beneficiaries. Additionally, § 1.04 provided, in relevant part:

> During my lifetime, I shall retain the powers set forth in this Section in addition to any powers that I reserve in other provisions of this agreement.
>
> **(a) Action on Behalf of My Trust**
>
> During any period that I am serving as a Trustee of my trust, I may act for and conduct business on behalf of my trust without the consent of any other Trustee.
>
> **(b) Amendment, Restatement or Revocation**
>
> I have the absolute right, at any time and from time to time, to amend, restate, or revoke any term or provision of this agreement in whole or in part. Any amendment, restatement, or revocation must be in a written instrument signed by me.
>
> My agent acting under a valid power of attorney executed by me may amend this agreement to the extent the

> agent is specifically authorized to do so in the instrument appointing the agent. An amendment made by my agent in good faith shall be conclusive on all persons interested in the trust and my agent shall not be liable for the consequences of any amendment or for not having amended the trust. An amendment by my agent must be in a written instrument signed by the agent.
>
> **(c) Addition or Removal of Trust Property**
>
> I have the absolute right, at any time and from time to time, to add to the trust property and to remove any property from my trust.

Section 12.20 addressed Winslow and Garman's trustee powers as to real estate and stated in part, "My Trustee may sell at public or private sale, convey, purchase, exchange, lease for any period, mortgage, manage, alter, improve and in general deal in and with real property in such manner and on such terms and conditions as my Trustee deems appropriate."

Winslow also executed a durable special power of attorney appointing Garman and Cindy Kuhn to serve as Winslow's holders of financial power of attorney. This document provided Garman and Kuhn the "full power and authority to do everything necessary to transfer, assign, convey, and deliver any interest [Winslow] may have in property owned by [Winslow] to the then acting Trustee of the . . . LaVeta Winslow Living Trust."

In late 2015 and again in May 2016, Garman applied for Medicaid for Winslow. These applications were denied in part because Winslow's resources exceeded program standards. These resources included the Mankato house.

Garman again applied for Medicaid for Winslow on September 23, 2016. The September application indicated Winslow's assets included a car, a checking account, a savings account, an annuity account, an irrevocable burial trust, and the Mankato house.

On October 3, 2016, DHHS mailed Winslow a verification request seeking confirmation of Winslow's interest, dividends,

royalties, annuity, pension, and trust fund income and requesting Winslow's most recent bank statements and life insurance documentation. The request provided that "[f]ailure to provide verifications by 10-13-2016 could result in the denial, termination or decrease in [Winslow's] benefits."

On October 17, 2016, DHHS mailed Winslow another verification request seeking confirmation of "Current Trust, Bonds, Certificates of Deposit . . . , IRA, Money Market, Keogh, 401(K), [and] Mutual Funds." DHHS also requested a current accounting of the assets held by the trust. The request noted that Winslow was likely over the resource limit but that "if LaVeta is wanting to revoke the entire trust at this time and return all assets in the trust to herself she is able to do so. . . . Initially, if this is done she may still be over resources, but she could potentially gain Medicaid eligibility." The request again provided that "[f]ailure to provide verifications by 10-27-2016 could result in the denial, termination or decrease in [Winslow's] benefits."

In a DHHS supervisor narrative dated October 17, 2016, DHHS acknowledged that the trust assets were available to Winslow and that Winslow had the authority to revoke or amend the trust. This DHHS supervisor narrative copied an October 6 email from a program specialist with DHHS, Division of Medicaid and Long-Term Care, explaining Winslow's authority under the trust.

On November 4, 2016, DHHS mailed Winslow an initial notice of action denying her coverage for failure to provide information. The notice stated that the information requested in the October 17 request was applicable only if Winslow was dissolving her trust. If not, Winslow would remain over the resource limit and would be ineligible for Medicaid. The notice further provided that the September application would remain valid until December 22.

On December 20, 2016, Garman deeded the Mankato house from the trust to Winslow. On December 22, Winslow's attorney called DHHS concerning the Mankato house to request an

"IM-1 form"—a document entitled "Agreement to Sell Real Property and Repay Assistance" which allows an applicant 6 months to sell real property and excludes use of that property as a resource for Medicaid eligibility purposes. DHHS responded to Winslow's attorney that an IM-1 form would not be needed because DHHS had not determined whether Winslow's resources would be under the eligibility limits. Winslow then submitted verification documents on December 22, 23, and 28. DHHS eventually provided Winslow an IM-1 form sometime after December 22.

After reviewing the documentation provided in December 2016, DHHS determined Winslow was ineligible for Medicaid because her resources, which included two credit union accounts and the Mankato house, were above $4,000. On December 30, DHHS mailed Winslow notice of the denial which stated "Resources Exceed Program Standard" as the reason for Winslow's ineligibility. Also on December 30, Winslow signed the IM-1 form for the Mankato house. Winslow then reapplied for Medicaid, and on April 12, 2017, she was approved, with a share of cost, effective January 1, 2017.

Winslow filed an administrative appeal, and a hearing was held in June 2017. At the hearing, the parties agreed the main issue on appeal was whether the Mankato property "is a countable resource during the potential period of affected benefits for the September 2016 application." Testimony from Sarah Shurigar-Meyer and Garman was received.

Shurigar-Meyer was the lead Medicaid worker with DHHS, Division of Medicaid and Long-Term Care. In her testimony, she explained DHHS' reasoning for the denial of Winslow's September 2016 application. Specifically, Shurigar-Meyer testified that Winslow was denied because she was over the resource limit of $4,000 for Medicaid. Winslow's asset with the most value was the Mankato house, and Shurigar-Meyer testified Winslow would have been under the resource limit if the property were not an available resource. The Mankato house was determined to be an available resource "[b]ecause

the property was listed in a trust" and "there was not a[n] IM-1 [form] signed to exclude that property because it was listed in the trust." Shurigar-Meyer testified that once Winslow had the property transferred to her own name and signed the IM-1 form on December 30, 2016, Winslow was eligible for Medicaid benefits beginning in January 2017.

Shurigar-Meyer further explained that under DHHS policy, once DHHS becomes aware a property needs to be sold, DHHS is required to provide the applicant with an IM-1 form. Shurigar-Meyer testified:

> [T]here was a lot of information that was missing, that we were asking for, that wasn't provided until December 22nd, December 23rd[;] . . . even though we were aware of the property, there was still [a] question as to whether or not that property was accessible to [Winslow], and I don't know that we necessarily had that answer until we got the documentation that we needed on December 22nd and 23rd.

However, Shurigar-Meyer admitted on cross-examination that DHHS had the trust document prior to the September 2016 application and agreed that DHHS understood Winslow was authorized to revoke the trust and have the Mankato house returned to her name.

Garman testified to her participation in the application process. As to the Mankato house, she explained that she was aware that the house would need to be sold within 6 months after Winslow was approved for benefits. Pursuant to such understanding, Garman took actions in the fall of 2016 to clean out the house and discussed selling it to various people. Garman testified that while DHHS workers told Garman she would have to revoke the trust in order to sell the house, no one from DHHS advised her she could transfer the house to Winslow's name and utilize an IM-1 form to keep the house from being considered an available resource. Instead, Garman was first told about the IM-1 form by her attorney in December 2016. Garman explained that as

trustee, she always had authority to transfer the property back to Winslow.

Following the hearing, the interim director of DHHS, Division of Medicaid and Long-Term Care, issued an order affirming the denial of the September 2016 application. The order stated that Winslow "did not meet Medicaid eligibility requirements, due to resources, until the trust property was transferred to [Winslow], and an [IM-1 form] was signed."

Winslow appealed this decision to the district court, arguing that the Mankato house should have been excluded from her countable resources beginning August 1, 2016, and that DHHS should have furnished her with an IM-1 form in September 2016.

The district court affirmed the denial of benefits. In its opinion, the court found that the Mankato house did not qualify for Winslow's home because Winslow had not resided in the house for at least 6 months prior to the September 2016 application and the house was owned by the trust and not Winslow personally. As such, the house was not exempt from consideration as an available resource as Winslow's home under 477 Neb. Admin. Code, ch. 21, § 001.15B1 (2014), and Winslow was not entitled to additional time under 477 Neb. Admin. Code, ch. 21, § 001.15B5 (2014), to liquidate before it was counted as an available resource.

The court also determined that Winslow did not have the legal authority to liquidate the Mankato house until after Garman deeded it to her personally on December 20, 2016. Because Winslow did not have such authority, the court found that DHHS was not required to provide her an IM-1 form until after the transfer. Moreover, because Winslow did not sign an IM-1 form until December 30, the court held that January 1, 2017, was the appropriate start date since 477 Neb. Admin. Code, ch. 21, § 001.15B8 (2014), directs that the 6-month period in which the real property is excluded begins on the month following the signing of the IM-1 form. Winslow appeals this order.

II. ASSIGNMENTS OF ERROR

Winslow assigns, restated, that the district court erred by (1) failing to find that the Mankato house was Winslow's home and exempt from consideration as an available resource, (2) failing to find that DHHS was required to provide Winslow an IM-1 form for the Mankato house while it was held by the revocable trust, and (3) finding that DHHS appropriately counted the Mankato house as an available resource and denied Winslow's September application.

III. STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[1]

[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.[2]

[3] 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.[3]

IV. ANALYSIS

[4,5] The Medicaid program provides joint federal and state funding of medical care for individuals whose resources are insufficient to meet the cost of necessary medical care.[4] A state is not obligated to participate in the Medicaid program;

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[1] Neb. Rev. Stat. § 84-918 (Reissue 2014); *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[2] *J.S., supra* note 1.

[3] *Donna G. v. Nebraska Dept. of Health & Human Servs.*, 301 Neb. 838, 920 N.W.2d 668 (2018).

[4] *In re Estate of Vollmann*, 296 Neb. 659, 896 N.W.2d 576 (2017).

however, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.[5] Nebraska elected to participate in the Medicaid program through enactment of the Medical Assistance Act,[6] and DHHS is responsible for administering Nebraska's program.[7]

In order to be eligible for Medicaid, an individual applicant must be under a resource limit of $4,000.[8] This is determined by taking the total equity value of available, nonexcluded resources of the client and comparing it to the $4,000 maximum.[9] If the total equity value of available, nonexcluded resources exceeds the established maximum, the client is ineligible.[10] Available resources include cash or other liquid assets or any type of real or personal property or interest in property that the client owns and may convert into cash to be used for support and maintenance.[11]

1. Home Exemption

An applicant's home—defined as any shelter which the individual owns and uses as his or her principal place of residence—is exempt from being considered as an available resource.[12] However, if the applicant has moved away from the home and does not plan or is unable to return to it, it may be considered an available resource.[13] Specifically, when an applicant moves to a nursing home or to an assisted living facility and it is not possible to determine immediately

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[5] *Id.*

[6] See Neb. Rev. Stat. § 68-901 et seq. (Reissue 2018).

[7] *In re Estate of Vollmann, supra* note 4.

[8] 477 Neb. Admin. Code, ch. 21, § 001.16 (2014).

[9] 477 Neb. Admin. Code, ch. 21, § 001.01 (2014).

[10] *Id.*

[11] 477 Neb. Admin. Code, ch. 21, § 001.03 (2014).

[12] § 001.15B1 and 477 Neb. Admin. Code, ch. 21, § 001.15B2 (2014).

[13] § 001.15B5.

if the client will be able to return to the property, a maximum of 6 months may be allowed to make that determination.[14] After these 6 months, the property may no longer be considered the individual's principal place of residence and must be considered an available resource.[15] However, the applicant is allowed time to liquidate the property before it affects eligibility.[16]

Here, it is uncontested that Winslow has been out of the Mankato house since September 2015. While an initial goal was for Winslow to return to the Mankato house, she stayed at Evangelical and returned to the house only for occasional visits. When Winslow submitted her September 2016 Medicaid application, she had been at Evangelical beyond the 6-month maximum and the Mankato house was no longer her principal place of residence under DHHS regulations.

Winslow claims the requirement that an applicant with property no longer considered a principal place of residence have time to liquidate the property before it affects eligibility means the property retains the home exemption during the liquidation proceedings even if this occurs outside of the 6-month period. As such, Winslow argues that attempting to liquidate property which was classified as a home allows the applicant to be eligible once the Medicaid application is submitted in contrast to attempting to liquidate real property other than a home where the eligibility period would begin the month after an IM-1 form is signed.

This distinction is unsupported by the regulations. The regulations clearly provide that if an applicant has lived in an assisted living facility and not on the subject property for a period beyond 6 months, the property is no longer considered the applicant's principal place of residence and is no longer a

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[14] *Id.*

[15] *Id.*

[16] § 001.15B5 and 477 Neb. Admin. Code, ch. 21, §§ 001.15B5a and 001.15B7 (2014).

"home" for eligibility purposes.[17] As such, in order to exclude this property from the available resources calculation, the property is classified as real property other than a home, for which the applicant may sign an IM-1 form utilizing the procedure discussed below.[18]

In consideration of all of the above, the district court did not err in determining that the Mankato house was no longer Winslow's home for Medicaid eligibility purposes.

2. Other Real Property Exception

If real property is not considered the applicant's home for eligibility purposes, the applicant may still be prospectively eligible pending the liquidation of the property.[19] Under § 001.15B7, entitled "Liquidation of Real Property," this period of exception is described as follows:

> When a client has excess resources because of real property, s/he may receive Medicaid pending liquidation of the resource, according to the following regulations. . . .
>
> Note: If the client has excess resources because of real property other than his or her home during a retroactive period, s/he is ineligible for Medicaid. The client may be prospectively eligible with excess resources because of real property if an [IM-1 form] is signed.

Under § 001.15B8 entitled "Time Limits for Liquidation," the procedure is described as follows:

> Real property which the client is making a good faith effort to sell must be excluded. First it must be determined if the individual has the legal authority to liquidate the property. If not, the client is allowed 60 days to initiate legal action to obtain authority to liquidate. . . .
>
> Once the client has the legal authority to liquidate the property, the client's signature on the [IM-1 form] must

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[17] § 001.15B5.

[18] §§ 001.15B5, 001.15B5a, and 001.15B7.

[19] §§ 001.15B5a and 001.15B7.

> be obtained. The client is allowed six calendar months to liquidate the real property. If the client refuses to sign the [IM-1 form], s/he is immediately ineligible because of excess resources. The six-month period begins with the month following the month in which the [IM-1 form] is signed.
>
> Once the [IM-1 form] is signed, the six calendar months are counted, whether or not the client is receiving assistance.

[6] To summarize these regulations, if an applicant is determined to possess real property that is not subject to the home exemption and is considered an available resource, DHHS is required to make available an IM-1 form to the applicant provided that (1) the applicant has authority to liquidate the property and (2) the applicant would be under the available resource limit if the property is excluded from consideration.[20] Should DHHS determine the applicant does not have authority to liquidate the property, "the client is allowed 60 days to initiate legal action to obtain authority to liquidate."[21] Once an IM-1 form is signed, the applicant's 6-month eligibility period begins the following month.[22]

(a) Authority to Liquidate

DHHS determined the Mankato property was an available resource and not Winslow's home for eligibility purposes. However, DHHS also determined that Winslow lacked authority to liquidate the property, because it was held by the trust rather than under her name. Shurigar-Meyer testified that for that reason, DHHS did not provide Winslow the IM-1 form until after the Mankato property was transferred from the trust to Winslow. Shurigar-Meyer explained that until that transfer occurred, there was still "[a] question as to whether or not

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[20] §§ 001.15B7 and 001.15B8.

[21] § 001.15B8.

[22] *Id.*

that property was accessible to [Winslow]" because it was held by the trust.

[7] Under DHHS regulations, an applicant is not required to own the property in the applicant's own name for that property to be considered an available resource. Available resources are defined in § 001.03 as "cash or other liquid assets or any type of real or personal property or interest in property that the client owns and may convert into cash to be used for support and maintenance." We have previously found that available resources, therefore, can include assets held by trusts if a person establishes that trust with his or her assets and the individual is able to benefit from the corpus of the trust or the income derived therefrom.[23]

Similarly, the regulations which describe other real property eligible for the 6-month liquidation period do not require the real property to be listed under the applicant's own name.[24] These regulations require only real property which the applicant has the "legal authority to liquidate" and which is otherwise an available resource.[25] Thus, real property held by a revocable trust which is determined to be an available resource may be eligible for the 6-month exception if the applicant has authority to liquidate the property.

DHHS' contention that it could not determine whether Winslow had authority to liquidate the Mankato property until it was transferred back to Winslow's name is contradicted by the record. Shurigar-Meyer conceded that DHHS knew about the Mankato property and had the trust document prior to Winslow's September 2016 application. The trust identified Winslow as the trustmaker and listed Winslow as one of the trustees. One of the duties of the trustees was to administer

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[23] See, *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006); *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003).

[24] See §§ 001.15B7 and 001.15B8.

[25] § 001.15B8.

and dispose of the property of the trust for Winslow's and her beneficiaries' benefit. As such, the trustees were empowered with authority to sell at public or private sale, convey, purchase, exchange, lease for any period, mortgage, manage, alter, or improve any real property held by the trust. Under the trust, Winslow retained the right to take action on behalf of the trust without the consent of any other trustee. Specifically, the trust provided that Winslow, during her lifetime, has "the absolute right, at any time and from time to time, to amend, restate, or revoke any term or provision of [the trust] in whole or in part" and "the absolute right, at any time and from time to time, to add to the trust property and to remove any property" from the trust. It is clear from the plain language of the trust that Winslow had the legal authority to liquidate the Mankato property through revocation of the trust reverting trust property back to her possession, transfer of the property to her name, or sale of the property under her authority as a trustee.

The record shows DHHS was aware by at least October 6, 2016, of Winslow's authority to revoke the trust. The October 6 email from the DHHS program specialist, which was copied onto a DHHS supervisor narrative, detailed DHHS' understanding that Winslow had the authority to revoke or amend the trust. Additionally, in the October 17 verification request, DHHS informed Winslow of this finding and stated, "[I]f LaVeta is wanting to revoke the entire trust at this time and return all assets in the trust to herself she is able to do so."

DHHS argues that there was confusion on whether the trust was revocable or irrevocable and that such a determination would have affected whether Winslow had authority to reach the trust assets and liquidate the Mankato property. In support of this argument, DHHS points to the length of the trust document and a filing by Winslow in March 2017 which alleged the "denial for assistance is erroneous" because DHHS "wrongly categorized property held in an irrevocable trust as an asset of . . . Winslow."

However, as noted above, the record shows DHHS determined the trust was revocable as early as October 2016. The length of the trust document did not prohibit DHHS from reaching this conclusion by that time. The document clearly established Winslow had authority as the trustmaker to revoke the trust and, as a trustee, to transfer property from the trust and sell or dispose of the property of the trust.

In summary, Winslow had authority to liquidate the Mankato property under the terms of the trust, DHHS had the trust document which provided such authority prior to September 2016, and DHHS acknowledged that it understood Winslow had the authority to revoke the trust and potentially become eligible by at least October 6. As such, DHHS and the district court erred in finding that Winslow lacked authority to liquidate the Mankato property while it was held by the trust.

(b) Provision of IM-1 Form

As explained above, if an applicant (1) has authority to liquidate real property other than a home and (2) would be under the available resource limit if the property is excluded from consideration, DHHS is required to provide an IM-1 form.[26] Any period of prospective eligibility begins the month after the IM-1 form is provided and signed.[27]

DHHS provided Winslow the IM-1 form on or after December 22, 2016; she signed the form December 30; and she was prospectively eligible beginning in January 2017. DHHS argued it was not required to provide the IM-1 form prior to December 2016 because Winslow lacked the authority to liquidate since the property was held by the trust. As determined, this was in error and Winslow had such authority while the property was held by the trust. DHHS had the trust document and acknowledged Winslow could revoke the trust by, at least, October 6.

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[26] §§ 001.15B7 and 001.15B8.

[27] § 001.15B8.

However, DHHS informed Winslow that no IM-1 form would be needed until it was determined that she would be under the available resource limit if the property were excluded from consideration. As a result, we must consider Winslow's available resources.

(c) Available Resource Limit

Winslow's asset with the most value was the Mankato house, and Shurigar-Meyer testified Winslow would have been under the resource limit if the property were not an available resource. As a result, once DHHS had sufficient information that Winslow's other available resources were below $4,000, it was required to provide Winslow an IM-1 form.

[8] We first note the rule that when challenging the decision of an administrative agency, the presumption under Nebraska law is that the agency's decision was correct, with the burden of proof upon the party challenging the agency's actions.[28] The record on appeal is limited as to when DHHS had information concerning the extent of Winslow's assets. While reference was made to various documents DHHS requested and received during the application process, the record does not include many of those documents or explanations as to what information those documents contained. Specifically, testimony and exhibits reference documents received December 22, 23, and 28, 2016, but these documents are not in our record and are not described beyond acknowledgment that DHHS received requested verification. It is unclear what relationship this documentation had to DHHS' determination that Winslow would be under the resource limit if the Mankato property were excluded.

In addition, DHHS' October 6, 2016, email indicates that a current accounting of all assets held by the trust was still needed and that an annuity verification signed by the financial

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[28] *Gridiron Mgmt. Group v. Travelers Indemnity Co.*, 286 Neb. 901, 839 N.W.2d 324 (2013).

institution was required. Further, as late as December 28, DHHS was seeking additional information regarding assets held in another trust, the "Paul Wilson Trust formerly [the] Earl M[.] Winslow Trust." DHHS was still considering at that time what access Winslow had to this trust, if any.

As such, on the record before us, we find that the determination that Winslow would be under the available resource limit excluding the Mankato property did not occur prior to December 30, 2016.

V. CONCLUSION

The district court correctly determined the Mankato property was not subject to the home exemption for Winslow's September 2016 Medicaid application. However, the court erred in determining the Mankato property was not eligible for the other real property exception because Winslow lacked authority to liquidate while it was held by the trust. Winslow had the authority to liquidate under the terms of the trust, and such authority was recognized by DHHS in October 2016. Nevertheless, on the record before us, Winslow failed to provide sufficient documentation prior to December 30 that she was under the available resource limit if she could exclude the Mankato property. As such, DHHS was not required to provide Winslow an IM-1 form until December 30. We therefore affirm the judgment of the district court.

Affirmed.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

D.W., appellee and cross-appellant, v. A.G., appellant and cross-appellee.

926 N.W.2d 651

Filed May 3, 2019. Nos. S-18-657, S-18-658.

1. **Judgments: Injunction: Appeal and Error.** A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record.
2. **Evidence: Appeal and Error.** Where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.
4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
5. **Due Process: Words and Phrases.** While the concept of due process defies precise definition, it embodies and requires fundamental fairness.
6. **Constitutional Law: Due Process.** 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.
7. **Rules of the Supreme Court: Appeal and Error.** Where a party's brief fails to comply with Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2014), an

appellate court may proceed as though the party failed to file a brief or, alternatively, examine the proceedings for plain error.

8. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeals from the District Court for Douglas County: Darryl R. Lowe, County Judge. Judgment in No. S-18-657 reversed, and cause remanded with directions. Judgment in No. S-18-658 affirmed in part, and in part reversed.

Benjamin M. Belmont and Wm. Oliver Jenkins, of Brodkey, Peebles, Belmont & Line, L.L.P., for appellant.

Joseph P. Naatz, of Kreikemeier Law, L.L.C., for appellee.

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

Papik, J.

Based on an allegation that A.G. sexually assaulted her, D.W. sought and obtained an ex parte sexual assault protection order against him. A.G. requested a show cause hearing on whether the sexual assault protection order should remain in effect, at which he denied D.W.'s allegations. After the close of evidence at the hearing, the trial court stated that the sexual assault protection order would not remain in effect, but that it would enter a protection order. The trial court subsequently dismissed the sexual assault protection order and, after sua sponte filing D.W.'s original petition and affidavit under a new case number, entered a harassment protection order in that case.

A.G. appeals the entry of the harassment protection order, and D.W. cross-appeals the order dismissing the sexual assault protection order. We find no basis to reverse the dismissal of the sexual assault protection order, but find that the entry of the harassment protection order violated A.G.'s right to procedural due process. Accordingly, we affirm in part, and in part

reverse and remand with directions to vacate the harassment protection order.

BACKGROUND

D.W.'s Initial Petition.

D.W. commenced this action by filing a petition and affidavit to obtain a sexual assault protection order against A.G. under Neb. Rev. Stat. § 28-311.11 (Cum. Supp. 2018). According to D.W.'s affidavit, on the night of October 18, 2017, after she spent an evening drinking with friends and acquaintances, including A.G., he had sexual intercourse with her when she was "incapacitated and not able to give consent." She alleged that A.G. made sexual advances toward her at a bar and that after leaving the bar, he went with D.W. to her apartment and continued to make advances. She stated that she went to her bed, intending to go to sleep, but that her next memory was of being sexually penetrated by A.G.

D.W. further alleged that since the incident, A.G. had violated contact restrictions imposed by the university where they both attended and that his presence on campus was "interfering with [her] educational experience." D.W. stated that A.G. had not shown "consideration for [her] feelings or what he did to [her]." She said she was "in fear that he will continue to harass [her] by his actions."

The matter was assigned to a county court judge, pursuant to § 28-311.11(3) and Neb. Rev. Stat. § 25-2740(2) (Cum. Supp. 2018).

Ex Parte Sexual Assault Protection Order.

After D.W. filed her petition and affidavit, the trial court issued an ex parte sexual assault protection order. It enjoined A.G. from imposing any restraint on D.W.'s person or liberty; harassing, threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of D.W.; and having any contact or communication with D.W.

A.G. requested a show cause hearing on the matter.

Show Cause Hearing.

The trial court conducted a show cause hearing at which both D.W. and A.G. presented evidence and argument. The evidence consisted of testimony and photographs. D.W.'s petition and affidavit were not offered into evidence.

According to the evidence introduced at the show cause hearing, the events at issue occurred in the early morning hours of October 19, 2017. At that time, D.W. was an undergraduate student. D.W. testified that the day before was her 21st birthday and that she engaged in extensive drinking over the course of that day. She consumed several bottles of a malt beverage that afternoon and continued to drink when several friends and acquaintances, including A.G., came over to her apartment that evening. The group later went to and returned from a restaurant. D.W. and others in the group continued to drink at both locations.

Eventually, some members of the group, including both D.W. and A.G., went to a bar. D.W. testified that while at the bar, she engaged in "mutual flirtation" with A.G. and others, but that, after a certain point, she had no further memories of the time at the bar. She testified that her next memory after being at the bar was of having sexual intercourse with A.G. at her apartment. She testified that she did not recall consenting to the sexual intercourse.

A.G. testified that D.W. was aggressively flirting with him at the bar. He testified that while riding from the bar, D.W. was holding his hand, and that when they arrived at her apartment, she invited him to her room. He testified that D.W. appeared coherent when she invited him in. A.G. also testified that as they were walking to D.W.'s room, she told him that if he wanted to "'hook up,'" which he assumed to mean sex, he had to promise not to tell her boyfriend.

As D.W. and A.G. approached D.W.'s apartment, they encountered an acquaintance. Surveillance photographs introduced into evidence capture D.W. and A.G. talking to this acquaintance, who testified that during his brief interaction

with D.W. and A.G., D.W. appeared coherent and steady on her feet and was not slurring her words. He acknowledged that he could tell that D.W. and A.G. had been drinking, but that they appeared happy and that he did not suspect anything was wrong or out of the ordinary. The acquaintance testified that D.W. did not seem tired, exhausted, or almost ready to pass out.

A.G. testified that he and D.W. began kissing and touching each other as soon as they entered her apartment. He testified that D.W. then invited him into her bedroom and that they "had sex."

A.G. testified that during the entire evening, D.W. never appeared incoherent and she did not stumble or fall down. He testified that he never had any reason to believe D.W. was unable to give consent.

Trial Court's Rulings.

After the close of evidence at the show cause hearing, the trial court stated that it would not leave the sexual assault protection order in place. It explained that it could not find that there was a lack of consent. The trial court also focused on the acquaintance's testimony and noted that it found him to be the most credible of all the witnesses. The trial court described his testimony that D.W. did not appear to be incoherent or unsteady prior to entering her apartment with A.G. as the "key element."

But while the trial court made clear it would not leave the sexual assault protection order in place, it said it would enter a protection order. The trial court made some references to D.W.'s fear of A.G., but did not specify what type of protection order it planned to enter.

Two days after the show cause hearing, D.W.'s initial petition and affidavit for a sexual assault protection order were refiled under a new case number. Although not reflected in the record on appeal, the parties agree that the trial court refiled the petition and affidavit under a new case number sua sponte.

On the same day, June 8, 2018, the trial court issued a harassment protection order in the newly filed case. That order stated that the parties had been present at a hearing with counsel and that the court found a harassment protection order should be issued. It imposed the same restrictions as the previous ex parte sexual assault protection order.

Three days later, on June 11, 2018, the trial court entered an order in the original case, dismissing the sexual assault protection order because it was not supported by sufficient evidence. The order stated that sufficient evidence was adduced to merit a harassment protection order.

A.G. appealed both the harassment protection order in the newly filed case and the order finding that sufficient evidence was adduced to merit a harassment protection order in the original case. D.W. cross-appealed.

ASSIGNMENTS OF ERROR

With regard to the entry of the harassment protection order, A.G. assigns the following errors: (1) the trial court lacked subject matter jurisdiction to enter it, (2) it was entered in violation of his right to procedural due process, (3) it was not supported by the evidence, and (4) the trial court improperly acted as an advocate in entering it.

D.W. filed a cross-appeal, but her brief does not include a separate section assigning error.

STANDARD OF REVIEW

[1,2] A protection order is analogous to an injunction. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Id.* In such a de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and

accepted one version of the facts rather than another. *Maria A. on behalf of Leslie G. v. Oscar G.*, 301 Neb. 673, 919 N.W.2d 841 (2018).

[3] Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision. *Mahmood v. Mahmud, supra*.

ANALYSIS

Subject Matter Jurisdiction.

We begin, as we must, with A.G.'s argument that the trial court did not have subject matter jurisdiction to enter the harassment protection order. He argues that the trial court did not have jurisdiction to enter a harassment protection order because D.W. did not seek one.

[4] While we find that the trial court's entry of a harassment protection order is problematic for reasons discussed in greater detail below, we do not believe the trial court lacked subject matter jurisdiction to enter it. 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. *Village at North Platte v. Lincoln Cty. Bd. of Equal.*, 292 Neb. 533, 873 N.W.2d 201 (2016). Because the trial court had the authority to hear and determine cases regarding harassment protection orders, the court did not lack subject matter jurisdiction to enter the harassment protection order. See Neb. Rev. Stat. § 28-311.09 (Reissue 2016).

Procedural Due Process.

In addition to arguing that the trial court lacked jurisdiction, A.G. argues that for several reasons, the entry of the harassment protection order was erroneous. We now turn to those arguments, beginning with his claim that the trial court violated his right to due process when it entered the harassment protection order. Here, we agree with A.G.

[5,6] While the concept of due process defies precise definition, it embodies and requires fundamental fairness. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). 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.*

When it comes to protection orders, we have recognized that because the intrusion on the respondent's liberty interests is relatively limited, "the procedural due process afforded in a harassment protection hearing is likewise limited." *Mahmood v. Mahmud*, 279 Neb. 390, 397, 778 N.W.2d 426, 432 (2010). But while the procedures required in a harassment protection order proceeding may not "reflect the full panoply of procedures common to civil trials," we have held that due process does impose some basic requirements. *Id.* at 398, 778 N.W.2d at 433. For example, we have held that testimony at a show cause hearing in a protection order proceeding must be under oath and documents must be admitted into evidence before being considered. See *id.*

We further discussed procedural due process requirements in protection order proceedings in *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014). In that case, we reversed the entry of a domestic abuse protection order upon the respondent's appeal. The petitioner also filed a cross-appeal and argued, for the first time on appeal, that a harassment protection order was warranted. We rejected the petitioner's argument for a number of reasons. In doing so, we discussed and distinguished *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010), a Nebraska Court of Appeals decision.

In *Sherman*, the court held that when a trial court is presented with a case in which a petitioner seeks a domestic abuse protection order but the evidence would only support a harassment protection order, the judge should explain the requirements for both types of protection orders, allow the petitioner to choose which theory to pursue, and, grant the respondent a continuance, if requested. We explained in *Linda N.* that the procedure outlined in *Sherman* allowed a petitioner to elect to change theories, but that "[t]he change must be initiated before the trial court makes a final decision." *Linda N.*, 289 Neb. at 619, 856 N.W.2d at 446. We further observed that the procedure outlined in *Sherman* protected the due process rights of both parties "by trying the case only on the theory elected by the petitioner." *Linda N.*, 289 Neb. at 618, 856 N.W.2d at 446. Conversely, we said that to allow a petitioner to change the theory on which a protection order was sought on appeal would violate due process.

Inherent in both *Linda N.* and *Sherman* is a recognition that a respondent in a protection order proceeding must be notified of the grounds upon which a protection order is sought and provided with an opportunity to respond to those grounds at the show cause hearing. This should come as no surprise. Notice and an opportunity to be heard are, after all, basic requirements of procedural due process. See, e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) ("[t]he essential requirements of due process . . . are notice and an opportunity to respond"); *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) ("[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified'") (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 17 L. Ed. 531 (1863)).

In this case, we conclude that A.G. was not provided with sufficient notice and an opportunity to be heard regarding a

harassment protection order. D.W.'s initial petition sought a sexual assault protection order. She submitted a form petition for a sexual assault protection order, which asked her to list the date, time, and a description of the alleged sexual assault. On a page attached to the petition, D.W. alleged that A.G. sexually assaulted her. The trial court thereafter entered an ex parte sexual assault protection order. A.G. requested a show cause hearing on whether the sexual assault protection order should remain in place. At that hearing, both parties focused on whether a sexual assault had occurred. At no time did D.W. request that a harassment protection order be entered or make allegations sufficient to give A.G. fair notice that she sought such an order. And at oral argument, D.W.'s counsel could not identify any evidence introduced at the show cause hearing that tended to show that A.G. harassed D.W.

Despite all this, the trial court apparently saw some basis for a harassment protection order. That the trial court seems to have brought up the harassment protection order on its own initiative raises questions of its own. See *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010) (holding that by electing which theory to pursue, rather than allowing petitioner to make choice, trial judge crossed line into advocacy). But even if the source of the harassment protection order theory is set to the side, the late hour at which the theory was raised—after the close of evidence—presents a procedural due process problem. A.G. requested a show cause hearing as to whether a sexual assault protection order should remain in effect. By the time that A.G. learned that a harassment protection order was under consideration, he no longer had the opportunity to present a case to the trial court that such an order was not warranted.

In this respect, the procedure followed in this case is not meaningfully different from the procedure we found to be inconsistent with procedural due process in *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014). Whether a new theory for a protection order is asserted for the first time on

appeal or after the close of evidence at the show cause hearing, the respondent does not have an opportunity to defend against the entry of the protection order on the new theory and is denied procedural due process.

The trial court appears to have correctly sensed that there was something standing in the way of its entering a harassment protection order in the case filed by D.W. We can discern no other reason why the trial court would take the puzzling step of sua sponte refiling D.W.'s initial petition under a new case number and then entering the harassment protection order in that case. The trial court's sua sponte refiling of D.W.'s petition in a new case was hardly capable, however, of remedying the due process problem outlined above.

Because the entry of the harassment protection order did not comply with procedural due process, we reverse it, and remand the cause with directions to vacate it. Because we reverse the harassment protection order on these grounds, we decline to consider A.G.'s remaining assignments of error.

D.W.'s Cross-Appeal.

[7,8] As noted above, D.W.'s brief in support of her cross-appeal does not include a separate section assigning error. It does include a heading in the argument section of her brief stating: "The trial court erred in dismissing the sexual assault protection order agai[ns]t the appellant." Brief for appellee on cross-appeal at 20. We have held, however, that headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2014). See, e.g., *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013). Where a party's brief fails to comply with § 2-109(D)(1), we may proceed as though the party failed to file a brief or, alternatively, examine the proceedings for plain error. See *Estate of Schluntz v. Lower Republican NRD*, 300 Neb. 582, 915 N.W.2d 427 (2018). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in

damage to the integrity, reputation, or fairness of the judicial process. *Id.*

Despite D.W.'s failure to assign error in the manner contemplated by our rules, the basis for her cross-appeal can be discerned: She contends that the trial court erred by dismissing the sexual assault protection order against A.G. For reasons we will explain, we cannot say that the trial court plainly erred when it dismissed the sexual assault protection order.

Courts may grant sexual assault protection orders to victims of sexual assault offenses. § 28-311.11(1). The relevant statute defines sexual assault offenses by referencing various other statutes. Section 28-311.11 provides:

> (12) For purposes of this section, sexual assault offense means:
>
> (a) Conduct amounting to sexual assault under section 28-319 or 28-320 or sexual assault of a child under section 28-319.01 or 28-320.01 or an attempt to commit any of such offenses; or
>
> (b) Subjecting or attempting to subject another person to sexual contact or sexual penetration without his or her consent, as such terms are defined in section 28-318.

Neb. Rev. Stat. § 28-319(1) (Reissue 2016) states that first degree sexual assault occurs when any person subjects another person to sexual penetration either without consent of the victim or when the person knew or should have known that "the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct" (or under other circumstances not relevant here).

D.W. contends that the evidence showed either that she was subjected to sexual penetration without consent or that she was mentally or physically incapable of resisting or appraising the nature of her conduct. While A.G. admitted that he engaged in sexual activity with D.W., he maintained that all such activity was consensual and that D.W. appeared physically and mentally capable of providing consent.

The evidence at the show cause hearing on whether consent was provided and whether D.W. was capable of providing consent was, at a minimum, disputed. D.W. admitted to mutual flirtation between herself and A.G. at the bar, but testified that her next memory was of being sexually penetrated by A.G. in her apartment. She testified that she did not recall consenting to sexual intercourse with him. A.G. testified that D.W. was not incoherent or stumbling when they returned to her apartment; that she told him that if they "'hook[ed] up,'" he had to promise not to tell her boyfriend; and that D.W. was a willing participant in the sexual activity. In addition, the acquaintance testified that just prior to entering her apartment, D.W. did not seem tired, exhausted, or almost ready to pass out.

After hearing all of this evidence, the trial court explained its decision not to enter a sexual assault protection order. It stated that it could not find a lack of consent. It also noted that it found the acquaintance to be credible and described his testimony regarding D.W.'s condition just prior to entering her apartment as the "key element." Because the evidence on whether a sexual assault occurred was, at the very least, conflicting and required the trial court to make credibility determinations of witnesses, we cannot say that the trial judge committed plain error by vacating the sexual assault protection order. See *Maria A. on behalf of Leslie G. v. Oscar G.*, 301 Neb. 673, 678, 919 N.W.2d 841, 846 (2018) ("where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another").

CONCLUSION

We find that the trial court violated A.G.'s right to procedural due process by entering a harassment protection order without providing sufficient notice and an opportunity to be heard. We therefore reverse the June 8, 2018, order that

issued the harassment protection order, as well as the June 11 order to the extent that it found evidence sufficient to merit a harassment protection order. We remand the cause with directions to vacate the harassment protection order. We find no plain error in the trial court's order dismissing the sexual assault protection order, and we therefore affirm that portion of the June 11 order.

Judgment in No. S-18-657 reversed, and cause remanded with directions.
Judgment in No. S-18-658 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

McManus Enterprises, Inc., doing business as Heidelberg's, appellant, v. Nebraska Liquor Control Commission, appellee.

926 N.W.2d 660

Filed May 3, 2019. No. S-18-699.

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.** Whether an agency decision conforms to the law is by definition a question of law.
5. **Administrative Law: Judgments: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented which an appellate court decides independently of the decision made by the court below.
6. **Administrative Law: Statutes.** For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.
7. ____: ____. Properly adopted and filed regulations have the effect of statutory law.
8. **Administrative Law.** 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. ____. A court will construe regulations relating to the same subject matter together to maintain a consistent and sensible scheme.
11. ____. A court must attempt to give effect to all parts of a regulation, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
12. **Administrative Law: Intent.** In determining the meaning of regulatory 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.
13. **Administrative Law: Liquor Licenses.** Under 237 Neb. Admin. Code, ch. 6, § 019.01F (2012), a licensee cannot be sanctioned for a violation unless the licensee has allowed an unreasonable disturbance to continue.
14. ____: ____. Under 237 Neb. Admin. Code, ch. 6, § 019.01F (2012), in order for "other activity" to be a disturbance, the dangerous activity itself must arise and be of such a nature that may place others in danger.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Reversed and remanded with directions.

Charles D. Humble, of Erickson & Sederstrom, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Milissa Johnson-Wiles for appellee.

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

Cassel, J.

INTRODUCTION

This appeal turns on the correct interpretation of the Nebraska Liquor Control Commission's "disturbance rule."[1] The rule's plain language applies only where a licensee "allow[s] any unreasonable disturbance; as such term is defined [in the rule], *to continue without taking the steps*, as set forth [in the

[1] 237 Neb. Admin. Code, ch. 6, § 019.01F (2012).

rule]."[2] The commission and the district court on review[3] disregarded that plain language: ignoring the words "to continue." Although we must reverse this license cancellation, we emphasize that our decision does not preclude the commission from adopting a rule that would impose upon licensees a duty to take reasonable steps to prevent disturbances from occurring in the first instance. But its existing rule does not do so, and we are required to apply the rule as written.

BACKGROUND

Disturbance Rule

Because our decision turns upon the plain language of the disturbance rule, we recite it in full:

> **019.01F** Disturbance: No licensee or partner, principal, agent or employee of any licensee shall allow any unreasonable disturbance; as such term is defined hereunder, to continue without taking the steps, as set forth hereunder, within a licensed premise or in adjacent related outdoor areas.
>
> **019.01F1** A "Disturbance" as used in this section shall mean any brawl, fight, or other activity which may endanger the patrons, employees, law enforcement officers, or members of the general public within licensed premises or adjacent related outdoor area. Such term shall include incidents involving, but not necessarily limited to: drug dealing; intoxicated individuals; soliciting of prostitution; or any physical contact between the licensee's agents or employees and its customers, involving any kissing, or any touching of the breast, buttock or genital areas. Any brawl fight or other activity which results in serious injury to any patro[n], employee or members of the

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

[3] See, Neb. Rev. Stat. § 53-1,116 (Reissue 2010) (appeal from commission order in accordance with Administrative Procedure Act); Neb. Rev. Stat. § 84-917 (Reissue 2014) (judicial review under Administrative Procedure Act).

general public shall be reported to law enforcement. Serious injury means any gunshot wou[n]d, knife or other stab wound or any other injury requiring medical treatment onsite or transportation to a medical facility for treatment. Licensees and their employees shall not prohibit or interfere in any way with a patro[n] who chooses to contact law enforcement in the event they are assaulted on the premises.

019.01F2 Unless there is reason to believe that a licensee or partner, principal, agent or employee of any licensee would endanger himself/herself or others, such person shall take such action as is reasonably necessary to terminate the disturbance. Physical force should be exercised only in extreme circumstances and should be limited to the force reasonably required to terminate the disturbance and remove the individual from the licensed premise, without endangering any patron or other person.

019.01F3 In the event efforts taken in accordance with the preceding subparagraph are not successful or if there is reason to believe that the licensee, partner, principal, agent or employee of any licensee may create a danger to himself/herself or others, th[e]n in such event, such person shall immediately contact law enforcement personnel to assist in properly handling the disturbance. In the event law enforcement and/or medical personnel are summoned, the directions and/or orders given by such law enforcement or medical personnel shall be followed.

019.01F4 A licensee who has conformed with the procedure as set forth in this section shall be deemed to have not permitted a disturbance to occur and continue. Licensees who wish to document their compliance with this rule may maintain a log in which they document disturbances or other unusual occurrences.[4]

[4] § 019.01F.

Events

John McManus is the owner of McManus Enterprises, Inc. (collectively McManus), which operates Heidelberg's bar in Lincoln, Nebraska. In August 2017, a professional boxing match was held at an arena in Lincoln. The day before the match, an event promoter approached McManus, asking to host an event at Heidelberg's after the match. McManus agreed. The promoter hired and paid a company to provide security for the event.

The Omaha Police Department informed the Lincoln Police Department (LPD) that an event following the last boxing match in Omaha, Nebraska, resulted in an "all call" disturbance. "All call" means a radio call directing all available officers to respond. LPD became concerned that "there could be a gang following and some violent problems." An LPD officer testified that on the evening of the match, LPD approached John McManus, the owner, about its concerns and informed him of the incident following the last boxing match in Omaha. The owner testified that he was unaware of problems following the last boxing match in Omaha and that LPD never informed him about such issues.

After the match, LPD had 10 to 15 officers in the parking lot of Heidelberg's. About 1:55 a.m., a small group of people clustered around the front door started a fight that rippled through the crowd. LPD entered the bar and began to break up the fights. One officer requested an all-available-unit call. A few of the security company's guards aided LPD in breaking up the fights. Approximately 15 to 20 minutes later, all patrons were out of the bar.

License Proceeding

The commission charged McManus with "allow[ing] or permit[ting] a disturbance," in violation of § 019.01F. Although the commission charged McManus with a second violation, it dismissed that charge at the close of the hearing.

After the hearing, the commission found that McManus violated the disturbance rule when it (1) "allow[ed] or permit[ted] a disturbance in or about the licensed premises," (2) "ignore[d] security concerns that were expressed to it by law enforcement and proceeded with the event despite the warning," and (3) "willingly turn[ed] over a portion of [its] licensed business to the care and control of an unregulated third party and its security force," and that (4) such willful actions "created an unreasonable threat to the health, safety and welfare of its patrons and first responders." The commission canceled McManus' liquor license.

District Court

After McManus sought judicial review of the commission's order, the district court concentrated its analysis on the "other activity which may endanger" language in the definition of "disturbance" in § 019.01F1. It reasoned that because McManus was aware of the Omaha "all call" and admitted to similar problems with previous events, it was aware of the potential danger. It reasoned that the actions of the security company and LPD could not be attributed to McManus, because McManus had no control over them. The court concluded that the record supported the commission's findings that McManus violated the disturbance rule when it was aware of the danger and failed to take reasonable steps to terminate the disturbance. It affirmed the commission's order.

McManus filed a timely appeal, which we moved to our docket.[5]

ASSIGNMENTS OF ERROR

McManus assigns, restated, that the district court erred in (1) failing to apply the plain meaning of the disturbance rule and thereby finding that McManus allowed a disturbance and (2) canceling McManus' liquor license "on the basis that [McManus] failed to take actions required in the . . .

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

disturbance rule to prevent the disturbance from continuing when the required actions already had been taken by third parties to prevent the disturbance from continuing."

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.[6] 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.[7] 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.[8]

[4,5] Whether an agency decision conforms to the law is by definition a question of law.[9] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented which an appellate court decides independently of the decision made by the court below.[10]

ANALYSIS

The commission is empowered to adopt and promulgate rules and regulations to carry out the Nebraska Liquor Control Act,[11] including provisions covering any and all details which

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[6] *Leon V. v. Nebraska Dept. of Health & Human Servs.*, 302 Neb. 81, 921 N.W.2d 584 (2019).

[7] *Id.*

[8] *Id.*

[9] *Betty L. Green Living Trust v. Morrill Cty. Bd. of Equal.*, 299 Neb. 933, 911 N.W.2d 551 (2018).

[10] *Leon V., supra* note 6.

[11] Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010 & Cum. Supp. 2018).

are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act.[12] McManus does not dispute that as a licensee, it is subject to the rules and regulations of the act, including the disturbance rule.

McManus instead contends that the district court erred when it agreed with the commission that the disturbance occurred when McManus hosted the event. It argues this is contrary to the plain reading of the regulation, because the regulation is designed to terminate disturbances that are occurring from continuing. It argues that nothing in the regulation places a duty on a licensee to take action against something that might or could happen. We agree.

[6,7] For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.[13] Indeed, we have often said that properly adopted and filed regulations have the effect of statutory law.[14]

[8,9] 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.[15] A rule is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.[16] Neither party argued that the disturbance rule is ambiguous. We agree that its plain and ordinary meaning controls our decision.

[10] A court will construe regulations relating to the same subject matter together to maintain a consistent and sensible scheme.[17] Consequently, we read § 019.01F, which includes its subparagraphs, §§ 019.01F1 to 019.01F4, to determine the

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[12] See *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003).

[13] *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015).

[14] See, e.g., *Leon V., supra* note 6.

[15] *In re Petition of Golden Plains Servs. Transp.*, 297 Neb. 105, 898 N.W.2d 670 (2017).

[16] *Prokop v. Lower Loup NRD*, 302 Neb. 10, 921 N.W.2d 375 (2019).

[17] *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

meaning of the disturbance rule as a whole. In discussing the rule, reference to § 019.01F will generally refer to the entire rule. But when quoting the rule, we will use a specific paragraph to enable a reader to easily locate our quotation.

By its plain language, § 019.01F dictates that no licensee shall allow any unreasonable disturbance to continue. The commission argues that the regulation also prohibits a licensee from allowing a disturbance to occur. Logically, in order for a disturbance to continue, it must first occur. But as we explain, under the plain language of the regulation, a licensee does not violate the disturbance rule until a disturbance has occurred.

[11] First and foremost, the first section of the disturbance rule compels this reading. It states that "[n]o licensee . . . shall allow any unreasonable disturbance; as such term is defined hereunder, to continue without taking the steps, as set forth hereunder, within a licensed premise or in adjacent related outdoor areas."[18] When quoting from this language, the district court decision simply omitted the words "to continue." Given that we treat a regulation like a statute,[19] a settled principle of statutory interpretation[20] dictates this rule: A court must attempt to give effect to all parts of a regulation, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. The district court's reading disregarded this principle.

A plain reading of § 019.01F2 supports our conclusion. It requires the licensee and those who act for the licensee to "take such action as is reasonably necessary *to terminate the disturbance*."[21] "Terminate" means "[t]o bring to an end, put

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[18] § 019.01F.

[19] See *Melanie M., supra* note 13.

[20] See *Patterson v. Metropolitan Util. Dist.*, 302 Neb. 442, 923 N.W.2d 717 (2019).

[21] § 019.01F2 (emphasis supplied).

an end to, cause to cease."[22] It seems evident that one cannot "terminate" something that has not occurred.

Section 019.01F3 reinforces this understanding. "In the event efforts taken in accordance with [§ 019.01F2] are not successful . . . , th[e]n in such event, such person shall immediately contact law enforcement personnel to assist in properly handling the disturbance."[23] Efforts cannot be either successful or unsuccessful until a disturbance has occurred and the licensee or its representative has attempted some "action . . . to terminate the disturbance."[24] And how, a reader of the regulation might reasonably ask, is one to request assistance from law enforcement in "properly handling the disturbance" until after a disturbance has commenced.[25]

[12] Finally, § 019.01F4 provides a safe harbor for licensees which have "conformed" to the disturbance rule. It states in part, "A licensee who has conformed with the procedure as set forth in this section shall be deemed to have not permitted a disturbance to occur *and* continue."[26] Another rule of statutory construction[27] leads to this rule: In determining the meaning of regulatory 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. Under the interpretation urged by the commission, one would expect § 019.01F4 to read "occur *or* continue," but it does not. The plain and ordinary meaning of "and," in this context, means that a disturbance has *both* "occur[red]" and "continue[d]."

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[22] "Terminate," Oxford English Dictionary Online, http://www.oed.com/view/Entry/199426 (last visited Apr. 19, 2019).

[23] § 019.01F3.

[24] § 019.01F2.

[25] See § 019.01F3.

[26] § 019.01F4 (emphasis supplied).

[27] See *Patterson, supra* note 20.

[13] Within the disturbance rule, the word "occur" appears only in § 019.01F4. Under the commission's interpretation, one would expect it to appear in § 019.01F. But it does not. As used in § 019.01F4, we understand it to support the ordinary and plain language of § 019.01F. Similarly, §§ 019.01F2 and 019.01F3 support the plain language of § 019.01F by requiring licensees to take reasonable action to terminate a disturbance. Again, logically, in order to terminate a disturbance, it must occur and continue. We hold that under § 019.01F, a licensee cannot be sanctioned for a violation unless the licensee has allowed an unreasonable disturbance to continue.

The State agreed with McManus that merely hosting an event is not a violation of § 019.01F. However, it contends that McManus violated the disturbance rule when

> [McManus] agree[d] to host the event by opening its doors to a third party promotor and the promotor's security team over which [McManus] had no control, with knowledge that prior events by the same promotor had resulted in an "all call" for LPD, with no clear plan and adequate security tailored to the nature of the event and size of the expected "standing room only" crowd.[28]

The district court reasoned that McManus "violated the disturbance rule when it disregarded the security concerns expressed to it by law enforcement and proceeded with the event that placed the safety of the public at risk." Both interpretations relied upon the phrase "other activity which may endanger"[29] to craft a preventative interpretation of "other activity." This interpretation inconsistently read into the regulation a preventative consideration that does not appear within the explicit language of the regulation.

Under the plain language, a "disturbance" applies a present temporal meaning.[30] The rule utilizes the present tense

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[28] Brief for appellee at 10.

[29] § 019.01F1.

[30] See *id.*

when defining disturbance and does not place any conditional language on the existence of the disturbance. For example, a disturbance shall mean any brawl which may endanger others or any fight which may endanger others. It would fly in the face of the plain and ordinary language to read all other disturbances as occurring in the present and "other activity which may endanger" as preventative or precognitive. Effectively, the district court's interpretation placed the proverbial cart before the horse when it placed the conditional language on the disturbance and not the consequences.

Moreover, the nonexhaustive list of examples of a "disturbance" in § 019.01F1—such as drug dealing, intoxicated individuals, soliciting prostitution, and physical contact between customers and employees or agents—further illustrates disturbances happening in the present. The list utilizes the present, present participle, and past tense to define disturbance. It does not place any conditional language on the existence of the disturbance.

[14] A licensee's hosting an event with awareness of a potential disturbance will not be considered a disturbance. Unlike the several other examples of disturbances listed above, hosting an event, in and of itself (at least under the disturbance rule as now written), does not put others in potential danger. Some other activity must occur, like the brawl that broke out, to place others in danger for it to be considered a disturbance under the existing language. In this case, the disturbance did not occur until 1:55 a.m., when the brawl took place. At that point, LPD officers were immediately involved. Therefore, under § 019.01F, in order for "other activity" to be a disturbance, the dangerous activity itself must arise and be of such a nature that may place others in danger.

Under the plain and ordinary meaning of the disturbance rule, McManus did not have to take reasonable action to terminate the disturbance until 1:55 a.m., when it occurred, at which point the duty under § 019.01F to "[not] allow any unreasonable disturbance . . . to continue" sprang into effect.

Because the district court found that McManus did not take reasonable action before the disturbance occurred, its interpretation was inconsistent with the plain language of § 019.01F. Accordingly, the district court's interpretation did not conform to the law, and we reverse.

Our holding does not preclude the commission from promulgating a preventative rule for disturbances. The problem is, the current rule simply does not do so.

CONCLUSION

Under the plain and ordinary language, a licensee does not violate the disturbance rule until a disturbance has occurred. At that point, the duty to "not allow" the disturbance "to continue" becomes effective. Because the district court's analysis read into the regulation an interpretation inconsistent with the plain language, its decision did not conform to the law. We reverse the decision and remand the cause to the district court with directions to remand the matter to the commission 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

State of Nebraska, appellee, v. Lucio P. Munoz, appellant.

927 N.W.2d 25

Filed May 10, 2019. No. S-18-050.

1. **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.
2. **Effectiveness of Counsel: Appeal and Error.** Assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance.
3. **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.
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. **Appeal and Error.** In the absence of plain error, where 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.
6. **Trial: Prosecuting Attorneys.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.
7. ____: ____. A prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.

8. ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.
9. **Rules of Evidence: Intent.** The purpose of Neb. Rev. Stat. § 27-513(2) (Reissue 2016) is to prevent the jury from drawing an unfavorable inference from a witness' assertion of a privilege.
10. **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.
11. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
12. ____: ____: ____. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.
13. **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.
14. ____: ____. 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.
15. **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.
16. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.
17. **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.

18. **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.
19. **Criminal Law: Evidence.** The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.

Appeal from the District Court for Scotts Bluff County: Leo P. Dobrovolny, Judge. Affirmed.

Kelly S. Breen, of Nebraska Commission on Public Advocacy, 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.

I. INTRODUCTION

In this direct appeal from criminal convictions, Lucio P. Munoz focuses on three incidents at trial: (1) a comment during the prosecutor's opening statement about evidence not found, (2) a witness' assertion of a testimonial privilege in the jury's presence, and (3) expert testimony regarding blood spatter evidence. Because trial counsel did not object, Munoz alleges plain error and ineffective assistance of counsel. We find neither. The prosecutor's statement was consistent with the evidence. The bill of exceptions does not show that the prosecutor knew the witness would assert a privilege. And the blood spatter evidence was neither irrelevant nor unfairly prejudicial. We affirm the district court's judgment.

II. BACKGROUND

On Friday, December 30, 2016, at approximately 10 p.m., Munoz knocked on Trudy Ziegler's door. He told her that his girlfriend, Melissa May, had been raped that morning by a tenant of the same apartment complex where they all lived.

Ziegler told Munoz to call the police, and he did so from her apartment.

Just after 11 p.m., two police officers arrived at the apartment complex. Their body cameras recorded the interaction. Munoz told the officers that May had been raped. He allowed the officers into his apartment, where an intoxicated May was asleep on Munoz' bed. After Munoz woke her, May told the officers that she did not know why they had been called and Munoz told her to "tell them the truth." May did not wish to make a police report. One of the officers told Munoz that when May was sober, she could come talk to the police. Munoz replied that she was not going to do so. He added, "But something's gonna happen, I know."

An upset Munoz returned to Ziegler's apartment and said that May did not want to press charges. He asked "what do I do now," and Ziegler told him "just love her all the more."

At approximately 2 a.m. on December 31, 2016, Munoz called his son, Martin Brady. Munoz told Brady that he "did something . . . bad" and that he wanted to kill himself. Brady's girlfriend called the police to check on Munoz.

The same two officers returned to Munoz' apartment shortly after 3 a.m. Again, their body cameras recorded the interaction. Munoz said that he was feeling bad "because of what happened." He allowed the officers into his apartment. The door to his bedroom was closed, and he told the officers that his girlfriend had gone home. Munoz agreed to go to a hospital to speak with someone. He locked the deadbolt on his apartment door, and one of the officers drove him to the hospital.

At approximately 8 a.m., Brady received a call from a doctor for Munoz "to get out of the . . . hospital." Brady and his girlfriend picked up Munoz and took him to Brady's house. Munoz stayed at Brady's house the rest of the morning, and at some point, arrangements were made for Munoz to leave town. Brady explained that Munoz had talked about seeing family because it had "been awhile" and that Munoz had brothers in Texas and Illinois.

A friend of Munoz agreed to take Munoz to Illinois to visit one of his brothers. The friend asked if Munoz wanted to travel the next day, but Munoz said he wanted a ride as soon as possible. So, the friend testified, they "gassed up, and headed out." According to the friend, Munoz had no luggage or other items and he left Munoz in Illinois with Munoz' brother.

Meanwhile, Ziegler did not see Munoz or May on Saturday, which she said was unusual. On Sunday and Monday, Ziegler knocked on Munoz' door, but there was no answer. On Tuesday, January 3, 2017, Ziegler asked the property manager to check on May. Using a master key to unlock the deadbolt, the property manager entered Munoz' apartment. She opened the bedroom door and discovered May, deceased, on the bed.

An autopsy revealed that May had suffered 37 stab wounds, and the cause of death was determined to be multiple stab wounds. The turquoise sweatshirt on May's body appeared to match her top as depicted on the December 30, 2016, body camera footage. Evidence for a sexual assault kit was collected, and it showed no DNA profile other than that of May.

Munoz' brother in Texas began searching for Munoz due to a concern that "something had happened . . . where he live[s]." After making telephone calls, he discovered that Munoz was in Illinois. Munoz asked his brother to forgive him, but did not say for what. During later conversations, Munoz "said that he was going to die in prison."

Officers with the Scotts Bluff County sheriff's office flew to Illinois to transport Munoz back to Scotts Bluff County. As they were going through the airport to catch a connecting flight, they heard someone playing a piano and Munoz said "they are playing my death song" and "I'm going to get the death penalty." While waiting for a flight, Munoz asked the other officer questions about Nebraska's death penalty, including "if it was voted back in" and the method of execution.

The State charged Munoz with first degree murder and use of a deadly weapon to commit a felony, and the court

conducted a jury trial. Additional background concerning events occurring during trial will be set forth in the analysis section.

The jury returned verdicts of guilty on both counts. The court imposed a sentence of life imprisonment for the murder conviction and of 20 to 40 years' imprisonment for the use of a weapon conviction. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

Munoz' five assignments of error fall into two general categories. He asserts as plain error that prosecutorial misconduct occurred during opening statements and that the court erred by permitting Brady to invoke his Fifth Amendment privilege in the presence of the jury.

Munoz assigns that his trial counsel provided ineffective assistance by failing to object to the prosecutor's opening statement, failing to demand compliance with Neb. Evid. R. 513(2), Neb. Rev. Stat. § 27-513(2) (Reissue 2016), and failing to challenge blood spatter evidence.

[1,2] The argument section of Munoz' brief contains a subsection concerning additional instances of alleged ineffective assistance of counsel, but these issues were not assigned as 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.[1] Moreover, assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance.[2] We do not consider these additional unassigned matters.

IV. STANDARD OF REVIEW

[3] An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly

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[1] *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (2019).

[2] See *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

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]

[4] 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]

V. ANALYSIS

1. Plain Error

[5] Munoz presents two issues as a matter of plain error, because he did not object or otherwise preserve the issue for appellate review. In the absence of plain error, where 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]

(a) Prosecutorial Misconduct

Munoz contends that the following remarks by the prosecutor during his opening statement amounted to prosecutorial misconduct:

> There is some DNA evidence in this case and I think I told some of you that the last trial we had. The murder weapon was not found. His clothing with . . . May's blood was not found. Of course, we have about [a] four hour time gap from the time the police were first there and the time — the second they were there. And, the clothes he

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[3] *Id.*

[4] *Id.*

[5] *State v. Trice*, 292 Neb. 482, 874 N.W.2d 286 (2016).

> has when he is arrested in Illinois and are sent back here are not the clothes he left with. Those were changed.

Munoz claims the above statements are problematic, because there was no evidence that Munoz hid or destroyed "blood" evidence or that May's blood was found on any article of clothing belonging to Munoz.

We begin with the observation that the jury was informed that opening statements are not evidence. The prosecutor told the jury, "This is opening statement, what we say right now is not evidence." And although the court's preliminary instructions were not memorialized in the record, Munoz' counsel stated:

> As [the judge] indicated in the preliminary instruction that he gave to you, we talked about opening statements. He indicated that the statements that the attorneys get to make at this time should not be considered as evidence. So anything that [the prosecutor] told you just a few minutes ago should not be considered as evidence and don't consider anything that I'm going to tell you is evidence as well.

[6-8] When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.[6] A prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.[7] And a prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[8]

The prosecutor's opening statement did not constitute prosecutorial misconduct. The evidence at trial was consistent with the prosecutor's opening statement: Neither the murder

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[6] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[7] *State v. Taylor*, 300 Neb. 629, 915 N.W.2d 568 (2018).

[8] *State v. Swindle, supra* note 6.

weapon nor any of Munoz' clothing containing May's blood was found, and Munoz was wearing different clothing at the time of his arrest than the clothing he was wearing when he left town. Because there was no prosecutorial misconduct, it follows that there can be no plain error.

(b) Assertion of Privilege

Munoz also claims that plain error occurred when Brady invoked his Fifth Amendment privilege in the jury's presence. After Brady identified Munoz in the courtroom, the following colloquy occurred:

> [Prosecutor:] Okay. Do you then recall having a conversation with him in the early [sic] December 31st of 2016?
>
> [Brady:] I would like to invoke my Fifth Amendment rights.
>
> [Prosecutor]: Okay. Judge, I'm going to go ahead and offer immunity.
>
> THE COURT: All right. Sir, the County Attorney has heard your exercise of your Fifth Amendment rights under the United States Constitution. Under Nebraska law if the County Attorney indicates that immunity will be granted you for anything you may say here in the courtroom, you are required to testify. So notwithstanding your exercise of your Fifth Amendment rights, because the County Attorney has extended you immunity, I'm ordering you to go ahead and answer his questions.
>
> [Brady]: Okay.

Brady then proceeded to answer all questions posed to him.

[9] Munoz argues that plain error occurred when Brady was permitted to invoke his Fifth Amendment privilege in the presence of the jury. He relies on § 27-513(2), which states that "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury." We have explained

that the purpose of § 27-513(2) is to prevent the jury from drawing an unfavorable inference from a witness' assertion of a privilege.[9]

We recently addressed the invocation of a privilege in the jury's presence, but the circumstances here are distinguishable. In *State v. Draper*,[10] the trial court permitted the defendant's wife to assert her privilege against self-incrimination in the presence of the jury. We stated: "[A]ll parties knew that she would, before being granted immunity, invoke her privilege against self-incrimination. And the record fails to establish any basis justifying the assertion of that privilege in front of the jury."[11] In contrast, the bill of exceptions here does not indicate that any party or the court knew in advance that Brady would invoke his Fifth Amendment privilege against self-incrimination.

Under the circumstances here, error is not plainly evident from the record. Munoz argues: "Clearly the prosecutor anticipated that Brady would invoke his 5th Amendment right not to testify during his direct examination. Otherwise he would not have been prepared to immediately offer the witness immunity."[12] But it is just as conceivable that the criminal investigation had revealed Brady's involvement was minimal and not worthy of prosecution, such that the prosecutor had no hesitation about offering immunity.[13] The bill of exceptions does not contain evidence showing that the parties or the court knew Brady would invoke his privilege. And, after being given immunity, Brady testified and was subject to cross-examination. We find no plain error.

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[9] See *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

[10] *Id.*

[11] *Id.* at 789, 857 N.W.2d at 344.

[12] Brief for appellant at 13.

[13] See Neb. Rev. Stat. § 29-2011.02 (Reissue 2016).

2. Ineffective Assistance of Counsel

Munoz' other assignments of error allege that his trial counsel provided ineffective assistance. After setting forth general principles, we consider the specific allegations of ineffective assistance.

(a) General Principles

[10-12] Munoz has different counsel on direct appeal. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record, otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding.[14] 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.[15] The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.[16]

[13-15] Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[17] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the

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[14] *State v. Mrza, supra* note 2.

[15] *Id.*

[16] See *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018), *disapproved on other grounds, State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018).

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

defendant's defense.[18] 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.[19] 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.[20]

(b) Opening Statement

[16] Munoz argues that his trial counsel was ineffective in failing to object to the prosecutor's opening statement. Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.[21] As we determined above, the prosecutor's opening statement did not amount to prosecutorial misconduct. Because there was no basis to object, Munoz' counsel did not perform deficiently in failing to object.

(c) Failing to Demand Compliance With § 27-513

Munoz next contends that counsel was ineffective for failing to demand compliance with § 27-513. As noted above, the bill of exceptions does not reveal that any party knew Brady would assert his Fifth Amendment privilege, and Munoz does not cite to any evidence that such knowledge existed.

Even if it were known that Brady would invoke the Fifth Amendment, Munoz cannot show prejudice due to counsel's

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[18] *State v. Mrza, supra* note 2.

[19] *Id.*

[20] *Id.*

[21] *State v. Taylor, supra* note 7.

failure to object and demand compliance with § 27-513. There is no indication that by calling Brady as a witness, the prosecutor was trying to build a case out of inferences from use of a testimonial privilege. Further, we are not presented with the situation where "'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination.'"[22] Because Brady testified and was subject to cross-examination, Munoz cannot demonstrate a reasonable probability that the result of the proceeding would have been different if Brady had invoked the privilege outside of the jury's presence.

(d) Blood Spatter Evidence

Finally, Munoz argues that his trial counsel was ineffective by failing to challenge blood spatter evidence as irrelevant and unfairly prejudicial. We disagree.

The State's blood spatter expert visited the scene and documented bloodstain patterns. Based on the blood evidence, the expert gave "brief snapshots of what happened at different times":

> So there were some impact patterns and castoff near the head of the bed and it's my opinion that the victim was laying there wrapped up in a blanket on top of the blankets underneath her, basically, the black plaid blankets and the blankets underneath when this attack started. There were enough spatter patterns to indicate that some liquid blood had been shed while she was in that position, and that something impacted into it. I wasn't able to determine what. Sometime during the attack she had turned around toward with her head toward the foot of the bed, her feet toward the head of the bed. And, after she was stabbed she had somehow was laying, as I mentioned before, laying head first on top of the white

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[22] *State v. Draper, supra* note 9, 289 Neb. at 786, 857 N.W.2d at 342.

> comforter, her left arm down creating that pooling off of the side of the bed. Based on the position of her right arm and based on the lack of blood around her right arm, . . . it's my opinion that somebody took her right arm and pulled her back up onto the bed. I don't know if she was alive at that time, it's possible. If she was in that final position when the spatter around her was created, which led me to believe it's probably expectorate, but could, also, be spatter patterns from something impacting the liquid blood on her. When she was in this final position somebody covered her up within five to 30 minutes after her blood was deposited based on the (inaudible) on her hip. Somebody with blood on them, and I can't say how much, but some liquid blood on them moved around to the foot of that bed creating those transfer patterns. And, after it was all done, whoever it was, walked into the bathroom, probably washed off their hands, washed off the weapon, creating the diluted blood around the rim of the sink.

Munoz first argues that the evidence was irrelevant. Evidence which is not relevant is inadmissible.[23] Munoz highlights that the blood spatter expert did not identify any evidentiary link between the blood evidence and any particular suspect nor any particular object associated with a suspect.

[17] 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."[24] Relevancy requires only that the probative value be something more than nothing.[25]

The blood spatter evidence satisfied the low bar for establishing relevancy. It showed the brutal nature of May's death,

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[23] Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2016).

[24] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2016).

[25] *State v. Brown*, 302 Neb. 53, 921 N.W.2d 804 (2019).

which was consistent with the State's theory that Munoz believed May was "cheating on" him and "react[ed] violently." This alone satisfies the minimal requirement that the probative value of the evidence be something more than nothing. Because a relevancy objection would have been futile, counsel did not perform deficiently by failing to object on relevancy grounds.

Munoz also claims that the blood spatter evidence was unfairly prejudicial. He points out that the blood spatter expert provided testimony regarding photographs that she used in her report. Munoz claims that the direct examination of the expert "was merely an opportunity for the State to overly emphasize the horrific and brutal nature of an unidentified assailant's attack."[26]

[18] 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. Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.[27] 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.[28]

[19] Gruesome crimes produce gruesome photographs and evidence.[29] But 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.[30] Using the blood evidence found at the crime scene, the blood spatter expert helped explain what happened during the attack on May. Although

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[26] Brief for appellant at 15.

[27] *State v. Brown, supra* note 25.

[28] *Id.*

[29] See *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016).

[30] *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

the expert could not identify May's killer, we do not believe that the district court would have excluded the evidence on the basis that the probative value of the expert's testimony was substantially outweighed by the danger of unfair prejudice. Accordingly, Munoz' trial counsel did not perform deficiently by failing to object.

VI. CONCLUSION

We find no plain error with regard to the prosecutor's opening statement or the invocation of Fifth Amendment privilege in the jury's presence. With regard to Munoz' claims of ineffective assistance of trial counsel, we conclude that the record on appeal shows the claims to be without merit. We therefore affirm the judgment of the district court.

Affirmed.

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

Sharon L. Rohde, appellee, v. Keith E. Rohde, appellant.

927 N.W.2d 37

Filed May 10, 2019. No. S-18-179.

1. **Divorce: 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.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate 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. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **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.
4. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
5. **Property Division.** As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
6. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

7. **Property Division: Appeal and Error.** As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate. The date of valuation is reviewed for an abuse of the trial court's discretion.
8. **Divorce: Property Division: Equity.** The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided.
9. **Property Division: Equity: Time.** The choice of a date as of which assets available for equitable distribution should be identified and valued must be dictated largely by pragmatic considerations.
10. **Divorce: Property Division.** Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.
11. **Property Division: Proof.** The burden of proof rests with the party claiming that property is nonmarital.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

A. Bree Robbins and Nancy R. Shannon, of Cordell Cordell, L.L.P., for appellant.

Christopher A. Vacanti, of Vacanti Shattuck, for appellee.

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

Cassel, J.

INTRODUCTION

Keith E. Rohde appeals from a decree dissolving his marriage to Sharon L. Rohde, challenging the division of property. Keith proposes two novel theories: (1) All assets must be valued using a single date and (2) a coverture formula is required to establish the premarital value of a business. We decline both invitations. The first would impinge upon the discretion necessary to equitably divide a marital estate. And the second depends upon speculation and assumptions generally inconsistent with such valuations. Keith's remaining arguments lack merit. We affirm the decree.

BACKGROUND

Before Sharon filed a complaint for dissolution in November 2016, she and Keith were married for 21 years. During the period between filing and trial, the parties lived separate and apart for 1 year. The assets relevant on appeal include real estate, notes receivable, businesses, accounts, household goods, jewelry, and vehicles.

Real Estate and Notes Receivable

The parties owned three properties in Omaha, Nebraska. One property was the marital home (184th Plaza home); one property was their friend's home (140th Ave. home), which was secured by a note receivable from the friend; and one property was occupied by another person (Polk St. home), which was secured by a note receivable.

The parties offered appraisals of the 184th Plaza home. Sharon's appraiser valued the home at the date of filing. Keith's appraiser valued the home at the date of trial. Sharon testified to the value of the 140th Ave. home note receivable at the date of trial and presented evidence of the outstanding note.

Keith stated that prior to the marriage, he put a downpayment on the parties' first home and acknowledged that Sharon repaid him part of the downpayment. He asked the court to classify the downpayment as nonmarital.

Businesses

Since 1989, Keith has owned Metro Excavating Inc. (Metro). Keith continued to operate the business throughout the marriage. Keith testified that Metro was operational for over 70 months before the marriage. Keith asked the district court to offset the current value of the business by 23.13 percent as the value of the nonmarital business.

Additionally, Keith owns Storage Road Sales & Service Inc. (Storage Road). Before Keith married Sharon, he purchased the land for $34,000. He then constructed a building on the property that cost $17,000 for the steel framework and tin exterior.

Both parties obtained appraisals of the property and businesses. Keith's appraiser valued the Storage Road property at the date of trial. Sharon's appraiser gave two valuations for the property at the date of filing: the lower appraisal used the income capitalization approach, and the higher appraisal used the direct sales comparison approach. The higher valuation was rebutted by Keith's appraiser. Keith testified that the nonmarital value of the Storage Road property was $252,000.

In June 2016, Keith entered into three leases with Walvoord Finish Grading Inc. (collectively Walvoord Leases). The leases were for the equipment of both Metro and Storage Road, as well as a property lease. The leases were valued at the date of trial, which excluded the first payments made during the pendency of the action. Keith asked the district court to take into consideration the tax consequences when awarding the leases, and specifically in reducing the value by 32 percent. Additionally, during the pendency of the action, Keith sold several pieces of business equipment.

Sharon presented evidence that she is the sole owner of KMT Storage Company, Inc. (KMT), which was appraised at the date of filing.

Accounts

The parties had several bank and retirement/investment accounts. There are three categories of accounts: joint accounts, commercial accounts, and investment accounts. The parties submitted evidence that allowed the court to value the joint and commercial accounts on both the date of filing and trial. Sharon submitted evidence of the value of the investment accounts on a separate date. Keith did not offer any evidence as to the value of the investment accounts on a separate date.

During the pendency of the action, Sharon removed $50,000 from one of the joint accounts. She testified that she removed the money at the advice of counsel to pay bills that Keith used

to pay for. Sharon presented evidence of her personal bank accounts with a value at the date of filing. The account balance did not account for the full $50,000 removed from the joint account.

Remaining Assets

Keith offered an appraisal of Sharon's jewelry valued at the date of trial. Keith and Sharon offered the same appraisals of the household goods at the date of trial.

Sharon offered an appraisal of her Ford Explorer. The vehicle was valued at the date of trial. At the date of filing, Keith owned a GMC pickup, and during the pendency of the action, he sold the GMC pickup and purchased a Dodge Ram pickup. In Sharon's statement of assets and debts, she valued Keith's Dodge Ram pickup at the date of trial.

Decree

The district court valued the following assets at the date of filing: the 184th Plaza home, the commercial accounts, the Storage Road property, and the KMT property. It valued the following assets at the date of trial: the 140th Ave. home note receivable, the joint accounts, the Walvoord Leases, household goods, jewelry, and vehicles. It valued the investment accounts and equipment sales on a separate date.

The district court awarded the following assets to Sharon: the 184th Plaza home, KMT, the commercial accounts for KMT, her personal checking accounts, her jewelry, and the Ford Explorer. The district court awarded the following assets to Keith: the 140th Ave. home note receivable, Metro and Storage Road, the commercial accounts for Metro and Storage Road, the Walvoord Leases, the equipment sale, and the Dodge Ram pickup. The district court equally split between the parties the Polk St. home note receivable, the joint accounts, the investment accounts, and the household goods.

When dividing the marital estate, the district court made findings. Regarding the nonmarital value of Metro, it reasoned

there was no testimony or evidence as to the value of Metro on the date of the marriage 22 years ago and "to sit here and for me to place a value on Metro . . . as a going concern in 1995, I just don't know that I can do that." It declined to classify a nonmarital value for the first home downpayment, it offset the purchase price and cost of the Storage Road building as nonmarital, it did not consider tax consequences of the Walvoord Leases, and it classified Keith's inherited tools as nonmarital.

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

ASSIGNMENTS OF ERROR

Keith assigns that the district court erred (1) by valuing assets and debts on different dates, (2) by finding that all of Metro was a marital asset and failing to offset any portion as nonmarital, and (3) in its classification, valuation, and division of assets and debts in the marital estate.

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.[2]

[2] In a review de novo on the record, an appellate 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. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[3]

[3] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a

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

[2] See *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

[3] *Id.*

litigant of a substantial right and denying just results in matters submitted for disposition.[4]

ANALYSIS

[4,5] We begin by reciting familiar propositions from the law controlling equitable division of marital property and debts. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.[5] This is the polestar guiding our analysis of the issues. And as we have often repeated, a spouse should be awarded one-third to one-half of the marital estate.[6]

[6] Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.[7]

As we have already noted, when evidence is in conflict, an appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[8] This rule drives the outcome of the issues presented—other than the novel theories that Keith asserted. We turn first to those theories.

Valuation Dates

In brief, Keith argued that the district court erred when it failed to value all the assets and debts on a single date. He

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[4] *Id.*

[5] *Id.*

[6] See *id.*

[7] *Id.*

[8] See *id.*

contended that the court contradicted itself when it valued assets on separate dates and stated:

> To be consistent, these values to me appear to be the most credible given — I'm not saying the others aren't credible — the most accurate, trying to suggest a time and a place for division, so — I don't want to pick one date for one account, one date for another account.

More specifically, Keith contends that the district court erred when valuing the 184th Plaza home, the Storage Road and KMT properties, and business accounts on the date of filing; the 140th Ave. home, jewelry, household goods, joint accounts, and vehicles on the date of trial; and the investment accounts and business equipment on an unrelated date. He requests us to remand the matter back to the district court "with instructions to value the property as of one particular date that is relationally related to the [marital] estate or remand for a new trial on the issue."[9] We decline to do so.

[7] As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate. The date of valuation is reviewed for an abuse of the trial court's discretion.[10]

Although we have never explicitly stated that more than one valuation date may be utilized in valuing marital assets and liabilities, we have alluded to that understanding.[11] In *Brozek v. Brozek*,[12] the appellant argued that the date of separation rather than the date of trial was the appropriate date to value the marital assets. The district court valued most of the marital property at the date of separation, valued farm equipment a year after separation, and valued the corporate

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[9] Brief for appellant at 15.

[10] *Osantowski, supra* note 2.

[11] See, *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016); *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998).

[12] *Brozek, supra* note 11.

shares 3 years later at the date of trial. Although the corporate shares were classified as a nonmarital asset for the appellee, the district court found the value at trial, rather than the value at separation, to be more persuasive. We did not disturb this method.

In *Davidson v. Davidson*,[13] the district court did not value individual assets to establish the marital estate; instead, it used the difference in the appellant's net worth immediately prior to marriage and 4 months after filing for dissolution. We relied on a Nebraska Court of Appeals' case, where evidence supported valuations made 1 week before trial and were rationally related to the property to be divided. We reasoned that the valuation of the appellant's net worth 4 months after filing for dissolution was rationally related to the property composing the marital estate. We concluded that the district court did not abuse its discretion.

In *Walker v. Walker*,[14] the Court of Appeals discussed how a valuation date should be determined. The appellant argued that the real estate should have been valued at the date of dissolution and not the date of separation. The court acknowledged that there is case law to support the proposition that the date of trial is the appropriate date for valuation. But, "we find no hard and fast rule that prohibits the district court from using other times as the appropriate date for valuation purposes so long as the value selected bears 'a rational relationship to the property to be divided upon dissolution.'"[15]

Although many states use a uniform date of separation or date of dissolution for their valuation date, several states follow an approach similar to ours.[16] New York and Ohio courts

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[13] *Davidson, supra* note 11.

[14] *Walker v. Walker*, 9 Neb. App. 694, 618 N.W.2d 465 (2000).

[15] *Id.* at 699, 618 N.W.2d at 470.

[16] 1 Barth H. Goldberg, Valuation of Divorce Assets § 1:16 (rev. ed. 2005 & Cum. Supp. 2018-19).

have discussed the issue of valuing separate assets on separate dates. In *Collins v. Donnelly-Collins*,[17] the Appellate Division of the Supreme Court of New York stated that "selection of the appropriate valuation dates for various assets is addressed to the sound discretion of the trial court, upon consideration of all of the relevant facts and circumstances in the case." In *Berish v. Berish*,[18] the Ohio Supreme Court discussed the pragmatic difficulties of finding one date that the court could always use to value the marital estate. It was reluctant to accept such a simple formula, because "'[t]he formula for division derives from the facts of the individual case'" and the court must have the "necessary flexibility to exercise its discretion."[19] We find these cases persuasive.

[8,9] We decline to mandate that a trial court must use only one valuation date in equitably dividing a marital estate. The date for valuation must be rationally related to the property being divided. Frequently, a single valuation date will be appropriate; but sometimes, it will not. The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided.[20] This harkens back to the polestar of equitable division, which is fairness and reasonableness under the facts of the case. What may be a fair and reasonable valuation on one date for an asset may be unfair and unreasonable for another asset on the same date. "The choice of a date as of which assets available for equitable distribution should be identified and valued must be dictated largely by pragmatic considerations."[21] It can become arduous for the district court to determine one date that fairly and reasonably values the

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[17] *Collins v. Donnelly-Collins*, 19 A.D.3d 356, 357, 796 N.Y.S.2d 159, 160 (2005).

[18] *Berish v. Berish*, 69 Ohio St. 2d 318, 432 N.E.2d 183 (1982).

[19] *Id.* at 321, 432 N.E.2d at 185.

[20] *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008).

[21] *Berish, supra* note 18, 69 Ohio St. 2d at 319, 432 N.E.2d at 184.

entire marital estate.[22] We choose not to tie the hands of the district court; thus, the court need not find "'[o]ne [date] to rule them all.'"[23]

During oral argument, Keith retreated somewhat from the original contention made in his brief. He conceded that at trial, he had failed to present evidence to value the entire marital estate on a single date. In other words, his evidence did not attempt to value all of the marital property as of one, and only one, date. Therefore, it seems disingenuous to now argue that the district court should have selected a single valuation date despite his own failure to adduce evidence accordingly.

The dates used by the district court to value the marital estate were rationally related to the respective items of property. The value at the date of filing was rationally related to the 184th Plaza home, the commercial accounts, and the business properties, because once the parties separated, these assets no longer benefited them both. The value at the date of trial was rationally related to the 140th Ave. home, jewelry, joint accounts, household goods, and vehicles, because several assets had no variation in value and the joint accounts were still used by both parties until the time of trial. The values of the investment accounts and equipment sales were rationally related to the valuation date, because the parties presented only one date to value each asset. We conclude that the district court did not abuse its discretion in valuing marital assets on dates that rationally related to the property being divided.

Nonmarital Business Value

Keith argues that the district court abused its discretion when it failed to classify any portion of Metro as nonmarital. He requests this court to adopt the coverture formula to

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[22] See *Berish, supra* note 18.

[23] See J.R.R. Tolkien, The Fellowship of the Ring 49 (Houghton Mifflin 1994) (1954).

determine the nonmarital value of Metro. He testified that Metro had been in existence for 320 months and that over 70 of those months were prior to the marriage. He contends that 23.13 percent of Metro's value was nonmarital, which, he argues, we should deduct from the marital estate.

We note that at trial, Keith argued that his nonmarital valuation of Metro is "not really a coverture method." The district court responded that "the manner in which the value is trying to be determined is more or less a coverture method." The district court acknowledged that the business was worth something when the parties married, but declined to adopt the valuation because there was no testimony or evidence presented as to the worth of the business at the time of the marriage.

[10,11] Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.[24] The burden of proof rests with the party claiming that property is nonmarital.[25] Because Keith claimed that a portion of Metro was nonmarital, it was his burden to show what interest or value was nonmarital.

In dissolution actions in Nebraska, the coverture formula has been extended only to dividing pensions[26] and termination payments from employment by an insurance company.[27]

> "'Simplified, the coverture formula provides that the numerator of the fraction used to determine the marital portion is essentially the number of months of credible service of the employed spouse while married and therefore is the pension contribution *while married* and that the denominator is the total number of months

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[24] *Osantowski, supra* note 2.

[25] *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016).

[26] See *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006).

[27] See *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017).

> that the spouse has [been] or will be employed which resulted in the pension the employee will receive. This denominator number includes and will include the time the employed spouse worked before, during, and after the marriage.'"[28]

We have not applied the coverture formula to the valuation of the premarital portion of a business. We suspect that the variations in revenue and expenses from year to year, the growth or decline of a business due to numerous factors, and the variations in business cycles make it extremely unlikely that the coverture formula would produce anything other than mere speculation or conjecture. While we are not prepared to definitively preclude a trial court from ever using the coverture formula for such a purpose, we think it is unlikely to be appropriate except in very unusual circumstances.

We note that in other states, there have been isolated instances where intermediate appellate courts have accepted the use of the coverture formula as a method to determine nonmarital business value.[29] But in each of those cases, the appellate court affirmed a valuation method selected by a trial court; in none did the appellate court mandate the use of such a method. No state supreme court has expressly adopted the coverture formula as a method to determine nonmarital business value.

We are not satisfied that the coverture formula was appropriate under the facts of this case. Therefore, the district court did not abuse its discretion when it declined to apply that method.

We next look to whether other evidence was presented for the nonmarital value of Metro. Other than the notion of using the coverture formula, no evidence was submitted to value

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[28] *Id*. at 451-52, 894 N.W.2d at 275 (quoting *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009) (emphasis in original)).

[29] See, *Haslem v. Haslem*, 133 Ohio App. 3d 257, 727 N.E.2d 928 (1999); *Edwards and Edwards*, 141 Or. App. 11, 917 P.2d 504 (1996).

Metro as a going concern at the time when the parties were married. Where there is nothing on the record to show the source of premarital funds, they should be considered part of the marital estate.[30] There was no credible evidence in the record to support a nonmarital value of Metro. It necessarily follows that the district court did not abuse its discretion when it classified all of Metro as marital property.

Remaining Arguments

Keith makes several additional arguments pertaining to the valuation and division of marital and nonmarital assets. He argues that the district court failed to classify the first home down payment as nonmarital, failed to consider tax consequences of the Walvoord Leases, failed to separate the Walvoord Leases payments made to the joint account before division, incorrectly valued the nonmarital value of the Storage Road property, and incorrectly adopted Sharon's appraisals for the 184th Plaza home and the Storage Road property. After reviewing the record de novo, we conclude that the district court did not abuse its discretion in equitably dividing the marital and nonmarital assets. These arguments lack merit.

Additionally, Keith argues that the district court failed to reduce an award of the joint accounts to Sharon by $50,000; erroneously valued nonmarital tools as part of the marital estate; and accounted twice for money used to purchase the Dodge Ram pickup.

Although there appear to have been some mathematical variations from the pronounced decision to the written decree, the difference in the adjusted equalization amount would amount to less than one-half of 1 percent of the entire marital estate. And Keith did not avail himself of the remedies to correct this at the trial court level. His trial counsel approved the form of the decree. Thus, Keith was clearly aware of its content. And he did not pursue a motion to alter or amend the

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[30] *Stanosheck, supra* note 25.

judgment. As we have stated throughout this opinion, fairness and reasonableness is our guiding polestar. We cannot say that mathematical variations amounting to less than one-half of 1 percent of the entire marital estate resulted in an unfair or unreasonable division. We conclude that these mathematical variations are not clearly untenable, nor do they deprive Keith of a just result; therefore, the district court did not abuse its discretion.

CONCLUSION

Having reviewed the record de novo, we conclude that the district court did not abuse its discretion in determining the valuation dates for the marital assets and in classifying, valuing, and dividing the marital estate. Therefore, we 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. Vazgen Manjikian, appellant.

927 N.W.2d 48

Filed May 10, 2019. No. S-18-858.

1. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
5. ____: ____. 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.
6. **Pleas.** To support a finding that a defendant has entered a guilty plea freely, intelligently, voluntarily, and understandingly, a court must inform a defendant about (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
7. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after

acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

8. **Double Jeopardy: Juries: Evidence: Pleas.** In Nebraska, jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.
9. **Double Jeopardy: Legislature: Intent: Sentences.** Where the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the cumulative punishments are imposed in a single proceeding.
10. **Waiver: Constitutional Law: Intent: Presumptions: Words and Phrases.** A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege, and courts indulge every reasonable presumption against waiver of fundamental constitutional rights.
11. **Waiver.** The determination of whether there has been an intelligent waiver of a right must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.
12. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
13. **Sentences.** When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. The sentencing court is not limited to any mathematically applied set of factors.
14. ____. 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.
15. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
16. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will

consider an allegation that the plea was the result of ineffective assistance of counsel.

17. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
18. **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 on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
19. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be resolved on direct appeal if it requires an evidentiary hearing.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Jason E. Troia, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., 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.

Heavican, C.J.

INTRODUCTION

Following a traffic stop in Lancaster County, Nebraska, Vazgen Manjikian was charged by information with possession of a controlled substance, a Class IV felony. During the course of the traffic stop, an amount of amphetamine, a Schedule II controlled substance, was located, along with $234,956. Pursuant to a plea agreement, Manjikian was charged by amended information with one count of attempted possession of a controlled substance, a Class I misdemeanor. Manjikian now appeals his conviction and sentence on various constitutional grounds. We affirm.

BACKGROUND

On January 24, 2018, a Lancaster County sheriff's deputy observed a vehicle, bearing New York license plates, traveling westbound on Interstate 80 at mile marker 394 in Lancaster County. The deputy noted that the vehicle was following another vehicle at a distance of .39 seconds and at a speed of 73 miles per hour. The deputy initiated a traffic stop on the vehicle for following too closely. As the deputy was attempting to stop the vehicle, he observed the two occupants making furtive movements in the area around the center console of the vehicle.

Upon contacting the vehicle's occupants, the deputy noted the odor of raw marijuana emanating from the vehicle. The deputy identified the driver as Kevin Conrado, and the only passenger in the vehicle was identified as Manjikian. Conrado was asked for the vehicle's registration and paperwork, which he retrieved from a backpack in the back seat. The vehicle's rental agreement identified the renter as an individual who was later determined to be the brother of Manjikian. Further investigation revealed that following a murder conviction in California, Manjikian's brother had been incarcerated for a period of time preceding the initial rental period of the vehicle. Upon inspecting the vehicle's paperwork and rental agreement, the deputy noted that the rental agreement had expired 4 days prior, on January 20, 2018.

A search of the vehicle resulted in the discovery of two baggies of suspected methamphetamine found in the console area between the driver and passenger seats. The content in the baggies, as confirmed by the Nebraska State Patrol laboratory, was found to be methamphetamine. Deputies noted that one of the baggies was observed to have an end ripped open. The contents of that baggie appeared to have been dumped into an open drink container which was found in the vehicle and which held an unknown liquid.

Manjikian later admitted to a deputy that he possessed a controlled substance in the vehicle; although he referred to the

substance as "Adderall," it was later confirmed to be methamphetamine. In addition to the methamphetamine, deputies also discovered marijuana cigarettes in the center console area and a total of $234,956 in U.S. currency. Conrado's backpack contained $11,300, and Manjikian was in possession of $376, which was found on his person. The remainder of the currency was found stuffed inside three 64-ounce brownie mix cans that were resealed to look as if they were in their original condition.

On March 27, 2018, Manjikian was charged by information in Lancaster County District Court with possession of a controlled substance (amphetamine), a Class IV felony.[1] Manjikian entered a plea of not guilty to the charge.

On June 21, 2018, Manjikian, along with his trial counsel, appeared before the district court at a change of plea hearing. The parties advised the district court that they had reached an agreement wherein Manjikian would plead no contest to an amended information charging him with attempted possession of a controlled substance (methamphetamine) under Neb. Rev. Stat. § 28-201(4)(e) (Reissue 2016) and § 28-416(3), a Class I misdemeanor. In addition, Manjikian agreed to forfeit any interest in the $234,956 that was seized during the traffic stop that led to his arrest. The forfeiture agreement was in writing and stated, in pertinent part:

> Manjikian hereby enters into an agreement with the State of Nebraska in the above captioned matter and agrees that any interest he has in said $234,956.00 shall be forfeited to [U.S. Customs and Border Protection] pursuant to federal forfeiture laws. . . . Manjikian consents to the administrative forfeiture of the $234,956.00 and will not file a claim for it. In agreeing to such forfeiture, . . . Manjikian waives his rights pursuant to Neb. Rev. Stat. §28-431 and the procedural requirements for such forfeitures and waives his rights as they relate

[1] See Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2018).

> to claims of double jeopardy pursuant to the United States Constitution Amendment V, the Nebraska State Constitution Article I, section 12, and *State v. Franco*, 257 Neb. 15 (1999);
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> . . . Manjikian, having consulted with his attorney in the matter, now waives his rights freely, voluntarily, knowingly and intelligently without force, threat, coercion, duress, or promises, other than a plea agreement.

Following a hearing in which the court advised Manjikian of his rights and confirmed his understanding of such, the district court found that Manjikian's plea was "freely, voluntarily, knowingly and intelligently made" and adjudged him guilty of the offense. The court then ordered a presentence investigation and set a date for sentencing.

Manjikian's sentencing hearing was held on August 29, 2018. At the hearing, the district court sentenced Manjikian to 180 days' imprisonment, with 2 days' credit for time served. Manjikian appeals.

ASSIGNMENTS OF ERROR

In a brief prepared by appellate counsel, Manjikian claims that the district court erred in (1) finding that Manjikian made a free, voluntary, knowing, and intelligent plea; (2) accepting a plea that Manjikian contends violates constitutional protections against double jeopardy; and (3) abusing its discretion in sentencing him to a term of incarceration. Manjikian also contends that he received ineffective assistance of trial counsel.

STANDARD OF REVIEW

[1] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.[2]

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[2] *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016).

[2,3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[3] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[4]

[4,5] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[5] 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.[6]

ANALYSIS

Manjikian's Free, Voluntary, Knowing, and Intelligent Plea.

In his first assignment of error, Manjikian contends that the plea agreement he entered into with the State was not entered into freely, voluntarily, knowingly, or intelligently. According to Manjikian, the district court failed to advise him that by entering into the plea agreement, he waived his right to appeal any adverse decisions had he filed pretrial motions or proceeded to trial. Manjikian argues that the court's failure in this respect results in his plea not being made freely, voluntarily, knowingly, and intelligently.

[6] Under our holding in *State v. Lane*,[7] to support a finding that a defendant has entered a guilty plea freely, intelligently, voluntarily, and understandingly, a court must inform

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[3] *State v. Steele*, 300 Neb. 617, 915 N.W.2d 560 (2018).

[4] *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018).

[5] *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018).

[6] *Id.*

[7] *State v. Lane*, 299 Neb. 170, 907 N.W.2d 737 (2018).

a defendant about (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.[8]

Manjikian now argues, without binding authoritative support, that the court was also required, during the plea colloquy, to advise him of the fact that his plea would result in the waiver of his right to appeal any adverse decision had he filed pretrial motions or proceeded to trial. Manjikian further contends that the court was also required to advise him that appellate counsel and costs would be provided, had he qualified.

Manjikian would have us adopt a new prerequisite to accepting a plea in the form of the American Bar Association's Standard 14-1.4(a)(vi), requiring the court to advise the defendant that "by pleading guilty the defendant generally waives the right to appeal, except the right to appeal a motion that has been made, ruled upon and expressly reserved for appeal and the right to appeal an illegal or unauthorized sentence."[9]

We have consistently held that the rule to be distilled from our prior holdings is that in order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and knowingly, the court must inform the defendant concerning the nature of the charge,[10] the right to assistance of counsel,[11] the right to confront witnesses against the defendant,[12] the right to a jury trial,[13] and the privilege

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[8] *Id.*

[9] ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-1.4(a)(vi) at 36 (3d ed. 1999).

[10] *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), *disapproved on other grounds, State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

[11] *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

[12] *Id.*

[13] *Id.*

against self-incrimination.[14] The court must also examine the defendant and determine whether he or she understands the foregoing.[15] Lastly, the court must ensure the record establishes that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she is charged.[16]

As we stated in *State v. Irish*, "[we recognize] that the work of the ABA, although good and useful, nevertheless does not rise to the status of legislative acts or judicial holdings."[17] Through painstaking judicial work, we have established the minimum requirements for the court to accept a plea as being entered freely, intelligently, voluntarily, and knowingly.

Additionally, as we indicated in *State v. Turner*,[18] a requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too extreme construction of the U.S. Supreme Court's holdings in *Boykin v. Alabama*[19] and *McCarthy v. United States*.[20] Both Boykin and McCarthy dealt with a court's duties under Fed. R. Crim. P. 11 as it relates to a defendant's voluntarily and intelligently made plea agreement.

Here, the record demonstrates that the district court advised Manjikian at length about the nature of the charge, made significant reference to his right to assistance of counsel, and advised Manjikian of the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination. Beyond the required admonishments enumerated in *Lane*, the court went on to specifically warn Manjikian that

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[14] *Id.*

[15] *Irish, supra* note 10.

[16] *Id.*

[17] *Id.* at 818, 394 N.W.2d at 882.

[18] *Turner, supra* note 10.

[19] *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

[20] *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969).

his plea would waive his right to additional hearings regarding pretrial motions, had he subsequently decided to make any.

Based on the foregoing analysis, Manjikian's plea was entered freely, voluntarily, knowingly, and intelligently. We decline his invitation to adopt the American Bar Association's Standard 14-1.4(a)(vi), and we find his assignment of error to be without merit.

Double Jeopardy.

Manjikian next assigns that the district court erred and abused its discretion in accepting his no contest plea. Manjikian contends that such acceptance violated double jeopardy principles. Specifically, Manjikian argues that our precedent in *State v. Spotts*[21] acts to bar the State from seeking both forfeiture and subsequent criminal prosecution.

At oral arguments, for the first time, the State argued that the money seized during the traffic stop was abandoned property, because Manjikian disclaimed ownership of the money in a statement to law enforcement. The State further argues that Manjikian cannot now claim double jeopardy applies because of the forfeiture of the funds that he had earlier proclaimed were not his. The State's contention regarding abandonment was not discussed below, nor was it specifically assigned in their brief. We proceed, therefore, to analyze Manjikian's double jeopardy claim.

The U.S. Supreme Court has noted that the constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.[22] In *Benton v. Maryland*,[23] the Court applied the 5th Amendment's

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[21] *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999).

[22] *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

[23] *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

protection against double jeopardy to the states through the Due Process Clause of the 14th Amendment, noting that the protection "represents a fundamental ideal in our constitutional heritage."[24]

[7,8] The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[25] In Nebraska, jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.[26]

Manjikian's double jeopardy claim in this case appears to be based on the prohibition of multiple punishments for the same offense, i.e., the seizure and jail sentence.

In *State v. Franco*,[27] we stated that since *State v. One 1987 Toyota Pickup*,[28] we have determined that the Legislature intended forfeiture actions pursuant to Neb. Rev. Stat. § 28-431 (Reissue 2008) to be criminal proceedings. In *Franco*, a criminal defendant was charged with a crime and faced the forfeiture of personal property seized during his arrest. The district court concluded that the crime and the actions leading to forfeiture constituted separate criminal offenses so that the prosecution of both was not barred by double jeopardy. On appeal, this court disagreed, instead holding that a forfeiture action pursuant to § 28-431 necessarily required the proof of a violation of chapter 28, article 4, of the Nebraska Revised Statutes. In *Franco*, the defendant's

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[24] *Id.*, 395 U.S. at 794.

[25] *Spotts, supra* note 21.

[26] *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

[27] *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999).

[28] *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989), *overruled, Spotts, supra* note 21.

violation of § 28-416(1)(a)—the statute which charged him with possession of a controlled substance—had to be proved. We concluded that § 28-416(1)(a) was subsumed within § 28-431 and that as such, the two statutes were not defining separate offenses. In short, we held that the State could not seek forfeiture of property and then proceed in a criminal prosecution arising from the same set of facts without offending double jeopardy.[29]

[9] However, we went on to note that the *Blockburger* test, enumerated in *Blockburger v. United States*,[30] which is applied to prevent double punishment in situations where the Legislature intended to provide only for a single punishment, did not prevent the State from seeking a criminal prosecution and a forfeiture in the same proceeding if there was legislative intent to do so. We concluded that the Nebraska Legislature intended for punishments pursuant to §§ 28-416(1)(a) and 28-431 to be imposed cumulatively.[31] Where the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the cumulative punishments are imposed in a single proceeding.[32]

In *Spotts*, we reinforced our holding in *Franco*. The defendant in *Spotts* was arrested by the Nebraska State Patrol for being in possession of a controlled substance with the intent to deliver, a Class III felony. Before his criminal information was filed, the State sought forfeiture of $14,177 found on the defendant's person at the time of his arrest. Following his initial appearance at his criminal trial, he filed a plea in bar alleging in pertinent part that the conduct which exposed him to forfeiture of the $14,177 was the same conduct which

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[29] See *Franco, supra* note 27.

[30] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[31] *Franco, supra* note 27.

[32] *Id.*

exposed him to liability and punishment for the possession of methamphetamine. The defendant alleged that in order to forfeit the money found on his person, he would have had to commit one and the same offense as charged in the information. He asserted that the prosecution for possession of methamphetamine was barred, because said prosecution would expose him to double jeopardy.

In *Spotts*, we reiterated that forfeiture actions pursuant to § 28-431 constituted criminal proceedings. We ultimately found that *Franco* controlled, concluding that the Nebraska Legislature intended for punishments pursuant to §§ 28-416(1)(a) and 28-431 be imposed cumulatively. Where the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the cumulative punishments are imposed in a single proceeding. In *Spotts*, we ultimately agreed with the district court when it stated: "'[I]f [a] forfeiture action arises out of the underlying criminal case, the State is placed in the position of having to decide whether to pursue the forfeiture proceeding or whether to pursue the criminal proceeding.'"[33]

We observe that in 2016, the Legislature revised §§ 28-416 and 28-431.[34] Because we find that Manjikian expressly waived his constitutional right against double jeopardy when he entered into the plea agreement,[35] we express no opinion as to whether the revisions enacted by the Legislature change the viability of *Franco* and *Spotts*. Therefore we need not venture into a comprehensive analysis under *Spotts*.

[10,11] The U.S. Supreme Court has indicated that a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege, and courts indulge every reasonable presumption against waiver of fundamental

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[33] *Spotts, supra* note 21, 257 Neb. at 49, 595 N.W.2d at 262.

[34] See 2016 Neb. Laws, L.B. 1106, §§ 5 and 6.

[35] See *State v. Dye*, 291 Neb. 989, 870 N.W.2d 628 (2015).

constitutional rights.[36] The determination of whether there has been an intelligent waiver of a right must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.[37]

In this case, Manjikian's plea agreement in relevant part specifically stated:

> In agreeing to such forfeiture, . . . Manjikian waives his rights pursuant to Neb. Rev. Stat. §28-431 and the procedural requirements for such forfeitures and waives his rights as they relate to claims of double jeopardy pursuant to the United States Constitution Amendment V, the Nebraska State Constitution Article I, section 12, and *State v. Franco*, 257 Neb. 15 (1999)[.]

Based on the record, Manjikian has some formal education and has previously been involved in the California criminal justice system. Beyond his personal history which is informative of his background and understanding, when asked by the court whether he understood the plea agreement and his rights, Manjikian consistently answered that he was aware of the particular details of the agreement and had entered the agreement voluntarily.

[12] We have repeatedly held that the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.[38] This includes the right against double jeopardy; we have held that such exceptions include the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction.[39]

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[36] See *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938). See, also, *Ricketts v. Adamson*, 483 U.S. 1, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987) (Brennan, J., dissenting).

[37] *Johnson, supra* note 36.

[38] See *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991).

[39] *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991).

The record in this case is clear. Manjikian waived his right against double jeopardy when he entered into the plea agreement; therefore, Manjikian's assignment of error with regard to being put twice in jeopardy is without merit.

Sentence.

Manjikian next assigns as error that the court abused its discretion in sentencing him to a term of incarceration. Manjikian argues that the district court relied on improper information contained in the presentence investigation and on comments made by the prosecution alleging, without evidence, that Manjikian was involved in organized crime. His argument appears to further contend that probation would have been the appropriate sentence in this case.

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[40] 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.[41]

[13,14] When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[42] However, the sentencing court is not limited to any mathematically applied set of factors.[43] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor

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[40] *Steele, supra* note 3.

[41] *Clemens, supra* note 4.

[42] *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (2017).

[43] *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

and attitude and all the facts and circumstances surrounding the defendant's life.[44]

Here, the record establishes that the district court reviewed the presentence investigation report and considered all appropriate sentencing factors. The comments made by the district court noted at sentencing that the "facts and circumstances of this case" were "somewhat disturbing." Although the presentence report and comments made by the prosecution regarding Manjikian's alleged connections to organized crime were largely unsubstantiated, there is no indication that the district court's sentence turned solely on those claims.

The court's comments at sentencing do not indicate that the district court considered any inappropriate factors in determining the sentence to be imposed. The presentence report contains significant findings regarding Manjikian's violent criminal history, unauthorized possession of weapons, previous flight from justice, and propensity for poor impulse control and decisionmaking. Based on the facts and circumstances surrounding Manjikian's life and the crime charged, we cannot say that the district court abused its discretion in sentencing him to 180 days' incarceration.

Manjikian's assignment of error regarding the court's decision to sentence him to 180 days in jail is without merit.

Ineffective Assistance of Counsel.

Lastly, Manjikian claims that he received ineffective assistance of counsel in violation of his 6th Amendment right as applied to the states through the Due Process Clause of the 14th Amendment. Manjikian contends that his trial counsel's performance fell below the range of competence demanded of attorneys in criminal cases.

Specifically, Manjikian points to four instances in particular in which he claims trial counsel was deficient. First, Manjikian argues that his codefendant had signed a written confession

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[44] *Id.*

and was prepared to testify that the controlled substance was not Manjikian's. Manjikian argues that trial counsel was ineffective in advising Manjikian that his codefendant's statement and proposed testimony would not be sufficient to convince a jury. Second, Manjikian claims that trial counsel advised him a jury would likely convict him based on his being from out of state and that this erroneous advice caused Manjikian to enter into a plea agreement rather than proceed to trial. Third, Manjikian claims that trial counsel incorrectly advised him that observing his codefendant "do something" with the substance upon the officer's initiating the traffic stop was sufficient evidence to sustain a conviction for the crime with which he was charged, leading him to forgo his right to trial.[45] Lastly, Manjikian contends that his counsel failed to protect his rights against double jeopardy by not filing a plea in bar.

[15] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[46] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[47] The two prongs of this test may be addressed in either order, and the entire ineffective assistance analysis should be viewed with a strong presumption that counsel's actions were reasonable.[48]

[16,17] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[49] When a conviction is based upon a guilty plea,

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[45] Brief for appellant at 20.

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

[47] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[48] *Id.*

[49] *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[50]

The likelihood of the defense's success had the defendant insisted on going to trial is relevant to the prejudice analysis[51]; it is relevant to the consideration of whether a rational defendant would have insisted on going to trial.[52] The likelihood of the defense's success had the defendant gone to trial should be considered along with other factors, such as the likely penalties the defendant would have faced if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.[53]

Where, as here, appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[54] 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 be able to recognize whether the claim was brought before the appellate court.[55]

[18,19] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean

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

[51] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[52] *Id.*

[53] *Id.*

[54] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[55] *Ash, supra* note 47.

that it can be resolved on direct appeal.[56] The determining factor is whether the record is sufficient to adequately review the question.[57] An ineffective assistance of counsel claim will not be resolved on direct appeal if it requires an evidentiary hearing.[58]

In this case, the State submits that the record is sufficient to resolve Manjikian's claims of ineffective assistance of counsel and contends that Manjikian's claims are without merit. In regard to Manjikian's claim that his codefendant had signed a written confession and was prepared to testify that the controlled substance was not Manjikian's, the State directs our attention to Manjikian's own admissions which clearly refute any potential testimony of his codefendant. As to Manjikian's claim that trial counsel's statement as to the risk of conviction based on Manjikian's being from out of state, the State contends that such claims are betrayed by Manjikian's own admission to law enforcement. The State argues that Manjikian's admissions would have carried substantial weight which alone could have led to a conviction. The State directs our attention to the recorded jail telephone call between Manjikian and a sheriff's deputy in which Manjikian admitted that he had been in possession of "Adderall," an admission that supported Manjikian's plea.

In regard to Manjikian's claim that trial counsel failed to protect his right against double jeopardy, the record clearly refutes his claim, because he knowingly, intentionally, and voluntarily agreed, as a part of the plea agreement with the State, to forfeit the money to the federal government. Moreover, as noted above, the plea agreement specifically recited that Manjikian "waives his rights as they relate to claims of double jeopardy pursuant to the United States Constitution

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[56] *Id.*

[57] *Id.*

[58] *Id.*

Amendment V, [and] the Nebraska State Constitution Article I, section 12." Therefore, unlike the defendants in *Franco*[59] and *Spotts*,[60] Manjikian was not subjected to successive criminal prosecutions, but instead agreed to the forfeiture and reduced criminal charge in exchange for his plea.

Given the fact that Manjikian and his codefendant were transporting $234,956 on their persons, as well as in various sealed containers, while being in possession of an amount of methamphetamine and in a vehicle rented to Manjikian's brother, who was incarcerated at the time of the rental agreement, it cannot be said that Manjikian's defense had a strong likelihood of success on the merits. This is especially true given the fact that Manjikian admitted to law enforcement that he had been in possession of "Adderall," a controlled substance.

Had the plea agreement not been reached, Manjikian was facing a charge of possession of a controlled substance (amphetamine), a Class IV felony under § 28-416(3), which carries a potential maximum sentence of 2 years' imprisonment and 12 months' postrelease supervision or a $10,000 fine, or both, and a minimum sentence of 9 months' postrelease supervision, if imprisonment is imposed.[61] In light of the potential penalty he faced, had Manjikian not pled to the lower Class I misdemeanor, the weight of the evidence and the fact that our ineffective assistance analysis is viewed with a strong presumption that counsel's actions were reasonable, we cannot say that Manjikian's trial counsel was ineffective in regard to the plea agreement.

Further, we cannot say that trial counsel was incorrect in advising Manjikian regarding possession. We have previously stated that "possession of an illegal substance can be inferred from a vehicle passenger's proximity to the substance

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[59] *Franco, supra* note 27.

[60] *Spotts, supra* note 21.

[61] See Neb. Rev. Stat. § 28-105 (Reissue 2016).

or other circumstantial evidence that affirmatively links the passenger to the substance."[62] Given this prior holding and Manjikian's admission, we cannot say that Manjikian's claim that his codefendant was willing to testify and provide a written statement as to being the alleged true possessor of the controlled substance rises to the level of establishing that Manjikian suffered actual prejudice as a result of choosing to enter a plea instead of risking a trial. Trial counsel is afforded due deference to formulate trial strategy and tactics, and we are not to second-guess trial counsel's reasonable strategic decisions when reviewing claims of ineffective assistance of counsel.[63]

CONCLUSION

The district court did not err in finding that Manjikian made a free, voluntary, knowing, and intelligent plea. Additionally, the district court did not err in accepting the plea as it did not violate double jeopardy, because Manjikian waived his rights as evidenced by the language of the plea agreement. Further, the district court did not abuse its discretion in sentencing Manjikian to a term of incarceration. Lastly, Manjikian did not receive ineffective assistance of trial counsel.

The decision of the district court is affirmed.

Affirmed.

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[62] *State v. Draganescu*, 276 Neb. 448, 478, 755 N.W.2d 57, 85 (2008).

[63] See *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

Nebraska Supreme Court
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Jami Hollomon, appellant, v. Alex Taylor, appellee.

926 N.W.2d 670

Filed May 10, 2019. No. S-18-959.

1. **Child Custody: States: Judgments.** Whether a child custody determination issued by a court of another state may be registered in Nebraska presents a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Child Custody: Jurisdiction: Judgments.** When the registration procedure of Neb. Rev. Stat. § 43-1252 (Reissue 2016) has been followed and the registration is either not contested or, after a hearing none of the grounds under § 43-1252(d) have been established, the registering court shall confirm the registered order.
4. **Child Custody: Jurisdiction.** Proceedings to register a child custody determination from a foreign jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, with or without a simultaneous request for enforcement, are generally ministerial, and concerns about whether the registering court may properly exercise jurisdiction over a subsequent child custody proceeding are not yet implicated.

Appeal from the District Court for Seward County: James C. Stecker, Judge. Reversed and remanded with directions.

Nicholas R. Glasz for appellant.

Michael S. Kennedy, of Kennedy Law Firm, P.C., L.L.O., for appellee.

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

Stacy, J.

Jami Hollomon and Alex Taylor are the unmarried parents of a minor child. After the State of Texas entered an order adjudicating parentage and establishing a parenting plan, Hollomon attempted to register the Texas order in Nebraska. The district court for Seward County denied the request after concluding it "should decline jurisdiction" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[1] Hollomon appeals, and we reverse the order and remand the cause with directions to register and confirm the Texas order.

FACTS

Hollomon and Taylor had a child together in 2016. On June 11, 2018, the district court for Van Zandt County, Texas, entered an "Order Adjudicating Parentage" in case No. FM16-00080. In addition to establishing paternity of the minor child, the order approved the parties' mediated parenting plan and addressed issues of custody, support, and parenting time.

The Texas order identified a "Seward, NE" address for Hollomon and identified a Texas address for Taylor. The order gave Holloman the "exclusive right to designate the primary residence of [the child] without regard to geographic location of [Taylor]." Taylor was ordered to maintain health insurance for the child and to pay monthly child support. The order also set out a "Possession Order" which designated the parties' parenting time. As relevant to the issues on appeal, the order established two different possession schedules for the

[1] Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2016 & Cum. Supp. 2018).

child: one schedule for "Parents Who Reside 100 Miles or Less Apart," and another for "Parents Who Reside More Than 100 Miles Apart." Under the provisions applicable to parents residing more than 100 miles apart, Hollomon was given "a superior right of possession" of the child. It does not appear that any provision of the Texas order expressly required either Hollomon or Taylor to reside in Texas.

On August 15, 2018, about 2 months after the Texas order was issued, Hollomon sought to register the order in the district court for Seward County pursuant to § 43-1252. She filed a certified copy of the Texas order, accompanied by her affidavit requesting registration of the order in Nebraska. She did not simultaneously request to enforce or modify the Texas order. Hollomon's affidavit averred, among other things, that (1) she had been awarded custody of the minor child by the Texas order; (2) to the best of her knowledge and belief, the Texas order had not been modified; (3) she moved to Seward in November 2017 and intended to make Nebraska her permanent home; and (4) she was currently living with the child at an "undisclosed residence in Seward County, Nebraska." Although the affidavit did not explain why, Hollomon averred that the health, safety, or liberty of Hollomon or the child would be jeopardized by disclosure of her identifying information, and she asked that the information be sealed pursuant to § 43-1246(e).

The next day, pursuant to § 43-1252(c), the clerk of the district court for Seward County sent notice to both Taylor and the Texas court that a "child custody determination issued by the court of Van Zandt County, Texas" in "Cause Number FM: 16-00080" had been filed in the district court for Seward County on August 15. The notice further stated:

> (a) a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(b) a hearing to contest the validity of the registered determination shall be requested within twenty days after service of notice; and

(c) failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

The notice was personally served on Taylor August 23, 2018. Thereafter, Taylor entered a voluntary appearance and requested a hearing on registration of the Texas order. His motion stated he was resisting registration, because the Texas order "fails to comply with the registration requirements of Nebraska" and because "Texas still has jurisdiction."

After conducting an evidentiary hearing, the district court made the following journal entry on October 1, 2018, which was signed and file stamped:

> The matter comes on for hearing to Register Foreign Judgment. Nicholas Glasz, attorney, appears with [Hollomon]. Mike Kennedy, attorney, appears with [Taylor]. Statements of counsel are made. Evidence is adduced. The court finds that pursuant to §43-1245, this court should decline jurisdiction due to the conduct of the mother, . . . Hollomon. The mother removed the child from the geographic limits of the Texas order without permission. The mother is currently subject to a contempt order in Texas which is currently being monitored by the Texas court that issued the order seeking to be registered. The Texas court has continuing jurisdiction over the matter. The request for registration is denied.

Hollomon timely appealed, and we moved the case to our docket on our own motion.

ASSIGNMENT OF ERROR

Hollomon assigns, restated and consolidated, that the district court erred in denying registration of a foreign child

custody determination based on an unrelated foreign contempt order and an erroneous finding that Hollomon removed the minor child from the geographic limits of Texas without permission.

STANDARD OF REVIEW

[1,2] Whether a child custody determination issued by a court of another state may be registered in Nebraska presents a question of law.[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[3]

ANALYSIS

Both parties' briefing, and the order of the district court denying registration, generally frame the issue as whether Nebraska has jurisdiction over a "child custody proceeding" involving the parties' child under the UCCJEA. But on this record, the only question presented is whether the Texas order may be registered in Nebraska.

The statute governing registration of child custody determinations from another state is § 43-1252, which provides:

> (a) A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the district court in this state:
>
> (1) a letter or other document requesting registration;
>
> (2) two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

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[2] See *In re Sophia G.L.*, 229 Ill. 2d 143, 890 N.E.2d 470, 321 Ill. Dec. 748 (2008).

[3] *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015).

(3) except as otherwise provided in section 43-1246, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

(b) On receipt of the documents required by subsection (a) of this section, the registering court shall:

(1) cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

(2) serve notice upon the persons named pursuant to subdivision (a)(3) of this section and provide them with an opportunity to contest the registration in accordance with this section.

(c) The notice required by subdivision (b)(2) of this section shall state that:

(1) a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(2) a hearing to contest the validity of the registered determination shall be requested within twenty days after service of notice; and

(3) failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(d) A person seeking to contest the validity of a registered order shall request a hearing within twenty days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(1) the issuing court did not have jurisdiction under sections 43-1238 to 43-1247;

(2) the child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under such sections; or

(3) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of section 43-1233, in the proceedings before the court that issued the order for which registration is sought.

(e) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served shall be notified of the confirmation.

(f) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

[3] Taylor does not contend that Hollomon failed to comply with the procedural requirements of the registration statute, nor has he contested the registration on any of the grounds set out in § 43-1252(d). When the registration procedure of § 43-1252 has been followed and the registration is either not contested or, after a hearing none of the grounds under § 43-1252(d) have been established, the registering court shall confirm the registered order.[4] Thus, because Taylor requested a hearing but did not establish any of the grounds that would preclude confirmation of the registered order under § 43-1252(d), the district court for Seward County was required, as a matter of law, to confirm the registered order.

[4] To the extent the parties and the district court went beyond the ministerial issue of registration and analyzed whether the district court for Seward County has jurisdiction

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[4] § 43-1252.

to make or modify a child custody determination under §§ 43-1238 to 43-1245, their analysis was premature. Proceedings to register a child custody determination from a foreign jurisdiction under the UCCJEA, with or without a simultaneous request for enforcement, are generally ministerial, and concerns about whether the registering court may properly exercise jurisdiction over a subsequent child custody proceeding are not yet implicated.

Here, no Nebraska court has yet been asked to make, or to modify, a child custody determination. Hollomon's reason for seeking to register the Texas order in Nebraska was not articulated in her affidavit, and the record contains no simultaneous request for enforcement or modification. But even assuming Hollomon seeks to register the Texas order so she can subsequently seek to enforce it, a proceeding seeking only to enforce a previously entered custody order is not a child custody proceeding as defined under the UCCJEA.[5] As such, on this record, concerns about whether the district court for Seward County may exercise jurisdiction over a child custody proceeding are not yet implicated.[6]

CONCLUSION

For the foregoing reasons, the order of the district court is reversed, and the cause is remanded with directions to confirm the registered order.

Reversed and remanded with directions.

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[5] See § 43-1227(4) ("[c]hild custody proceeding . . . does not include a proceeding involving . . . enforcement under sections 43-1248 to 43-1264").

[6] See, e.g., *Harter v. Szykowny*, 2014 Ark. App. 701, 451 S.W.3d 215 (2014); *Berwick v. Wagner*, 336 S.W.3d 805 (Tex. App. 2011); *In re Sophia G.L., supra* note 2; *Jamil v. Jahan*, 280 Mich. App. 92, 760 N.W.2d 266 (2008); *Prickett v. Prickett*, 167 P.3d 661 (Wyo. 2007).

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State of Nebraska, appellee, v. Michael E. Goynes, Jr., appellant.

927 N.W.2d 346

Filed May 17, 2019. No. S-18-135.

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. **Pretrial Procedure: Trial: Evidence: Appeal and Error.** Where there has been a pretrial ruling regarding the admissibility of evidence, a party must make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review.
3. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
4. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test.
5. ____: ____: ____: ____. In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
6. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.

7. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
8. **Search Warrants: Probable Cause.** The particularity requirement for search warrants is distinct from, but closely related to, the requirement that a warrant be supported by probable cause.
9. **Search Warrants.** A purpose of the particularity requirement for a search warrant is to prevent the issuance of warrants on loose, vague, or doubtful bases of fact.
10. **Constitutional Law: Search Warrants: Police Officers and Sheriffs.** To satisfy the particularity requirement of the Fourth Amendment, a warrant must be sufficiently definite to enable the searching officer to identify the property authorized to be seized. The degree of specificity required depends on the circumstances of the case and on the type of items involved.
11. **Search Warrants: Probable Cause: Evidence.** A search warrant may be sufficiently particular even though it describes the items to be seized in broad or generic terms if the description is as particular as the supporting evidence will allow, but the broader the scope of a warrant, the stronger the evidentiary showing must be to establish probable cause.
12. **Search and Seizure: Search Warrants: Probable Cause.** A warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Matthew J. Miller 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.

Funke, J.

Michael E. Goynes, Jr., appeals his convictions of murder in the first degree, use of a deadly weapon (firearm) to commit a felony, and possession of a deadly weapon by a prohibited person. On appeal, Goynes challenges the district court's failure to suppress cell phone data content acquired through the execution of a search warrant. Goynes claims the warrant was unsupported by probable cause and insufficiently particular. The State, in turn, argues that the warrant was supported by probable cause and sufficiently particular and that the officers who executed the warrant acted in good faith. For the reasons set forth herein, we affirm.

I. BACKGROUND

At 4:25 p.m. on April 25, 2016, Omaha Police Department officers responded to a report of shots fired at an apartment complex in Omaha, Nebraska. In front of the complex, the officers found Barbara Williams on the ground in a pool of blood. Williams had been shot in the chest, and paramedics pronounced her dead at the scene.

As a result of a subsequent investigation, officers identified Goynes as a suspect and took him into custody on April 30, 2016. Goynes had an "LG Tribute 5" cell phone in his possession when he was arrested. Det. Larry Cahill submitted an application for a search warrant authorizing examination of the cell phone and the extraction of electronically stored information. In the supporting affidavit, Cahill stated his belief that data from the cell phone would assist him in determining the course of events regarding the homicide investigation of Williams.

The factual basis Cahill provided in his affidavit explained that on Monday, April 25, 2016, officers responded to the shooting at the apartment complex. Upon their arrival, the officers observed Williams deceased in front of the complex with an apparent gunshot wound to her torso. The officers then undertook an investigation wherein several potential witnesses to the shooting were interviewed.

The affidavit stated that around 4:20 p.m. on April 25, 2016, a witness heard approximately four or five gunshots and observed a white, four-door sedan parked just east of the north entrance facing the apartments. The witness then observed a black male wearing a white T-shirt, gray pants, and a dark-colored hat holding a handgun in his right hand and walking toward the sedan. The black male got into the driver's side of the sedan, which left the area quickly, traveling east on Boyd Street toward North 48th Street.

This account was supported by video described in the affidavit. In the video, which showed various views of the front of the apartment complex, investigators observed a white, four-door sedan drive past the front of the complex's entrance, where officers later located Williams, and park in a spot east of that entrance. The officers observed an unidentified party travel from where the sedan was parked, approach the elevated stoop of the entrance, and return back to the sedan's location. The video then showed the sedan leaving, traveling east on Boyd Street.

Cahill's affidavit described interviews occurring on April 29, 2016, with two other potential witnesses, George Taylor and Saville Hawthorne, who claimed to know the identity of the suspect.

Taylor's interview provided that Taylor and Hawthorne drove to a parking space across the street from the apartment complex at 4 p.m. on April 25, 2016. Taylor described that Hawthorne and Williams were friends and that after Taylor parked his vehicle facing the entrance of the complex, Hawthorne briefly went to talk to Williams before returning to the vehicle. Once Hawthorne returned to the vehicle, Taylor observed a white, four-door sedan pull into a parking spot just east of the apartment entrance where Williams was located. Taylor stated he observed a black male wearing a white T-shirt, dark pants, and a black hat exit the sedan, possibly from the back seat. Taylor indicated that he saw additional parties inside the white sedan, but that those individuals did

not exit the sedan. Upon exiting the sedan, the black male began walking toward the elevated stoop where Williams was sitting. Taylor identified the man as Goynes, also known as "'Gang Bang,'" explaining that Goynes is Hawthorne's cousin and a known gang member. Taylor described that Goynes then began firing a black handgun toward the stoop in front of the entrance. Taylor stated that two men, whom he knew as "'Action'" and "'Stay Ready,'" were sitting on the elevated stoop near Williams and that he believed Goynes was shooting at these men. Taylor stated he watched Goynes fire approximately 10 times, firing all the way up to the entryway stairs and toward where he saw "'Action'" and "'Stay Ready'" running. Taylor then sought cover and did not see Goynes or the sedan leave.

In Hawthorne's interview, she stated that she rode to the apartment complex with Taylor and that they parked facing the entrance of the complex. After noticing several friends, including Williams, sitting on the stoop in front of the entrance, she went over and "sat with them for a couple minutes." Hawthorne was then called away and left the stoop to return to the vehicle, where she sat in the front passenger seat. While in the vehicle, Hawthorne observed a white, four-door sedan approach and park on the east side of the entrance and saw a black male exit the sedan from the rear driver's side seat. The man that exited the sedan, whom Hawthorne identified as her cousin Goynes, walked toward the stoop and pulled out a black handgun from his waist which he used to shoot toward the stoop at least 10 times. Hawthorne believed Goynes was shooting at two men on the stoop she identified as "'Action'" and "'Stay Ready,'" whom she observed fled into the courtyard of the apartment complex. Hawthorne explained that Goynes ran up the stairs of the stoop and continued to shoot toward the courtyard before heading back and getting into the sedan. Hawthorne described that the sedan left the scene eastbound toward 48th Street. Hawthorne clarified she was "100% sure" Goynes was the shooter and was able to positively

identify him from a photographic lineup, as well as "'Action'" and "'Stay Ready.'"

Cahill asserted in his affidavit that there was data on the cell phone related to the offense and listed the areas in which that data could be found. Cahill supported his assertion by explaining:

> From training, experience and research Affiant Officer is aware that the data on cell phones can provide invaluable insight for criminal investigations. Cell phones are used for communication, access to information, socialization, research, entertainment, shopping and other functionality. In addition to personal use, cell phones are often used as tools in criminal activity. Affiant Officer is aware of numerous instances where cell phones were used by participants in crimes to communicate via voice and text messaging, occasions when they took photographs of themselves with weapons and/or illegal narcotics, times when they created videos of their criminal activity and instances when the Internet was used to research crimes they participated in, just to name a few. As such a cell phone can serve both as an instrument for committing a crime, as well as a storage medium for evidence of the crime.
>
> Cell phone data can assist investigators in determining the culpability of participants in criminal investigations. This is because the data can potentially provide a wealth of information that can assist in determining the motivation, method and participants involved in an incident. Information on the devices can provide invaluable insight to the who, what, when, where and why an incident occurred.

Cahill continued by explaining the kind of information the listed types of cell phone data could provide to investigators.

The county court found probable cause to support the warrant and granted Cahill's application. In the warrant, the court identified the warrant was in relation to the Williams'

homicide and authorized the search of the cell phone data described in the affidavit, including: cell phone information and configurations; user account information; call logs; contact lists; short and multimedia messaging service messages; chat and instant messages; email messages; installed applications and their corresponding data; media files such as images, videos, audio, and document files; internet browsing history; cell tower connections; global positioning system fixes, waypoints, routes, and tracks; Wi-Fi, Bluetooth, and synchronization connection history; memorandums and notes; user dictionary; and calendar information.

A subsequent application seeking the cell phone records from Goynes' cell phone provider was also granted but is not at issue in the instant appeal.

Goynes was charged with murder in the first degree, use of a deadly weapon (firearm) to commit a felony, and possession of a deadly weapon by a prohibited person.

Prior to trial, Goynes filed a motion to suppress all evidence obtained from the search of his cell phone records for the reason that such search was conducted in violation of the 4th, 5th, and 14th Amendments to the U.S. Constitution and article I, §§ 3, 7, 11, and 12 of the Nebraska Constitution. A hearing was held on the motion, and the district court clarified with Goynes that his motion was for both the cell phone records and the contents of his cell phone. The search warrant applications, affidavits, warrants, and other evidence were received as exhibits for the motion to suppress.

Cahill testified during the hearing and explained the process of applying for the warrants and that he relied on the warrants when he performed the search of the cell phone, its data, and its records. On cross-examination, he agreed that the witnesses described in the affidavits did not provide any information or evidence that the shooter was using a cell phone in the minutes immediately preceding or after the shooting, that the shooter communicated about the shooting over his cell phone, that the shooter took photographs or video of the

shooting, or that the shooter communicated about the shooting on social media.

The court overruled Goynes' motion and found the warrant for the content of Goynes' cell phone was supported by probable cause provided in the affidavit. The court also found the warrant was sufficiently particular concerning the data to be searched, the warrant was not overly broad, and the officers exercised good faith in performing the search.

The case continued to a jury trial. Cahill testified for the State, and during that testimony, the State offered Goynes' cell phone and a compact disc containing data extracted from the cell phone. Goynes renewed his objection to these exhibits based upon his motion to suppress, and the court overruled it.

The State also called an investigator with the Omaha Police Department's digital forensics squad as a witness. During his testimony, the State offered printed copies of the cell phone data detailing activity and internet searches that Goynes performed on his cell phone between April 25 and 30, 2016. The data contained in these printouts were select datasets of the information contained on the compact disc and Goynes' cell phone which were previously offered into evidence during Cahill's testimony. Goynes did not specifically object when these exhibits were presented.

According to the data contained in these exhibits, Goynes used the internet throughout the morning and early afternoon on April 25, 2016. Notably, Goynes repeatedly accessed Facebook between 3:38 and 4:19 p.m. and then stopped. There were no cell phone calls, text messages, or internet browsing history between 4:19 and 5:08 p.m. that day. At 5:08 p.m., Goynes again began accessing Facebook and, at 5:10 p.m., visited the website of a local television news station and viewed an article about the shooting before returning to Facebook. Later that day, Goynes again accessed Facebook and, at 9:15 p.m., visited the website of another local television news station and viewed another article about the shooting before

returning to Facebook. On April 30, the date Goynes turned himself in to police, the cell phone was again used to access an article related to the shooting. On that same day between the hours of 12:42 and 7:40 a.m., the cell phone was used to search various websites using the name "Michael Goynes," or variations of that name, as the search term.

At the conclusion of the trial, the jury returned a verdict finding Goynes guilty of all counts. Goynes was sentenced to life imprisonment for murder in the first degree, 45 to 50 years' imprisonment for use of a deadly weapon (firearm) to commit a felony, and 20 to 25 years' imprisonment for possession of a deadly weapon by a prohibited person.

II. ASSIGNMENT OF ERROR

Goynes assigns, restated, that the district court erred in failing to suppress cell phone data content acquired through the execution of a warrant that was unsupported by probable cause and insufficiently particular.

III. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[1] 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]

IV. ANALYSIS

[2,3] We initially note Goynes failed to object to the printouts of the cell phone data offered during the digital forensics investigator's trial testimony. Where there has been a pretrial ruling regarding the admissibility of evidence, a party must

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[1] *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

[2] *Id.*

make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review.[3] The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.[4] Therefore, Goynes' assignments as they relate to the printouts were waived and not adequately preserved for appellate review.

However, Goynes did object to the introduction of the cell phone and the compact disc containing the cell phone data. As such, and because we find the warrant met the probable cause and particularity requirements of the Fourth Amendment and article I, § 7, we address the substance of Goynes' claims on the validity of the warrant, even though he failed to object to the exhibits containing the printed data from the cell phone and failed to preserve a challenge to those exhibits for review.

1. Validity of Search Warrant

The Fourth Amendment provides that warrants may not be granted "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Nebraska Constitution, under article I, § 7, similarly provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

(a) Probable Cause

[4-7] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test.[5] The question is whether, under the totality of the circumstances

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[3] *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

[4] *Id.*

[5] *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[6] Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.[7] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.[8]

In the affidavit executed in support of the search warrant application, Cahill provided observations from officers investigating the scene of the shooting, summaries of interviews conducted of witnesses to the shooting, and a description of video showing events surrounding the shooting. Specifically, Taylor and Hawthorne gave eyewitness accounts of the shooting and identified Goynes as the shooter. Both Taylor and Hawthorne were acquainted with Goynes prior to the act, as Hawthorne and Goynes were cousins. Hawthorne picked Goynes out of a photographic lineup as well as the two men Taylor and Hawthorne believed were the targets of the shooting. Additionally, their accounts were supported by an eyewitness account, the video of the white sedan arriving and leaving the scene, and the observations of the officers upon arriving at the scene.

Goynes had the cell phone in his possession when he was arrested, and Cahill, through his training and experience, described why the cell phone likely had information relevant to the shooting investigation. Cahill explained that cell phone data provides insight for criminal investigations in that cell phones are used for communication, access to information, socialization, research, entertainment, shopping, and other functionality

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[6] *Id.*

[7] *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

[8] *State v. Hidalgo*, 296 Neb. 912, 896 N.W.2d 148 (2017).

and that these uses are often found to be tools in criminal activity. Cahill further explained that the data from cell phones can provide information on the motivation, method, and participants involved in a crime. Cahill stated that he was aware of numerous instances where cell phones were used by participants in crimes to communicate through voice and text messaging, take photographs of themselves with weapons or illegal narcotics, create videos of their criminal activity, and research crimes in which they participated. Cahill opined that these uses demonstrate a cell phone can serve as both an instrument for committing a crime and as a storage medium for evidence of the crime.

The factual basis provided in Cahill's affidavit is similar to the one described in *State v. Henderson*.[9] In that case, two men were shot and two men were seen running from the scene. The affidavits provided to the county court established that there was a fair probability that the defendant, Tillman Henderson, was involved in the shootings and that he had a cell phone in his possession when he was taken into custody shortly after the shootings. The officer seeking the warrant also provided language that, in his experience as a detective, he knew suspects used cell phones to communicate about shootings they have been involved in before, during, and after the shootings and that such communications could be through, inter alia, voice or text messages or social media. In determining that the affidavits provided the county court a substantial basis to find probable cause existed to search the cell phone, we found that it is reasonable to infer that Henderson's cell phone was used to communicate with others regarding the shootings before, during, or after they occurred, because Henderson was working with at least one other person to commit the shootings.[10]

In the instant case, Goynes had the cell phone in his possession at the time he was taken into custody and the affidavit

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[9] *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

[10] *Id.*

established it was a fair probability that Goynes had committed the shooting. There were additionally witness accounts summarized in the affidavit that described Goynes' committing the shooting with the aid of one or more other people, and Cahill described how, in his experience as an investigator, individuals who committed similar crimes commonly communicate, research, record, and perform other operations on their cell phones that would amount to evidence of the crime. Although the content of the affidavit pertaining to how suspects use cell phones standing alone may not always be sufficient probable cause, when considered with all of the facts recited above, as we determined in *Henderson*, the affidavit provided a substantial basis to find probable cause existed to search the cell phone data.

(b) Particularity

[8,9] In addition to the requirement of probable cause, the Fourth Amendment and article I, § 7, contain a particularity requirement describing the place to be searched and the persons or things to be seized. The particularity requirement for search warrants is distinct from, but closely related to, the requirement that a warrant be supported by probable cause.[11] A purpose of the particularity requirement for a search warrant is to prevent the issuance of warrants on loose, vague, or doubtful bases of fact.[12]

[10-12] To satisfy the particularity requirement of the Fourth Amendment, a warrant must be sufficiently definite to enable the searching officer to identify the property authorized to be seized.[13] The degree of specificity required depends on the circumstances of the case and on the type of items involved.[14]

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[11] *State v. Baker*, 298 Neb. 216, 903 N.W.2d 469 (2017).

[12] *Sprunger, supra* note 7.

[13] *Baker, supra* note 11. See, also, *U.S. v. Sigillito*, 759 F.3d 913 (8th Cir. 2014).

[14] See, *Sigillito, supra* note 13; *Baker, supra* note 11.

A search warrant may be sufficiently particular even though it describes the items to be seized in broad or generic terms if the description is as particular as the supporting evidence will allow, but the broader the scope of a warrant, the stronger the evidentiary showing must be to establish probable cause.[15] As relevant to the instant case, a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.[16]

Here, as detailed in the previous section, Cahill's affidavit provided probable cause that Goynes committed the shooting and that he was aided by others. When Goynes was taken into custody, he had the cell phone in his possession. Cahill explained cell phone data provides insight for criminal investigations on the motivation, method, and participants in that cell phones are used for communication, access to information, socialization, research, entertainment, shopping, and other functionality. Accordingly, Cahill listed several types of data he was seeking to search through the warrant and how the data was relevant to the investigation. These types of data included the following: cell phone information, configurations, calendar events, notes, and user account information which could identify who owns or was using a cell phone; call logs which could establish familiarity between people involved and timelines of an incident; short and multimedia messaging service messages, chat and instant messages, and emails which could provide insight to establish an individual's level of culpability and knowledge of the incident; installed application data which could aid in determining a user's historical geographic location and demonstrate the user's association with investigated people, location, and events; media files such as images, videos, audio, and documents which could provide

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[15] *Baker, supra* note 11.

[16] See *Henderson, supra* note 9.

times and locations, as well as firsthand documentation of the incident; internet browsing history which could demonstrate the planning, desire, and participation in a crime; cell tower connections, global positioning system data, Wi-Fi, Bluetooth, and synchronization logs which could provide information on location in relation to the incident; and user dictionary information which could demonstrate familiarity with the crime being investigated.

The county court used the list sought by Cahill and restated these types of data in the warrant as the areas permitted to be searched. From the facts surrounding the shooting and Cahill's explanation of the areas in the cell phone he was seeking to search, the court had a substantial basis to find probable cause that evidence relevant to the shooting was accessible data in the areas listed.

Goynes argues the scope of the search authorized in the warrant was too broad and was similar to warrants we determined did not meet the particularity requirement in *Henderson*. Goynes contends that the areas which the warrant permitted to be searched encompassed the entirety of the data contained within the cell phone and that *Henderson* condemns the allowance of such a search of "'any and all'" information stored on a cell phone.[17]

However, *Henderson* does not stand for the rule that a search of a cell phone cannot be expansive; instead, we held that the unlimited search of the cell phone in that case did not align with the justifying probable cause.[18] The *Henderson* warrants failed to refer to a specific crime being investigated. In addition, while the warrants in *Henderson* listed types of cell phone data to search, such as calls and text messages, they also authorized a search of "'any other information that can be gained from the internal components and/or memory

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[17] Brief for appellant at 25.

[18] *Henderson, supra* note 9.

Cards.'"[19] In finding the warrants were insufficiently particular, we noted the privacy interests arising from a cell phone's immense storage capacity, ability to store many different types of information, functionality as a digital record of nearly every aspect of the owner's life, and ability to access data located elsewhere.[20] We concluded that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.[21] We further held that by including such a catchall phrase as "'any other information,'" a warrant fails to set parameters for the search of this substantial device and limit the search to only that content that is related to the probable cause justifying the search.[22]

Unlike *Henderson*, the warrant in the instant case did identify it was for the investigation for the homicide of Williams. The warrant also did not contain such unqualified language that would permit the search of the cell phone for "'any other information.'"[23] Instead, the warrant listed specific areas to be searched within the cell phone. These areas were described in the affidavit, along with a description of the information they held which would be relevant to the investigation.

The affidavit authored by Cahill set forth sufficient probable cause to justify the search of the cell phone and sufficient particularity to identify the locations on the cell phone to be searched and the content to be seized. As a result, the court had a substantial basis for finding that probable cause existed to issue a warrant for these areas, and the warrant limited the scope in listing specific areas to be searched for evidence relevant to the homicide of Williams.

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[19] *Id.* at 277, 854 N.W.2d at 625.

[20] *Henderson, supra* note 9.

[21] *Id.*

[22] *Id.* at 290, 854 N.W.2d at 633.

[23] See *id.*

2. Good Faith Exception

[13] Because we conclude the affidavit contained sufficient facts to establish probable cause for the issuance of a search warrant, we need not address whether the good faith exception to the exclusionary rule applies. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[24]

V. CONCLUSION

For the reasons stated above, we conclude the search warrant at issue was supported by probable cause and met the particularity requirement of the Fourth Amendment and article I, § 7. Accordingly, the district court did not err in declining to suppress evidence obtained through the execution of the warrant.

Affirmed.

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[24] *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017).

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

Sharon Bruning and Robert Bruning, wife and husband, appellants, v. City of Omaha Zoning Board of Appeals, appellee.

927 N.W.2d 366

Filed May 17, 2019. No. S-18-214.

1. **Zoning: Appeal and Error.** On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.
2. ____: ____. In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.
3. ____: ____. Where competent evidence supports the district court's factual findings regarding a zoning appeal, an appellate court will not substitute its factual findings for those of the district court.
4. **Zoning: Ordinances.** Certain factual circumstances are by themselves insufficient to justify a finding of hardship, including the desire to build a larger building, the desire to generate increased profits, and where the applicant for a variance from a zoning regulation created his or her own hardships.
5. ____: ____. The general rule respecting the right of a zoning board of appeals to grant a variance from zoning regulations on the ground of unnecessary hardship is that it may not be granted unless the denial would constitute an unnecessary and unjust invasion of the right of property.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Diana J. Vogt, Jason M. Bruno, and James L. Schneider, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Jennifer J. Taylor, Senior Omaha City Attorney, for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

After leasing their agricultural-zoned land near 163d and Fort Streets in Omaha, Nebraska (Property), to several commercial entities and others, Sharon Bruning and Robert Bruning unsuccessfully sought a variance from the requirements of Omaha's zoning code based on a claim of unnecessary hardship. The request for a variance was denied by the City of Omaha Zoning Board of Appeals (Board). The district court for Douglas County affirmed the decision of the Board. The Brunings appeal. Competent evidence supports the findings of the district court and its conclusion that the Brunings' situation did not warrant a variance under Neb. Rev. Stat. § 14-411 (Reissue 2012). The district court did not abuse its discretion or make an error of law when it upheld the Board's decision. We affirm.

STATEMENT OF FACTS

The following facts are taken from the record in this appeal. The Brunings own a 4.66-acre parcel of land located near 163d and Fort Streets in Omaha. The land is and has been zoned for agricultural use since before the Brunings acquired the land in 1979.

In 2015, after receiving a complaint, the City of Omaha Planning Department (City) investigated and concluded that the Property was being used for activities not permitted by ordinance in an agricultural district. Specifically, the City found that the Property was being leased for use as landscaping and boiler repair businesses, as well as automobile storage. The Brunings thereafter applied for a variance requesting waivers which, if granted, would allow them to deviate from zoning requirements and continue these uses of the land. The

variance sought several waivers from the requirements of chapter 55 of the Omaha Municipal Code, specifically: Omaha Mun. Code, ch. 55, art. V, §§ 55-84 (2010) and 55-87 (2002); Omaha Mun. Code, ch. 55, art. XIII, § 55-715 (2014); and Omaha Mun. Code, ch. 55, art. XIV, §§ 55-734 (2012) and 55-740(f) (2013). The request also included waivers from the requirements regarding maximum building coverage, maximum impervious surface coverage, street yard landscaping, perimeter parking lot landscaping, and the required number of parking stalls.

The Brunings submitted the following information in support of their unsuccessful request for waivers. When the Brunings purchased the land in 1979, it was zoned for agricultural use and had been operated as a farm for over 100 years. The Property contained a house, a barn, and several other outbuildings. The Brunings operated seeding businesses on the land from 1979 until 2004 and employed 25 to 30 regular workers. During this time, the Brunings replaced several buildings and added new buildings for their businesses. They also paved a significant portion of the property and altered the grading to improve drainage. They claimed that each time they erected a new building, they sought permits from the City but were told that they did not need permits, because the buildings were used for storing supplies for the seeding businesses, a permitted agricultural use. The seeding companies performed mowing, seeding, landscaping, tree removal, erosion control, and similar services.

In 2004, the Brunings sold the seeding businesses. The purchaser of the seeding companies thereafter rented three buildings on the land from the Brunings to use as storage for the businesses. Over time, the businesses expanded, and the Brunings referred to them collectively as a "lawn and landscaping business." The Brunings continued to rent buildings to the lawn and landscaping business and, in addition, began renting other buildings to other enterprises, including seeding, lawn care, and landscaping businesses. Other than office space for

two office workers, the rented buildings were utilized for storage purposes, and the businesses receive no customers at the buildings. The Brunings also leased two buildings for personal private car collections and one for storage of vehicles and equipment of a local boiler repair business, which performed no repair work on site. The Brunings have completed many improvements to the buildings and land. The property is neat and orderly, and the Brunings mow regularly.

In both their request for a variance and appeal to the Board from the denial thereof, the Brunings primarily argued that because the Property had been used in essentially the same manner since 1979, and they had invested significant money in improvements to support their business activities without objection by the City, they suffered a hardship. The Brunings asserted that the only change in the use of the land was that the buildings previously used by the Brunings were now merely leased to others to use for similar purposes. Several adjoining residential neighbors supported the Brunings' application.

The Board held four hearings on the Brunings' request for a variance in February, April, May, and June 2017. The City and the Brunings attempted to resolve the issues, causing the matter to be postponed several times. The Board toured the Property during the pendency of the appeal. During this process, the City generally advised the Brunings that their current use of the land would more properly be characterized as industrial use, but that it would be unlikely that the land could be rezoned as industrial, because the land surrounding the Property had developed into residential use, and that under the City's master plan, the Property is ultimately targeted for residential development. The record shows that the Brunings attempted to reach an agreement with the City which would allow them to continue using the land as currently altered. The Board voted to deny the variance on June 8, 2017.

The Brunings appealed the decision to the district court for Douglas County under Neb. Rev. Stat. § 14-413 (Reissue 2012). On February 5, 2018, the district court found that there

was substantial evidence in the record to support the decision and affirmed the Board's denial. In reaching its decision, the district court noted that although the Property is zoned agricultural, the Brunings unilaterally altered the use of the Property by leasing buildings to others, a commercial activity. In its discussion, the district court also noted that the appeals process with the Board lasted 4 months and that all persons were able to speak, present evidence, and consult City officials.

The Brunings appeal.

ASSIGNMENTS OF ERROR

The Brunings claim, summarized and restated, that the district court erred when it found that the Board's decision to deny a variance was supported by the record and was not arbitrary and capricious. Specifically, they assert they were entitled to a variance because they had invested in the improvements and would suffer unnecessary hardship and lost income if they return the land to agricultural use.

STANDARDS OF REVIEW

[1-3] On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. *Lamar Co. v. Omaha Zoning Bd. of Appeals*, 271 Neb. 473, 713 N.W.2d 406 (2006). In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law. *Id*. Where competent evidence supports the district court's factual findings, an appellate court will not substitute its factual findings for those of the district court. *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001).

ANALYSIS

The Brunings claim that the district court erred when it affirmed the decision of the Board which had denied their

request for a variance. Relying on § 14-411, they contend that they were entitled to a variance because carrying out the strict letter of the ordinance would cause "unnecessary hardships." Because we determine that the district court did not err, we reject this assignment of error.

Section 14-411 defines the authority of zoning boards of appeal to grant a variance in cities of the metropolitan class, such as Omaha. See *Eastroads v. Omaha Zoning Bd. of Appeals, supra*. Section 14-411 provides, in relevant part:

> Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the [Board] shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

As noted, the Brunings' claim relies on "unnecessary hardships," which generally address a use prohibited by an ordinance, and they do not claim "practical difficulties," which generally address improvements which conflict with the restrictions. See, *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992); 3 Sara C. Bronin & Dwight H. Merriam, Rathkopf's The Law of Zoning and Planning § 58:4 (4th ed. 2019).

[4] Our case law under § 14-411 and its predecessors was summarized in *Rousseau v. Zoning Bd. of Appeals of Omaha*, 17 Neb. App. 469, 478, 764 N.W.2d 130, 136 (2009), wherein the Nebraska Court of Appeals stated: "Certain factual circumstances are by themselves insufficient to justify a finding of hardship." These include the desire to build a larger building, the desire to generate increased profits, and where the applicant created his or her own hardships. *Rousseau v. Zoning Bd. of Appeals of Omaha, supra*. See, *Bowman v. City of York, supra*; *Alumni Control Board v. City*

of Lincoln, 179 Neb. 194, 137 N.W.2d 800 (1965); *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955). In this case, the Brunings' assertion that they are entitled to a variance due to unnecessary hardship implicates the latter two scenarios recited above, i.e., the desire for increased profits and self-created hardships.

[5] The general rule respecting the right of the Board to grant a variance from zoning regulations on the ground of unnecessary hardship is that "it may not be granted . . . [u]nless the denial would constitute an unnecessary and unjust invasion of the right of property." *Frank v. Russell*, 160 Neb. at 362-63, 70 N.W.2d at 312. But it has been observed that the purpose of zoning would be defeated if every desire to remove restrictions on use justified a variance. One treatise states:

> Every zoning ordinance imposes some degree of hardship on all property to which it applies, since the restrictions of the ordinance limit the uses to which the property may be put. This degree of hardship is implicit in zoning; the restrictions on each parcel of property are compensated for by similar restrictions on neighboring property. The inability of each property owner to put his property to any desired use, however profitable to him and undesirable as far as his neighbors are concerned, is balanced by the fact that his neighbor's property cannot be so used as to injure his. Such hardship, consistent with the hardship imposed on all other pieces of property in the district, is not a ground for a variance.

3 Bronin & Merriam, *supra*, § 58:5 at 58-17.

With respect to maximizing profits, we have stated that although maximizing profits is an "understandable, and even laudable, goal," it does not provide a basis for "a variance from zoning regulations with which the rest of the community must live." *Bowman v. City of York*, 240 Neb. at 213, 482 N.W.2d at 545. See *Frank v. Russell, supra*.

With respect to self-created hardships, one treatise explains that they are those which "result from affirmative acts of the

property owner and which could have been avoided through a different course of action." 2 Patricia E. Salkin, American Law of Zoning § 13:16 at 13-133 to 13-134 (5th ed. 2018). A self-created hardship arises, for example, when a property owner establishes a structure or use not permitted under the zoning ordinance and then seeks a variance after the fact to legitimize the property use. 2 Salkin, *supra*. Self-created hardship "is almost always a bar to relief" where a property owner seeks an "'after the fact'" variance. *Id.* at 13-134. We have similarly stated that "'[i]t would certainly be unreasonable to allow one to create his own hardship and difficulty and take advantage of it to the prejudice of innocent parties.'" *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 978, 628 N.W.2d 677, 684 (2001) (quoting *Frank v. Russell, supra*).

Our review in this case is narrowly limited to whether the district court abused its discretion or committed an error of law when it affirmed the Board's decision to deny the variance. See *Lamar Co. v. Omaha Zoning Bd. of Appeals*, 271 Neb. 473, 713 N.W.2d 406 (2006). Where competent evidence supports the district court's factual findings, an appellate court will not substitute its factual findings for those of the district court. *Eastroads v. Omaha Zoning Bd. of Appeals, supra*.

In this case, the district court found "substantial evidence in the record" to support the Board's decision. The record includes recommendations from the City, numerous exhibits, input from stakeholders, and testimony offered at four hearings. The Board discussed the issues extensively, including life safety, public works, zoning issues, and proposed solutions, and it toured the Property during the process. Although the record indicates that the Brunings received support from some of their neighbors, comments by the Board members indicate concern that granting waivers would be a significant deviation from the zoning plan, and not merely reasonable adjustments. The Board members indicated they were concerned the existing use was not consistent with the "spirit of the ordinance." See § 14-411.

In its order, the district court analyzed the issues as follows:

> The property in question is zoned agricultural. . . . The [Brunings] have unilaterally altered the permissible use of the property by leasing portions of the buildings to others—essentially a commercial use. Even though the building[s] were used by the lessees for the same purpose[s] as the [Brunings], the permissible use changed.
>
> . . . [The Brunings] complain that they will be denied the income from the rents they had been receiving, but those rents were due to an impermissible use of the property. A denial of [the Brunings'] request for a variance does not change the ability of the [Brunings] to make full use of their property as it was originally intended.

Competent evidence supports these findings by the district court.

In *Rousseau v. Zoning Bd. of Appeals of Omaha*, 17 Neb. App. 469, 478-79, 764 N.W.2d 130, 137 (2009), the Court of Appeals noted the roles of the zoning boards and the courts in the context of granting or denying variances and stated:

> Generally, it is the zoning board of appeals' duty, and not the function of a court, to make this kind of decision. The Legislature has granted zoning boards of appeals significant leeway in making decisions and has required district courts to uphold a board's decision, barring illegality, insufficient evidentiary support, or an arbitrary, unreasonable, or clearly wrong decision. See *Eastroads v. Omaha Zoning Bd. of Appeals*[*, supra*]. Specifically, the Supreme Court has explained that administrative agencies including the zoning board of appeals provide "expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not to be taken lightly

or minimized by the judiciary." *Id.* at 979, 628 N.W.2d at 684 (quoting *Bowman v. City of York, supra*).

For completeness, we note that the Brunings are not deprived of all beneficial or reasonable use of their agricultural-zoned land such as would constitute a legally cognizable hardship. The denial of their request for a variance is not an unjust invasion of the right of property. See *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955). Omaha Mun. Code § 55-84 lists the use types that are permitted in the agricultural district, which include but are not limited to horticulture, single family residential, park and recreation services, kennels, and stables. Omaha Mun. Code, ch. 55, art. V, §§ 55-85 (2002) and 55-86 (2008), list the use types that are allowed, subject to approval of a conditional or special use permit, including but not limited to campgrounds, religious assembly, agricultural sales and service, sports and recreation, and veterinary services. When the Brunings developed and began leasing the Property to others, ultimately expanding to numerous separate businesses and uses, their activities became incompatible with agricultural use.

We find no abuse of discretion or error of law when the district court affirmed the decision of the Board which had denied the variance.

CONCLUSION

The Brunings developed the Property, their agricultural-zoned land, over the course of many years, eventually allowing commercial activities by others on the Property. On appeal, the district court found that the decision of the Board to deny the request for a variance was not illegal and that there was substantial evidence in the record to support the decision of the Board. Substantial evidence supports the district court's factual findings, and we find no errors of law or abuse of discretion by the district court. Accordingly, we affirm.

Affirmed.

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

Ross A. Pantano and Karyl L. Einerson, as Copersonal Representatives of the Estates of Arlene L. Pantano and Anthony R. Pantano, appellees and cross-appellants, v. American Blue Ribbon Holdings, LLC, doing business as Village Inn, appellant and cross-appellee, and Francis J. Kucirek, as Trustee of the Kucirek Living Trust, and Pamela K. Kucirek, as Trustee of the Kucirek Living Trust, appellees.

927 N.W.2d 357

Filed May 17, 2019. No. S-18-815.

1. **Verdicts: Appeal and Error.** When reviewing a jury verdict, an appellate court considers the evidence and resolves evidentiary conflicts in favor of the successful party.
2. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.
3. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.
4. **Rules of Evidence: Hearsay.** An excited utterance does not have to be contemporaneous with the exciting event. It may be subsequent to the event if there was not time for the exciting influence to lose its sway.
5. ____: ____. The true test of an excited utterance is not when the exclamation was made but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.

6. ____: ____. Relevant facts to determine whether a statement is an excited utterance include the declarant's manifestation of stress and the declarant's physical condition.
7. **Trial: Evidence: Jury Instructions.** An error in the admission of evidence may be cured by an instruction from the court.
8. **Pretrial Procedure: Pleadings: Evidence.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.
9. **Trial: Pleadings: Evidence: Appeal and Error.** It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence is offered at trial in order to predicate error before an appellate court.
10. **Summary Judgment: Final Orders: Appeal and Error.** The denial of a motion for summary judgment is not a final order reviewable on appeal.
11. **Negligence: Proof.** Establishing that an accident has occurred does not prove a case of negligence.
12. **Negligence: Evidence: Presumptions: Proof.** Negligence is not presumed and must be proved by evidence, direct or circumstantial.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed as modified.

Stephen G. Olson II and Andrea A. Montoya, of Engles, Ketcham, Olson & Keith, P.C., for appellant.

John M. Lingelbach, Minja Herian, and Casandra M. Langstaff, of Koley Jessen, P.C., L.L.O., for appellees Ross A. Pantano and Karyl L. Einerson.

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

Heavican, C.J.

INTRODUCTION

Following trial, a jury entered a verdict in favor of the estate of Arlene L. Pantano for $245,000 and in favor of the estate of Anthony R. Pantano for $15,000, but found that Arlene was 25 percent negligent. Accordingly, the district court entered a judgment for the estates in the amount of

$195,000. American Blue Ribbon Holdings, LLC (American Blue Ribbon), appeals. We affirm as modified.

FACTUAL BACKGROUND

Arlene and her husband, Anthony, filed suit against American Blue Ribbon on October 22, 2015. The suit alleged damages for injuries and loss of consortium suffered when Arlene fell at a Village Inn restaurant owned by American Blue Ribbon. Arlene alleged that she suffered a broken hip when she tripped on an entryway rug and fell near the entrance of the restaurant.

Arlene died of natural causes on July 19, 2016. Anthony had died approximately 4 months earlier, on March 26. This lawsuit was revived in the names of the copersonal representatives of Arlene's and Anthony's estates (the estates).

A jury trial was held in June 2018. The jury found for the estates in the total amount of $260,000, but found Arlene was 25 percent negligent in the cause of her fall. The district court entered judgment in favor of the estates for $195,000. American Blue Ribbon appealed.

At trial, Arlene's children, Ross A. Pantano, Karyl L. Einerson (Karyl), and Marilou DiPrima (Marilou), were all permitted to testify, over American Blue Ribbon's hearsay objection, that Arlene told them that she had tripped on the entryway rug at the restaurant and fell, injuring her hip. In addition, evidence was adduced as to Arlene's medical bills, along with testimony that American Blue Ribbon had not paid those bills. Further details of evidence offered will be discussed as appropriate.

ASSIGNMENTS OF ERROR

On appeal, American Blue Ribbon assigns that the district court erred in (1) denying its motions in limine; (2) overruling its hearsay objections as to the testimony of Ross, Karyl, and Marilou; (3) admitting evidence that American Blue Ribbon offered to pay, and then did not pay, medical bills incurred by Arlene; (4) denying its motion for summary judgment;

(5) denying its motion for directed verdict; (6) denying its motion for judgment notwithstanding the verdict; and (7) denying its motion for new trial.

On cross-appeal, the estates assign that the district court erred in (1) overruling their motion to strike American Blue Ribbon's comparative negligence affirmative defense, (2) instructing the jury as to the comparative negligence affirmative defense, and (3) providing a jury verdict form incorporating comparative negligence.

STANDARD OF REVIEW

[1,2] When reviewing a jury verdict, an appellate court considers the evidence and resolves evidentiary conflicts in favor of the successful party.[1] A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.[2]

[3] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.[3]

ANALYSIS

The primary issues on appeal in this case are (1) whether statements made by Arlene and Anthony at the time of Arlene's fall were admissible under the so-called excited utterance exception to the prohibition against hearsay[4]; (2) whether

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

[2] *Id.*

[3] *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 908 N.W.2d 60 (2018).

[4] See Neb. Rev. Stat. § 27-803(1) (Reissue 2016).

the admission into evidence of a statement of a Village Inn employee suggesting that American Blue Ribbon would pay Arlene's medical bills, along with testimony that American Blue Ribbon did not pay those bills, was prejudicial; and (3) whether the district court erred in instructing the jury with regard to American Blue Ribbon's affirmative defense of comparative negligence.

Excited Utterance.

American Blue Ribbon assigns on appeal that the district court erred in admitting Arlene's statement that she fell on the entryway rug, because that statement was hearsay and did not fall within the excited utterance exception to the hearsay rule. Specifically, American Blue Ribbon contends that Arlene's statement did not relate to a "startling event"[5]; that the statement was not made under the "stress" of the event[6]; and that, in any case, the statement was unreliable because Arlene had dementia. In addition, American Blue Ribbon argues that the estates did not establish that there was a defect in the entryway rug that would allow Ross' testimony regarding Arlene's statement to be considered reliable.

Section 27-803 provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is "not excluded by the hearsay rule." For a statement to qualify as an excited utterance under § 27-803(1), the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant under the stress of the event.[7]

[4-6] An excited utterance does not have to be contemporaneous with the exciting event. It may be subsequent to the

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[5] *Id.*

[6] *Id.*

[7] *State v. Nolt*, 298 Neb. 910, 906 N.W.2d 309 (2018).

event if there was not time for the exciting influence to lose its sway.[8] The true test is not when the exclamation was made but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.[9] "Relevant facts include the declarant's manifestation of stress, such as '"yelling,"' and the declarant's physical condition."[10]

Arlene's statements to her children regarding the cause of her injury fall within the excited utterance exception. Ross testified that Arlene, who was 90 years old at the time, was upset, crying, and in obvious pain after the fall. The evidence showed that Arlene had fractured her hip during the incident. Anthony was pacing and obviously distressed. Thus, when considered as to this declarant, the fall would be a startling event. And Arlene's statement that she tripped over the entryway rug was related to that startling event.

Furthermore, Arlene's statement to Ross that she had tripped over the entryway rug was made at the restaurant shortly after her fall and prior to her being transported to the hospital. Arlene's statements to Karyl and Marilou were made within "minutes" of Arlene's transport to the hospital. Both Karyl and Marilou testified that their mother was upset and in pain. Marilou testified that Arlene told her that she tripped on the entryway rug as she entered the restaurant and that Arlene indicated with her hands an irregularity with the rug that Marilou described to Arlene as the rug's having been buckled.

Upon our de novo review, we conclude that Arlene was still under the influence of the startling event at the time she made the statements to Ross, Karyl, and Marilou.

And we find no merit to American Blue Ribbon's assertion that the fact that Arlene had been diagnosed with dementia

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 929, 906 N.W.2d at 325.

affected the admissibility of her statements as excited utterances. American Blue Ribbon is correct that the touchstone of the excited utterance exception is trustworthiness. But a person suffering from dementia is still able to experience a startling event and react to that event accordingly. American Blue Ribbon cited to no authority and offered no evidence to suggest otherwise. A reaction to a startling event made under the stress of that event is reflexive and unthinking; it is not the product of conscious thought.[11] Such a statement might not be accurate, and any shock might have interfered with the declarant's observation or memory,[12] but that does not prevent the statement from being an excited utterance. That Arlene was diagnosed with dementia was evidence produced at trial, but that fact does not affect the admissibility of her statement as an excited utterance. There is no merit to this assertion.

Admission of Offer to Pay Medical Expenses.

American Blue Ribbon also argues that the district court erred in allowing Ross to testify that a Village Inn employee told him that Arlene's medical bills would be paid by the restaurant and in admitting Ross' testimony that American Blue Ribbon and Village Inn had not, in fact, paid those bills.

Neb. Rev. Stat. § 27-409 (Reissue 2016) provides that "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." As American Blue Ribbon observes, Ross was permitted, in contravention of this statute, to testify that a Village Inn employee told him that Arlene's medical expenses would be paid by the restaurant, but that the bills were not ever paid by Village Inn or American Blue Ribbon.

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[11] G. Michael Fenner, The Hearsay Rule 116 (3d ed. 2013).

[12] *Id.*

[7] But this court has held that an error in the admission of evidence may be cured by an instruction from the court.[13] In this case, jury instruction No. 12 was also read to the jury:

> There has been evidence that the Defendant has not paid any of Plaintiffs' medical bills. The law of Nebraska is that a Defendant such as Village Inn has no duty to pay medical bills of Arlene Pantano unless and until there has been a determination that the Defendant was negligent or breached a duty owed to Arlene Pantano.

Indeed, instruction No. 12 was drafted by counsel for American Blue Ribbon and was the suggested cure for the error of the erroneous admission of Ross' testimony. There is no merit to this assignment of error.

Liability of American Blue Ribbon.

American Blue Ribbon does not specifically assign that the district court erred in finding sufficient evidence to support the jury's finding of liability. But it does argue as much in its discussion of its assigned errors of the court's denial of summary judgment, directed verdict, judgment notwithstanding the verdict, and new trial.

In any case, American Blue Ribbon's contention is without merit, because there was evidence to support the jury's finding of liability. First, Karyl and Marilou both testified that Arlene told them that she tripped over the entryway rug at the Village Inn and that, in the words of Marilou, the rug was "buckled." As noted above, Arlene's statements are admissible hearsay under the excited utterance exception.

In addition, Ross testified that as Arlene was getting loaded into an ambulance, a Village Inn server wearing a name tag with the name "Makenzie" told him that she had tripped on the entryway rug twice that morning. Though American Blue Ribbon objected at trial on the basis that the server's

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[13] *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989).

statement was inadmissible hearsay, they did not clearly assign and argue that admission as error on appeal. There was sufficient evidence that American Blue Ribbon was negligent, and thus there is no merit to American Blue Ribbon's assignments of error regarding the denial of its motion for directed verdict, for judgment notwithstanding the verdict, and for new trial.

Remaining Assignments of Error.

American Blue Ribbon has also alleged various other assignments of error, all of which are without merit.

First, American Blue Ribbon contends that the district court erred in denying its motions in limine, specifically arguing that the estates failed to disclose witnesses, and for that reason the testimony of those witnesses should be stricken.

[8,9] A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.[14] It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence.[15] Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence is offered at trial in order to predicate error before an appellate court.[16] Thus, by assigning only that the court erred in denying its motions in limine, American Blue Ribbon has failed to preserve those arguments on appeal.

Moreover, American Blue Ribbon simply argues that certain witnesses were not disclosed and that their testimonies should be stricken. But American Blue Ribbon does not identify in its brief which witnesses were not disclosed. It is not the job of this court to search the record to find error. There is no merit to this assignment of error.

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[14] *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990).

[15] *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 532 N.W.2d 11 (1995).

[16] *McCune v. Neitzel, supra* note 14.

[10] American Blue Ribbon also assigns that the district court erred in denying its motion for summary judgment. But the denial of a motion for summary judgment is not a final order reviewable on appeal,[17] and as such, this assignment is without merit.

Finally, American Blue Ribbon also argues, though does not assign, that the district court erred in allowing Ross to testify regarding the effect that Arlene's fall had on her dementia. Because this was not specifically assigned as error, we will not address that contention further.

Comparative Negligence.

In its cross-appeal, the estates contend that the district court erred in overruling their motion to strike, instructing the jury on comparative negligence, and including comparative negligence on the verdict form, because American Blue Ribbon failed to offer any evidence that Arlene was negligent.

In response, American Blue Ribbon argues that the estates did not prove that it was negligent and further asserts that Arlene's age, dementia diagnosis, and preexisting medical conditions were such that "could reasonably lead a fact-finder to conclude [that Arlene] was at fault for her fall."[18]

[11,12] Establishing that an accident has occurred does not prove a case of negligence.[19] Negligence is not presumed and must be proved by evidence, direct or circumstantial.[20] Nothing American Blue Ribbon directs us to shows that any action by Arlene was negligent. As the estates argue, there is no suggestion that Arlene was not wearing her glasses or shuffling her feet or that she did not look where she was going. Nor was there evidence that due to her age and health, Arlene should

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[17] See *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

[18] Reply brief for appellant at 28.

[19] *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

[20] *Id.*

have known to use a wheelchair or a walker. In short, there is no evidence supporting a conclusion that Arlene was negligent. We accordingly find that the estates' assignment of error on cross-appeal has merit.

Having found that the cross-appeal on the issue of comparative negligence has merit, we conclude that the district court erred in instructing the jury with regard to comparative negligence and in providing a verdict form allowing for a deduction for Arlene's negligence. The judgment in favor of the estates should not have been reduced by 25 percent, and we therefore modify the judgment to $260,000.

CONCLUSION

The decision of the district court is affirmed as modified.

Affirmed as modified.

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, appellee, v. Richard C. Barnes, appellant.

927 N.W.2d 64

Filed May 17, 2019. No. S-18-875.

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 made by the court below.
2. **Criminal Law: Judgments: Sentences: Appeal and Error.** In a criminal case, the judgment from which the appellant may appeal is the sentence.
3. **Judgments: Collateral Attack.** When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
4. ____: ____. Absent an explicit statutory or common-law authority permitting collateral attack upon a criminal judgment under other circumstances, only a void judgment may be collaterally attacked.
5. **Sentences.** A sentence outside of the period authorized for a valid crime is erroneous only; it is not a void sentence.
6. ____. Failing to give credit for time served, while erroneous, does not render the sentence void.
7. **Criminal Law: Final Orders: Sentences: Collateral Attack.** Neb. Rev. Stat. § 83-1,106(1) (Reissue 2014) does not set forth a right to collaterally attack the final judgment in a criminal case on the ground that credit for time served was not given as mandated by the statute.

Appeal from the District Court for Pierce County: James G. Kube, Judge. Affirmed.

Richard C. Barnes, pro se.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Freudenberg, J.

NATURE OF CASE

The defendant, who was sentenced in 1994, sought in 2018 to have his sentence amended to reflect credit for time served by filing a "Motion/Request for Jail Credit." The district court denied the motion, and the defendant appeals. We affirm.

BACKGROUND

In 1994, pursuant to a voluntary guilty plea, Richard C. Barnes was convicted on one count of first degree murder and one count of use of a weapon to commit a felony. He was sentenced to life imprisonment on the murder conviction and from 6⅔ years' to 20 years' imprisonment on the use of a weapon conviction. The court did not give Barnes credit for time served.

Barnes did not file a direct appeal. In 2004, Barnes filed an amended motion seeking postconviction relief. He argued that defense counsel was ineffective by failing to file a direct appeal after Barnes requested that he do so. Barnes also argued that he had been denied due process and equal protection of the law, because the sentencing court failed to give him credit for time served against his sentence on the use of a weapon conviction. After an evidentiary hearing, Barnes' motion for postconviction relief was denied.

In *State v. Barnes*,[1] we affirmed the order denying postconviction relief. We held that the court did not clearly err in finding that Barnes did not ask his trial counsel to file a direct appeal. We thus affirmed the district court's conclusion that defense counsel's performance in failing to file a direct

[1] *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006).

appeal was not deficient. Regarding Barnes' challenges to the sentencing order that failed to give Barnes credit for time served, we held that those challenges were procedurally barred because they could have been raised on direct appeal.

In 2018, Barnes, proceeding pro se, filed a "Motion/Request for Jail Credit Pursuant to N.R.S. sec: 83-1,106(1). State v. Esquinel, 244 Neb. 308 (1993)." The district court denied the motion, reasoning that it had no authority to amend the 1994 sentencing order. Barnes appeals.

ASSIGNMENT OF ERROR

Barnes assigns that the "lower District Court erred in failing at the conclusion of the sentencing hearing by the failure of the district court to calculate the amount of credit to be given for time served."

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 made by the court below.[2]

ANALYSIS

Barnes argues that we should recognize the trial court plainly erred in failing to grant him credit for time served and that we should, as in the case of *State v. Groff*,[3] remand the cause to the district court for a determination of credit for time served. *State v. Groff*, however, involved the direct appeal from the defendant's convictions and sentences. This case involves a collateral attack.

[2-4] In a criminal case, the judgment from which the appellant may appeal is the sentence.[4] The sentence includes credit for time served under Neb. Rev. Stat. § 83-1,106(1) (Reissue

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[2] *State v. Jerke*, 302 Neb. 372, 923 N.W.2d 78 (2019).

[3] *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995).

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

2014).[5] When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.[6] Absent an explicit statutory or common-law procedure permitting otherwise, only a void judgment may be collaterally attacked.[7]

[5,6] A sentence outside of the period authorized for a valid crime is erroneous only; it is not a void sentence.[8] Thus, failing to give credit for time served, while erroneous, does not render the sentence void.[9]

[7] Barnes fails to present statutory or common-law authority for his 2018 motion collaterally attacking the erroneous, but not void, sentence rendered in 1994. Barnes purported to bring his motion under the authority of § 83-1,106(1) and *State v. Esquivel*.[10] Section 83-1,106(1) provides that "[c]redit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based." Section 83-1,106(1) does not set forth a right to collaterally attack the final judgment in a criminal case on the ground that credit for time served was not given as mandated by the statute. While we held in *State v. Esquivel* that a judge is

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[5] See, *State v. Barnes, supra* note 1; *State v. Groff, supra* note 3.

[6] *State v. Ratumaimuri, supra* note 4.

[7] See *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016). See, also, *State v. Jerke, supra* note 2; *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016); *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015); *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[8] See *Meyer v. Frakes*, 294 Neb. 668, 884 N.W.2d 131 (2016). See, also, e.g., *Hickman v. Fenton*, 120 Neb. 66, 231 N.W. 510 (1930); *In re Fanton*, 55 Neb. 703, 76 N.W. 447 (1898).

[9] See *State v. Barnes, supra* note 1.

[10] *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993).

required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under § 83-1,106(1), that case, like *State v. Groff*, was decided on direct appeal and does not provide authority for collaterally attacking a sentence that fails to grant credit for time served.

There is no authority for Barnes' collateral attack on the 1994 judgment through a motion for jail credit. Thus, the district court did not err in denying Barnes' motion.

CONCLUSION

For the foregoing reasons, we 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

State of Nebraska, appellee, v. Jordan L. Beehn, appellant.

927 N.W.2d 793

Filed May 24, 2019. No. S-18-603.

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 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. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.
5. **Postconviction: Sentences: Appeal and Error.** The Nebraska Postconviction Act is intended to provide relief in those cases where a miscarriage of justice may have occurred; it is not intended to be a procedure to secure a routine review for any defendant dissatisfied with his or her sentence.
6. **Postconviction: Effectiveness of Counsel: Appeal and Error.** To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient;

that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

7. **Postconviction: Effectiveness of Counsel: Proof.** In a postconviction proceeding, a showing of prejudice to the defense requires a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
9. **Effectiveness of Counsel: Pleas: Proof.** In a claim for ineffective assistance of counsel, the likelihood of the defense's success should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.
10. ____: ____: ____. Self-serving declarations that a defendant would have gone to trial are not enough to warrant a hearing; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.
11. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed.

Jack W. Lafleur, of Moyer & Moyer, for appellant.

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

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

Heavican, C.J.

INTRODUCTION

Jordan L. Beehn appeals from an order denying his motion for postconviction relief following an evidentiary hearing.

Beehn pled no contest to first degree assault and tampering with a witness and is currently serving 50 to 50 years' imprisonment. We affirm.

BACKGROUND

On November 24, 2012, Beehn and his wife were at a bar in Norfolk, Nebraska. They left the bar at the same time as another group of patrons, which consisted of brothers Jose Zepada and Jorge Zepada, accompanied by Jessika Ruroede. As the two groups left the bar, Beehn's wife and Ruroede engaged in an argument that led to a physical altercation between the two women. Jose and Jorge stood over the two women as they were fighting on the ground. According to witness accounts, Jose and Jorge tried to pull Beehn's wife from Ruroede, at which point Beehn retrieved a handgun from his person, hit Jose with the gun, and shot Jorge. The bullet struck Jorge's spinal cord and paralyzed him from the head down, an injury from which he will never recover.

Beehn was subsequently arrested for the assaults on Jose and Jorge. While Beehn was in jail awaiting trial, he suggested that his wife change her story about being "on top" during the altercation with Ruroede as she had previously told the police and had stated during recorded jail telephone calls to Beehn following the incident. In a letter sent from jail, Beehn further instructed his wife to locate other unidentified witnesses and offer to "pay what ever [sic] they want."

Beehn was initially charged with five offenses corresponding to the assaults. With regard to Beehn's assault of Jorge, Beehn was charged with first degree assault, a Class II felony, and second degree assault, a Class III felony. With regard to Beehn's assault of Jose, Beehn was charged with second degree assault, a Class III felony. In addition to the assault charges, Beehn was charged with use of a firearm to commit a felony, a Class IC felony, and possession of a firearm during the commission of a felony, a Class II felony. Upon the State's learning of Beehn's letter to his wife from jail, the State added

two additional charges of tampering with a witness, a Class IV felony, and bribery, a Class I misdemeanor.

Beehn had various attorneys throughout the pretrial proceedings, which lasted from November 2012 to February 2014. From the inception of the case until June 2013, Beehn was represented by private counsel, Charles Balsiger. Beehn discharged Balsiger, and the Madison County public defender, Kyle Melia, was appointed to the case. Melia represented Beehn for approximately 1 month, from June to July 2013. Beehn subsequently discharged Melia and hired private counsel, Craig Martin and Dennis McCarthy. Martin and McCarthy represented Beehn for the remainder of his proceedings at the trial level, from July 2013 until the entry of his pleas and sentencing in February 2014.

In December 2013, while represented by Martin and McCarthy, Beehn entered into a plea agreement with the State. Beehn pled no contest to one count of first degree assault and one count of tampering with a witness. In exchange for Beehn's pleas, the State dismissed the remaining five charges and agreed to make no specific sentencing recommendation. The district court advised Beehn of the rights he was waiving by entering the pleas, and a factual basis was provided, after which the district court accepted Beehn's pleas. Beehn, still represented by Martin and McCarthy, was sentenced to 50 to 50 years' imprisonment for the first degree assault conviction and 12 to 12 months' imprisonment for the tampering with a witness conviction. The sentences were ordered to run concurrently, resulting in an aggregate sentence of 50 to 50 years' imprisonment.

Direct Appeal.

On direct appeal, Beehn was again represented by Melia. On appeal, Beehn's sole assignment of error was a claim of excessive sentences. On August 1, 2014, in case No. A-14-195, the Nebraska Court of Appeals, without opinion, summarily affirmed Beehn's convictions and sentences.

Postconviction.

Following the denial of his direct appeal, Beehn initiated this postconviction proceeding. Beehn alleges, for the first time, that he received ineffective assistance of counsel at both the trial and appellate levels. With the assistance of new counsel, Beehn alleged a number of errors that can be consolidated as follows: (1) Trial counsel was ineffective for failing to advise Beehn about the defenses of self-defense and defense of others under Neb. Rev. Stat. §§ 28-1409 and 28-1410 (Reissue 2016); (2) trial counsel was ineffective for failing to advise Beehn that by entering his pleas, he would be waiving his right to appeal from pretrial rulings; (3) trial counsel was ineffective for failing to interview and depose witnesses and for failing to investigate the prospect of additional witnesses beyond those listed in the police reports; (4) trial counsel was ineffective for incorrectly advising Beehn that all communications between Beehn and his wife were privileged and could not be used against Beehn in the prosecution of his criminal charges; and (5) appellate counsel was ineffective for not raising claims (1) through (4) on direct appeal.

Despite the potential procedural bar, the district court conducted an evidentiary hearing of Beehn's claims. The evidence adduced at the hearing consisted of the bill of exceptions from Beehn's pretrial, plea, and sentencing proceedings; depositions of Beehn and each of his prior attorneys; transcripts of Beehn's telephone calls from jail; and a copy of the court file for all of the proceedings at the trial level.

Beehn testified that all of his attorneys told him that his only option was to enter into a plea agreement. Beehn claims that each of his attorneys told him that there were no available defenses for his charges. Specifically, Beehn claims that Balsiger, as well as Martin and McCarthy, told him that the defense of self-defense was not available in Nebraska. Beehn further claims that Balsiger erroneously advised him that any communications between Beehn and his wife were privileged and could not be used against him. Beehn contends that he,

Beehn, maintained this belief throughout his case until October 2013, when the court entered an order denying Beehn's assertion of spousal privilege.

Additionally, Beehn contends that his trial attorneys deposed only two witnesses and failed to investigate the existence of other witnesses that may have been beneficial to his case. Beehn further contends that counsel never advised him that by entering a plea agreement, he waived his right to appeal from adverse pretrial rulings. Lastly, Beehn contends that Melia never met with him to discuss his appeal, but that one of Melia's assistants advised him that an excessive sentence claim was the only claim available on appeal.

Beehn's initial trial counsel, Balsiger, disagreed with Beehn's allegations. Balsiger, who had been practicing criminal law since 1973, explained that he first met with Beehn on December 3, 2012, within a few days of the charges being filed. Balsiger testified that he and Beehn specifically discussed the possibility of asserting a defense such as justification of the use of force, which Balsiger thought would at least be a possible defense based on the limited information he had at that time. Balsiger further explained that during their first meeting, he also spoke with Beehn about the possibility of asserting a privilege for communications between Beehn and his wife, but told Beehn that "it may not be valid" based on the circumstances. Balsiger testified that he specifically advised Beehn "not to discuss the facts of this case with his wife or anyone else." Balsiger's testimony is corroborated by a December 6 recorded jail telephone conversation between Beehn and his wife in which the following exchange occurred:

> [Beehn]: The lawyer say anything?
>
> [Beehn's wife]: I talked to him after the deal, he questioned me on what I know and what happened. And then he told me that we need to not talk amongst ourselves about the whole case or something of that sort.
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> [Beehn]: Yeah, he told me that too.

Balsiger explained that he deposed at least two witnesses in the case: Ruroede, the female involved in the fight with Beehn's wife, and one of the officers involved in the investigation. Balsiger did not recall that Beehn had given him the names of any other witnesses to contact.

Melia, who represented Beehn for approximately 1 month after Balsiger's representation, also disagreed with Beehn's allegations. Melia explained that during his time as Beehn's trial counsel, he met with Beehn twice and also spoke with him on the telephone to discuss the case.

Melia testified that he discussed possible defenses with Beehn, including self-defense and defense of others. Melia noted that there were obvious obstacles to pursuing either defense, because it appeared that Beehn's wife was the aggressor in the fight. Melia also noted that a self-defense claim was further complicated by the fact that on at least one occasion, Beehn said the gun discharged accidentally, which would negate the defense altogether. Melia also explained that he told Beehn not to discuss his case over the telephone with anyone else and that he never gave Beehn the impression that Beehn's communications with his wife were privileged and could not be used against him. Melia also testified that he did not recall any witnesses that may have been available to contact other than Beehn, his wife, Ruroede, and the two victims.

McCarthy, who represented Beehn at the time of his pleas, also disagreed with Beehn's claims. McCarthy, who had been practicing law since 1989 with extensive experience in conducting jury trials, testified that he and Beehn discussed the issue of spousal privilege. McCarthy testified that he repeatedly told Beehn that his communications with his wife were not privileged. McCarthy contended that Beehn's assertion to the contrary is not true. He explained that the letter Beehn sent to his wife, which served as the basis for the tampering charge, was sent after Martin and McCarthy specifically advised Beehn that such communications were not privileged.

McCarthy further testified that he and Martin, McCarthy's cocounsel, also looked into available defenses, including self-defense and defense of others. McCarthy explained that they considered defense of others based on the theory that Beehn was protecting his wife, but their attempt to pursue this option was complicated by the fact that Beehn kept changing his story and, at one point, said the gun discharged accidentally. McCarthy also believed that such defense would have had credibility problems with Beehn.

McCarthy explained that because Beehn was intoxicated on the night in question, he kept changing his story. Additionally troubling was the fact that Beehn continued to try to persuade his wife to change her story. McCarthy testified that in light of these issues, he believed defense of others might not be successful. McCarthy testified that he explained these concerns to Beehn but never advised Beehn that the defense was unavailable.

Martin testified that Beehn agreed to the plea agreement and that Beehn knew what the pleas were and knew the rights he was giving up by taking the plea agreement. This was explained to Beehn by counsel, as was counsel's opinion that self-defense and defense of others would not be successful defenses. Martin testified that after he advised Beehn that his version of the facts would not fit self-defense or defense of others, Beehn's story changed several times.

As noted earlier, following Beehn's plea agreement which resulted in a conviction and prison sentence, Beehn, with the assistance of Melia, filed a direct appeal. The direct appeal was handled primarily by Melia's chief deputy public defender, Christopher Bellmore.

During the postconviction proceeding, Melia testified that on direct appeal, he and Bellmore did not see any viable ineffective assistance of counsel claims from their review of the record. Melia further indicated that even if they had been inclined to raise claims of ineffective assistance of counsel,

they would have been hesitant to do so given that Melia was one of Beehn's trial attorneys.

Melia did not recall meeting with Beehn, but did recall that Bellmore generally met with appellate clients because he lived closer than Melia to the State penitentiaries. The record demonstrates that Beehn and appellate counsel did meet in person and spoke about excessive sentencing issues and claims of ineffective assistance of counsel.

According to Beehn, he was advised by appellate counsel that the record did not support a claim of ineffective assistance of counsel on direct appeal. Therefore, Beehn's only assignment of error on direct appeal was in regard to excessive sentences. Beehn initiated a postconviction proceeding and was granted an evidentiary hearing. The district court subsequently denied Beehn's postconviction motion following the evidentiary hearing.

The district court concluded that each of Beehn's trial attorneys advised him of potential defenses, including self-defense and defense of others, and that the testimony on the matter was credible and refuted Beehn's allegation that he was not so advised. Moreover, as Beehn's trial attorneys explained, the district court found that it was unlikely that such defenses would have been successful, given the evidence against Beehn and all of the events that transpired while Beehn was in custody.

The court then noted that each of Beehn's trial attorneys advised him not to speak with anyone about the case, and specifically advised him that the spousal privilege may not, or would not, protect communications between Beehn and his wife. The court found that the testimony of Beehn's attorneys on the matter was credible and refuted Beehn's allegation that he was not so advised.

The court further noted that Beehn's trial attorneys contacted all of the witnesses known to them and made efforts to seek out additional witnesses and evidence. These efforts

proved to be unhelpful, or in some instances "detrimental," to Beehn's case.

The court found that before entering his pleas, Beehn was advised of the rights he was waiving and was advised that he would be waiving any defenses that may be available. The court also found that Beehn's trial attorneys, Martin and McCarthy, specifically advised Beehn that if he entered the pleas, he would be waiving his right to appeal from the court's pretrial rulings.

Lastly, the court noted that Beehn would have been unsuccessful had he raised his postconviction claims of ineffective assistance of trial counsel on direct appeal and that thus, his appellate counsel was not ineffective for failing to raise those claims. And because appellate counsel had served as Beehn's trial counsel for a period of time, the court believed there would have been a question as to whether appellate counsel could have raised the ineffective assistance of trial counsel claims.

ASSIGNMENT OF ERROR

Beehn assigns, consolidated and restated, that the trial court erred in denying his motion for postconviction relief in which he alleged the ineffective assistance of both trial and appellate counsel.

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 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

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[1] *State v. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018).

[2] *Id.*

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 reviews such legal determinations independently of the lower court's conclusion.[4]

ANALYSIS

As stated above, when appearing before the district court, Beehn's postconviction claims were that (1) trial counsel was ineffective for failing to advise Beehn about the defenses of self-defense and defense of others under §§ 28-1409 and 28-1410; (2) trial counsel was ineffective for failing to advise Beehn that by entering his pleas, he would be waiving his right to appeal from pretrial rulings; (3) trial counsel was ineffective for failing to interview and depose witnesses and for failing to investigate the prospect of additional witnesses beyond those listed in the police reports; (4) trial counsel was ineffective for incorrectly advising Beehn that all communications between Beehn and his wife were privileged and could not be used against Beehn in the prosecution of his criminal charges; and (5) appellate counsel was ineffective for not raising claims (1) through (4) on direct appeal. Additionally, Beehn now claims that appellate counsel was ineffective for failing to meet with him.

[4,5] Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.[5] The Nebraska Postconviction Act is intended to provide relief in those cases

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

[4] *State v. McGuire, supra* note 1.

[5] *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.

where a miscarriage of justice may have occurred; it is not intended to be a procedure to secure a routine review for any defendant dissatisfied with his or her sentence.[6]

[6,7] To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[7] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[8] A showing of prejudice to the defense requires a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.[9]

[8] Trial counsel is afforded due deference to formulate trial strategy and tactics.[10]

[9,10] In a claim for ineffective assistance of counsel, the likelihood of the defense's success should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.[11] Self-serving declarations that a defendant would have gone to trial are not enough to warrant a hearing; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.[12]

[11] When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel

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[6] *Id.*

[7] See *Strickland v. Washington, supra* note 3.

[8] See *State v. Allen, supra* note 5.

[9] *State v. Blank*, 239 Neb. 188, 474 N.W.2d 689 (1991).

[10] *State v. McGuire, supra* note 1.

[11] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[12] *State v. Barrera-Garrido*, 296 Neb. 647, 895 N.W.2d 661 (2017).

claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[13]

The likelihood of the defense's success had the defendant insisted on going to trial is relevant to the prejudice analysis.[14] It is relevant to the consideration of whether a rational defendant would have insisted on going to trial.[15] The likelihood of the defense's success had the defendant gone to trial should be considered along with other factors, such as the likely penalties the defendant would have faced if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.[16]

Failure to Advise Beehn About Potential Defenses.

Beehn first contends that trial counsel failed to advise him of potential defenses, including self-defense and defense of others, in regard to his case.

Under subsection (1) of § 28-1409, "[s]ubject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person . . ." except that under subsection (4) of § 28-1409,

> [t]he use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:

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

[14] See *State v. Yos-Chiguil, supra* note 11.

[15] *Id.*

[16] *Id.*

> (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . .

Section 28-1410 similarly states in part:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable to protect a third person when:
>
> (a) The actor would be justified under section 28-1409 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect.

Under Neb. Rev. Stat. § 28-1414(1) (Reissue 2016), "[t]he justification afforded by sections 28-1409 to 28-1412 is unavailable when: (a) The actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest which he endeavors to effect by force is erroneous[.]"

As noted above, Balsiger, Beehn's first defense attorney, testified that he met with Beehn within a few days of the charges first being filed. Balsiger specifically discussed with Beehn the possibility of asserting a defense such as justification for the use of force, which Balsiger thought would be at least a possible defense based on the information he had at that time.

Melia, who briefly represented Beehn following Balsiger's representation, met with Beehn twice and also spoke with him on the telephone to discuss the case. The record indicates that Melia discussed possible defenses with Beehn, including self-defense and defense of others. However, Melia noted that there

were obstacles to pursuing either defense, because it appeared that Beehn's wife was the aggressor in the fight. Moreover, Melia noted that a self-defense claim was further complicated by the fact that on at least one occasion, Beehn claimed that the gun discharged accidentally, which Melia believed would negate the defense altogether.

Following Melia's discharge as counsel, Martin and McCarthy were retained by Beehn. Martin and McCarthy also considered available defenses, including self-defense and defense of others. McCarthy explained that they considered defense of others based on the theory that Beehn was protecting his wife, but that their attempt to pursue this defense was complicated by the fact that Beehn kept changing his story and, at one point, said the gun discharged accidentally. The record demonstrates that McCarthy also had concerns regarding credibility problems with that defense, because Beehn was intoxicated on the night in question and continually changed his story.

McCarthy's concerns were reinforced by the fact that Beehn continued to try to persuade his wife to change her story, which further complicated the strategy of arguing self-defense. McCarthy indicated that in light of such issues, he believed the self-defense strategy might not be successful. McCarthy explained these concerns to Beehn, but the record does not adequately support Beehn's claim that he was advised that the defense was unavailable.

Following repeated discussions with various counsel and the seemingly universal belief of counsel regarding the viability and considerable lack of likelihood of success of a defense in this case, Beehn agreed to enter a plea agreement in order to seek a more lenient sentence.

We affirm the district court's finding that based on the evidence contained in the record, Beehn was advised by all his attorneys at trial level of the affirmative defenses of self-defense and defense of others. The record demonstrates that the employment of any potential affirmative defense was hampered

by Beehn's ever-changing story of the events of the evening in question, as well as his actions and communications during incarceration.

Beehn alleges that trial counsel was universally ineffective by not informing him of the availability of the defense of self-defense, but the record contradicts that claim. As such, Beehn has not shown that his trial counsel's performance was deficient.

Beehn's first assignment of error is without merit.

Failure to Advise Beehn of Effect of Pleas on Right to Appeal.

Beehn next contends that counsel did not advise him of the effect that entering into a plea agreement would have on his ability to appeal adverse preliminary rulings of the trial court. There is no merit to this claim.

According to Martin and McCarthy, Beehn's attorneys at the time he entered into the plea agreement, Beehn was advised that if he pled guilty, he would not be able to appeal any adverse rulings made during the pretrial process. McCarthy testified that he also advised Beehn of the rights he had and that he would be giving up those rights if he pled guilty. Further, McCarthy testified that based on the communications McCarthy had with Beehn, McCarthy was under the impression that Beehn understood his rights as they had been advised to him by McCarthy.

Martin testified that Beehn agreed to the plea agreement and that Beehn knew what the pleas were and knew the rights he was giving up by taking the plea agreement. The details of the plea agreement, and the resulting waiver of Beehn's rights, were explained to Beehn by counsel. Counsel also explained its opinion that the strategies of self-defense and defense of others would not be successful.

Based on the record, it is clear that counsel's performance was not deficient. Beehn's second claim of ineffective assistance of counsel is without merit.

Failure to Locate, Interview, or Depose Witnesses.

Beehn next argues that his trial counsel failed to locate, interview, or depose potential witnesses to the events of November 24, 2012. According to Beehn, Balsiger, as the first trial counsel, conducted depositions of Ruroede and the investigating officer. But Beehn suggests that Melia failed to conduct any interviews with witnesses. As for Martin and McCarthy, Beehn contends that they failed to conduct depositions. Beehn concedes that Martin and McCarthy's intern interviewed two of the three witnesses Beehn identified, but that he failed to depose them.

Further, Beehn contends that 10 additional witnesses were added by the State after Martin and McCarthy engaged in the representation of Beehn. According to Beehn, Martin and McCarthy failed to depose any of the 10 new witnesses. Beehn contends that had trial counsel been more diligent in deposing and interviewing witnesses, Beehn's defense theory would have "come into better focus."[17]

As the record reflects, Balsiger did depose two of the State's witnesses in preparation for trial. During the brief time in which Melia represented Beehn, Melia did not conduct interviews with witnesses to Beehn's case.

McCarthy testified that he did not take any additional depositions in Beehn's case. McCarthy contended that either he or his staff did interview additional witnesses not identified in the police reports but located based on information Beehn provided to him. McCarthy indicated that his staff interviewed those witnesses and recorded their statements. Without disclosing content, McCarthy noted that the witnesses interviewed were determined to be extremely detrimental to Beehn's case and were not helpful in any manner.

Additionally, McCarthy noted that the case and the credibility of the defense was further hampered when the State filed the charge of tampering with a witness, which arose from

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[17] Brief for appellant at 20.

the discovery of the letter Beehn had sent to his wife. In the letter, Beehn sought to have his wife locate witnesses and "pay what ever [sic] they want." The letter from Beehn further suggested to his wife that she give testimony of events that was inconsistent with her previous recitation of events given to the police.

Further, the record demonstrates that Martin, McCarthy, and their investigator went to the scene of the shooting to try to locate possible video surveillance cameras that may have recorded the incident. However, according to McCarthy's testimony, they were unable to locate any working cameras near the scene.

As for the 10 witnesses added by the State, Martin testified that they were all jailhouse witnesses located by the prosecution. Beehn fails to demonstrate any prejudice that resulted from failing to depose these witnesses, especially in light of the overwhelming evidence of guilt presented by the State.

McCarthy's testimony, however, reflected concerns regarding Beehn's possession of white supremacist materials while incarcerated, as well as Beehn's derogatory statements toward those of Latin American descent. Given the fact that the victims were of Latin American descent, McCarthy testified that he was concerned with the effect that Beehn's jailhouse behavior would have on a jury.

Based on the foregoing discussion, it is clear that trial counsel conducted a lengthy investigation and sought potential witnesses. The fact that the witnesses were not beneficial to Beehn's case, or altogether lacked credibility as a result of Beehn's offer of remuneration, does not fall on trial counsel. Beehn's assignment of error is without merit.

Advice Concerning Issues of Privilege Regarding Communications Between Beehn and His Wife.

Beehn testified that before the trial court entered its ruling in October 2013, in which it denied his motion to suppress statements made to his wife, he believed that his communications

with her were privileged. Beehn testified that he knew the State would listen to his telephone calls with his wife, but that he did not know the State could use statements made in those calls against him. Beehn contends that trial counsel led him to believe his communications with his wife were privileged. Beehn concedes that the communications with his wife were, in fact, not subject to spousal privilege.[18]

Beehn's claims that all four of his trial counsel informed him that the communications in question were privileged are directly refuted by trial counsel. According to the testimony of each attorney, Beehn was repeatedly advised not to discuss his case with anyone other than his attorney at the time. Beehn admitted as much in a December 6, 2012, telephone conversation with his wife. At one point, Beehn's wife stated in part, "[the attorney] told me that we need to not talk amongst ourselves about the whole case or something of that sort." To which Beehn responded, "Yeah, he told me that too." It is of particular note that this telephone conversation occurred only 3 days after Balsiger met with Beehn for the first time.

Melia testified that he did not remember the specific details of his conversation with Beehn. However, Melia stated that it was his practice to advise clients not to speak about their cases over the telephone, because in his experience, the prosecution routinely listened to jail telephone conversations.

McCarthy testified that he explained the nature of the privilege within the first 5 minutes of his and Beehn's first meeting and advised Beehn of the fact that his communications with his wife were not privileged. McCarthy went on to indicate that he and Martin repeatedly pleaded with Beehn to stop discussing his case with others, including his wife, and went so far as to send Beehn written correspondence to that effect.

Based on the evidence in the record contradicting Beehn's claim, this assignment of error is without merit.

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[18] See Neb. Rev. Stat. § 27-505 (Reissue 2016). See, also, *State v. Cowling*, No. A-92-744, 1993 WL 183609 (Neb. App. June 1, 1993) (not designated for permanent publication).

Failure of Appellate Counsel to Raise Ineffective Assistance of Trial Counsel Claim.

Beehn assigns that he received ineffective assistance of appellate counsel due to appellate counsel's failure to raise the claim of ineffective assistance of trial counsel. The State does not argue that Beehn failed to preserve this claim, and thus, we turn to our *Strickland* analysis.

As noted above, *Strickland v. Washington* consists of a two-prong analysis.[19] In order to prevail on an ineffective assistance of counsel claim, the defendant must satisfy both prongs of the *Strickland* analysis, that defense counsel's performance was deficient and that the deficient performance actually prejudiced the defendant's defense. The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.[20] 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.[21]

Assuming, without deciding, that appellate counsel's actions were deficient for failing to raise a claim of ineffective assistance of counsel on direct appeal, it is clear that Beehn has not suffered any resulting prejudice. Following the denial of his direct appeal, Beehn sought to collaterally attack his convictions through this postconviction proceeding. Despite not raising his ineffective assistance of counsel claims on direct appeal as procedurally required when appellate counsel is different from trial counsel, the district court nevertheless allowed Beehn to raise the claims and granted Beehn an evidentiary hearing to expound on those claims.

As Beehn did not suffer prejudice, this assignment of error is without merit.

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[19] See *Strickland v. Washington, supra* note 3.

[20] *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

[21] *State v. McGuire, supra* note 1.

Failure of Appellate Counsel to Meet With Beehn.

Lastly, Beehn contends that appellate counsel failed to meet with him or discuss his appeal. Beehn argues that appellate counsel took an extremely narrow view on direct appeal by only assigning as error that Beehn received excessive sentences.

By Beehn's own admission, he recalled an assistant from the Madison County public defender's office who visited with him for the direct appeal. According to Melia, Bellmore, his chief deputy public defender, was tasked with meeting clients incarcerated in the State penitentiaries. As such, the record is clear that appellate counsel did in fact meet with Beehn.

In regard to Beehn's claim that appellate counsel "took an extremely narrow view on Beehn's direct appeal,"[22] Melia testified that he discussed with Beehn the issues of excessive sentences and the lack of evidence for an ineffective assistance of counsel claim. Melia further testified that while discussing the possibility of a claim of ineffective assistance of counsel as it related to trial counsel, and any promise of leniency for which there was no evidence, Beehn was offered the option to seek new appellate counsel. Beehn did not do so.

The district court noted that on the issue of credibility, it relied more heavily upon the testimony of appellate counsel than on Beehn's testimony, "due to Beehn's history of willingness to change his facts to meet the circumstances of the moment." Further, appellate counsel's testimony was consistent throughout as to the facts of the case.

The district court's decision was not clearly erroneous. Beehn's final assignment of error is without merit.

CONCLUSION

The decision of the district court denying Beehn's motion for postconviction relief is affirmed.

Affirmed.

Freudenberg, J., not participating.

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[22] Brief for appellant at 23.

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

David A. Kaiser, Jr., appellant, v. Union Pacific Railroad Company, a corporation, appellee.

927 N.W.2d 808

Filed May 24, 2019. No. S-18-636.

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. **Federal Acts: Railroads: Claims: Courts.** Substantive issues concerning a claim under the Federal Employers' Liability Act are determined by the provisions of the act and interpretive decisions of the federal courts construing it.
4. **Federal Acts: Railroads: Liability: Negligence: Damages.** Under the Federal Employers' Liability Act, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.
5. **Federal Acts: Railroads: Claims: Negligence.** Claims for negligent infliction of emotional distress are cognizable under the Federal Employers' Liability Act.
6. **Negligence: Words and Phrases.** The zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.
7. **Trial: Testimony.** The important considerations in whether inconsistent prior testimony is to be disregarded as a matter of law are whether

the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.

8. **Federal Acts: Railroads: Negligence.** An employee cannot recover for negligent infliction of emotional distress under the Federal Employers' Liability Act merely because he or she suffers emotional distress as a result of observing another person's injuries.
9. **Summary Judgment: Proof.** A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
10. ____: ____. Once a party moving for summary judgment makes a prima facie case, the burden shifts to the opposing party to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
11. **Summary Judgment: Evidence.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

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

Kyle Wallor and Kate Geyer Johnson, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

Papik, J.

David A. Kaiser, Jr., sued his former employer, Union Pacific Railroad Company (Union Pacific), under the Federal Employers' Liability Act (FELA). Kaiser alleged that while providing aid to an injured fellow employee, he was exposed to the risk of being run over by a railcar. Kaiser alleged that

Union Pacific's negligence caused him to be exposed to this risk and that, as a result, he suffered emotional distress.

Union Pacific moved for summary judgment. It contended Kaiser could not show that during the incident in question, he suffered a physical injury or was within the "zone of danger," and thus contended he was not entitled to recover for negligent infliction of emotional distress under FELA. Kaiser submitted an affidavit in opposition to Union Pacific's motion for summary judgment, but the district court, citing *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), disregarded it, finding that it was inconsistent with Kaiser's deposition testimony. The district court went on to grant Union Pacific's motion for summary judgment. Kaiser appeals both the decision to disregard his affidavit and the order granting summary judgment. We affirm.

BACKGROUND

July 31, 2012, Accident.

Kaiser's lawsuit arises out of a workplace accident at Union Pacific's Mason City, Iowa, railyard in the early morning hours of July 31, 2012. At that time, Kaiser was a manager of yard operations at the Mason City railyard. On the evening of July 30 and the morning of July 31, Kaiser was overseeing a team of employees who were preparing railcars for departure on the next outbound train. Those employees included Chris Grey, Tristan Schinzel, and Georgiy Soloviyov. Grey, an engineer, was in the locomotive at the head of a train. Schinzel and Soloviyov were working to couple free railcars onto that train.

At approximately 2 a.m. on July 31, 2012, Kaiser was parked in his vehicle and was listening to the communications of his team on a radio. At that time, Kaiser heard Schinzel yelling that there was an emergency on the track and that "[Soloviyov] is down." Kaiser dialed the 911 emergency dispatch service and ran in the direction of the emergency.

When Kaiser arrived at the scene, he found Soloviyov injured with his head resting on one of the rails. Kaiser

attempted to move Soloviyov and to render aid. Other employees with emergency medical training arrived minutes later, and Kaiser stepped away to give them room. Soloviyov died from his injuries. Kaiser was not struck by a railcar and did not suffer any physical injuries from the incident.

Kaiser's Lawsuit and Deposition.

Kaiser filed a lawsuit against Union Pacific under FELA, alleging negligent infliction of emotional distress. Kaiser alleged that when he was responding to Soloviyov on July 31, 2012, he was at risk of being run over by a railcar. Kaiser alleged that Union Pacific's negligence subjected him to that risk and that he suffered from post-traumatic stress disorder as a result of the incident.

Union Pacific deposed Kaiser on April 20, 2016. Much of the questioning focused on Kaiser's recollection of events after hearing about the emergency on the radio. In particular, Kaiser was asked if Schinzel took steps to secure railcars in the area:

> Q [by counsel for Union Pacific]. When you turned to go south, [Schinzel] had the power and the cars attached to the power tied down; correct?
>
> A [by Kaiser]. That's what I told him to do, but I did not verify it.
>
> Q. Okay. Do you have any reason to believe that he did not tie down —
>
> A. No.
>
> Q. — the locomotive and the cars attached to the locomotive that were north of the lantern?
>
> A. No reason to believe that he didn't do what I told him.

Union Pacific's counsel also asked Kaiser whether railcars were moving in the area as he rushed to aid Soloviyov and after he arrived. Kaiser testified that while he was proceeding to Soloviyov's location, he never saw any railcars moving.

He testified that he could hear railcars moving and that the cars he heard moving "would have been around where [he] was at," but that he did not know what railcars were moving. Kaiser testified that as he was providing aid to Soloviyov, he could not tell if railcars were moving because he "wasn't paying attention to that." Kaiser testified that he "could hear movement around [him], but [that his] priority was [Soloviyov]." In addition, Kaiser testified that he did not see any railcars move and that he could not "tell . . . without a doubt that [railcars] moved."

Union Pacific's First Motion for Summary Judgment.

Later in 2016, Union Pacific moved for summary judgment. Union Pacific argued that to recover for negligent infliction of emotional distress under FELA, Kaiser was required to prove that he either suffered a physical injury or was within the zone of danger of physical injury. Union Pacific contended that there was no evidence to show that Kaiser met the criteria. Among other exhibits, Union Pacific offered Kaiser's deposition testimony in support of its motion.

Kaiser submitted an affidavit in opposition to the motion. In the affidavit, Kaiser stated that as he was rendering aid to Soloviyov, he was in fear for his own safety. He stated that during that time, while he could not see railcars moving, he could hear railcars moving and feared that moving railcars could cause another accident.

The district court denied the motion for summary judgment. In a written order, it stated that genuine issues of material fact were present as to whether Kaiser was in the zone of danger while rendering aid to Soloviyov.

Union Pacific's Renewed Motion for Summary Judgment.

In 2017, Union Pacific filed a renewed motion for summary judgment. Union Pacific relied on the same legal argument

regarding the zone of danger, but offered additional evidence from other Union Pacific employees regarding the status of railcars in Soloviyov's vicinity after the accident.

Union Pacific offered an affidavit of Schinzel in which he stated that shortly after leaving Soloviyov to locate some equipment, he heard railcars impact one another and asked for but heard no response from Soloviyov. At that point, Schinzel moved to Soloviyov's last known location. Upon arriving, he saw Soloviyov on the ground with his head against one of the railcars. Schinzel stated that the railcars he and Soloviyov had been moving had come to rest against the remainder of the train on a descending grade and could not have moved once they came to rest in that position. Schinzel also stated that after Soloviyov's injury, he did not hear or otherwise observe any other cars move in the railyard.

In addition to Schinzel's affidavit, Union Pacific offered affidavits from Grey and other employees working in the railyard that morning. Grey stated that he heard and felt two railcars make contact with the rest of his train, after which he asked Schinzel and Soloviyov about the movement. Grey added that his train could not have exerted force on the railcars Schinzel and Soloviyov were moving and did not move after this incident. Grey also stated that at the time of the incident, he did not see, hear, or feel any other railcars moving in the railyard. Two employees who arrived at the scene to provide aid to Soloviyov stated that at no point did they see, hear, or otherwise observe railcars moving in the yard. Finally, Union Pacific offered an affidavit of an expert in mechanical engineering with a specialty in the railroad industry who, based on his review of locomotive event recorder data, concluded that there was no movement of railcars in the yard after Soloviyov was injured.

Kaiser offered a supplemental affidavit in opposition to Union Pacific's renewed motion for summary judgment. Kaiser's supplemental affidavit reaffirmed his initial affidavit but added that he had "recently reviewed legal documents on

what the 'zone of danger' means" and could state that he was in the zone of danger while providing aid to Soloviyov and that he was aware of it at the time. The supplemental affidavit contained the following additional paragraphs regarding Kaiser's awareness of danger at the time:

> 4. That on the way to help [Soloviyov,] your affiant radioed . . . Schinzel to lock down the cars, but was fully aware he did not obey this order because he was at the scene instead of locking down the cars, nor did he yell to me that he had locked down the cars.
>
> 5. Also at the scene, [Schinzel] would not go under the car to help [Soloviyov,] which was another reason your affiant was aware that the car had not been locked down by [Schinzel] as I had ordered him to do.
>
> 6. Knowing that [Schinzel] had not locked down the cars[,] your affiant was well aware that the design of the yard would allow cars to freely roll into the car I was under at the time I was trying to save [Soloviyov].
>
> 7. Again I still replay these events in my head and still cannot understand why [Schinzel], a former marine and a member of the Union Pacific family of co-workers, didn't follow my orders and lock down the cars.

The district court granted Union Pacific's second motion for summary judgment. It found that Kaiser's supplemental affidavit was inconsistent with his deposition testimony and disregarded it under *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). Additionally, the district court found that Kaiser had not offered evidence to refute the evidence offered by Union Pacific that no railcars were moving in the area after Soloviyov's injury.

Kaiser appeals.

ASSIGNMENTS OF ERROR

Kaiser assigns two errors on appeal: (1) The district court erred in disregarding his supplemental affidavit under *Momsen, supra*, and (2) the district court erred in granting summary judgment in favor of Union Pacific.

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. *Benard v. McDowall, LLC*, 298 Neb. 398, 904 N.W.2d 679 (2017). 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

Governing Law.

[3,4] Before proceeding to Kaiser's assignments of error, we pause to set forth the general principles of law governing his claim for negligent infliction of emotional distress. Kaiser sued Union Pacific under FELA. Substantive issues concerning a claim under FELA are determined by the provisions of the act and interpretive decisions of the federal courts construing it. *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010). Under FELA, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence. *Id.*

[5,6] Claims for negligent infliction of emotional distress are cognizable under FELA. In *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), the U.S. Supreme Court held that while such claims are cognizable, the common-law zone of danger test limits the recovery available. "[T]he zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.*, 512 U.S. at 547-48.

The issues raised in this appeal pertain to Kaiser's attempt to show that there was a genuine issue of material fact as to whether he was in immediate risk of physical harm while he was rendering aid to Soloviyov. We proceed to consider those issues now.

Consideration of Supplemental Affidavit.

As noted above, the district court disregarded Kaiser's supplemental affidavit in the course of deciding Union Pacific's renewed motion for summary judgment. The district court refused to consider the affidavit under our opinion in *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). Kaiser argues that the district court improperly applied *Momsen*.

Momsen was a medical malpractice action. One of the defendants, a doctor, testified at his deposition that he had not been given the vital signs of the patient and that if he had, he would have gone to the hospital immediately because the vital signs indicated a serious condition. At trial, the doctor testified that he did not go to the hospital because the patient's vital signs had not changed and it was his professional medical judgment that it was not necessary to go to the hospital. When asked how he could reconcile his trial testimony with that given in his deposition, the doctor responded, "'I can't.'" *Id.* at 52, 313 N.W.2d at 212.

[7] At issue on appeal in *Momsen* was whether the doctor's trial testimony should be disregarded. This court held that it should. It explained that the "important considerations" in whether inconsistent prior testimony is to be disregarded as a matter of law are whether the testimony "pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony." *Id.* at 55, 313 N.W.2d at 213.

Kaiser argues that his supplemental affidavit should not have been disregarded under *Momsen* for a number of reasons.

As explained below, we are not persuaded that the district court erred by disregarding the supplemental affidavit.

First, we do not agree with Kaiser's contention that his supplemental affidavit was not "'materially different'" from his deposition testimony and thus not subject to being disregarded under *Momsen*, 210 Neb. at 53, 313 N.W.2d at 213. In his deposition, Kaiser said he had no reason to believe that Schinzel did not tie down the railcars as Kaiser had instructed. Kaiser's supplemental affidavit, on the other hand, consists almost entirely of reasons why Kaiser was purportedly "fully aware" that Schinzel did *not* follow his instructions while at the scene of the accident.

Neither are we convinced by Kaiser's contention that the *Momsen* rule should not have been applied because he offered a sufficient explanation for his change in testimony. Kaiser contends that after "thinking it over," he realized Schinzel did not secure the railcars, and he urges us to find this is a sufficient explanation. Brief for appellant at 14. The supplemental affidavit itself appears to offer a different explanation for the change in testimony. In the supplemental affidavit, Kaiser states that it was prompted by his recent review of legal documents regarding the zone of danger test. In any case, Kaiser has failed to offer a reason why he was not able to recall being "fully aware" that Schinzel had not secured the railcars at his deposition but was able to do so in an affidavit submitted in opposition to a summary judgment motion signed nearly 6 years after the incident.

Finally, we also disagree with Kaiser's claim that the change in testimony was not made to meet the exigencies of litigation. Kaiser signed and offered the supplemental affidavit after Union Pacific offered its evidence in support of its renewed motion for summary judgment. In the supplemental affidavit, Kaiser testified to facts he had not testified to in either his deposition or his initial affidavit in opposition to summary judgment. Kaiser's deposition testimony that he did not have any reason to believe Schinzel did not secure

railcars was helpful to Union Pacific's summary judgment motion. Kaiser obviously hoped statements in his supplemental affidavit that he was actually "fully aware" Schinzel did not do so could help him withstand summary judgment. Additionally, the supplemental affidavit itself tends to confirm that the change in testimony was brought about by the exigencies of litigation. As noted above, Kaiser acknowledged in the supplemental affidavit that its genesis was his review of legal documents regarding the zone of danger test. Under these circumstances, we cannot say the trial court erred by finding that the change in testimony was brought about by the exigencies of litigation.

We find no merit to any of the reasons Kaiser puts forth as to why the district court erred by disregarding his supplemental affidavit under *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981).

Summary Judgment.

Kaiser maintains that even if the district court did not err in disregarding his supplemental affidavit, summary judgment for Union Pacific was nonetheless improper. According to Kaiser, other evidence in the summary judgment record established a genuine dispute as to whether he was in the zone of danger while attending to Soloviyov after the accident. Again, we must disagree.

As noted above, the U.S. Supreme Court held in *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), that only those plaintiffs who suffer a physical impact or who are placed in immediate risk of physical harm as a result of a defendant's negligence can recover damages for negligent infliction of emotional distress under FELA. Here, the parties agree that Kaiser was not physically struck by a railcar. The dispute centers on whether he was placed in immediate risk of physical harm.

In support of their respective positions, the parties marshal FELA cases applying the zone of danger test. Union Pacific

urges us to consider *Waisonovitz v. Metro North Commuter R.R.*, 550 F. Supp. 2d 293 (D. Conn. 2008), *affirmed* 350 Fed. Appx. 497 (2009). In that case, the operator of a train sued the railroad under FELA for negligent infliction of emotional distress after the train he was operating ran over and killed a coworker. The operator testified that he suffered severe emotional distress when he saw his colleague's body after the train had stopped, but the court granted summary judgment to the railroad because there was no evidence that the operator was ever within the zone of danger. Union Pacific cites other cases to the same effect. See, e.g., *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530 (3d Cir. 1995).

[8] These cases cited by Union Pacific establish that an employee cannot recover for negligent infliction of emotional distress under FELA merely because he or she suffers emotional distress as a result of observing another person's injuries. Kaiser, however, is not contending that he suffered emotional distress merely because he observed Soloviyov's injuries. He is pursuing this case under the theory that he was in danger of being hit by a moving railcar while he was tending to Soloviyov. And, as Kaiser points out, there is authority recognizing that employees who respond to the injuries of others may find themselves in the zone of danger while doing so. See *Lee v. National Railroad Passenger Corp.*, 791 F. Supp. 2d 550 (S.D. Miss. 2011) (denying summary judgment to railroad in FELA negligent infliction of emotional distress case in which employee responded to crash site and came upon smoke, gas fumes, and downed powerlines).

Even if Kaiser's legal theory is viable, there remains the question of whether there were sufficient facts to support it. Specifically, we must consider whether there was a genuine dispute as to whether Kaiser was actually in immediate risk of being struck by a moving railcar while he was with Soloviyov. We proceed to that question now.

[9] A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence

to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015). Union Pacific clearly made a prima facie case here through the testimony of those at the scene and its expert that no railcars were or could have been moving after Soloviyov was injured.

[10,11] Once the moving party makes a prima facie case, the burden shifts to the opposing party to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id.* Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork. *Id.*

Kaiser contends he has produced evidence that creates a genuine issue of material fact. Kaiser directs us to testimony in his deposition that during his time at the Mason City railyard, he became aware of instances in which railcars that had not been properly coupled together "rolled back." Additionally, Kaiser directs our attention to his testimony at his deposition that he could hear railcars moving as he approached and later provided aid to Soloviyov.

Having evaluated the evidence Kaiser claims creates a genuine issue of material fact with our summary judgment standards in mind, we find that it is insufficient to withstand summary judgment. Kaiser's claim that he was aware of previous occasions at which railcars "rolled back" does not, in itself, provide a basis for the finder of fact to conclude, without engaging in guesswork, speculation, conjecture, or choice of possibilities, that railcars were doing so when Kaiser was with Soloviyov. See *Roskop Dairy, supra*.

As for Kaiser's testimony about hearing railcars moving, we reach the same conclusion. Much of Kaiser's testimony about his awareness of the movement of railcars was couched in uncertainty. Union Pacific points out, for example, that Kaiser

admitted he never saw any railcars move, that he was focused on Soloviyov rather than the railcars, that he did not know what railcars he heard moving, and that he could not even say without a doubt that railcars, in fact, moved.

Kaiser's most definitive statements about the movement of railcars were that he heard movement "around [him]" and that the cars he heard moving "would have been around where [he] was at." We understand how one could reasonably infer from this testimony that railcars were moving somewhere in Kaiser's vicinity. However, without some evidence regarding what railcars were moving, where they were located in relation to Kaiser, and what direction and speed they were moving, we do not understand how a finder of fact could conclude, without guessing or speculating, that railcars were moving in a way that subjected Kaiser to an immediate risk of physical harm. Kaiser's statements about hearing railcars moving thus do not create a genuine issue of fact. See *Roskop Dairy, supra*.

Kaiser failed to present evidence from which a finder of fact could determine, without resorting to guesswork or speculation, that he was subjected to an immediate risk of physical harm. The district court thus did not err in granting summary judgment in favor of Union Pacific.

CONCLUSION

Finding no error in the district court's decision to disregard Kaiser's supplemental affidavit or its decision to grant summary judgment to Union Pacific, we affirm.

Affirmed.

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, on behalf of State of Florida, on behalf of Mia G., a minor child, appellant, v. Julio G., appellee.

927 N.W.2d 817

Filed May 24, 2019. No. S-18-642.

1. **Attorney Fees.** Whether attorney fees are authorized by statute or by the court's recognition of a uniform course of procedure presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Constitutional Law: Due Process: Right to Counsel: Paternity.** Due process requires that an indigent defendant in a paternity proceeding be furnished appointed counsel at public expense.
4. **Paternity: Presumptions.** A notarized acknowledgment of paternity creates a rebuttable presumption of paternity, but the presumption can be challenged on the basis of fraud, duress, or material mistake of fact.

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

Patrick F. Condon, Lancaster County Attorney, and Anna Marx for appellant.

Elise M.W. White, of White Law Office, 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

In this appeal, we are asked to decide whether a court may appoint counsel at public expense for an indigent individual who has signed a notarized acknowledgment of paternity pursuant to Neb. Rev. Stat. § 43-1408.01 (Reissue 2016) but who, in response to a suit by the State for child support, challenges the acknowledgment of paternity under Neb. Rev. Stat. § 43-1409 (Reissue 2016) on the basis of fraud, duress, or material mistake of fact. Because we conclude that such appointment is required by due process, we reject the State's claim to the contrary and, accordingly, affirm.

STATEMENT OF FACTS

Mia G., a minor child, was born in 2016, and on March 25, 2016, Julio G. and Mia's mother signed a notarized acknowledgment of paternity, attesting that Julio was the father of Mia. Julio is also named as the father on the minor child's birth certificate.

On May 1, 2017, the State, through the county attorney for Lancaster County, filed a child support action in the district court for Lancaster County against Julio on behalf of Mia and attached the signed acknowledgment of paternity to its complaint. On July 20, at a hearing before the district court referee, speaking through an interpreter, Julio admitted that he signed the acknowledgment of paternity in the hospital but challenged the acknowledgment and requested an attorney. Julio indicated that he does not read or speak English, that he did not know what he was signing, and that he was led to believe the acknowledgment related to medical care. Julio stated that "the doctors in Cuba had all told me that I could not have children." Julio stated that he would not have signed an acknowledgment of paternity without a DNA test and that prior to mistakenly signing the acknowledgment, he and Mia's mother had agreed they would complete genetic testing. Julio stated that "if I'm going to be ordered by the State to pay

child support for a child for 18 years, I just want to be sure that they're mine." The referee found that Julio was indigent and, over objections by the State, appointed counsel for Julio. On July 25, the district court entered a written order that appointed counsel for Julio to be paid by Lancaster County. In the order, the court made clear that the action was a paternity case.

Counsel for Julio proceeded to file pleadings consistent with Julio's claims and obtained an order for genetic testing. The parties agree that following DNA testing, Julio stipulated to paternity, and the referee determined that Julio should pay child support. The district court found that Julio is the biological father of Mia and entered an order for child support. Julio's appointed counsel moved for attorney fees and expenses. The district court granted attorney fees and expenses for fees incurred through the point at which appointed counsel sent a closing letter to Julio, consistent with its earlier order appointing counsel.

The State appeals.

ASSIGNMENT OF ERROR

The State claims, summarized and restated, that the district court erred when it appointed counsel to represent Julio at public expense.

STANDARD OF REVIEW

[1,2] Whether attorney fees are authorized by statute or by the court's recognition of a uniform course of procedure presents a question of law. *D.I. v. Gibson*, 295 Neb. 903, 890 N.W.2d 506 (2017). We independently review questions of law decided by a lower court. *Id.*

ANALYSIS

The State contends that because paternity was presumed by the parties' acknowledgment of paternity, it was not at issue in its child support case, and that the district court erred when

it appointed counsel for Julio to be paid by Lancaster County. We reject the State's assignment of error.

[3] It is established in Nebraska that due process requires that an indigent defendant in a paternity proceeding be furnished appointed counsel at public expense. *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988). Although commenced as a child support case, paternity immediately became the central issue in this case when Julio challenged the acknowledgment of paternity, claiming a material mistake of fact under § 43-1409, and sought DNA testing pursuant to Neb. Rev. Stat. § 43-512.04 (Reissue 2016). It was established that Julio was indigent, and we conclude the district court did not err when it determined that paternity was at issue in the case and that Julio was entitled to court-appointed counsel.

Relevant Statutes.

We begin by setting forth the relevant and applicable statutes which frame the State's child support action and Julio's subsequent challenge to the notarized acknowledgment which placed paternity at issue in the case.

Section 43-1409 provides:

> The signing of a notarized acknowledgment, whether under section 43-1408.01 or otherwise, by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. The signed, notarized acknowledgment is subject to the right of any signatory to rescind the acknowledgment within the earlier of (1) sixty days or (2) the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order in which the signatory is a party. After the rescission period *a signed, notarized acknowledgment is considered a legal finding which may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger*, and the legal responsibilities, including the child support obligation, of any signatory arising from

> the acknowledgment shall not be suspended during the challenge, except for good cause shown. Such a signed and notarized acknowledgment or a certified copy or certified reproduction thereof shall be admissible in evidence in any proceeding to establish support.

(Emphasis supplied.) Section 43-512.04 discusses the procedure for initiating an action for child support or medical support on behalf of a child whose paternity is presumed by a notarized acknowledgment as described above in § 43-1409. Section 43-512.04(4) provides:

> In such proceeding, if the defendant is the presumed father as described in subdivision (1)(b) of this section, the court shall make a finding whether or not the presumption of paternity has been rebutted. The presumption of paternity created by acknowledgment as described in section 43-1409 may be rebutted as part of an equitable proceeding to establish support by genetic testing results which exclude the alleged father as being the biological father of the child. A court in such a proceeding may order genetic testing as provided in sections 43-1414 to 43-1418.

District Court Could Properly Appoint Julio an Attorney at Public Expense.

At the initial court hearing, when the district court heard Julio's challenge to his acknowledgment of paternity, the court correctly determined and stated in its order that the child support case had become an action in which paternity was challenged, and hence a paternity action.

[4] Based on the language of § 43-1409, we have explained that a notarized acknowledgment creates a rebuttable presumption of paternity but that the presumption can be challenged on the basis of fraud, duress, or material mistake of fact. *In re Interest of Kodi L.*, 287 Neb. 35, 840 N.W.2d 538 (2013); *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

In this case, Julio followed the path set forth in § 43-1409 for challenging an acknowledgment of paternity. At the initial referee hearing, Julio told the referee that he had reasons to believe that he was not the biological father of the child. He explained that he did not know what he was signing when he signed the acknowledgment of paternity, because he did not read or speak English, the acknowledgment form was in English, and he believed it was a form pertaining to a medical matter relating to the birth of the child. Although the better practice is to file a challenge in writing using the language of the statute, Julio's challenge was sufficient under § 43-1409 to allege a material mistake of fact with regard to the acknowledgment form and was recognized as such by the referee. Julio acted promptly and unequivocally to put paternity at issue at the initial referee hearing, and the district court correctly determined that the case related to paternity in its order for appointment of counsel. Julio's subsequent motions to dismiss the complaint and for genetic testing and the affirmative defenses asserted in his answer are consistent with a paternity proceeding.

In *Carroll v. Moore*, 228 Neb. 561, 579, 423 N.W.2d 757, 767 (1988), we held that under the U.S. Constitution, an indigent person who is alleged to be the father of a child has "an absolute right" to court-appointed counsel in a paternity proceeding. See, also, *Elstun v. Elstun*, 8 Neb. App. 97, 589 N.W.2d 334 (1999), *reversed in part on other grounds* 257 Neb. 820, 600 N.W.2d 835. We noted that due process was implicated because, inter alia, the "threat of future incarceration resulting from a finding of paternity is significant in determining the need for counsel." *Carroll v. Moore*, 228 Neb. at 578, 423 N.W.2d at 767. We stated: "The concepts of 'fundamental fairness' and 'meaningful opportunity to be heard' which are integral to the notion of due process make the right to counsel mandatory." *Id*. at 579, 423 N.W.2d at 767. In *Carroll v. Moore*, we observed that all parties, including the State, are interested in an accurate and fundamentally

fair determination of paternity. Although the posture of *Carroll v. Moore* differs from the current case, its principles logically apply to this action initiated by the State and in which paternity was inextricably linked to the prosecution of the matter.

Because the child support action was based on a notarized acknowledgment of paternity, Julio's challenge to the acknowledgment under § 43-1409 rendered the action a "paternity proceeding." Julio was indigent, and under our recognized course of procedure, the district court correctly concluded that he had a right to court-appointed counsel at public expense. In this case, the district court properly ordered that appointed counsel's reasonable fees, up to and including preparation of the closing letter to the client, be paid by Lancaster County.

CONCLUSION

In this action initiated by the State, Julio, who was indigent, challenged his signed acknowledgment of paternity under § 43-1409 based on a material mistake of fact. Julio had a right to appointed counsel at public expense. Accordingly, the district court did not err when it appointed counsel for Julio and ordered Lancaster County to pay reasonable attorney fees. We affirm the orders of the district court.

Affirmed.

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

Abay, L.L.C., appellant, v. Nebraska Liquor Control Commission et al., appellees.

927 N.W.2d 780

Filed May 24, 2019. No. S-18-715.

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.** Whether an agency decision conforms to the law is by definition a question of law.
5. **Administrative Law: Judgments: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented which an appellate court decides independently of the decision made by the court below.
6. **Administrative Law: Liquor Licenses: Final Orders: Appeal and Error.** Proceedings in the district court reviewing a final decision of the Nebraska Liquor Control Commission involve review without a jury de novo on the agency record.
7. **Administrative Law: Appeal and Error.** In a review de novo on the record, the district court is required to make independent factual determinations based upon the record and reach its own independent conclusions with respect to the matters at issue.

8. **Administrative Law: Liquor Licenses: Courts: Evidence: Appeal and Error.** A district court in its de novo review is not required to give deference to the findings of fact made by the Nebraska Liquor Control Commission, but it may consider the fact that the commission, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the commission's judgment as to credibility.
9. **Alcoholic Liquors: Liquor Licenses: States.** The power of the State to absolutely prohibit the manufacture, sale, transportation, or possession of intoxicants includes the power to prescribe the conditions under which alcoholic beverages may be sold, and it may exercise large discretion as to the means employed in performing this power.
10. **Courts: Statutes.** A statutorily created court has only such authority as has been conferred upon it by statute. Thus, its powers are limited to those delineated by statute.
11. **Administrative Law: Statutes.** Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act.
12. **Administrative Law: Liquor Licenses.** The Nebraska Liquor Control Commission may impose conditions on a liquor license.

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

Michael F. Polk, of Sena, Polk & Stacy, L.L.P., for appellant.

William Acosta-Trejo, Assistant Omaha City Attorney, for appellees City of Omaha et al.

Douglas J. Peterson, Attorney General, and Milissa Johnson-Wiles for appellee Nebraska Liquor Control Commission.

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

Miller-Lerman, J.

NATURE OF CASE

After the Omaha City Council recommended denial, the Nebraska Liquor Control Commission (Commission) granted

Abay, L.L.C., a Class D liquor license for its convenience store, but restricted Abay from offering "single can sales" and "spirits/wine sales less than .375." Abay appealed the order of the Commission to the district court for Lancaster County. Following its review de novo on the record, the district court found that Abay had rejected the city council's suggested conditions of no single sales of beer and no distilled spirits less than 375 milliliters. The district court examined these conditions and determined that these restrictions on the liquor license were within the Commission's authority under the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010, Cum. Supp. 2016 & Supp. 2017), were reasonable, and were not arbitrary or capricious. The district court affirmed the Commission order. Abay appeals. Because there was competent evidence in the record for the district court's decision and it was not arbitrary, capricious, or unreasonable, we affirm.

STATEMENT OF FACTS

In 2017, Abay, doing business as Blondo Convenient Food Mart, applied for a Class D liquor license to sell packaged alcoholic liquor at its new store at 7901 Blondo Street in Omaha, Nebraska. See § 53-124. In July, the City of Omaha (City) held a public hearing to review the license application. At the city council hearing, Tesfaye Kinde, owner of Abay, offered evidence in support of its application. Kinde submitted photographs and testified about his other two successful convenience stores. The City and citizens offered objections to the Class D liquor license, in which they asserted a lack of need for an additional liquor license in the area. Generally, the City and citizen protestors claimed that allowing additional liquor sales would lead to more alcohol-related trash and vagrancy problems. At the hearing, members of the city council asked if Kinde would agree to "no single sales of beer in containers less than 40 oz's [sic] and no distilled spirits less

than 375 ml" to prevent a "cycle of people coming back and forth" for "airplane" shots, single cans, and other high alcohol content, low-volume beverages. Kinde noted that at one of his other convenience stores, he sells more small bottles than big bottles of liquor. He claimed that the proposed restrictions would "hurt the business a lot." Kinde declined to accept restrictions on the license. The city council subsequently denied recommendation for a license application.

Abay applied to the Commission for a Class D liquor license. The Commission held a hearing on Abay's application on October 18, 2017. Evidence was presented by Abay and by the City and citizen protestors. The City claimed that sales of small bottles were an issue, because such sales might lead to more trash in the area. Citizen protestors claimed, inter alia, that there "already are small alcohol bottles emptied around the neighborhood" and that there are problems with homeless people, trash, and alcohol bottles in a nearby creek. Kinde testified that at his other locations, he does not permit loitering and his employees pick up trash every 2 hours.

After taking the matter under advisement, in an order dated October 26, 2017, the Commission found that Abay met the criteria for a license as established in § 53-132(2), and issued a restricted license with two conditions: "No single can sales" and "No spirits/wine sales less than .375."

Abay appealed from the order of the Commission to the district court for Lancaster County in accordance with the Administrative Procedure Act. See § 53-1,116 (appeal from Commission order in accordance with Administrative Procedure Act); Neb. Rev. Stat. § 84-917 (Reissue 2014) (judicial review under Administrative Procedure Act). The district court noted that both the City and citizen protestors "expressed concerns about the litter in the area surrounding the store and how sales of single cans and small bottles of alcohol can create unsafe and unsanitary conditions in the neighborhood." Following its review de novo on the record, the district court found that

Abay had rejected the city council's suggested conditions of no single sales of beer and no distilled spirits less than 375 milliliters.

Given the understanding recited in its factual findings that the license permitted by the Commission order was conditioned on no single beer sales and no spirits or wine less than 375 milliliters, the district court determined that the Commission possessed the authority to grant a license with reasonable restrictions and conditions and concluded that the Commission's restrictions were reasonable and not arbitrary or capricious. The district court affirmed the Commission order.

Abay appeals the order of the district court.

ASSIGNMENTS OF ERROR

Abay claims, restated, that the district court erred when it affirmed the order of the Commission because, in its view, the Commission lacks statutory authority to impose conditions or restrictions on a liquor license, and, in any event, the conditions imposed by the Commission were arbitrary, unreasonable, and vague as a matter of law.

STANDARD OF REVIEW

[1-5] 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. *McManus Enters. v. Nebraska Liquor Control Comm., ante* p. 56, 926 N.W.2d 660 (2019). 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*. 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. *Id*. Whether an agency decision conforms to the law is by definition a question of law. *Id*. To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented which an appellate court decides independently of the decision made by the court below. *Id*.

ANALYSIS

As an initial matter, we note that the district court reviews a decision of the Commission de novo on the record under the Administrative Procedure Act. See § 84-917(5)(a). As stated above, in reviewing a district court's judgment for errors appearing on the record, we will not substitute our factual findings for those of the district court where competent evidence supports those findings.

[6-8] Proceedings in the district court reviewing a final decision of the Commission involve review without a jury de novo on the agency record. See *Schwarting v. Nebraska Liq. Cont. Comm.*, 271 Neb. 346, 711 N.W.2d 556 (2006). The district court is required to make independent factual determinations based upon the record and reach its own independent conclusions with respect to the matters at issue. See *id*. The district court is not required to give deference to the findings of fact made by the Commission, but it may consider the fact that the Commission, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the Commission's judgment as to credibility. See *id*. The district court may affirm, reverse, or modify the Commission's decision or remand the case for further proceedings. § 84-917(6)(b).

In this case, the district court made indepth factual determinations, and as we read the district court order, it found competent evidence in the record that the conditions in the Commission order prohibited single can sales of beer and "no distilled spirits less than 375 ml." To the extent that this

finding modified the Commission order, it was within the district court's authority to do so under the Administrative Procedure Act. See § 84-917(6)(b).

Abay contends that the Commission is empowered only to grant or deny a license and cannot impose conditions on a license. We do not agree.

[9] It is well established that the power of the State to absolutely prohibit the manufacture, sale, transportation, or possession of intoxicants includes the power to prescribe the conditions under which alcoholic beverages may be sold, and it may exercise large discretion as to the means employed in performing this power. *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988) (citing *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972)). Nebraska appellate courts and the Commission itself have long relied on this reasoning to conclude that the Commission can impose restrictions on a license as part of prescribing the conditions under which alcoholic beverages may be sold.

In *F & T, Inc. v. Nebraska Liquor Control Comm.*, 7 Neb. App. 973, 587 N.W.2d 700 (1998), the Nebraska Court of Appeals concluded that the power of the State to absolutely prohibit the manufacture, sale, transportation, or possession of intoxicants includes the power to prescribe the conditions under which alcoholic beverages may be sold and that it may exercise large discretion as to the means employed in performing this power. See, also, *Gas 'N Shop, supra.* The court's recognition of the broad range of powers given to the Commission through its statutory authority, including the ability to impose conditions explained in *F & T, Inc.* has since been followed both explicitly and implicitly. See, e.g., *City of Omaha v. C.A. Howell, Inc.*, 20 Neb. App. 711, 832 N.W.2d 30 (2013). In case No. S-18-045, an unpublished memorandum opinion filed on December 19, 2018, we recently reached a similar result in *ANS, Inc. v. Nebraska*

Liquor Control Comm., in which we affirmed the order of the district court which had affirmed the order of the Commission which had found, inter alia, that a bar had violated an express condition of its Class C liquor license prohibiting a certain individual from involvement with the daily operation of the bar.

We further observe that because the Nebraska Liquor Control Act has been judicially construed to authorize the Commission to fix certain reasonable requirements upon a licensee and that construction has not evoked an amendment, we presume that the Legislature has acquiesced in the court's determination of the Legislature's intent. See *State v. Coble*, 299 Neb. 434, 908 N.W.2d 646 (2018).

Although not explicit in *F & T, Inc.*, we conclude that the authority of the Commission to impose conditions is consistent with its statutory powers. Section 53-101.05 provides:

> The Nebraska Liquor Control Act shall be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor.

Section 53-116 provides: "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic of alcoholic liquor, except as specifically delegated in the Nebraska Liquor Control Act, is vested exclusively in the [C]ommission." See, also, § 53-132 (regarding requirements for issuing retail license).

[10-12] We have repeatedly noted that

> a statutorily created court has only such authority as has been conferred upon it by statute. Thus, its powers are limited to those delineated by statute. [Citation omitted.] Administrative bodies, likewise, have only that authority specifically conferred upon them by statute or by

> construction necessary to achieve the purpose of the relevant act.

Jolly v. State, 252 Neb. 289, 290, 562 N.W.2d 61, 63 (1997). Following our independent review of the law, we conclude that the statutes confer authority for the Commission to impose conditions on a liquor license and that the decisions of the Commission and of the district court in this case conform to the law. *McManus Enters. v. Nebraska Liquor Control Comm., ante* p. 56, 926 N.W.2d 660 (2019). Thus, we reject Abay's suggestion that the Commission cannot impose conditions on a liquor license.

Abay also maintains that because the Commission order did not explicitly refer to volume, the district court erred when it affirmed the reference in the Commission order relative to distilled spirits "less than .375." We do not believe that the district court erred.

As discussed above, the district court effectively found that the order should be read as "375 ml" and it found support in the record for this reading. To the extent that the district court order modified the Commission order, it had the authority to do so. § 84-917(6)(b). In its ruling, the district court emphasized "*the recommendation of the local governing body*" in an effort to highlight the reasonableness of the recommendation of the city council members that a license be restricted to "no distilled spirits less than 375 ml" which restriction was ultimately adopted by the Commission. The 375-milliliters volume is consistent with the concerns expressed by citizen protestors, also highlighted by the district court, about small bottles of liquor creating additional litter which would exacerbate an existing litter problem in the neighborhood and nearby creek. As noted above, we review this district court order for errors appearing on the record. *McManus Enters., supra*. Our review shows that there was competent evidence in the record for the district court's decision. It was neither arbitrary, capricious, nor unreasonable.

CONCLUSION

Following our review of the district court order for errors appearing on the record, we reject Abay's assignments of error effectively challenging the validity and specificity of conditions on its Class D liquor license. In doing so, we hold that the Nebraska Liquor Control Act, §§ 53-101 to 53-1,122, empowers the Commission to include conditions on a liquor license if those restrictions are consistent with the purpose of the Nebraska Liquor Control Act and are reasonably necessary to the protection of the health, safety, and welfare of the people of the State of Nebraska and to the promotion and fostering of temperance in the consumption of alcohol. See § 53-101.05. The district court order was not arbitrary, capricious, or unreasonable, and there was competent evidence in the record for its decision. Accordingly, we affirm.

Affirmed.

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

State of Nebraska, appellee, v. Danny J. McGinn, appellant.

928 N.W.2d 391

Filed May 24, 2019. No. S-18-744.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
6. **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.
7. **Courts: Appeal and Error.** The State has the right to appeal a decision of the district court sitting as an intermediate court of appeals.
8. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.

9. ____. An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.
10. **Drunk Driving: Blood, Breath, and Urine Tests: Evidence: Proof.** A driving under the influence offense can generally be shown either by evidence of physical impairment and well-known indicia of intoxication or simply by excessive alcohol content shown through a chemical test.
11. **Criminal Law: Evidence: Double Jeopardy: New Trial: Appeal and Error.** Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict. If it was not, then double jeopardy forbids a remand for a new trial.
12. **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.

Appeal from the District Court for Holt County, Mark D. Kozisek, Judge, on appeal thereto from the County Court for Holt County, Kale B. Burdick, Judge. Judgment of District Court reversed, and cause remanded with directions.

Forrest F. Peetz, of Peetz Law, 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.

Funke, J.

Danny J. McGinn appeals the district court's decision affirming his conviction for driving under the influence, second offense, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010). The district court determined the county court erred in admitting breath test evidence but affirmed the conviction by finding there was sufficient evidence to support

McGinn's conviction. The State has not appealed the district court's decision on the inadmissibility of the breath test evidence. Therefore, the sole issue on appeal is whether the district court erred in affirming the conviction after finding the breath test evidence inadmissible. For the reasons set forth herein, we reverse the district court's decision and remand the cause with directions.

BACKGROUND

This case originated in August 2017 when McGinn was charged with driving under the influence of alcohol, second offense, in violation of § 60-6,196, stemming from a traffic stop of his vehicle in July. According to the complaint, McGinn

> operate[d] or ha[d] actual physical control of a motor vehicle while under the influence of alcoholic liquor when he/she had a concentration of .08 grams or more by weight of alcohol per 210 ml of his/her breath, but less than .150 grams by weight of alcohol per 210 ml of his/her breath.

During the traffic stop and subsequent investigation, the arresting officer conducted field sobriety tests and a breath test using a DataMaster machine.

Motion to Suppress

In October 2017, McGinn filed a motion to suppress any chemical test of his blood, breath, or urine conducted during the traffic stop and subsequent investigation. In his motion, McGinn claimed the State failed to permit him to have an additional test conducted following the officer-directed test, in violation of Neb. Rev. Stat. § 60-6,199 (Reissue 2010).

The county court denied McGinn's motion, determining that § 60-6,199 did not give McGinn the right to a separate test and instead only required the State to allow McGinn the right to contact a physician of his choice. The trial court reasoned that the physician would evaluate McGinn's condition and order whatever laboratory tests the physician deemed

appropriate. Because there was no evidence that the McGinn contacted a physician of his choice and no evidence that a physician attempted to evaluate him or ordered any tests, the court declined to suppress or limit the use of the breath test evidence.

Trial

A bench trial was held in January 2018. During trial, Sgt. Mike Parks, with the Holt County sheriff's office, testified regarding the maintenance, use, and operating procedure for the DataMaster utilized to test McGinn.

Deputy Steven Binkerd testified as the arresting officer. Binkerd explained that on July 28, 2017, around 11:30 p.m., he stopped McGinn for speeding. Binkerd testified that when he asked McGinn for his driver's license and vehicle documentation, he observed McGinn "was nervous, anxious, fast talking." Once McGinn provided his driver's license and insurance, Binkerd asked specifically for the vehicle registration, and McGinn asked, "'Is that the little pink one?'" Binkerd responded that it was, and McGinn began to look for it, but they "started talking and he got lost again." McGinn asked again whether it was the "'little pink one,'" and Binkerd told McGinn it was. Finally, McGinn found it and handed it to Binkerd.

Binkerd testified that he detected the odor of alcohol emitting from McGinn's vehicle during the stop. McGinn had explained he consumed three drinks that evening. Binkerd then administered field sobriety tests. First, Binkerd conducted a horizontal gaze nystagmus test, to which he observed six indicators signifying to Binkerd there was "a 77 percent chance" that McGinn was over a .1 blood alcohol content. Next, Binkerd conducted a nine-step walk-and-turn test, which "showed impairment" in that McGinn struggled to complete the test while wearing flip-flops and then barefoot, took only eight of the instructed nine steps, and missed the instructed heel-toe maneuver. Binkerd then administered the one-legged stand test, and McGinn used his arms for balance and counted

to 31 instead of 30 as instructed. Binkerd explained this indicated to him there was a "65 or 66 percent chance that he was impaired based on those results." The next test Binkerd conducted was the "Rhomberg" test, in which McGinn stood in a wider stance than instructed, estimated 28 seconds as the passage of 30 seconds, and swayed slightly. Binkerd opined that this performance "showed signs of impairment." Finally, Binkerd conducted an alphabet test, which he testified showed no signs of impairment.

After conducting the field sobriety tests, Binkerd conducted a preliminary breath test and arrested McGinn. At the jail, Binkerd advised McGinn of a postarrest chemical test advisement form, which McGinn signed, explaining the use of a DataMaster test by the State. While explaining the DataMaster test, McGinn asked Binkerd about getting a blood test and Binkerd informed him that the State was no longer using blood tests due to a 2016 U.S. Supreme Court opinion[1] but that Nebraska statute allows McGinn a second test at his own expense.[2] Binkerd administered the DataMaster test, which indicated an alcohol concentration of .128 grams per 210 liters of breath.

After the DataMaster test, McGinn brought up his right to a second test and requested a blood draw. Binkerd was unclear how *Birchfield* affected a request for a secondary test and called his supervisor, Parks, for clarification. After that call, Binkerd informed McGinn that the sheriff's office no longer dealt with blood tests regardless of whether it was for the State's test or a secondary test. Instead, Binkerd instructed McGinn that any requested secondary test would have to be a breath test taken on the same DataMaster used for the officer-directed test. Binkerd testified that McGinn made a telephone call at some point after the DataMaster test and that he was

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[1] See *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

[2] See § 60-6,199.

booked; however, there was no indication that the call was made to a physician.

McGinn renewed his objection to the testimony and evidence concerning the breath test results on the grounds asserted during him motion to suppress. The court overruled McGinn's objection, stating that "law enforcement cannot hamper a motorist's efforts to obtain independent testing, but they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test [and] under no duty to transport the defendant anywhere to secure that independent testing."

The county court found McGinn guilty of driving under the influence, second offense, and sentenced McGinn to 10 days in jail, a $500 fine, an 18-month suspension of his driver's license, and 12 months' probation.

Appeal to District Court

McGinn appealed his conviction to the district court. As the district court noted in its subsequent decision, the main issue raised by the appeal involved § 60-6,199 and whether Binkerd refused to permit the additional test as provided. The court noted that the parties did not dispute the relevant evidence: that Binkerd directed McGinn to submit to a breath test, that McGinn submitted to the test, that McGinn requested a separate blood test, and that the separate blood test was not obtained.

The district court first determined the county court was correct in finding the State need not assist a motorist in obtaining a second test. However, the district court explained that the county court failed to answer the question of whether Binkerd refused to permit the additional test when such a refusal is prohibited by § 60-6,199. Noting that Binkerd instructed McGinn that any secondary test would have to be on the same DataMaster used for the officer-directed test, the district court found Binkerd had refused to permit the additional test requested by McGinn. Therefore, the district court found the original test and the results thereof were not competent

evidence and determined that the county court erred in admitting such evidence.

Having determined the breath test evidence was inadmissible and could not be the basis for McGinn's conviction, the district court considered whether the remaining evidence was sufficient to support the county court's guilty verdict. The district court noted Binkerd's testimony that McGinn had been speeding, McGinn appeared distracted and was having difficulty providing the vehicle registration, an odor of alcohol was emitting from McGinn's vehicle, McGinn admitted to drinking alcohol, and McGinn's results from the field sobriety tests indicated to Binkerd that McGinn was intoxicated. The court then concluded that the "evidence was sufficient for the court to find [McGinn] guilty of driving under the influence" and affirmed the county court's conviction.

ASSIGNMENTS OF ERROR

McGinn assigns the district court erred in sustaining the county court's conviction after determining the breath test evidence was inadmissible.

STANDARD OF REVIEW

[1-5] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.[3] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[4] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[5] But we independently review questions of law

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[3] *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

[4] *Id.*

[5] *Id.*

in appeals from the county court.[6] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court.[7]

[6] 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.[8]

ANALYSIS

We first note the State's brief spends a substantial portion of its argument discussing the admissibility of the breath test evidence. However, the district court determined that the breath test was inadmissible due to a violation of § 60-6,199 and that the State has not cross-appealed and has not assigned as error that determination. At oral argument, the State contended that they did not need to appeal the district court's admissibility determination, because the district court ultimately affirmed McGinn's conviction on other grounds.

[7,8] Under Neb. Rev. Stat. § 25-2733(3) (Reissue 2016), the judgment of the district court vacates the judgment in the county court and thus only the district court's judgment is reviewable by this court. Our holding in *State v. Thalken*[9] articulated the State's right to appeal a decision of the district court sitting as an intermediate court of appeals. As a result, the State has not preserved the purported error committed by the district court. As we have previously stated, an appellate court does not consider errors which are argued but not assigned.[10]

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[6] *Id.*

[7] *Id.*

[8] *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017).

[9] *Thalken, supra* note 3.

[10] *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017).

[9] Additionally, we have held that an appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.[11] Thus, the sole issue on appeal is whether the district court erred in affirming the county court's conviction after determining the county court erred in admitting the breath test evidence.

We now turn to the remaining issue decided by the district court regarding the sufficiency of the evidence to sustain McGinn's conviction. The district court noted that under § 60-6,196, there are three ways to prove driving under the influence: namely, § 60-6,196(1)(a) while under the influence of alcoholic liquor or any drug; § 60-6,196(1)(b) when such person has a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood; or § 60-6,196(1)(c) when such person has a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his or her breath. The court went on to hold that because the breath test was inadmissible and there was no blood test completed, the only remaining basis to prove a violation was under § 60-6,196(1)(a).

The district court noted that Binkerd testified he stopped McGinn around 11:30 p.m. for speeding, there was an odor of alcohol coming from McGinn's vehicle, and McGinn admitted to drinking. Binkerd further testified that McGinn "was nervous, anxious, fast talking"; struggled to find his vehicle registration; repeated questions; and indicated intoxication during field sobriety testing. As a result, the district court found the evidence sufficient that a rational trier of fact could have determined McGinn had driven while under the influence of alcohol, in violation of § 60-6,196(1)(a).

[10] The district court is correct that a driving under the influence offense can generally be shown either by evidence

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[11] See, e.g., *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

of physical impairment and well-known indicia of intoxication or simply by excessive alcohol content shown through a chemical test.[12] However, in this matter, though the complaint charged McGinn with driving under the influence of alcohol, second offense, in violation of § 60-6,196, it did not state which subsection it was alleging. Further, the complaint alleges that McGinn

> operate[d] or ha[d] actual physical control of a motor vehicle while under the influence of alcoholic liquor when he/she had a concentration of .08 grams or more by weight of alcohol per 210 ml of his/her breath, but less than .150 grams by weight of alcohol per 210 ml of his/her breath.

This allegation utilizes the language from § 60-6,196(1)(a) and (c). However, it fails to include the conjunction "or" to clarify both specific allegations are being alleged. The State conceded that the lack of such conjunction results in only a § 60-6,196(1)(c) allegation being made in the complaint. This issue was not raised by the State at trial or in McGinn's appeal either to the district court or to this court. It was first raised by the State during oral arguments and is properly before this court as part of our analysis as to the sufficiency of the remaining evidence.

Without considering the breath test evidence, the record is insufficient to support a determination that McGinn operated or had actual physical control of his vehicle while he had a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his breath. The only other relevant evidence received on this issue was observational testimony which would have gone to a claim under § 60-6,196(1)(a). As discussed above, the charge against McGinn was under § 60-6,196(1)(c), and there was no other evidence on McGinn's breath alcohol content. Accordingly, the judgment of the district court was in error.

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[12] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[11,12] Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict.[13] If it was not, then double jeopardy forbids a remand for a new trial.[14] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[15]

In this matter, because insufficient evidence was offered to prove a violation of § 60-6,196 as charged, double jeopardy forbids a remand for a new trial. Therefore, in consideration of all of the above, we reverse the district court's decision affirming the county court's conviction and remand the cause to the district court with directions to remand the matter to the county court with directions to dismiss.

CONCLUSION

The district court erred in affirming the county court's conviction of McGinn for driving under the influence, second offense. Specifically, the county court's consideration of the breath test evidence, which the district court found inadmissible, was not harmless error. Accordingly, we reverse the district court's decision affirming the county court's conviction and determine double jeopardy requires dismissal of this action.

Reversed and remanded with directions.

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[13] *State v. Merchant*, 288 Neb. 440, 848 N.W.2d 630 (2014).

[14] *Id.*

[15] *Id.*

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

In re Guardianship and Conservatorship of Alice H., an incapacitated and protected person. Jodie Haferbier McGill, Successor Guardian and Conservator, appellee, v. Douglas County, Nebraska, appellant.

927 N.W.2d 787

Filed May 24, 2019. No. S-18-780.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Courts: Jurisdiction.** Under Neb. Rev. Stat. § 25-2720.01 (Reissue 2016), county courts have the power to vacate or modify their own judgments and orders during or after the term in which they were made in the same manner as provided for district courts.
4. **Guardians and Conservators: Counties: Attorney Fees: Costs.** Under Neb. Rev. Stat. § 30-2620.01 (Reissue 2016), a court may order the county to pay the reasonable fees and costs of an attorney appointed by the court for the incapacitated person, but only if the incapacitated person does not possess an estate.
5. ____: ____: ____: ____. Under Neb. Rev. Stat. § 30-2643 (Reissue 2106) a court may order the county to pay the reasonable fees and costs of an attorney appointed by the court for the protected person, but only if the protected person does not possess an estate.

Appeal from the County Court for Douglas County: Marcena M. Hendrix, Judge. Affirmed in part, and in part reversed.

Donald W. Kleine, Douglas County Attorney, Timothy K. Dolan, and Tess M. Moyer for appellant.

No appearance for appellee.

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

Stacy, J.

In 2016, the county court for Douglas County surcharged a former guardian-conservator and ordered her to pay, among other things, $37,505.70 in attorney fees to the successor guardian-conservator. The former guardian-conservator paid only a portion of the attorney fees, and in 2018, the successor guardian-conservator asked the court to order Douglas County to pay the balance. The court granted that request, and Douglas County appeals. Because the record contains no evidence that the ward did not possess an estate from which the attorney fees could be paid, we reverse that portion of the order.

BACKGROUND

In 2007, a guardianship-conservatorship was established for Alice H. (the ward) in Douglas County. The ward's adult daughter, Pamela Grimes, was appointed her guardian-conservator.

In 2012, the court was notified that Grimes had not been paying the ward's nursing home bills and had refused to sell the ward's home, which had become infested with bugs. The nursing home sought the appointment of a nonfamily member to serve as guardian-conservator for the ward. A hearing was held, and the court appointed attorney Jodie Haferbier McGill to serve as the ward's guardian-conservator.

Application for Surcharge

After her appointment, McGill filed an application for surcharge, alleging Grimes had misappropriated the ward's funds. The application alleged that $ 26,914.91 of the ward's funds were "unaccounted for" and sought to have Grimes surcharged "in an amount that the Court deems appropriate." The application also sought an award of attorney fees.

An evidentiary hearing on the application was held on February 19, 2016. Grimes appeared pro se, and McGill represented herself. McGill offered into evidence an affidavit in which she averred that she spent 20.5 hours initiating and prosecuting the surcharge action, at a rate of either $180 per hour for an attorney or $60 per hour for an assistant, for a total of $2,360. At the hearing, however, McGill also indicated she planned to amend her affidavit "to include the unpaid amount for my attorney's fees for acting as guardian/conservator."

McGill filed such an amended affidavit on March 8, 2016. The amended affidavit itemized all the time McGill had spent on the case in her capacity as a guardian-conservator, averring she spent 219.36 hours at an hourly rate of $180 for an attorney or $60 for an assistant, for a total of $37,252.20, plus costs and expenses of $253.50. The amended affidavit included the 20.5 hours McGill attributed in her earlier affidavit to initiating and prosecuting the surcharge action.

On March 9, 2016, the court entered an order granting the application for surcharge. The court found that Grimes "misappropriated several thousand dollars of the ward's income and assets" and "utilized the ward's bank account for her own personal use." It also found McGill was an attorney who spent time "in furtherance of duties on the legal issues in this matter" at rates that were fair and reasonable. The order directed Grimes to "purchase a prepaid funeral policy for [the ward] as restitution for the misappropriated funds." The order also sustained McGill's amended motion for attorney fees and specifically ordered Grimes to: "Pay the Successor Guardian and Conservator's attorney's fees in the amount of $37,505.70 to . . . McGill. This amount shall accrue interest at the judicial rate of 2.510% until paid in full."

No appeal was taken from this 2016 order.

2018 Application for Approval of Attorney Fees

In March 2018, McGill filed an application and supporting affidavit for approval of attorney fees in the amount of

$2,088 plus costs of $12.57 as "payment for the work done [as guardian-conservator from] March 9, 2017 to February 9, 2018." This was the only relief requested in the application. The supporting affidavit averred that the ward had died and referenced bank assets of $1,768.76 as of February 21. The affidavit sought an order directing the bank assets to be applied toward the $2,088 in attorney fees.

The affidavit also made several additional requests that were unrelated to the motion seeking $2,088 in attorney fees. As relevant to this appeal, the affidavit referenced the court's March 9, 2016, order requiring Grimes to pay McGill's attorney fees, and averred that Grimes had paid only $100 and owed "an outstanding total balance of $42,990.23." The affidavit requested that Douglas County be ordered to pay the balance of the attorney fee award at the reduced hourly rate of $60 per hour for a total of $15,160.64, but also asked that "Grimes be liable for any and all unpaid portions of the total balance of the account." In an amended affidavit, McGill asked that the "balance of the order entered on March 9, 2016" be paid by Douglas County "at the reduced rate of $80 per hour for a total of $15,725.60."

At a hearing on June 22, 2018, the county court took up several matters, including McGill's application for approval of attorney fees, and a separately filed motion to terminate the guardianship which is not in our record. Douglas County appeared at the hearing to oppose McGill's request that the county be ordered to pay the balance of the attorney fees previously taxed to Grimes. After the hearing, the county court entered two orders. The first order was filed the same day as the hearing, and the second was filed approximately 1 week later.

In its first order, the "Douglas County Court Fund" was ordered to pay two sums: (1) "[g]uardian fees in the amount of $1,923.57" and (2) "the balance of the order entered March 9, 2016 in the amount of $17,649.17 . . . for prior Guardian Fees and expenses incurred by . . . McGill in her duties as Guardian

of [the ward]." The second order, entered June 29, terminated the guardianship-conservatorship, approved the final accounting, and ordered the "Douglas County Court" to pay two sums: (1) attorney fees of $1,923.57 for McGill's "current fees" and (2) prior attorney fees and expenses in the sum of $15,725.60. Additionally, the court ordered that $1,768.76 was "to be paid from [the ward's] American National Bank trust account" to McGill.

Motions to Alter or Amend

On June 27, 2018, Douglas County filed a motion to alter or amend the June 22 order and filed an amended motion the next day. The county did not ever seek to alter or amend the order entered June 29.

As to the order of June 22, 2018, Douglas County asked the court to amend the requirement that Douglas County "pay the Successor Guardian and Conservator the balance of an earlier order entered March 9, 2016 (said balance totaling $17,649.17)." The county argued the fees had been assessed against Grimes due to her misappropriation of the ward's funds and claimed it would violate public policy to require the county to expend taxpayer funds to indemnify Grimes for her private misconduct. Douglas County did not challenge the June 22 order to the extent it required Douglas County to pay the guardian-conservator's "current fees" in the amount of $1,923.57.

On July 11, 2018, a hearing was held on the motions to alter or amend. No evidence was adduced. Douglas County argued that although the March 2016 order had not cited any statutory authority for ordering Grimes to pay McGill's attorney fees, the court likely relied on Neb. Rev. Stat. § 30-2658(b) (Reissue 2016). That statute provides in relevant part that a conservator is individually liable for torts committed in the course of administration of the estate if he or she is personally at fault. Douglas County argued that by assessing a surcharge in March 2016, the court found Grimes was individually liable

for the amount surcharged. The county's argument characterized the entire $37,505.70 judgment against Grimes as relating to the time McGill spent investigating and prosecuting Grimes' misappropriation.

On July 27, 2018, the court entered an order granting, in part, the county's motions, and amending its prior order "to the extent that the Guardian's hourly rate is reduced to $50.00 per hour. It is further ordered that Douglas County Court pay . . . McGill $10,968.00."

On August 8, 2018, Douglas County filed a notice purporting to appeal from the court's orders of June 22 and July 27. We moved this case to our docket on our own motion. McGill has not filed a brief or otherwise participated in this appeal.

ASSIGNMENTS OF ERROR

Douglas County assigns, restated, that the county court erred in (1) modifying its 2016 order 2 years after issuing it and (2) ordering Douglas County to assume Grimes' personal liability for paying McGill's attorney fees.

STANDARD OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record in the county court.[1] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

ANALYSIS

As a threshold matter, we note that although Douglas County seeks to appeal from the orders of June 22 and July 27, 2018, the order of June 22 was effectively superseded by the order of

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[1] *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015).

[2] *Id.*

June 29. We thus focus our analysis on the final order of July 27, which purported to modify the order of June 29.

2016 Order Not Vacated or Modified

[3] Douglas County first argues that the county court's order was improper because it vacated or modified the March 2016 order without legal authority. County courts have the power to vacate or modify their own judgments and orders during or after the term in which they were made in the same manner as provided for district courts.[3] But on this record, we cannot find that when the county court entered its July 27, 2018, order, it also vacated or modified its earlier order of March 2016.

The court's March 2016 order required Grimes to pay McGill attorney fees in the amount of $37,505.70. The court's July 27, 2018, order required Douglas County to pay McGill attorney fees of $10,968 for the same period. Neither the July 27 order nor the June 29 order referenced, expressly or impliedly, the March 2016 order.

Douglas County assumes the July 27, 2018, order sought to modify the March 2016 order, because both orders relate to McGill's attorney fees for the same time period. But the fact that both orders relate to payment of McGill's attorney fees does not compel the conclusion that the latter order vacated or modified the former. Two parties can both be responsible for the same financial obligation,[4] and the record indicates that in 2018, when McGill asked the court to order Douglas County to pay a portion of the 2016 attorney fee award, she expressly asked that Grimes also remain liable.

On this record, we find no merit to Douglas County's contention that the order of July 27, 2018, vacated or modified

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[3] See *In re Interest of Luz P. et al.*, 295 Neb. 814, 891 N.W.2d 651 (2017), citing Neb. Rev. Stat. § 25-2720.01 (Reissue 2016).

[4] See, generally, *Cano v. Walker*, 297 Neb. 580, 901 N.W.2d 251 (2017).

the March 2016 order, and we proceed to the consideration of whether the July 27 order conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable.[5]

No Personal Liability Shifted

Douglas County argues it would violate public policy to make the county pay sums the court previously ordered Grimes to pay individually because of her wrongful conduct. This argument is premised on the county's assumption, expressed repeatedly before the county court and in its briefing to this court, that the $37,505.70 in attorney fees Grimes was ordered to pay in the March 2016 order is related to time McGill spent investigating and prosecuting the surcharge action.

But the record here, specifically the affidavits submitted by McGill at the time the surcharge action was tried, does not support Douglas County's assumption that the $37,505.70 in attorney fees was attributable to Grimes' misappropriation. To the contrary, the record shows the actual attorney fees incurred by McGill in investigating and prosecuting the surcharge were approximately $2,300, and the remainder of the $37,505.70 in fees was incurred by McGill during the course of performing her regular duties as the ward's guardian and conservator.

Because the record does not support Douglas County's contention that the $37,505.70 in attorney fees was incurred as a result of investigating or proving Grimes' misconduct, there is no merit to the related argument that it would therefore violate public policy to require Douglas County to pay a portion of those fees.

Order to Pay Fees Was Improper Without Evidence

The court entered three separate orders directing Douglas County to pay McGill's attorney fees, and none cited any

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[5] *In re Guardianship & Conservatorship of Barnhart, supra* note 1.

authority for doing so. Our review of the relevant authority indicates two statutes under which the county may be ordered to pay such fees. The first is Neb. Rev. Stat. § 30-2620.01 (Reissue 2016), which applies in guardianship proceedings for incapacitated persons and provides in relevant part:

> The reasonable fees and costs of an attorney, a guardian ad litem, a physician, and a visitor appointed by the court for the person alleged to be incapacitated shall be allowed, disallowed, or adjusted by the court and may be paid from the estate of the ward if the ward possesses an estate or, if not, shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action.

The second is Neb. Rev. Stat. § 30-2643 (Reissue 2016), which applies in conservatorship proceedings and provides in relevant part:

> The reasonable fees and costs of an attorney, a guardian ad litem, a physician, a conservator, a special conservator, and a visitor appointed by the court for the person to be protected shall be allowed, disallowed, or adjusted by the court and may be paid from the estate of the protected person if the protected person possesses an estate or, if not, shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action.

These statutes authorize a court to "allow[], disallow[], or adjust[]" the payment of "reasonable fees and costs" of an attorney appointed by the court for an incapacitated person in guardianship proceedings or for a protected person in conservatorship proceedings.[6] However, both statutes provide that if the incapacitated person or protected person "possesses an estate," the fees "may be paid from the estate."[7] And both statutes provide that if the incapacitated person or protected person

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[6] §§ 30-2620.01 and 30-2643.

[7] *Id.*

does not possess an estate, then the fees and costs "shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action."[8]

[4,5] Under either statute, then, the county can be ordered to pay reasonable attorney fees only if the incapacitated person or protected person does not possess an estate. But in the instant guardianship-conservatorship proceeding, the record on appeal contains neither findings nor evidence regarding the extent of the ward's estate. There were arguments presented suggesting the ward was indigent, but counsel's arguments are not evidence.[9] And although an affidavit was received averring the ward had a small sum of money in one bank account at the time of her death, this alone is not sufficient for the county court, or for this court, to conclude the ward does not "possess[] an estate" under § 30-2620.01 or § 30-2643.

On this record, we cannot find that either § 30-2620.01 or § 30-2643 provides statutory authority for the court's order directing Douglas County to pay McGill's attorney fees. We have not been directed to any alternative authority or recognized course of procedure to support an order requiring Douglas County to pay McGill's attorney fees, and we therefore cannot find the order of the county court conforms to the law or is supported by competent evidence.

CONCLUSION

On this record, we cannot find the county court's order of July 27, 2018, conformed to the law and was supported by competent evidence to the extent it directed Douglas County to pay McGill's attorney fees. We thus reverse that portion of the order, and in all other respects, the order is affirmed.

Affirmed in part, and in part reversed.

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[8] *Id.*

[9] *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999).

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

Christine W., appellant, v. Trevor W., appellee.

928 N.W.2d 398

Filed May 24, 2019. No. S-18-922.

1. **Jurisdiction: Statutes.** Subject matter jurisdiction and statutory interpretation present questions of law.
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. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
4. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
5. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.
6. **Juvenile Courts: Statutes: Jurisdiction.** A juvenile court is a statutorily created court of limited and special jurisdiction, and it has only the authority which the statutes confer on it.
7. **Courts: Juvenile Courts: Jurisdiction: Parental Rights.** A juvenile court lacks statutory authority under Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2018) to transfer a proceeding back to the district court where: (1) The district court, having subject matter jurisdiction of a modification proceeding under § 42-364(6) in which termination of parental rights has been placed in issue and having personal jurisdiction of the parties to that proceeding, has transferred jurisdiction of the proceeding to the appropriate juvenile court; (2) termination of parental rights remains in issue and unadjudicated in the transferred proceeding; (3) the State is not involved in the proceeding and has not otherwise asserted jurisdiction over the child or children involved in the modification proceeding; and (4) the juvenile court has not otherwise been deprived of jurisdiction.

Appeal from the County Court for Washington County, C. Matthew Samuelson, Judge, on transfer thereto from the District Court for Washington County, John E. Samson, Judge. Judgment of County Court vacated and remanded.

Scott V. Hahn, of Hightower Reff Law, and, on brief, Tosha Rae D. Heavican for appellant.

No appearance for appellee.

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

Cassel, J.

INTRODUCTION

After Trevor W. commenced a modification proceeding in the district court, Christine W. counterclaimed to terminate Trevor's parental rights and obtained an order transferring the proceeding to the county court, sitting as a juvenile court. But when the proceeding reached the juvenile court, it "denie[d]" the transfer and purportedly returned the proceeding to district court. Christine appeals from the juvenile court's order. Because the juvenile court's order purporting to transfer the proceeding back to district court was beyond the juvenile court's statutory authority and void, we vacate that order and remand the cause to the juvenile court for further proceedings consistent with this opinion.

BACKGROUND

Statutory Framework

In order to understand the procedural background of this appeal, the reader needs some familiarity with the statutes concerning jurisdiction of trial courts over the matters at issue: modification of a parenting plan and termination of parental rights. Before setting forth the specific statute controlling the transfer from district court to juvenile court of a proceeding where termination of parental rights has been placed in issue,

we begin by recalling statutes identifying the authority of district, county, and juvenile courts over such matters. We then summarize the specific statute addressing transfer or retention of a district court proceeding where termination of parental rights has been placed in issue.

Under Nebraska's marital dissolution, separation, annulment, custody, and support statutes,[1] a proceeding is commenced by filing a "complaint" in the district court.[2] Consequently, dissolution and custody proceedings begin in the district court.

But another statute[3] authorizes "domestic relations matters,"[4] which includes dissolution and custody proceedings, to be heard by a district court judge or a county court judge.[5] Consistent with that other statute, the statute governing commencement of a marital dissolution and custody proceeding authorizes the proceeding to be heard "by the county court or the district court as provided in section 25-2740."[6]

Despite the procedure allowing selection of a county court judge in a domestic relations matter, the matter remains as a district court proceeding and achieves the same finality as a district court judgment. According to § 25-2740(2), the party shall state in the complaint whether he or she wants the proceeding to be heard by a district court judge or by a county court judge. If the party requests a county court judge, "the county court judge assigned to hear cases in the county in which the matter is filed at the time of the hearing is deemed appointed by the district court and the consent of the county court judge is not required."[7] Where the proceeding is heard by a county court

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[1] Neb. Rev. Stat. §§ 42-347 to 42-381 (Reissue 2016 & Cum. Supp. 2018).

[2] § 42-352.

[3] Neb. Rev. Stat. § 25-2740 (Cum. Supp. 2018).

[4] See § 25-2740(1)(a) (defining "[d]omestic relations matters").

[5] § 25-2740(2).

[6] § 42-352.

[7] § 25-2740(2).

judge, it is "considered a district court proceeding" and "an order or judgment of the county court in a domestic relations matter has the force and effect of a district court judgment."[8]

Section 42-364(6) authorizes modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court. A proceeding to modify a parenting plan is "commenced by filing a complaint to modify."[9] Under §§ 42-348 and 42-351(1), a district court has jurisdiction to adjudicate such actions. But under § 42-348, marital dissolution and custody proceedings "may be transferred to a separate juvenile court or county court sitting as a juvenile court which has acquired jurisdiction pursuant to section 43-2,113."

Neb. Rev. Stat. § 43-2,113(2) (Cum. Supp. 2018) provides that a juvenile court "shall have and exercise jurisdiction . . . with the county court and district court in all matters arising under Chapter 42, article 3, when the care, support, custody, or control of minor children under the age of eighteen years is involved." The statute dictates, "Such cases shall be filed in the county court and district court and may, with the consent of the juvenile judge, be transferred to the trial docket of the separate juvenile court or county court."[10]

Most proceedings seeking termination of parental rights fall within the jurisdiction of the juvenile courts.[11] Such jurisdiction is concurrent with the county court or district court.[12]

With this general framework in mind, we now recite the statute governing retention or transfer of a proceeding where termination of parental rights has been placed in issue—which is the situation in the proceeding before us.

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[8] *Id.*

[9] § 42-364(6).

[10] § 43-2,113(2).

[11] Neb. Rev. Stat. § 43-247(6) (Reissue 2016).

[12] See Neb. Rev. Stat. § 43-246.01(3)(b) (Reissue 2016).

Section 42-364(5) states:

> Whenever termination of parental rights is placed in issue the court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the county court or district court is a more appropriate forum. In making such determination, the court may consider such factors as cost to the parties, undue delay, congestion of trial dockets, and relative resources available for investigative and supervisory assistance. A determination that the county court or district court is a more appropriate forum shall not be a final order for the purpose of enabling an appeal. If no such transfer is made, the court shall conduct the termination of parental rights proceeding as provided in the Nebraska Juvenile Code.

Thus, when termination of parental rights is placed in issue in a district court dissolution and custody modification proceeding, the district court is required to transfer jurisdiction to a juvenile court unless the district court concludes that it is the more appropriate forum.

Although this court[13] and the Nebraska Court of Appeals[14] have only occasionally reviewed proceedings to terminate parental rights which were retained and actually adjudicated in district court, the statutes authorize a district court to do so. Often, the decision to do so may turn on the "relative resources available for investigative and supervisory assistance."[15] Typically, a district court will conclude that where termination

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[13] See, e.g., *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013); *R.D.N. v. T.N.*, 218 Neb. 830, 359 N.W.2d 777 (1984), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[14] See, e.g., *Timothy T. v. Shireen T.*, 16 Neb. App. 142, 741 N.W.2d 452 (2007); *Worm v. Worm*, 6 Neb. App. 241, 573 N.W.2d 148 (1997); *Joyce S. v. Frank S.*, 6 Neb. App. 23, 571 N.W.2d 801 (1997), *disapproved on other grounds, Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998).

[15] § 42-364(5).

of parental rights has been placed in issue, the proceeding should be transferred to the juvenile court under § 42-364(5). With that understanding in place, we turn to the circumstances presented here.

Dissolution of Marriage

The parties are the biological parents of a child born in 2009. In a 2012 decree, the Washington County District Court dissolved the parties' marriage. The decree included a parenting plan. The district court's decree awarded Christine legal and physical custody of the child and provided Trevor with regular parenting time.

Requests for Modification and Termination

In 2018, Trevor filed in the district court a "motion" to modify the parenting plan. His motion noted that he was "incarcerated" and requested, among other things, at least one 30-minute telephone call per week and two visits per month.

Christine responded by filing a counterclaim for termination of Trevor's parental rights under § 43-247(6) and Neb. Rev. Stat. § 43-292(1), (2), and (9) (Reissue 2016). She alleged that in May 2014, the Washington County District Court sentenced Trevor to 25 to 35 years' incarceration following a conviction for four counts of sexual assault in the first degree. Alternatively, Christine asked that the court modify the decree and parenting plan to provide for "no court-ordered parenting time or contact" between Trevor and the child.

Motion to Transfer Jurisdiction

Shortly after a hearing in which the district court expressed doubt that it had jurisdiction to terminate parental rights, Christine moved to transfer "jurisdiction of the above-captioned matter" to the county court for Washington County, acting as a juvenile court. The district court held a hearing on the motion, during which Trevor stated that he had no objection to it. The district court thereafter entered an order transferring the case

to the juvenile court "for all issues pertaining to the minor child herein." The order recited that the juvenile court had consented to the transfer of jurisdiction to juvenile court.

Approximately 2 months later, the juvenile court entered a "Transfer Order," stating that it "does not accept said transfer for lack of subject matter jurisdiction." The order was filed in the district court proceeding and acknowledged that the court had earlier consented to the transfer. But the court stated that it lacked jurisdiction based "upon further review of case law and Neb. Rev. Stat. [§] 43-292.02."

Neb. Rev. Stat. § 43-292.02 (Cum. Supp. 2018) provides:

> (1) A petition shall be filed on behalf of the state to terminate the parental rights of the juvenile's parents or, if such a petition has been filed by another party, the state shall join as a party to the petition, and the state shall concurrently identify, recruit, process, and approve a qualified family for an adoption of the juvenile, if:
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> (a) A juvenile has been in foster care under the responsibility of the state for fifteen or more months of the most recent twenty-two months; or
>
> (b) A court of competent jurisdiction has determined the juvenile to be an abandoned infant or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or committed a felony assault that has resulted in serious bodily injury to the juvenile or another minor child of the parent. For purposes of this subdivision, infant means a child eighteen months of age or younger.
>
> (2) A petition shall not be filed on behalf of the state to terminate the parental rights of the juvenile's parents or, if such a petition has been filed by another party, the state shall not join as a party to the petition if the sole factual

basis for the petition is that (a) the parent or parents of the juvenile are financially unable to provide health care for the juvenile or (b) the parent or parents of the juvenile are incarcerated. The fact that a qualified family for an adoption of the juvenile has been identified, recruited, processed, and approved shall have no bearing on whether parental rights shall be terminated.

(3) The petition is not required to be filed on behalf of the state or if a petition is filed the state shall not be required to join in a petition to terminate parental rights or to concurrently find a qualified family to adopt the juvenile under this section if:

(a) The child is being cared for by a relative;

(b) The Department of Health and Human Services has documented in the case plan or permanency plan, which shall be available for court review, a compelling reason for determining that filing such a petition would not be in the best interests of the juvenile; or

(c) The family of the juvenile has not had a reasonable opportunity to avail themselves of the services deemed necessary in the case plan or permanency plan approved by the court if reasonable efforts to preserve and reunify the family are required under section 43-283.01.

(4) Except as otherwise provided in the Nebraska Indian Child Welfare Act, if a child is conceived by the victim of a sexual assault, a petition for termination of parental rights of the perpetrator shall be granted if such termination is in the best interests of the child and (a) the perpetrator has been convicted of or pled guilty or nolo contendere to sexual assault of the child's birth parent under section 28-319 or 28-320 or a law in another jurisdiction similar to either section 28-319 or 28-320 or (b) the perpetrator has fathered the child or given birth to the child as a result of such sexual assault.

Section 43-292.02 has four main subsections. Generally, each main subsection has a distinct purpose. Subsection (1)

generally establishes circumstances where the State has a duty to seek termination of parental rights. Subsection (2) specifies circumstances where, despite the command of subsection (1), the State shall not seek termination. Subsection (3) identifies situations excusing the State from the mandate of subsection (1). And subsection (4) mandates termination of parental rights in particular circumstances not present here.

In transferring the case back to district court, the juvenile court apparently relied on § 43-292.02(3). The court explained, "In review of [§] 43-292.02(3)([a]), the Court is of the opinion that either [subs]ection (b) or (c) of [§] 43-292.02 must be complied with in conjunction with (3)([a]) of said statute in order to proceed to terminate a parent's parental rights." The order does not cite any particular case law, and it is not clear how or why the juvenile court arrived at this conclusion, particularly given that the State has not been involved in this proceeding in any way. The juvenile court then stated that because it did not believe the statute had been followed, it was transferring the case back to the district court "for further consideration."

Eight days later, Christine filed a notice of appeal in the district court proceeding. We moved the appeal to our docket.[16]

ASSIGNMENT OF ERROR

Christine assigns that the juvenile court erred in denying subject matter jurisdiction based on its application of § 43-292.02(3).

STANDARD OF REVIEW

[1] Subject matter jurisdiction and statutory interpretation present questions of law.[17]

ANALYSIS

[2,3] Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to

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

[17] *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016).

which the proceedings in question belong and to deal with the general subject matter involved.[18] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[19] Here, the juvenile court determined sua sponte that it lacked subject matter jurisdiction.

The juvenile court's conclusion is puzzling, because a clear statutory path seems to dictate otherwise. First, reading § 43-246.01(3)(b) together with § 43-247(6), juvenile courts have concurrent original jurisdiction over "proceedings for termination of parental rights." Second, the district court for Washington County had subject matter jurisdiction of a proceeding seeking to modify a dissolution decree previously entered by that court.[20] Trevor invoked this jurisdiction by filing his complaint to modify (styled as a motion). Christine did likewise by her filings styled as a counterclaim and an amended counterclaim. Third, the district court had personal jurisdiction of the parties to the modification proceeding, who both appeared voluntarily.[21] The juvenile court's order does not dispute the district court's jurisdiction of the modification proceeding or that termination of parental rights was placed in issue in that proceeding. Fourth, the district court transferred jurisdiction to the county court for Washington County, sitting as a juvenile court, pursuant to § 42-364(5). Under the Nebraska Juvenile Code[22] as applied to Washington County, a "[j]uvenile court" means "the county court sitting as a juvenile court."[23] Thus, the jurisdictional path ran from the district court to the juvenile court.

Despite the juvenile court's reasoning that it lacked subject matter jurisdiction because of § 43-292.02, the juvenile court

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[18] *Id.*

[19] *Id.*

[20] See §§ 42-351(1) and 42-364(6).

[21] See § 42-355.

[22] Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2016 & Cum. Supp. 2018).

[23] § 43-245(12).

did not dismiss the proceeding. Instead, it purported to transfer the matter back to the district court. In doing so, it exceeded its statutory authority under § 42-364(5).

[4,5] Statutory language is to be given its plain and ordinary meaning.[24] And the intent of the Legislature is expressed by omission as well as by inclusion.[25]

Section 42-364(5) is clear: Where termination of parental rights has been "placed in issue," it empowers a district court (or a county court adjudicating a modification proceeding pursuant to § 25-2740) to "transfer jurisdiction" to a "juvenile court established pursuant to the Nebraska Juvenile Code." Indeed, § 42-364(5) requires the transfer unless the district court concludes that it is the more appropriate forum.

Once jurisdiction has been established in the district court, the transfer to the juvenile court has been made, and termination of parental rights remains in issue, the juvenile court must adjudicate those rights. Section 42-364(5) simply does not authorize a juvenile court to transfer a termination proceeding back to the district court under these circumstances. In doing so, the court exceeded its statutory authority. While there may be circumstances under which authority for a juvenile court to transfer a termination proceeding back to the district court is impliedly authorized under § 42-364(5), they are not present here.

[6] A juvenile court is a statutorily created court of limited and special jurisdiction, and it has only the authority which the statutes confer on it.[26] This applies equally to a county court sitting as a juvenile court.[27]

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[24] See *Patterson v. Metropolitan Util. Dist.*, 302 Neb. 442, 923 N.W.2d 717 (2019).

[25] *Donna G. v. Nebraska Dept. of Health & Human Servs.*, 301 Neb. 838, 920 N.W.2d 668 (2018).

[26] *In re Interest of Josue G.*, 299 Neb. 784, 910 N.W.2d 159 (2018).

[27] See *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011).

[7] We hold that a juvenile court lacks statutory authority under § 42-364(5) to transfer a proceeding back to the district court where: (1) The district court, having subject matter jurisdiction of a modification proceeding under § 42-364(6) in which termination of parental rights has been placed in issue and having personal jurisdiction of the parties to that proceeding, has transferred jurisdiction of the proceeding to the appropriate juvenile court; (2) termination of parental rights remains in issue and unadjudicated in the transferred proceeding; (3) the State is not involved in the proceeding and has not otherwise asserted jurisdiction over the child or children involved in the modification proceeding; and (4) the juvenile court has not otherwise been deprived of jurisdiction. That is the situation here. Accordingly, the juvenile court lacked the statutory authority to transfer to the district court a case which had been transferred to the juvenile court under § 42-364(5). The juvenile court's order doing so was void, and we must vacate the void order.

CONCLUSION

We conclude that the juvenile court acted beyond its statutory authority and that its order, filed in the district court proceeding, was void. We vacate the void order. Because the last order that was not void was the order transferring the proceeding to the juvenile court, that order remains effective but interlocutory. The cause should proceed based upon the district court's order transferring the matter to juvenile court.

In disposing of this appeal, we observe that over a year has elapsed since Trevor filed his motion seeking to modify the parenting time and Christine filed a counterclaim to terminate his parental rights. No relief has been afforded either party. We encourage the juvenile court to focus on the best interests of the child and to move this matter promptly to a final disposition.

Vacated and remanded.

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

State of Nebraska, appellee, v. Eugene T. Cosey, also known as John Lnu, also known as "G," appellant.

927 N.W.2d 822

Filed May 31, 2019. No. S-18-747.

1. **Identification Procedures: Due Process: Appeal and Error.** A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.
2. **Identification Procedures: Police Officers and Sheriffs: Pretrial Procedure.** An identification infected by improper police influence is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.
3. ____: ____: ____. When considering the admissibility of an out-of-court identification, a trial court must first decide whether the police used an unnecessarily suggestive identification procedure. If they did, the court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible.
4. **Identification Procedures.** Reliability is the linchpin in determining the admissibility of identification testimony.
5. ____. To determine the reliability of an out-of-court identification, the trial court must consider, based on the totality of the circumstances, (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and

the confrontation. Against these factors is to be weighed the corrupting influence of the suggestive identification itself.

Appeal from the District Court for Clay County: Vicky L. Johnson, Judge. Affirmed.

Mark Porto, of Porto Law Office, 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.

Heavican, C.J.

INTRODUCTION

Eugene T. Cosey was charged with delivery of a controlled substance, a Class II felony, pursuant to Neb. Rev. Stat. § 28-416 (Reissue 2016). During the course of the proceedings, Cosey repeatedly sought to suppress a confidential informant's identification of him as the person who sold the drugs to the informant, arguing that the identification violated his due process rights. Cosey was convicted following a jury trial in which the informant's identification was admitted. We affirm.

BACKGROUND

On August 2, 2017, Cosey was charged with delivery of a controlled substance. The charge stemmed from an October 17, 2016, alleged narcotics transaction that had occurred between a confidential informant and a man known to the informant only as "G."

On October 17, 2016, the informant was working at his regular job when an acquaintance introduced the informant to a man who sought to sell the informant an amount of methamphetamine. The informant, who has served as a confidential informant for law enforcement since 1999, met with the purported narcotics dealer, identified as G, for approximately

10 to 15 minutes. During the course of the conversation, the informant and G agreed to meet later that day to complete the proposed narcotics sale. The informant then contacted Officer Thomas Hayes, an investigator with the Fillmore County sheriff's office, to arrange to have the drug transaction recorded by law enforcement.

At approximately 4 p.m. on October 17, 2016, the informant again met with G, this time in Sutton, Nebraska. Hayes was positioned across the street as the informant and G completed the narcotics sale. According to the informant, G was in the informant's vehicle for approximately 3 minutes while the sale of narcotics took place. During that time, the informant was recording audio of the encounter. The informant testified that he made detailed observations of the man that sold him the narcotics, but further indicated that he knew the subject only as "G" or "John."

Following the drug transaction, the informant met with Hayes at another location. At that point, the informant provided Hayes with the methamphetamine he had purchased, along with the unused money and the recording device. The informant was only able to provide Hayes with the name "G" or "John" as the individual who sold him the methamphetamine.

At Hayes' behest, the informant subsequently attempted to conduct a second transaction with G. However, the informant was advised by a woman purporting to be G's girlfriend that G was incarcerated and unable to sell the informant any additional methamphetamine.

In the weeks that followed, Hayes attempted to determine the identity of G. During the course of his efforts, on November 9, 2017, Hayes contacted the police department in Hastings, Nebraska, and inquired whether anyone in the department knew of any person recently arrested going by the moniker "G." The office manager of the Hastings Police Department indicated that Cosey was known to use the moniker "G," but that Cosey had not recently been arrested. The Hastings Police Department provided Hayes with a photograph

of Cosey. Hayes then sent a text message and the photograph to the informant, asking if it was a photograph of G. The informant responded that the photograph provided by Hayes was the man he knew as G.

On August 2, 2017, Cosey was charged with delivery of a controlled substance, a Class II felony.[1] On December 15, Cosey filed an amended motion to suppress seeking, among other things, suppression of the informant's identification of Cosey on the ground that the identification was the result of an unduly suggestive identification procedure utilized by Hayes.

A suppression hearing was held on February 22 and 23, 2018. The district court entered an order finding that the identification procedure was unduly suggestive; however, the court ultimately concluded that the informant's identification was sufficiently reliable to allow it to be admitted into evidence. The court therefore denied Cosey's motion to suppress.

On May 2, 2018, the State filed an amended information charging Cosey with the original charge of delivery of a controlled substance, as well as a habitual criminal enhancement. Following a jury trial, Cosey was found guilty of delivery of a controlled substance. On July 11, the State dismissed the habitual criminal enhancement and Cosey was sentenced to 3 to 5 years' imprisonment.

ASSIGNMENT OF ERROR

Cosey's sole assignment of error is that the district court erred in denying his motion to suppress.

STANDARD OF REVIEW

[1] A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.[2]

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[1] See § 28-416(1)(a) and (2)(a).

[2] *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014).

ANALYSIS

Cosey argues that the district court erred in denying his motion to suppress. Cosey notes that the district court was correct in finding that the photographic identification of Cosey made by the witness was unduly suggestive, a finding that the State neither contests nor concedes. Cosey argues that the district court erred in its conclusion regarding the reliability of the witness' identification as analyzed with the five factors set forth in U.S. Supreme Court precedent.[3] Therefore, Cosey contends, the identification made by the informant should not have been admitted.

[2] The U.S. Supreme Court has noted:

> An identification infected by improper police influence . . . is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is "a very substantial likelihood of irreparable misidentification" . . . the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.[4]

[3] The U.S. Supreme Court has set forth a two-prong test for determining the admissibility of out-of-court identifications. The Court stated that when considering the admissibility of an out-of-court identification, a trial court must first "decide whether the police used an unnecessarily suggestive identification procedure. . . . If they did, the court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore

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[3] See *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). See, also, *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

[4] *Perry v. New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

inadmissible."[5] As is the case here, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.[6]

[4,5] Reliability is the linchpin in determining the admissibility of identification testimony.[7] In *State v. Faust*,[8] we adopted the U.S. Supreme Court's test for determining the admissibility of identification testimony such as the identification in this case. To determine the reliability of an out-of-court identification, the trial court must consider, based on the totality of the circumstances, (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. Against these factors is to be weighed the corrupting influence of the suggestive identification itself.[9]

Applying the two-prong test to this case, we accept for the purpose of this appeal the district court's conclusion that law enforcement's use of a single photograph sent to the witness with the potentially leading question, "'Is this "G"?'" resulted in the identification's being infected by improper police influence. But our analysis does not end there.

We turn to the second prong of the two-prong test and weigh the reliability of the identification against the unduly suggestive acts of law enforcement. We begin by weighing the reliability of the identification, and in doing so, we turn to the five factors discussed above.

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[5] *Id.*, 565 U.S. at 235.

[6] *Manson v. Brathwaite, supra* note 3.

[7] *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005) (citing *Manson v. Brathwaite, supra* note 3). See, also, *Perry v. New Hampshire, supra* note 4.

[8] *State v. Faust, supra* note 7.

[9] *Id.* (citing *Manson v. Brathwaite, supra* note 3; *Neil v. Biggers, supra* note 3).

Opportunity of Witness to View Alleged Criminal at Time of Crime.

Cosey concedes that the informant had a significant opportunity to view G during the course of two meetings that lasted for a combined total of approximately 18 minutes. The evidence presented at the hearing on Cosey's motion to suppress was that the informant was introduced to G through an acquaintance. The informant testified that their introduction and initial meeting lasted for approximately 10 to 15 minutes and that the two were in close proximity to one another.

Later the same day, October 17, 2016, the informant and G met again. Although their second meeting lasted only approximately 3 minutes, the two were again within mere feet of one another. During the course of this meeting, the two exchanged money for narcotics and engaged in a brief discussion. We further note that the second meeting, like the first, occurred during daylight hours when the informant had an uninhibited view.

Witness' Degree of Attention.

During the course of the informant's testimony, he indicated that he had worked as an informant since 1999. The informant testified that throughout the course of his 19-year career, he learned to make concentrated observations of specific details of his surroundings and interactions. Specifically, the informant noted that he was sure to take note of license plates; speech patterns; and physical, as well as clothing, descriptions when interacting with others.

The informant indicated that on October 17, 2016, he was engaging in such concentrated observations. The informant testified that he observed G pull into the area of an ethanol fuels plant in Hastings in a white, four-door Buick. The informant recalled G's being seated in the rear passenger seat of the vehicle and further provided an accurate description of G under the circumstances.

Cosey argues that the informant's attentiveness is "virtually meaningless" considering the delay between the informant's observations on October 17, 2016, and Hayes' presentation of Cosey's photograph on November 9.[10] Cosey argues that the informant's testimony, in which he indicated that he had been provided Cosey's photograph "four days later or so, five days later," calls into question the informant's level of attention, given the fact that he was not presented with Cosey's photograph until 23 days after October 17. Cosey further argues that the informant's inaccuracies with regard to when the informant provided the identification should be viewed in light of the "significant financial incentive" to identify Cosey and "remain in the good graces of . . . Hayes."[11]

While the informant's attention and recollection as to the specific dates and overall timeline of the investigation may be flawed, that lapse does not necessarily translate to a lack of attention with regard to the specific event recalled and described. Additionally, Cosey's claim regarding the informant's recollection of the timetable and his financial incentive calls into question the informant's overall credibility, which was a determination more appropriately considered by the jury.

Based on the record, the informant was not a casual observer. The record demonstrates that through the informant's 19 years of experience, which formed his expertise in information gathering, the informant developed a strategy to coordinate a surveilled narcotics purchase with G. The informant was in close proximity to G during the narcotics transaction; thus, his observation of G was not based on passing glances, but on studied observation. The record further demonstrates that the informant testified he was able to describe, by paying close attention, the environment, background, and physical description of the parties involved in the two

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[10] Brief for appellant at 13.

[11] *Id.* at 14.

transactions; thus, the informant had a high degree of certainty in this case.

Accuracy of His or Her Prior Description of Criminal.

The informant first described to Hayes that G was an African-American male, bald, and 5 feet 8 or 9 inches tall. During the course of the suppression hearing, the informant identified Cosey as G, but noted that G had "gained some weight" since the informant had last seen him on October 17.

Cosey makes two arguments in an attempt to call into question the accuracy of the informant's identification. First, Cosey alleges that the informant had no way of knowing whether G was in fact bald, because the photographs taken by Hayes during the narcotics transaction show G wearing a baseball cap. Second, Cosey argues that the informant misidentified the name of the suspected drug trafficker to Hayes as being "John" and not "G."

Cosey's argument that the informant could not have observed G's hair length and style does not carry much weight. The presence of a baseball cap does not necessarily defeat the ability of the informant to observe G's hair length at some point during the course of their two interactions. The State contends that the photographs depicting G wearing a baseball cap were taken at the second meeting, during the afternoon of October 17, 2016.

As to Cosey's second argument that the informant originally misidentified or misrepresented to Hayes the name of the suspected trafficker, we find this argument disingenuous. In his brief, Cosey argues that the informant "stated that the seller went by the name 'John'" and further contends that Hayes testified almost exclusively that the seller's name was "'John'" rather than "'G.'"[12] However, the record reflects that while Hayes used the name "John" when referring to the seller, Hayes, in fact, noted that he was provided with two names that

[12] *Id.*

the seller was known to use. We find that the informant's prior description was sufficiently accurate.

Level of Certainty Demonstrated at Confrontation.

At the suppression hearing, the informant testified that he had no doubt that the person from whom he purchased drugs was Cosey. The district court, in its order, took note of the level of certainty that the informant had with regard to Cosey's being the person that allegedly sold the contraband. The record reflects that the informant had a high level of certainty in his identification and that the level of certainty did not waver at the confrontation stage.

Time Between Crime and Confrontation.

The first instance of the informant's meeting G and purchasing narcotics occurred on October 17, 2016. Hayes testified that he received the photograph of Cosey on November 9. At that point, the photograph was provided to the informant, who identified it as a photograph of Cosey, or G, the man who sold him the drugs. This initial identification occurred 23 days after the informant observed G.

The suppression hearing where the informant identified Cosey as "G" occurred on February 22, 2018, more than 16 months after the events giving rise to Cosey's arrest. Although this is a significant lapse in time that weighs against allowing the identification, based on the totality of the circumstances, we cannot say that there is a substantial likelihood of irreparable misidentification in this case.[13]

Balancing Test.

Although identifications arising from single-photograph displays may be viewed in general with suspicion, in this case,

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[13] See *Manson v. Brathwaite, supra* note 3 (acknowledging Court's concern regarding lapse of 7 months in *Neil v. Biggers, supra* note 3).

we find little pressure on the witness to acquiesce in the suggestion that such a display entails.[14] Cosey raises a legitimate concern regarding the potential coercive nature of the quid pro quo relationship that often exists between confidential informants and law enforcement; here, that fear is largely alleviated by the fact that the informant has provided reliable information to law enforcement for 19 years and has significant interest in providing accurate information.

Although it plays no part in our *Faust* analysis, the assurance as to the reliability of the identification is hardly undermined by the fact that Cosey was also identified by his acquaintance as the person the acquaintance introduced to the informant.[15] Further, on the voice recording of the narcotics transaction, Cosey's voice was identified by an officer familiar with Cosey's voice and speech patterns.

We cannot say that under all the circumstances of this case there is "'a very substantial likelihood of irreparable misidentification.'"[16] Short of that, such evidence is for the jury to weigh.[17] Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.[18] Under the totality of the circumstances, the identification of Cosey was reliable, even though the confrontation procedure may have been suggestive.

CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

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[14] *Id.* See, also, *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

[15] See *State v. Faust, supra* note 7.

[16] See *Manson v. Brathwaite, supra* note 3, 432 U.S. at 116 (quoting *Simmons v. United States, supra* note 14).

[17] *Id.*

[18] *Id.*

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

Robert M. on behalf of Bella O., a minor child, appellee, v. Danielle O., appellant.

928 N.W.2d 407

Filed May 31, 2019. No. S-18-818.

1. **Protection Orders: Injunction: Appeal and Error.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Cum. Supp. 2018) is analogous to an injunction. Thus, the grant or denial of a protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Protection Orders.** Whether domestic abuse occurred is a threshold issue in determining whether an ex parte protection order should be affirmed; absent abuse as defined by Neb. Rev. Stat. § 42-903 (Cum. Supp. 2018), a protection order may not remain in effect.
3. **Protection Orders: Words and Phrases.** Not only is the recipient or target of a credible threat a "victim" of abuse eligible for a domestic abuse protection order under Neb. Rev. Stat. § 42-924 (Cum. Supp. 2018), so too are those family members for whose safety the target reasonably fears because of the threat.

Appeal from the District Court for Sarpy County: Patricia A. Freeman, County Judge. Affirmed.

Darren J. Pekny and Annie E. Mathews, of Johnson & Pekny, L.L.C., for appellant.

No appearance for appellee.

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

Papik, J.

Danielle O. appeals a domestic abuse protection order obtained by Robert M. on behalf of their daughter, Bella O. Danielle physically attacked two other family members while Bella was present, but did not attack Bella. The trial court determined Danielle's conduct put Bella in fear of bodily injury by means of a credible threat and thus constituted domestic abuse as defined by Neb. Rev. Stat. § 42-903(1)(b) (Cum. Supp. 2018). Although our reasoning differs somewhat from that of the trial court, we nonetheless affirm.

BACKGROUND

Robert and Danielle are the parents of Bella, born in 2007. Robert and Danielle never married. In 2013, a North Dakota court issued an order setting forth Robert's and Danielle's rights and responsibilities concerning Bella. The court granted the parties joint "decision-making responsibilit[ies]" but gave Robert "primary residential responsibility," subject to Danielle's unsupervised parenting time, with the caveat that such parenting time would be supervised if Danielle "has a relapse with regard to alcohol abuse." At the time of these proceedings, Robert lived in Nebraska and Danielle lived in Minnesota. This case arises from an incident that occurred in Minnesota on July 9, 2018, at a duplex Danielle's mother, Nancy O., shared with Danielle's brother, Neill O.

Petition and Ex Parte Domestic Abuse Protection Order.

On July 10, 2018, Robert filed a petition and affidavit to obtain a domestic abuse protection order for Bella against Danielle under Neb. Rev. Stat. § 42-924 (Cum. Supp. 2018). The affidavit alleged that on July 9, Danielle and Bella left the duplex to go to a store but were absent from approximately 6

p.m. to 12 a.m. Nancy was unable to reach Danielle or Bella during that time, even though Bella had a cell phone when she left. Nancy told Robert that Danielle took Bella's cell phone away after Nancy attempted to call and text several times and that Danielle refused to tell Nancy where they were. According to Robert's affidavit, Danielle had only supervised visitation rights and was not permitted to take Bella anywhere without supervision due to Danielle's extensive drug and alcohol abuse and criminal history.

Robert's affidavit stated that Danielle returned to the duplex with Bella when Nancy threatened to call the police. Once there, Danielle assaulted Neill and Nancy in Bella's presence, inflicting multiple injuries on Neill's face and body. Danielle also kicked in a door, breaking it off the frame. Bella called Robert and told him she was scared for her safety and for Nancy's safety and that police were on their way. Danielle was arrested for domestic abuse. According to the affidavit, Bella reported to Robert that Danielle "was believed to be" under the influence of drugs and/or alcohol. Robert expressed fear that Danielle would take Bella and not return her.

The matter was assigned to a county court judge, pursuant to § 42-924(2) and Neb. Rev. Stat. § 25-2740(2) (Cum. Supp. 2018). The trial court issued an ex parte domestic abuse protection order on July 10, 2018, generally enjoining Danielle from in-person contact with Bella and from threatening, restraining, or assaulting her.

Show Cause Hearing.

Danielle requested a hearing to show cause why the protection order should not remain in effect. See Neb. Rev. Stat. § 42-925 (Cum. Supp. 2018). At the show cause hearing, Robert appeared without counsel and the trial court received his petition and affidavit, summarized above.

Danielle also appeared at the show cause hearing and was represented by counsel. She offered a police report concerning the incident. According to the report, when police arrived,

Bella was running out of the house with Nancy behind. They observed Bella holding onto Nancy, crying, and screaming, "'[S]he is hurting my uncle,'" multiple times. Nancy told police that Danielle was inside, damaging things and fighting Neill. In the duplex, police observed an overturned coffee table and Danielle and Neill engaged in a struggle.

Neill reported to police that Danielle had picked Bella up to go shopping at about 6 p.m. Nancy called multiple times, and Danielle repeatedly said they were 45 minutes away. When Danielle and Bella finally returned several hours later, Bella ran inside the duplex to Nancy. Neill confronted Danielle and attempted to block her access to the duplex. A physical struggle ensued, during which Danielle punched and scratched Neill while he tried to get her out of the residence. Neill estimated that the struggle lasted 20 minutes.

Neill said that at some point, Danielle broke open a door and moved upstairs to where Nancy and Bella were. Neill said that Danielle then "swung on" Nancy and was trying to talk to Bella, but Bella was telling her to leave. Neill told police that Danielle was never abusive toward Bella, but also that Bella was "scared" and that Neill instructed Bella to go downstairs. Neill said that after Bella went downstairs, Danielle followed her and began to throw and damage things. Neill again attempted to restrain Danielle, and police arrived shortly thereafter. They observed scratch marks on Neill's left elbow, red marks below his left eye, a small swollen lump above his right eyebrow, and redness around his neck and ear.

Nancy told the police that Neill tried to get Danielle to leave because Bella was crying. Nancy stated that when she observed Neill struggling with Danielle, who was "swinging, and scratching at Neill's face," she locked a door leading to the upstairs. Danielle then kicked in that door, breaking the doorframe, and went to Bella's room. Nancy reported that Bella told Danielle to leave and that Danielle went downstairs,

started a fight with Neill again, and threw some things. Nancy then called the police, and she and Bella ran outside.

Bella told police that prior to the incident at the duplex, she and Danielle went to a store, but then went to other places that Bella did not expect to go. Bella said that when they returned to the duplex, Danielle "got 'really weird'" and began hitting Neill and hitting and kicking Nancy. Bella said she asked Danielle to leave, because Danielle was "scaring her."

According to the police report, Danielle refused to give a statement to police and was arrested for misdemeanor domestic assault. Police noted that Danielle stated her fingers or knuckles were hurt.

Danielle also testified regarding the incident. She stated that on July 9, 2018, she was exercising her court-ordered parenting time with Bella. Danielle testified that when Bella asked to return to the duplex, Danielle took her there. According to Danielle, Bella had access to Danielle's cell phone when she was with Danielle and Danielle gave Bella the cell phone whenever she asked for it.

Danielle provided relatively little testimony about the physical confrontation at the duplex. She did not take issue with the description of the incident in the police report she offered into evidence, and she specifically agreed with the statement in the report attributed to Neill that Danielle was never abusive toward Bella. She also testified that she did not make any threats toward Bella and presented evidence that she was not under the influence of drugs or alcohol at the time of the incident.

Trial Court's Ruling.

At the conclusion of the evidence, the trial court ruled that the protection order would remain in place. In explaining its ruling on the record, the trial court referenced the evidence that Danielle attacked Neill and Nancy and threw objects in Bella's presence and that Bella was scared. It concluded that because Danielle's behavior showed a "pattern of conduct to

suggest a credible threat," the protection order should remain in place. The trial court subsequently entered a written order affirming the ex parte domestic abuse protection order.

Danielle appeals.

ASSIGNMENT OF ERROR

Danielle assigns that the trial court erred in finding that her actions constituted abuse within the meaning of § 42-903.

STANDARD OF REVIEW

[1] A protection order pursuant to § 42-924 is analogous to an injunction. Thus, the grant or denial of a protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Maria A. on behalf of Leslie G. v. Oscar G.*, 301 Neb. 673, 919 N.W.2d 841 (2018).

ANALYSIS

Statutory Background.

[2] Before proceeding to Danielle's arguments, we briefly review the law governing domestic abuse protection orders. Under the Protection from Domestic Abuse Act (the Act), Neb. Rev. Stat. § 42-901 et seq. (Reissue 2016 & Cum. Supp. 2018), "[a]ny victim of domestic abuse" may seek a domestic abuse protection order. § 42-924. Whether domestic abuse occurred is a threshold issue in determining whether an ex parte protection order should be affirmed; absent abuse as defined by § 42-903, a protection order may not remain in effect. § 42-924. See *Maria A. on behalf of Leslie G., supra*. See, also, *Linda N. on behalf of Rebecca N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014).

For purposes of the Act, "[a]buse" is defined by § 42-903(1) as the occurrence of one or more of the following acts "between family or household members":

> (a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;
>
> (b) Placing, by means of credible threat, another person in fear of bodily injury. . . . or
>
> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.

Family or household members include persons related by consanguinity, that is, by blood. See, § 42-903(3); *Zimmerer v. Prudential Ins. Co.*, 150 Neb. 351, 34 N.W.2d 750 (1948).

As noted above, the trial court found that Bella was a victim of abuse by determining that Danielle placed Bella in fear of bodily injury by means of a credible threat. The Act defines "credible threat" as follows:

> [C]redible threat means a verbal or written threat, including a threat performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct that is made by a person with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family.

§ 42-903(1)(b).

Danielle contends that Robert did not demonstrate that Bella was a victim of a credible threat under § 42-903(1)(b). She contends that the evidence did not show that her conduct was "aimed" at Bella, that Danielle's actions constituted a threat, or that Danielle made "an implied threat through a 'pattern of conduct.'" Brief for appellant at 9.

"Target" of Threat.

We begin with Danielle's position that Bella was not entitled to a protection order because Danielle's conduct was not aimed

at her. On this point, Danielle concedes that she engaged in violent and aggressive behavior toward Neill and Nancy, but contends that none of those actions were directed toward Bella. Danielle asserts that Robert cannot obtain a protection order on Bella's behalf under § 42-903(1)(b) for conduct directed at others.

We agree with Danielle that § 42-903(1)(b) requires a court to determine to whom a threat is directed. In defining "credible threat," the statute provides that the threat must be "made by a person with the apparent ability to carry out the threat so as to cause the person *who is the target of the threat* to reasonably fear for his or her safety or the safety of his or her family." § 42-903(1)(b) (emphasis supplied). As the emphasized language makes clear, credible threats must have a target.

The trial court appeared to conclude that a protection order was justified because Bella was the target of a threat. Danielle disputes that determination, and we acknowledge that evidence that Danielle's actions were directed at Bella is minimal. Neill told police that Danielle was never abusive toward Bella. And while Bella was in the vicinity when Danielle committed acts of violence upon Neill, Nancy, and their property, this record does not show words or actions of Danielle directed at Bella.

[3] That said, we do not believe that § 42-903(1)(b) allows only the target of a credible threat to obtain a protection order. Section 42-903(1)(b) provides that a credible threat includes threats that cause the target to "reasonably fear for his or her safety *or the safety of his or her family*." (Emphasis supplied.) This language contemplates the possibility that a threat will cause the target to fear for the safety of family members. Given this language, we conclude that not only is the recipient or target of a credible threat a "victim" of abuse eligible for a domestic abuse protection order under § 42-924, so too are those family members for whose safety the target reasonably fears because of the threat. Indeed, it would make little sense if a credible threat caused the target to fear for the safety of his or

her family members, but only the target was a victim of abuse eligible to file for a protection order.

Under this view of the statute, Bella did not have to be the target or recipient of a threat in order to be a victim thereof. Bella would also be a victim of a credible threat if Neill or Nancy were the targets of a credible threat that caused them to reasonably fear for Bella's safety and the other elements of a credible threat were present. As we will explain in the sections below, we find that to be the case.

Threat Implied by Pattern of Conduct.

Before explaining our reasoning for finding that Neill and Nancy were the targets of a credible threat that caused them to reasonably fear for Bella's safety, we will address Danielle's argument that she did not make an implied threat via a pattern of conduct. Section 42-903(1)(b) allows for credible threats to take various forms—verbal, written, electronic, implied, or some combination thereof. Here, there is no evidence that Danielle made an explicit threat in this case, be it verbal, written, or electronic, so any threat for purposes of the Act had to have been one that was "implied by a pattern of conduct." See § 42-903(1)(b).

We disagree with Danielle that her conduct did not amount to an implied threat. While "credible threat" is defined in the Act, that definition uses the word "threat." See § 42-903(1)(b). "Threat" is not further defined, so our basic principles of statutory interpretation require us to give the word its plain and ordinary meaning. See *State ex rel. Peterson v. Creative Comm. Promotions*, 302 Neb. 606, 924 N.W.2d 664 (2019). The plain and ordinary meaning of "threat" is a "communication, declaration, or expression of an intention to inflict harm or damage." *Clement v. State*, 309 Ga. App. 376, 379, 710 S.E.2d 590, 592 (2011) (collecting dictionary definitions).

We believe that Danielle's conduct communicated an implied threat under this definition. The evidence in the record,

particularly the police report, shows that after Danielle arrived at the duplex, she struck or attempted to strike both Neill and Nancy, broke open a door, and damaged other property. Notably, Danielle introduced the police report into evidence and did not take issue with accounts of the incident contained therein. This evidence showed that Danielle actually inflicted harm and damage and acted in a manner that suggested she would continue to do so. We believe these actions communicated an intention to inflict harm or damage and thus amounted to a threat.

We also reject Danielle's argument that the threat was not implied by a "pattern of conduct." Brief for appellant at 12. It is Danielle's position that the term "pattern" requires that an implied threat be communicated by multiple acts, but, she argues, the evidence here is of a single incident. *Id.*

The term "pattern" is not defined in the statute, so, again, we must give the word its plain and ordinary meaning. See *State ex rel. Peterson, supra*. We agree with Danielle that the plain language meaning of pattern requires multiple acts. See, *Colorado Ethics Watch v. Gessler*, 363 P.3d 727, 731 (Colo. App. 2013) (quoting Webster's College Dictionary 991 (1991), defining "'[p]attern'" as "'a combination of . . . acts . . . forming a consistent or characteristic arrangement'"); *La Crosse County v. Mark P.*, Nos. 95-3582, 95-3583, 1996 WL 74401 at *3 (Wis. Feb. 22, 1996) (unpublished opinion listed in table at 200 Wis. 2d 245, 546 N.W.2d 888 (1996)) ("[t]he plain meaning of the word 'pattern' refers to an action which occurs more than once"). See, also, Black's Law Dictionary 1308 (10th ed. 2014) (defining "pattern" as "[a] mode of behavior or series of acts that are recognizably consistent").

But while a pattern of conduct cannot be demonstrated by a single act, we do not view Danielle's actions at the duplex as a single act. As we have noted, Danielle directed violent and aggressive behavior at multiple victims in multiple locations in the duplex and she also broke a doorframe and damaged

other property. We believe Danielle's series of actions at the duplex are sufficient to amount to a pattern of conduct.

In reaching this conclusion, we find distinguishable *Knopik v. Hahn*, 25 Neb. App. 157, 902 N.W.2d 716 (2017), a Nebraska Court of Appeals opinion upon which Danielle relies. At issue in *Knopik* was whether the plaintiffs were entitled to a harassment protection order based on a confrontation in which their neighbor used profane and aggressive language and punched one of the plaintiffs over a 10- to 20-minute time period. The Court of Appeals reversed the entry of a harassment protection order. Danielle contends that her actions did not amount to a pattern of conduct under *Knopik*.

Danielle's argument regarding *Knopik* overlooks, however, that the harassment statutes and the credible threat prong of the domestic abuse statute are not identical. In the harassment statutes, "[h]arass" is defined to be a "knowing and willful course of conduct," and "[c]ourse of conduct" is further defined to be a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." Neb. Rev. Stat. § 28-311.02(2)(a) and (b) (Reissue 2016). Furthermore, the harassment statutes explicitly state that they were enacted to deal with "stalking offenses." § 28-311.02(1). In *Knopik*, the Court of Appeals found that the neighbor had not engaged in the "type of stalking offense necessary to support issuance of a harassment protection order." 25 Neb. App. at 164, 902 N.W.2d at 721-22. We do not read *Knopik* to have turned on whether the neighbor engaged in a single or multiple acts and thus do not believe it supports Danielle's argument that she did not engage in a pattern of conduct here.

Reasonable Fear for Safety of Bella.

In addition to finding that Danielle made an implied threat via a pattern of conduct, we find that this threat caused the targets or recipients of the threat—Neill and Nancy—to

reasonably fear for the safety of Bella. Of course, neither Neill nor Nancy testified at the show cause hearing, so we do not have direct evidence on this question. Having reviewed the record, however, we find circumstantial evidence that leads us to find that it is more likely than not that they reasonably feared for Bella's safety. See *Maria A. on behalf of Leslie G. v. Oscar G.*, 301 Neb. 673, 919 N.W.2d 841 (2018) (domestic abuse protection order petitioner must establish abuse by preponderance of evidence).

The police report suggests that after Danielle returned to the duplex with Bella, Neill and Nancy were doing their best to keep Bella away from Danielle. This included Nancy's locking the door to the upstairs area of the duplex only to have Danielle kick the door in and go to speak to Bella. The police report indicates that Bella was scared at this point and that Neill told her to go downstairs. Again, Danielle followed her and began to throw and damage items downstairs. Nancy then ran outside with Bella. In addition to their own apparent attempts to shield Bella from Danielle, Danielle's multiple attempts to approach Bella while engaging in reckless and destructive behavior lead us to find it more likely than not that Neill and Nancy feared for Bella's safety. For the same reasons, we find that it was reasonable for Neill and Nancy to do so.

CONCLUSION

Although we base our analysis on different reasoning, we conclude that the trial court did not err in determining that Bella was a victim of abuse within the meaning of § 42-903. Accordingly, we affirm.

Affirmed.

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

David Weyh, appellee, v. Barry Gottsch, appellant.

929 N.W.2d 40

Filed June 7, 2019. No. S-18-192.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. But an appellate court independently reviews questions of law decided by a lower court.
2. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
3. **Declaratory Judgments: Contracts: Appeal and Error.** 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. When a dispute sounds in contract, the action is to be treated as one at law. An appellate court treats the determination of factual issues in such a declaratory judgment action which was tried without a jury in the same manner as any other action at law; accordingly, the findings of the trial court have the effect of a verdict and will not be set aside unless clearly wrong.
4. **Prejudgment Interest: Appeal and Error.** Awards of prejudgment interest are reviewed de novo.
5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Limitations of Actions: Contracts.** An action upon an oral contract must be brought within 4 years from the date of the event giving rise to the cause of action.
7. **Actions: Contracts: Time: Damages.** A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to.

This is so even though the nature and extent of damages may not be known.

8. **Limitations of Actions.** Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
9. **Contracts: Judgments: Appeal and Error.** The disputed terms of an oral agreement are questions of fact, and in a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
10. **Trial: Witnesses: Evidence: Appeal and Error.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
11. **Trial: Expert Witnesses: Appeal and Error.** Generally, an appellate court reviews a trial court's decision to exclude expert testimony for an abuse of discretion.
12. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
13. **Statutes: Appeal and Error.** When an appellate court construes statutes relating to the same subject matter, it should do so in a manner that maintains a sensible and consistent scheme and gives effect to every statutory provision.
14. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
15. **Prejudgment Interest: Statutes.** Neb. Rev. Stat. §§ 45-103.02 and 45-104 (Reissue 2010) are alternate and independent statutes authorizing the recovery of prejudgment interest.
16. **Prejudgment Interest.** Neb. Rev. Stat. § 45-104 (Reissue 2010) contains no requirement that the claims described therein must also be liquidated in order to recover prejudgment interest.
17. **Judgments: Interest: Time.** Prejudgment interest under Neb. Rev. Stat. § 45-104 (Reissue 2010) ends, and postjudgment interest begins, on the date of entry of judgment.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed as modified.

Molly J. Miller, Patrick J. Sullivan, and Travis M. Jacott, of Adams & Sullivan, P.C., L.L.O., for appellant.

Cathy S. Trent-Vilim, Daniel P. Chesire, Brian J. Brislen, and Adam R. Feeney, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

Stacy, J.

Pursuant to an oral agreement, David Weyh and Barry Gottsch farmed together for approximately 10 years and agreed to share net profits equally. When the farming operation ended and it was time to settle up, a dispute arose and Weyh filed this action seeking to recover his share of the operation's profits. After a bench trial, the district court found that Gottsch owed Weyh $1,214,056.73 in unpaid profits. It also found that Weyh was entitled to prejudgment interest in the amount of $972,582.10 pursuant to Neb. Rev. Stat. § 45-104 (Reissue 2010).

Gottsch appealed, and we granted bypass to address the assignments of error related to recovery of prejudgment interest under Nebraska law. On that issue, Gottsch argues that all requests for prejudgment interest must comply with Neb. Rev. Stat. § 45-103.02 (Reissue 2010), and he contends it was error to award prejudgment interest under § 45-104 without also finding Weyh's claim was liquidated under § 45-103.02(2). Weyh disagrees, and argues §§ 45-103.02(2) and 45-104 provide alternate routes for recovering prejudgment interest. Weyh contends that because his claim is the type of claim enumerated in § 45-104, prejudgment interest was properly awarded.

After examining the statutory language and legislative history of the pertinent statutes, and considering our competing lines of authority on prejudgment interest, we hold that § 45-103.02(2) is not the exclusive means of recovering

prejudgment interest in Nebraska, and we disapprove of prior cases holding otherwise. We clarify that §§ 45-103.02 and 45-104 provide separate and independent means of recovering prejudgment interest, and we hold that when a claim is of the types enumerated in § 45-104, then prejudgment interest may be recovered without regard to whether the claim is liquidated. We thus find no error in applying § 45-104 to award prejudgment interest to Weyh, but we agree with Gottsch there was an error in calculating prejudgment interest. We affirm the judgment as modified.

I. FACTS

In October 2004, Weyh and Gottsch entered into an oral agreement to farm together. They agreed Weyh would provide the labor and manage the day-to-day farming operations. They agreed Gottsch would provide the equipment and some occasional labor and would handle all the financial aspects of the farming operation. They agreed the operation would farm some land owned by Gottsch and some land owned by third parties. They agreed the operation would continue from year to year until one of them decided to end it, and they agreed to share the net profits of the farming operation equally. Their agreement was never reduced to writing.

Weyh and Gottsch farmed together continuously through the 2014 harvest. During that period, Weyh performed work on the farm nearly every day and also hired and supervised additional laborers. Weyh kept a general log of his daily farming activities. He did not take a salary or wage from the farming operation, but Gottsch occasionally provided Weyh with what the parties described as "draws against future profits." Both parties understood those draws were being advanced against Weyh's share of the farming operation's net profits once they finally "settled up." While the farming operation was ongoing, Gottsch and Weyh did not settle up at the end of each farming year. Instead, it was understood that when one or both of them decided to end the farming operation, Gottsch

would provide an accounting and the net profits would then be determined and distributed equally.

Gottsch purchased the planting and harvesting equipment for the farming operation, and he was responsible for marketing the crops and keeping the farming operation's books. All proceeds from the farming operation went into bank accounts controlled exclusively by Gottsch. Gottsch also used these accounts for his personal expenses and for some of his other business endeavors. Gottsch's bookkeeper, Debra Wetzel, maintained the books for the farming operation and for Gottsch's other businesses. After the farming operation ended, Wetzel prepared a profit-and-loss statement for the entire farming operation. While the farming operation was ongoing, there was no formal accounting prepared.

In October 2014, Gottsch notified Weyh he had decided to end the farming operation and it was time to "settle up." Shortly thereafter, Gottsch told Weyh the entire farming operation generated net profits of $1,518,115.65. Gottsch arrived at that figure by expensing to the farming operation, among other things, $1,813,164.15 for accumulated rent on land owned by Gottsch and farmed by the operation, and $144,161.04 for earnings paid to one of Gottsch's employees, Philip Kollars, who sometimes worked for the farming operation. Weyh disputed both these expenses, claiming neither was properly attributed to the farming operation.

1. Complaint

In December 2014, Weyh sued Gottsch in the district court for Sarpy County, Nebraska, seeking to recover his share of the net profits of the farming operation. Weyh's complaint set out the parties' oral agreement and alleged several theories of recovery, including breach of contract. The complaint alleged the farming operation's net profits totaled $3,475,440.70, and Weyh sought to recover half of that amount plus prejudgment interest.

Gottsch's answer admitted he had failed to pay Weyh the agreed upon one-half share of net profits and admitted he was

in possession of money belonging to Weyh. But Gottsch alleged that a profit-and-loss statement had not yet been completed for the 2014 crop year, and further alleged that a final accounting and payment had been "hindered" by Weyh's demands to change the profit-and-loss statement. Gottsch admitted that his "failure to perform his obligations under the contract has damaged [Weyh] in an amount to be determined following a full accounting," but he denied that Weyh was entitled to recover the amount sought in the complaint.

2. Amended Complaint

Eventually, Gottsch provided Weyh a final accounting that included the 2014 crop year. The final accounting showed the entire farming operation generated net profits of $1,079,003.58. Included among the expenses of the farming operation were $2,130,657.21 in rent to Gottsch for land owned by him and farmed by the operation, and $208,452.64 in earnings paid to Kollars.

After Weyh received the final accounting from Gottsch, he amended his complaint to expressly accept the final accounting, with two exceptions: Weyh alleged that neither the $2,130,657.21 in accumulated rent to Gottsch nor the $208,452.64 in earnings paid to Kollars were properly expensed to the farming operation. The amended complaint sought a declaratory judgment to that effect and alleged separate theories of recovery for breach of contract, fraudulent misrepresentation, fraudulent concealment, unjust enrichment/constructive trust, money received and retained, and breach of the implied covenant of good faith and fair dealing. On each theory of recovery, Weyh's amended complaint sought recovery of his one-half share of the net profits plus prejudgment interest.

Gottsch filed an answer to the amended complaint and later was permitted to amend his answer. The amended answer admitted the parties had orally agreed to farm together and had agreed to share equally in the profits and losses of the farming operation. But Gottsch denied that Weyh was entitled

to recover the amount sought in the amended complaint, and he raised several affirmative defenses, including that Weyh's claims were time barred under Neb. Rev. Stat. §§ 25-211 and 25-212 (Reissue 2016).

3. Bench Trial

During the 3-day bench trial, the primary disputes were (1) whether Weyh's claims were time barred and (2) how to treat the two contested expenses: rent to Gottsch and earnings to Kollar. Both parties testified on these issues.

(a) Weyh's Testimony

According to Weyh, he and Gottsch decided to farm together while they were standing on a hillside in 2004. At that time, they agreed Weyh would provide the farm labor and Gottsch would provide the land, the equipment, and the financial management. They agreed to share net profits equally, and they agreed to farm together "until we both decided to quit." Weyh testified they never agreed that Gottsch would be paid cash rent in addition to a share of the profits.

In the fall of 2014, Gottsch told Weyh he was ending the farming operation. After learning this, Weyh demanded a full accounting, and Gottsch agreed it was time to "settle up." Weyh claims Gottsch remarked at the time "I owe you so much money" and suggested that with the all the money he was owed, Weyh could start his own operation if he wanted to continue farming.

Once a final accounting was prepared, Weyh accepted it, with the exception of two expenses: $2,130,657.21 in rent to Gottsch and $208,452.64 in earnings paid to Kollars. According to Weyh, neither of these expenses were properly attributed to the farming operation.

Weyh testified that Gottsch never brought up the topic of rent until 2006, when they met to go over Gottsch's financial notes. During that 2006 meeting, Weyh noticed that Gottsch had listed, as a farm expense, rent to himself on the land he owned. Weyh told Gottsch that was not a proper farm expense

under their agreement, and Gottsch replied that "we'll figure it out." Weyh testified the two did not discuss rent again, and Weyh did not press the issue further. Weyh testified that when he and Gottsch farmed land owned by others, the farming operation entered into written lease agreements for cash rent, and that none of those agreements also included crop share.

Weyh also testified about a hunting operation he and Gottsch entered into in 2005, again pursuant to an oral agreement. Initially, they agreed Gottsch would contribute the property upon which hunts would take place, Weyh would serve as the hunting guide, and they would split net profits equally. Under that initial agreement, Gottsch did not charge rent for the use of his land. Later, they modified the agreement so that Weyh paid Gottsch cash rent for the use of his land, and Weyh retained 100 percent of the profits from the hunts. At no time during the operation of the parties' hunting business did Gottsch receive both cash rent and a share of the profits.

Weyh objected to expensing Kollars' earnings to the farming operation. According to Weyh, Gottsch hired Kollars in 2010 to take care of Gottsch's personal and rental properties, and at that time, Gottsch assured Weyh that Kollars' wages would not come out of the farming operation. Kollars performed work on Gottsch's cars and pool and several of Gottsch's properties. Over time, Gottsch asked Kollars to do maintenance work on some of the farming equipment too. Weyh objected to Kollars' working for the farming operation, as he did not think Kollars' help was needed. At some point, Kollars told Weyh that Gottsch had instructed him to charge at least 50 percent of his time to the farming operation. Weyh objected to that practice because he did not think Kollars was really working for the farm, and Kollars replied, "I only do what I'm told."

(b) Gottsch's Testimony

According to Gottsch, when he and Weyh agreed to farm together, they also agreed that rent on Gottsch's land would be a farm expense. Gottsch did not dispute that he and Weyh

discussed farming together while they were on the hillside in 2004, but he thought the agreement on rent occurred during a later conversation at the "brown shop" sometime before the 2005 planting season. Gottsch admitted that his recollection of that conversation was vague, but he recalled telling Weyh he would "put up all the money and all the equipment" but "I got to charge rent." Gottsch testified that one of the reasons he started farming, and agreed to purchase all the equipment, was that he had sold his share of a family business and wanted to manage his capital gains exposure.

Gottsch testified that after the 2005, 2006, and 2007 crop years, he provided Weyh with some handwritten financial notes that listed, as a farm expense, rent on Gottsch's land. Gottsch did not recall that Weyh ever "confronted" him about including rent as an expense of the farming operation.

Gottsch testified that "just before the lawsuit" was filed, he hired an agronomist to help him set the cash rents for all of the prior farming years. At that time, he also modified the rents for the 2005, 2006, and 2007 crop years. Gottsch admitted that he never discussed the amount of rent with Weyh prior to any crop year and that Weyh had "zero" input on the amount of rent. Gottsch was not aware of any other farming operation where the landowner would get cash rent plus half the crop share, and he admitted it was common to agree in advance on the amount of rent so the farm tenant could decide whether to accept or reject the rent before the crop year. Gottsch admitted Weyh did not have such an opportunity before any of the crop years for which Gottsch was seeking rent.

Regarding the "draws" paid to Weyh, Gottsch testified there was no set schedule, interval, or timeframe for draws. Instead, Weyh would ask for a draw when he needed it and Gottsch would "just round it up to whatever I felt like would be good," because he knew Weyh "had money coming." Gottsch testified that the parties did not take stock of their profits and losses after each crop year and that they never agreed to settle up after each year. Gottsch admitted that he was "terrible

at settling up" and that when he decided to end the farming operation in the fall of 2014, he knew an accounting needed to be done for "the entirety of the operation."

In 2010, Gottsch hired Kollars to perform maintenance and repairs on Gottsch's various properties and vehicles. Gottsch also directed Kollars to do "some" work for the farming operation. When Gottsch informed Weyh that Kollars would be available to help with the farming operation, Weyh disapproved, because "he wanted his guys helping." Gottsch told Kollars to report his time directly to Wetzel, Gottsch's bookkeeper, and he denied that he ever instructed Kollars to attribute a certain amount of his time to the farming operation.

In 2014, Wetzel attributed most of Kollars' time to the farming operation. At trial, Gottsch admitted that was not correct. Gottsch testified that Kollars performed "some" work for the farm in 2014, but Gottsch did not think there was "any way he had that high of a percentage with the farm." Gottsch admitted that, other than what Kollars reported to Wetzel, he had no way of knowing what percentage of Kollars' time was attributable to the farming operation.

(c) Bookkeeper's Testimony

In 2006, Wetzel began keeping the books for Gottsch's personal and business entities, including those related to the farming operation. Wetzel did not keep separate accounts for the farming operation and Gottsch's personal and other business affairs; all of Gottsch's financial information went into a single account for bookkeeping purposes, with separate classifications. Using a business software application, Wetzel would, as much as possible, enter "farm" expenses contemporaneously as they occurred. Sometimes she was provided information on expenses from Gottsch, and other times from Weyh. Wetzel described Weyh's recordkeeping practices as "pretty detailed" and Gottsch's as "[p]retty bad."

Wetzel testified that while the farming operation was ongoing, Gottsch never asked her to include rent on his land as a farm expense. It was not until the farming operation ended in

2014 that Gottsch made such a request, and at that time, he told Wetzel that when she prepared the final accounting, rent on the land he owned "needed to be part of that equation." In response, Wetzel made a list of all the property Gottsch owned "so he could establish what he wanted to charge for rent." Wetzel testified that after she prepared the accounting in early 2015, Gottsch was still "adjusting the rents that he thought he should charge on properties he owned."

According to Wetzel, Kollars began working for Gottsch in 2010 and all of Kollars' W-2 wage and tax statements listed Gottsch as the employer. Kollars was instructed by Gottsch to call or text Wetzel each week to report what percentage of his work was attributable to the farming operation and what percentage was attributable to Gottsch's other personal and business ventures. When Kollars did not contact Wetzel to report his percentages for the week, she would automatically attribute all of Kollars' time to the farming operation.

In 2014, Kollars gave Wetzel no information about how his work should be allocated, so Wetzel attributed all of Kollars' earnings as an expense of the farming operation. Wetzel's records also attributed a portion of Kollars' earnings in 2010 through 2013 to the farming operation, but the records did not include an hourly breakdown, and Wetzel had no personal knowledge of how much time Kollars actually devoted to the farming operation. From 2010 through 2014, the total amount of Kollars' earnings expensed to the farming operation was $208,452.64.

4. District Court's Findings

(a) Claims Not Time Barred

The district court rejected Gottsch's contention that any of Weyh's claims were time barred. It found the parties intended the farming operation to be ongoing until one or both of them decided to end it, at which time they would settle up and divide net profits equally. The court found that while the farming operation was ongoing, the parties did not distribute "draws" on any regular basis and that there was no agreement to do

so. Nor was there any agreement to settle up after each crop year. The court thus reasoned that Weyh's claim for breach of contract did not accrue until late 2014, because that was the point at which the farming operation ended and it was time to settle up, and Gottsch failed to pay Weyh his share of the net profits. Because Weyh's suit against Gottsch was filed just a few months after the claim accrued, the court found it was not time barred.

(b) Rent to Gottsch

On the issue of rent, the court stated "[t]he crux of the issue" was one of credibility, and it ultimately found "there was no credible evidence that the parties agreed [Gottsch] would charge rent for properties he owned that the farming operation farmed." The court reasoned the parties' course of conduct supported this finding, as it was undisputed that Gottsch unilaterally set the rent amounts for the majority of the farming years after the farming operation had ended and that Gottsch never sought input or agreement from Weyh on rent amounts during the course of the farming operation. The court thus concluded that rent to Gottsch was not part of the parties' oral agreement and, consequently, entered a declaratory judgment that rent to Gottsch was not a proper expense of the farming operation.

(c) Kollars' Earnings

The court found the evidence did not support including Kollars' earnings as a farm expense. First, the court found the parties' oral agreement did not include expensing Kollars' earnings to the farming operation, finding it significant that Gottsch expressly told Weyh that Kollars' time would not be expensed to the farming operation. Additionally, the court found that neither Gottsch nor Wetzel had firsthand knowledge of how much of Kollars' work was actually devoted to the farming operation. That lack of knowledge, combined with admittedly incorrect information in the final accounting, left the court with "no way of knowing how many hours, if any,

. . . Kollars worked for the farming operation, as opposed to for [Gottsch] personally." The court found this failure of proof prevented Gottsch from claiming any portion of Kollars' earnings as a farm expense for any farming year, and entered a declaratory judgment that Kollars' earnings were not properly expensed to the farming operation.

(d) Breach of Contract

The court found that Gottsch breached the parties' oral contract by failing to pay Weyh the full amounts owed to him when the operation ended and by providing an accounting that improperly listed rent to Gottsch and earnings to Kollars as expenses of the farming operation. Using the figures from Gottsch's final accounting that Weyh had accepted, the court found the farming operation's net profits were $3,418,113.45, and concluded Weyh was entitled to half this amount, less sums he had previously taken in "draws" over the years. Ultimately, the court determined Weyh was entitled to damages for breach of contract in the amount of $1,214,056.73. The court also found in Weyh's favor on several other theories of recovery and awarded identical damages under each theory.

(e) Prejudgment Interest

Weyh's original and amended complaints sought prejudgment interest, and in closing argument, Weyh suggested he was entitled to prejudgment interest under either of two theories: because his claim was liquidated under § 45-103.02(2) or because his claim fit within those described in § 45-104. Gottsch opposed an award of prejudgment interest, arguing it was not recoverable either because Weyh's claim was not liquidated or because it would be too difficult to determine the date on which Weyh's entitlement to prejudgment interest accrued.

The district court concluded Weyh was entitled to prejudgment interest "in the amount of 12% per annum under Neb. Rev. Stat. § 45-104" and awarded $972,582.10 in prejudgment interest. The order does not explain how this amount

was calculated, but it is clear the court relied exclusively on § 45-104 in awarding prejudgment interest. It found that Weyh had met his burden of proof under § 45-104 by showing that Gottsch received, into his personal bank account, Weyh's share of the net profits from the farming operation and retained such sums after they should have been paid to Weyh. In addressing prejudgment interest, the court's order did not discuss § 45-103.02(2) or make any findings as to whether Weyh's claim was liquidated or unliquidated.

(f) Appeal and Petition to Bypass

Gottsch timely appealed and moved to bypass the Nebraska Court of Appeals, arguing this case presents an important and unresolved issue of statutory interpretation regarding the recoverability of prejudgment interest under Nebraska law. Weyh agrees, and both parties seek clarification regarding whether all prejudgment interest awards must satisfy § 45-103.02, or whether an award of prejudgment interest may be based only on § 45-104.

In several prior appeals, parties have raised the issue of whether §§ 45-103.02(2) and 45-104 are separate and independent means of obtaining prejudgment interest or whether they are interrelated and, if so, how.[1] But until now, the issue has been presented in cases where the facts did not satisfy one or both statutes and, consequently, the tension between §§ 45-103.02(2) and 45-104 has not been directly addressed by this court.[2] We granted the petition to bypass to address that issue.

II. ASSIGNMENTS OF ERROR

Gottsch assigns, consolidated and restated, that the district court erred in (1) finding the breach of contract claim accrued

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[1] See, *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 825 N.W.2d 779 (2013); *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012); *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009).

[2] See *id.*

when the farming operation ended and was not time barred, (2) finding the parties had not agreed that rent to Gottsch or earnings to Kollars were proper expenses of the farming operation, (3) finding an agreement to charge rent on Gottsch's property would violate the statute of frauds, (4) relying on evidence of the parties' previous hunting operation, (5) excluding expert testimony offered by Gottsch, (6) finding in favor of Weyh on several other theories of recovery, (7) finding Weyh was entitled to prejudgment interest under § 45-104, and (8) improperly calculating prejudgment interest.

III. STANDARD OF REVIEW

[1] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[3] But an appellate court independently reviews questions of law decided by a lower court.[4]

[2] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.[5]

[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.[6] When a dispute sounds in contract, the action is to be treated as one at law.[7] An appellate court treats the determination of factual issues in such a declaratory judgment action which was tried without a jury in the same manner as any other action at law; accordingly, the findings of the trial court

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[3] *Donut Holdings v. Risberg*, 294 Neb. 861, 885 N.W.2d 670 (2016).

[4] *Id.*

[5] *Hike v. State*, 297 Neb. 212, 899 N.W.2d 614 (2017).

[6] *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[7] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

have the effect of a verdict and will not be set aside unless clearly wrong.[8]

[4] Awards of prejudgment interest are reviewed de novo.[9]

[5] Statutory interpretation presents a question of law on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[10]

IV. ANALYSIS

1. Preliminary Issues

In addition to finding in favor of Weyh on the theory of breach of contract, the court found in Weyh's favor on several other theories and awarded identical damages under each. Gottsch's sixth assignment of error challenges the district court's findings with respect to the alternate theories of recovery, but it is not necessary to address that assignment, because, as we explain below, we affirm the district court's judgment on the breach of contract theory.[11] When addressing Gottsch's remaining assignments of error, we focus our analysis on the breach of contract theory.

2. Statute of Limitations for Breach of Contract

[6-8] An action upon an oral contract must be brought within 4 years from the date of the event giving rise to the cause of action.[12] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the

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[8] See *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989).

[9] *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

[10] *Diamond v. State*, 302 Neb. 892, 926 N.W.2d 71 (2019).

[11] See *Woodmen of the World v. Nebraska Dept. of Rev.*, 299 Neb. 43, 907 N.W.2d 1 (2018) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

[12] Neb. Rev. Stat. § 25-206 (Reissue 2016).

decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.[13] A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. This is so even though the nature and extent of damages may not be known.[14] Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.[15]

Here, the district court found that Weyh's breach of contract claim accrued in late 2014 when the parties ended the farming operation, it was time to settle up, and Gottsch failed to pay Weyh his share of the net profits.

Gottsch argues the district court erred when it found Weyh's breach of contract claim was not time barred. He suggests that Weyh's cause of action for breach of contract accrued as early as 2006, when Gottsch provided Weyh the handwritten financial notes that included rent to Gottsch as a farm expense and arguably breached their oral agreement. Alternatively, he suggests that Weyh's claim accrued as early as 2008, when Weyh first requested an accounting and did not receive it. Gottsch argues that either or both of these events triggered the statute of limitations and that because Weyh did not file suit until 2014, his claim for breach of contract is time barred.

Gottsch's arguments presume that the parties' oral agreement (1) required Gottsch to perform an accounting after each farming year or whenever requested by Weyh and (2) required the parties, each year, to distribute net profits based on such accounting. But this characterization of the parties' agreement is not supported by either the record or the district court's factual findings.

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[13] *Hike, supra* note 5.

[14] *Irving F. Jensen Co. v. State*, 272 Neb. 162, 719 N.W.2d 716 (2006).

[15] *Id.*

The court found the parties agreed to continue farming until one of them decided to end the operation, and it found their agreement did not require them to settle up at the end of each crop year. Implicit in these findings is recognition that the parties agreed to farm on a running account and to settle up when the operation ended. Substantial evidence in the record supports these findings, and we conclude they are not clearly wrong.

Because the parties' agreement did not require Gottsch to provide a yearly accounting or to distribute net profits after each crop year while the farming operation was ongoing, the district court did not err in finding Weyh's cause of action for breach of contract accrued in late 2014 when the farming operation ended and Weyh demanded a final accounting and payment of his share of the profits. Shortly thereafter, when Gottsch provided an accounting that included expenses Weyh claimed were outside their agreement, and then failed to pay Weyh the profits he was owed, Weyh's claim for breach of the oral contract accrued and the limitations period began to run. Weyh filed this action in December 2014, well within the applicable statute of limitations. Gottsch's first assignment of error is without merit.

3. Rent to Gottsch

Gottsch's second, third, fourth, and fifth assignments of error each pertain to the trial court's finding that the parties' oral agreement did not include rent to Gottsch. We find no merit to any of these assignments.

(a) Rent to Gottsch Not Part of Oral Agreement

[9,10] The disputed terms of an oral agreement are questions of fact,[16] and in a bench trial of a law action, the trial court's

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[16] See, *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005); *Edward Peterson Co. v. Ulysses S. Schlueter Constr. Co.*, 179 Neb. 883, 140 N.W.2d 830 (1966) (where evidence as to terms of oral contract is conflicting, it presents question of fact for jury).

factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[17] Additionally, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.[18]

The district court found no credible evidence the parties had agreed that the farming operation would pay rent to Gottsch on land he owned. Further, the district court found the parties' course of conduct demonstrated there was no agreement to pay rent to Gottsch,[19] noting the evidence was undisputed that (1) Gottsch never asked his bookkeeper to include rent as an expense while the farming operation was ongoing; (2) Gottsch unilaterally set the rent amounts after the crop year, and after the entire farming operation ended, without ever seeking input or agreement from Weyh; and (3) when the farming operation entered into lease agreements with third parties, it agreed to pay cash rent and never agreed to crop share in addition thereto.

Based on these factual findings, the district court entered a declaratory judgment that the parties' oral agreement did not include rent on Gottsch's property and that rent was not a proper expense of the farming operation. To the extent Gottsch's second assignment of error challenges these findings, we conclude they are not clearly wrong and will not be disturbed on appeal.

In his third assignment of error, Gottsch challenges the district court's alternative finding that an oral agreement to pay rent to Gottsch would have violated the statute of frauds. Because we find no error in the district court's finding that rent to Gottsch was not part of the parties' oral agreement, it

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[17] See *Donut Holdings, supra* note 3.

[18] *In re Estate of Etmund*, 297 Neb. 455, 900 N.W.2d 536 (2017).

[19] See, generally, *Tilt-Up Concrete v. Star City/Federal*, 255 Neb. 138, 582 N.W.2d 604 (1998).

is not necessary to address the assignment of error challenging the court's alternative analysis regarding rent.[20]

(b) Evidence of Hunting Operation

In his fourth assignment, Gottsch contends the court erred in considering evidence of the parties' hunting operation. He argues the hunting operation was so different from the farming operation that the court should not have relied on evidence of the hunting operation at all. This is essentially an argument that evidence of the hunting operation was irrelevant and thus inadmissible. But Gottsch did not object to the admission of this evidence at trial and thus has waived that argument.[21]

To the extent Gottsch's argument turns instead on the weight given to such evidence, it also fails. In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.[22] We find no merit to Gottsch's fourth assignment of error.

(c) Exclusion of Expert Testimony

In his fifth assignment of error, Gottsch argues the district court erred in excluding expert testimony from Richard Hickman. Hickman was described as an "expert in the area of land leases" who "does leases and negotiations for farming operations." At trial, Gottsch made an offer of proof that, if permitted, Hickman would have testified that based on his financial calculations, Gottsch was assuming most of the risk of the farming operation, while Weyh assumed very little. Gottsch sought to offer Hickman's testimony to show it was reasonable

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[20] See *Woodmen of the World, supra* note 11.

[21] See, *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010); *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997).

[22] *In re Estate of Etmund, supra* note 18.

for him to include rent to himself as a farm expense. Weyh objected to the admission of Hickman's testimony on grounds it was irrelevant and unduly prejudicial, and the district court excluded the testimony.

[11,12] Generally, an appellate court reviews a trial court's decision to exclude expert testimony for an abuse of discretion.[23] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.[24]

Having reviewed the record, we find no abuse of discretion in excluding Hickman's testimony, whether or not it is characterized as expert testimony. The proffered evidence was cumulative, because the court already had, in the profit-and-loss statement, all the numbers necessary to make the mathematical calculations to which Hickman would have testified if permitted. The exclusion of cumulative evidence is not prejudicial to a litigant and generally is not an abuse of discretion.[25]

Moreover, we find no merit to Gottsch's arguments that exclusion of the evidence resulted in prejudice to him. He argues the evidence was crucial to understanding why rent to him "should be included"[26] in the parties' agreement. But the district court was not tasked with determining what the parties should have agreed to, it was tasked with determining what the parties actually agreed to. We find no merit to Gottsch's fifth assignment of error.

4. Kollars' Earnings

Gottsch's second assignment of error challenges the district court's finding that Kollars' earnings were not a proper

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

[24] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015); *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

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

[26] Brief for appellant at 26.

expense of the farming operation. This factual finding was based in part on evidence that Gottsch expressly told Weyh that Kollars' time would not be expensed to the farming operation, and in part was based on a failure of proof as to how much of Kollars' work was actually devoted to the farming operation during any farming year. As already explained, we will not disturb these factual findings unless they are clearly wrong.[27]

On the record before us, we conclude the district court's findings regarding Kollars' earnings were not clearly wrong. There is no merit to this assignment of error.

5. Award of Prejudgment Interest

In his seventh assignment of error, Gottsch argues the district court erred in awarding Weyh prejudgment interest under § 45-104. In Nebraska, there are two statutes that authorize recovery of prejudgment interest. The first, § 45-104, was enacted in 1879, and the second, § 45-103.02, was enacted in 1986 and amended in 1994.

Since its adoption more than a century ago, § 45-104 has identified four types of claims—all contract based—under which prejudgment interest is allowed. When the Legislature enacted § 45-103.02 in 1986, it expanded the recovery of prejudgment interest to other types of claims too. The proper harmonization of §§ 45-103.02 and 45-104 lies at the center of this assignment of error. We begin with the plain language of each statute.

Section 45-104 provides:

> Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by

[27] See *Donut Holdings, supra* note 3.

unreasonable delay of payment. Unless otherwise agreed or provided by law, each charge with respect to unsettled accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing.

Section 45-103.02 currently provides:

(1) Except as provided in section 45-103.04, interest as provided in section 45-103 shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met:

(a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;

(b) The offer is made not less than ten days prior to the commencement of the trial;

(c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and

(d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

(2) Except as provided in section 45-103.04, interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment.

Weyh's amended complaint sought recovery of prejudgment interest on the breach of contract claim and asked that such interest be calculated from the date his share of the net profits should have been distributed.[28] In his closing argument, Weyh claimed entitlement to prejudgment interest under

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[28] See Neb. Ct. R. Pldg. § 6-1108(a) (when interest on demand for recovery of money is claimed, "the time from which interest is to be computed shall also be stated").

either § 45-103.02(2) or § 45-104. The district court awarded prejudgment interest under § 45-104, reasoning that over the course of the farming operation, Gottsch received Weyh's share of the net proceeds and retained it in his personal bank accounts, and that once the farming operation ended and a final accounting was completed, Gottsch continued to retain Weyh's share of the profits without Weyh's consent. The court did not address § 45-103.02(2) or discuss whether the claim was liquidated.

On appeal, Gottsch contends the district court erred in awarding prejudgment interest under § 45-104. He advances several arguments, all premised on the theory that once § 45-103.02 was enacted, it became the exclusive means to recover prejudgment interest in Nebraska. Alternatively, Gottsch argues that to recover prejudgment interest, Weyh had to prove both that his claim was the type described in § 45-104 and that his claim was liquidated under § 45-103.02.

Weyh, on the other hand, argues that this court has not yet squarely addressed the interplay between §§ 45-103.02(2) and 45-104, and he urges a construction that gives continuing effect to the plain language of both statutes. He asks us to hold that §§ 45-103.02 and 45-104 provide alternate methods for recovering prejudgment interest, and he suggests that nothing in the statutory language or legislative history of § 45-103.02 indicates it was intended to be the exclusive or preferred means for recovering prejudgment interest.

The unresolved tension between §§ 45-103.02(2) and 45-104 is central to the parties' arguments, and they are not the first litigants to grapple with the issue.[29] Resolving that tension requires that we recognize, and reconcile, competing and contradictory lines of authority in our own jurisprudence.

We begin with an overview of our case law on prejudgment interest before the adoption of § 45-103.02. We then discuss

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[29] See, e.g., cases cited *supra* note 1; *Farm & Garden Ctr. v. Kennedy*, 26 Neb. App. 576, 921 N.W.2d 615 (2018) (petition for further review denied January 23, 2019).

the adoption and amendment of § 45-103.02 and consider the relevant legislative history. Finally, after summarizing our more recent cases on prejudgment interest, we address the parties' arguments on the proper construction of §§ 45-103.02 and 45-104.

(a) § 45-104

Long ago, this court observed, "The collection of interest is a statutory right, and did not exist at common law."[30] For more than a century, § 45-104 was the only statute authorizing the recovery of prejudgment interest in Nebraska. Yet, there are surprisingly few appellate decisions construing or analyzing the categories described in § 45-104. In fact, before 1994, most of this court's opinions addressing prejudgment interest did not even mention § 45-104.

During that period, the overwhelming majority of our opinions addressing prejudgment interest focused exclusively on whether the plaintiff had presented a "liquidated claim" as that term was defined by this court, and did not mention § 45-104 at all.[31] Occasionally, our opinions would cite § 45-104 for the applicable interest rate, but would still decide the availability of prejudgment interest by analyzing only whether the claim was

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[30] *Wittenberg v. Mollyneaux*, 59 Neb. 203, 206, 80 N.W. 824, 825 (1899).

[31] See, *A.G.A. Inc. v. First Nat. Bank*, 239 Neb. 74, 474 N.W.2d 655 (1991); *Otto Farms v. First Nat. Bank of York*, 228 Neb. 287, 422 N.W.2d 331 (1988); *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), *overruled on other grounds, First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985); *Land Paving Co. v. D. A. Const. Co.*, 215 Neb. 406, 338 N.W.2d 779 (1983); *Classen v. Becton, Dickinson & Co.*, 214 Neb. 543, 334 N.W.2d 644 (1983); *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977); *Frank McGill, Inc. v. Nucor Corp.*, 195 Neb. 448, 238 N.W.2d 894 (1976); *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 231 N.W.2d 110 (1975); *Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc.*, 189 Neb. 30, 199 N.W.2d 729 (1972); *National Fire Ins. Co. v. Evertson*, 157 Neb. 540, 60 N.W.2d 638 (1953); *McKain v. Platte Valley Public Power and Irrigation District*, 151 Neb. 497, 37 N.W.2d 923 (1949); *Wittenberg, supra* note 30.

liquidated.[32] Because the plain language of § 45-104 has never included the term "liquidated," this line of cases is best understood as having applied a traditional common-law rule allowing the recovery of interest as damages on liquidated claims,[33] rather than applying the statutory categories of § 45-104.

In a second line of cases, we analyzed the availability of prejudgment interest by examining two factors: whether the claim was liquidated and whether the claim fell within one of the categories described in § 45-104.[34] And in a third line of cases, we analyzed the availability of prejudgment interest by applying the categories described in § 45-104 without considering whether the claim was also liquidated.[35]

Until now, we have not discussed or attempted to reconcile these competing lines of authority.

(b) § 45-103.02

In 1986, the Legislature considered two separate bills seeking to establish a method for recovering prejudgment interest in tort cases,[36] but only one bill advanced to general file.[37] As originally introduced, L.B. 298 merely updated the rate of "interest on all decrees and judgments" in Neb. Rev. Stat. § 45-103 (Reissue 1984). In other words, the original

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[32] See, *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989); *Graff v. Burnett*, 226 Neb. 710, 414 N.W.2d 271 (1987); *Bolzer, supra* note 31; *Church of the Holy Spirit v. Bevco*, 215 Neb. 299, 338 N.W.2d 601 (1983); *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982); *Abbott v. Abbott*, 188 Neb. 61, 195 N.W.2d 204 (1972).

[33] See, 1 Dan B. Dobbs, Dobbs Law of Remedies § 3.6(1) (2d ed. 1993); Charles T. McCormick, Handbook on the Law of Damages § 51 (1935).

[34] See, *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987); *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984).

[35] *City of Bellevue v. Western Surety Co.*, 184 Neb. 678, 171 N.W.2d 772 (1969); *Fraser v. Temple*, 173 Neb. 367, 113 N.W.2d 319 (1962); *Murphy v. City of Omaha*, 33 Neb. 402, 50 N.W. 265 (1891).

[36] See 1986 Neb. Laws, L.B. 1232 and L.B. 298.

[37] See L.B. 298, § 3.

bill related only to the rate of postjudgment interest. But it was amended on the floor to authorize recovery of judgment interest *before* the rendition of judgment when certain conditions were met. The amendment passed and was codified at § 45-103.02.

As adopted, § 45-103.02 applied to "all causes of action accruing on or after January 1, 1987" and provided in relevant part:

> [J]udgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
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> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
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> (2) The offer is made not less than ten days prior to the commencement of the trial;
>
> (3) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (4) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.[38]

The legislative history indicates the purpose of § 45-103.02 was to encourage settlement of tort cases by authorizing the recovery of prejudgment interest when a reasonable settlement demand was refused. But the language of § 45-103.02 as originally enacted was quite broad, and in *Knox v. Cook*,[39] this court construed the statutory preconditions in § 45-103.02 to apply to all claims for prejudgment interest.

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[38] *Id.*

[39] *Knox, supra* note 32.

Knox was an action to recover on a personal guaranty for monthly rent payments. In addition to seeking past-due rent payments, the plaintiffs sought prejudgment interest on the basis that their claim was liquidated. This court agreed the claim for past-due rent was liquidated, but in *Knox*, we construed the plain language of § 45-103.02 to govern all claims for prejudgment interest accruing after January 1, 1987, regardless of whether the claim was liquidated or unliquidated. Because the plaintiff had not complied with the preconditions of § 45-103.02, *Knox* reasoned that no prejudgment interest could be recovered on past-due rent accruing after the effective date of § 45-103.02. However, *Knox* allowed the plaintiff to recover prejudgment interest on past-due rent which had accrued during the 13-month period before § 45-103.02 went into effect, citing to our general rule that "'[p]rejudgment interest is allowed where the amount of the claim is liquidated.'"[40]

The dissenting opinion in *Knox*, in which two justices joined, cautioned against construing § 45-103.02 to preclude recovery of prejudgment interest under § 45-104:

> I dissent from that part of the majority opinion that seems to hold that compliance with Neb. Rev. Stat. § 45-103.02 (Reissue 1988) is a prerequisite to the recovery of prejudgment interest in all situations. *Rather, I would hold that the section is an addition to those cases where prejudgment interest is allowed pursuant to Neb. Rev. Stat. § 45-104 (Reissue 1988)*.
>
> The application of the conditions in § 45-103.02, specifically that of a greater recovery than demanded, will result in denial of justified prejudgment interest. If one demands a delinquent payment [in contract] and subsequently sues and recovers a judgment for the delinquent payment, prejudgment interest must be denied, since plaintiff's first offer of settlement is "[not] exceeded by the judgment."

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[40] *Id*. at 394, 446 N.W.2d at 5.

> The result, I submit, is contrary to the plain intent of the statute, i.e., to encourage settlements, not to offer a boon to deadbeats.[41]

Eight years later, the Legislature amended § 45-103.02 via 1994 Neb. Laws, L.B. 1183. Its stated goal in doing so was to overrule *Knox*.[42]

L.B. 1183 sought to overrule *Knox* by creating two subsections: one authorizing prejudgment interest on "unliquidated claims" and the other authorizing prejudgment interest on "liquidated claims." L.B. 1183 did not expressly define either term, but both are well defined in our case law.[43]

Subsection (1) retained all the procedural preconditions of § 45-103.02 as it was originally enacted, but made them applicable only to "unliquidated claims." On such claims, prejudgment interest accrued at the rate established in § 45-103, from the date of the first settlement offer which is exceeded by the judgment to the entry of judgment.

Subsection (2) of § 45-103.02 added new provisions related exclusively to the recovery of prejudgment interest on the unpaid balance of "liquidated claims." On such claims, prejudgment interest accrued "as provided in section 45-104," from the date the cause of action arose to the entry of judgment.

L.B. 1183 did not expressly repeal or amend § 45-104. But Gottsch argues that when the Legislature amended § 45-103.02

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[41] *Id*. at 395-96, 446 N.W.2d at 6 (emphasis supplied) (White, J., dissenting; Boslaugh and Fahrnbruch, JJ., join).

[42] Committee on Banking, Commerce and Insurance Hearing, L.B. 1183, 93d Leg., 2d Sess. 64 (Feb. 8, 1994).

[43] See, e.g., *Brook Valley Ltd. Part., supra* note 1, 285 Neb. at 172-73, 825 N.W.2d at 792 (holding claim is liquidated "when there is no reasonable controversy as to both the amount due and the plaintiff's right to recover"); *Jacob v. Schlictman*, 16 Neb. App. 783, 792-93, 753 N.W.2d 361, 370 (2008) (holding where "reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is considered to be unliquidated").

via L.B. 1183, it intended to establish § 45-103.02 as the exclusive procedure for recovering prejudgment interest in Nebraska. Weyh disagrees and argues that when the Legislature enacted and amended § 45-103.02, it intended to authorize additional ways to recover prejudgment interest, but did not intend to affect the existing method for recovering prejudgment interest under § 45-104. To the extent it informs this debate over legislative intent, we summarize the legislative history of L.B. 1183.[44]

The Committee on Banking, Commerce and Insurance held a hearing on L.B. 1183 in February 1994. During that hearing, senators repeatedly referred to the existing "case law" on the issue of prejudgment interest and liquidated claims, but they made no reference at all to § 45-104 or its statutory categories.[45] Testimony from the committee hearing indicates the Legislature understood the law prior to *Knox* to be "you get prejudgment interest at the statutory rate on liquidated claims."[46] At one point during the committee hearing, an attorney testified that the purpose of the 1994 amendment was to put "in statute what prior to 1986 was in case law."[47] And a senator explained that before 1986, the case law defined what a liquidated claim was, and "we had statutes to set the interest rate."[48]

These comments demonstrate an awareness of the primary line of cases from this court applying a traditional "liquidated claim" standard. However, senators did not mention the statutory categories in § 45-104 or the line of cases applying those

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[44] See *State v. McColery*, 301 Neb. 516, 919 N.W.2d 153 (2018) (appellate court can examine act's legislative history if statute is ambiguous or requires interpretation).

[45] Committee on Banking, Commerce and Insurance Hearing, L.B. 1183, 93d Leg., 2d Sess. 64-71 (Feb. 8, 1994).

[46] *Id.* at 64.

[47] *Id.* at 71.

[48] *Id.* at 67.

categories without analyzing whether the claim was liquidated. The Legislature was clearly aware § 45-104 existed, because it expressly incorporated the interest rate from § 45-104 into § 45-103.02(2). But we see no indication in the legislative history that the Legislature considered the categories in § 45-104 to be relevant to the discussion of prejudgment interest on liquidated claims under § 45-103.02(2).

The Legislative history on L.B. 1183, summarized, indicates the singular focus of amending § 45-103.02 in 1994 was to overrule *Knox*.[49] According to the floor debate, L.B. 1183 was intended to "return[] us back to the state of affairs that would have pertained before Knox v. Cook."[50] The Legislature did so by clarifying that the statutory preconditions set out in § 45-103.02(1) govern the recoverability of prejudgment interest only when a claim is unliquidated. Subsection (2) governs the recovery of prejudgment interest on liquidated claims and contains no preconditions. The notable absence of any discussion in the legislative history of the contract-based categories in § 45-104 suggests the Legislature did not think L.B. 1183 had any effect on those statutory categories. With minor language adjustments, § 45-103.02 has remained the same since 1994.

(c) Post-1994 Cases

On several occasions after § 45-103.02 was amended in 1994, this court adhered to the proposition first announced in *Knox* that prejudgment interest may be awarded only pursuant to § 45-103.02.[51] None of these cases discussed whether § 45-104 remained a viable alternate means to recover prejudgment interest.

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[49] See *id.* at 64.

[50] Floor Debate, Committee on Banking, Commerce and Insurance, 93d Leg., 2d Sess. 9954 (Mar. 3, 1994) (Senator Bob Wickersham).

[51] See, e.g., *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015); *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 734 N.W.2d 719 (2007); *Blue Valley Co-op, supra* note 9.

In another line of cases, we analyzed the recoverability of prejudgment interest by considering both § 45-103.02(2) and § 45-104,[52] and we affirmed the award of prejudgment interest only when the claim was the type described in § 45-104 and was also liquidated under § 45-103.02(2).[53] The Court of Appeals recently followed a similar approach in affirming an award of prejudgment interest.[54]

Not surprisingly, litigants continue to debate whether § 45-103.02 is the exclusive means to recover prejudgment interest, whether §§ 45-103.02 and 45-104 authorize separate ways to recover prejudgment interest, and whether both § 45-103.02(2) and § 45-104 must be satisfied to recover prejudgment interest on a liquidated claim.[55] Several prior cases raised questions about the proper framework for analyzing prejudgment interest under §§ 45-103.02(2) and 45-104, but it was not necessary in those cases to answer the question, because the claims did not satisfy either § 45-103.02(2) or § 45-104.[56] As we explained in a 2013 case:

> The parties dispute the proper legal framework for addressing the award of prejudgment interest. The appellants contend that §§ 45-103.02 and 45-104 are not alternate routes to recover prejudgment interest, but that the [liquidated claim requirement of § 43-403.02(2)] must be met regardless whether the case is a type enumerated in § 45-104. The [appellees], on the other hand, contend that §§ 45-103.02 and 45-104 are alternate routes to recover prejudgment interest and that if the case is a

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[52] See, e.g., *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998); *Daubman v. CBS Real Estate Co.*, 254 Neb. 904, 580 N.W.2d 552 (1998).

[53] *Id.*

[54] *Farm & Garden Ctr. v. Kennedy*, 26 Neb. App. 576, 921 N.W.2d 615 (2018).

[55] See, e.g., cases cited *supra* note 1.

[56] See, *Fitzgerald, supra* note 1; *BSB Constr., supra* note 1.

> type enumerated in § 45-104, whether [it is liquidated] is irrelevant.
>
> We see no need to resolve this issue because we conclude this case is not a type enumerated under § 45-104. So regardless which approach is correct, whether prejudgment interest is proper depends on whether this case presented a [liquidated claim under § 45-103.02(2)].[57]

The instant case, however, allows us to resolve the debate over whether §§ 45-103.02 and 45-104 provide alternate routes to recover prejudgment interest, because Weyh's claim is the type described in § 45-104, and Gottsch does not contend otherwise.

Section 45-104 applies to four types of judgments: (1) money due on any instrument in writing; (2) settlement of the account from the day the balance shall be agreed upon; (3) money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof; and (4) money loaned or due and withheld by unreasonable delay of payment.[58]

We agree with the district court that Weyh proved a claim under § 45-104 for money received to the use of another and retained without the owner's consent. The evidence showed that Gottsch received, in his personal bank account, Weyh's share of the net profits from the farming operation and retained such sums without Weyh's consent after the farming operation ended.

(d) Framework for Prejudgment Interest Under §§ 45-103.02(2) and 45-104

As noted, in arguing the district court erred in awarding prejudgment interest under § 45-104, Gottsch presents two related arguments. First, he argues that § 45-103.02 is the exclusive means for recovering prejudgment interest and

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[57] *Brook Valley Ltd. Part., supra* note 1, 285 Neb. at 171, 825 N.W.2d at 791.

[58] See *Brook Valley Ltd. Part., supra* note 1.

that recovery cannot be premised exclusively on § 45-104. Alternatively, he argues that to recover prejudgment interest, Weyh must satisfy both § 45-103.02 and § 45-104. We reject both arguments.

[13,14] When an appellate court construes statutes relating to the same subject matter, it should do so in a manner that maintains a sensible and consistent scheme and gives effect to every statutory provision.[59] It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.[60]

After considering the plain language of the relevant statutes and reviewing our multiple lines of cases and the legislative history, we expressly disapprove of our prior cases holding or implying that § 45-103.02 is the exclusive means of recovering prejudgment interest in Nebraska.[61] Nothing in the plain language of § 45-103.02, and nothing in the relevant Legislative history, supports such a conclusion. To the contrary, the Legislative history suggests the adoption and amendment of § 45-103.02 were not intended to have any effect on the substantive provisions of § 45-104.

[15] We now hold that §§ 45-103.02 and 45-104 are alternate and independent statutes authorizing the recovery of

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[59] See *TracFone Wireless v. Nebraska Pub. Serv. Comm.*, 279 Neb. 426, 778 N.W.2d 452 (2010).

[60] *In re Estate of Fuchs*, 297 Neb. 667, 900 N.W.2d 896 (2017).

[61] *Roskop Dairy, supra* note 51; *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010); *Travelers Indemnity Co., supra* note 51; *Blue Valley Co-op, supra* note 9; *Cheloha, supra* note 52; *Daubman, supra* note 52; *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995); *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994); *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994); *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993); *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990); *Knox, supra* note 32.

prejudgment interest. In other words, the Legislature has created three separate ways to recover prejudgment interest, and none is preferred. Section 45-103.02(1) authorizes the recovery of prejudgment interest on unliquidated claims when the statutory preconditions are met, § 45-103.02(2) authorizes the recovery of prejudgment interest on liquidated claims, and § 45-104 authorizes the recovery of prejudgment interest on four categories of contract-based claims without regard to whether the claim is liquidated or unliquidated.

All three of these statutory provisions establish different criteria for the recovery of prejudgment interest, and none makes the recovery of prejudgment interest contingent on proof of another. We thus disapprove of our prior cases that allowed prejudgment interest only if § 45-104 was satisfied and the claim was also liquidated,[62] and we reject Gottsch's argument that Weyh can only recover prejudgment interest under § 45-104 if he also proves his claim was liquidated under § 45-103.02(2).

[16] Finally, although Weyh and Gottsch disagree about whether Weyh's claim is liquidated as that term is defined in our case law, we do not reach that question. Section 45-104 contains no requirement that the claims described therein must also be liquidated in order to recover prejudgment interest, and it never has. We expressly approve our prior line of cases applying the substantive provisions of § 45-104 without considering whether the claim was liquidated,[63] and we reject Gottsch's argument to the contrary. For the sake of completeness, we see no need to approve or disapprove the line of cases in which we substituted a traditional liquidated claim rule for the substantive provisions of § 45-104. When the Legislature adopted § 45-103.02(2) in 1994, it effectively codified that line of cases.

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[62] See cases cited *supra* note 34.

[63] See cases cited *supra* note 35.

We thus agree that Weyh was entitled to an award of prejudgment interest under § 45-104 without regard to whether his claim was liquidated. Gottsch's seventh assignment of error has no merit.

6. Calculating Prejudgment Interest

In his final assignment of error, Gottsch argues that even if Weyh is entitled to an award of prejudgment interest under § 45-104, the amount awarded by the district court was erroneous. Based on our de novo review,[64] we agree, and we recalculate the award accordingly.

The district court's order awarded prejudgment interest of $972,582.10 "as of October 31, 2017" (date of closing argument), but did not identify the date prejudgment interest commenced or provide analysis of how prejudgment interest was calculated. We consider each issue in turn.

(a) Start Date

The district court found that after the farming operation ended and it was time to settle up, Gottsch retained Weyh's share of the net profits without Weyh's consent. Consequently, the court applied that portion of § 45-104 which allows prejudgment interest "on money received to the use of another and retained without the owner's consent." Section 45-104 provides that on such a claim, prejudgment interest runs "from the receipt thereof." In construing this provision, we have held that interest is chargeable at the statutory rate "from the time that the money is wrongfully withheld."[65]

Based on the amount of prejudgment interest awarded, the district court appears to have awarded interest beginning sometime before 2014. But under the parties' agreement, Gottsch was not required to settle up until the farming operation ended. In other words, the parties generally agreed to operate on a

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[64] See *Blue Valley Co-op, supra* note 9.

[65] *Cheloha, supra* note 52, 255 Neb. at 43, 582 N.W.2d at 300.

running account until such time as the farming operation was terminated. Consequently, Gottsch could not have retained Weyh's money without his consent until after the farming operation ended and it was time to settle up and distribute Weyh's share of the net profits.[66]

But the record here does not identify that date with precision. There was evidence that Weyh demanded a final accounting in a letter dated October 15, 2014, but he did not also demand final distribution in that letter. Because we have not been directed to evidence of any earlier date on which Weyh demanded distribution of his share of the net profits, we use the date Weyh filed his initial complaint, December 4, 2014, as the date on which prejudgment interest began to accrue under § 45-104.

(b) End Date

The trial court ended prejudgment interest on the date the parties delivered closing arguments and the case was taken under advisement, rather than on the date judgment was entered. Section 45-104 identifies the accrual date, but unlike § 45-103.02, § 45-104 does not expressly provide that such interest stops accruing when judgment is entered. However, the statute governing postjudgment interest compels such a construction.

[17] Postjudgment interest is governed by Neb. Rev. Stat. § 45-103.01 (Reissue 2010) and provides that such interest begins to accrue "from the date of entry of judgment." Construing § 45-103.01 and § 45-104 together, we hold that prejudgment interest under § 45-104 ends, and postjudgment interest begins, on the date of entry of judgment. Here, judgment was entered on January 31, 2018, and that is the proper end date for an award of prejudgment interest under § 45-104.

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[66] See 25 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 66:112 (4th ed. 2002) (on running account, prejudgment interest will not run until balance is struck and demand is made).

(c) Calculation

The district court determined that Gottsch owed Weyh net profits of $1,214,056.73. Under § 45-104, prejudgment interest on that amount is chargeable at the rate of 12 percent per annum from the date the profits were wrongfully withheld (December 4, 2014), to the entry of judgment on January 31, 2018. We therefore modify the prejudgment interest awarded to $460,210.66 ($1,214,056.73 × 12 percent × 1,153 days ÷ 365 days per year).

We therefore find that Weyh is entitled to $460,210.66 in prejudgment interest, and modify the award accordingly.

V. CONCLUSION

Weyh's cause of action for breach of contract did not accrue until October 2014, and the district court correctly found the action was not time barred. Further, the district court did not err in finding that neither rent to Gottsch nor Kollars' salary was properly included as expenses of the farming operation. The court's award of damages to Weyh in the sum of $1,214,056.73 is affirmed.

Prejudgment interest was properly awarded pursuant to § 45-104, but was incorrectly calculated. We modify the amount of prejudgment interest to $460,210.66, and affirm the judgment as modified.

Affirmed as modified.

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

Ariana Bernal Sabino, appellant, v. Juan Carlos Genchi Ozuna, appellee.

928 N.W.2d 778

Filed June 7, 2019. No. S-18-234.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.
2. **Affidavits: Evidence.** An analysis of an applicant's eligibility for in forma pauperis status will necessarily be dependent on the facts and circumstances presented by that applicant's financial and personal situation.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Reversed and remanded with directions.

Roxana Cortés Reyes, of Immigrant Legal Center, an affiliate of the Justice for Our Neighbors Network, and David V. Chipman, of Monzón, Guerra & Associates, for appellant.

No appearance for appellee.

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

Heavican, C.J.

INTRODUCTION

The district court entered a decree dissolving the marriage of Ariana Bernal Sabino and Juan Carlos Genchi Ozuna, but denied Sabino's petition for findings of fact regarding the

abuse, abandonment, and neglect of her children by Ozuna. Sabino filed a motion to proceed in forma pauperis on appeal. After a hearing, that motion was denied. Sabino has appealed that denial. We reverse the district court's denial of Sabino's request for in forma pauperis status and remand the cause with directions to grant Sabino's motion.

FACTUAL BACKGROUND

A decree dissolving the marriage of Sabino and Ozuna was entered on January 11, 2018. At that time, the district court denied Sabino's motion seeking findings of fact regarding abuse, abandonment, and neglect of her children by their father, Ozuna.

Sabino filed a notice of appeal on February 6, 2018. Accompanying that notice of appeal was a motion to proceed in forma pauperis. The supporting poverty affidavit stated that Sabino had $200 on hand, no checking or savings account funds, had been unemployed until recently, and listed expenses of $2,842. The affidavit also indicated that she lived with her partner and her four minor children. Sabino further noted that until she had recently obtained employment, her partner had been her "sole provider," and that she was unable to pay the fee or provide security for her appeal.

The district court set a hearing on its own motion, in which it sought information regarding the income of Sabino's partner. The district court noted that it "assume[d] the partner is assisting in these bills, or assisting in some other way. If they're partners, then, I take it, all of his money is her money or all her money is her money or whatever. So that's what I'm asking here."

Information provided at the hearing indicated that Sabino and her four children resided with the partner, but that the couple was not married and that the partner was the biological father of only the youngest child. At the time of the hearing, Sabino had just begun a job that paid $9.75 per hour, explaining that she believed she should eventually earn

approximately $1,690 per month. In addition, questioning from the district court revealed that the couple had two cars, both titled in the partner's name, one of which was driven by Sabino. Monthly expenses addressed at the hearing totaled $2,842 and included rent, utilities, food, telephone, insurance, and payments on medical bills for one of Sabino's children with Ozuna.

Other evidence indicated that Sabino's partner worked three jobs for a total of approximately 80 hours of work per week, earning approximately $3,740 per month. In addition to paying all expenses, the partner sent $600 per month to his parents in Mexico. Evidence at the hearing also suggested that Sabino had begun to work, earning an income so that her partner could quit one of his jobs.

The district court found that appeal expenses would be between $600 and $750 and denied the request of in forma pauperis status. In its oral pronouncement of that decision, the district court explained that Sabino

> has no expenses because he's paying everything. . . . And she's making — going to be making at least $1,690 a month gross income. So the gross income that she's making isn't paying any of the expenses since her partner is paying all of the expenses. Therefore, I'm finding that she's not destitute or not in the condition that she can't pay these fees.

ASSIGNMENT OF ERROR

Sabino assigns that the district court erred in denying her motion to proceed in forma pauperis.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.[1]

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[1] *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017).

ANALYSIS

The sole issue on appeal is whether the district court erred in denying Sabino's motion to proceed in forma pauperis status for her appeal of the divorce decree entered on January 11, 2018. We find that the court erred, and accordingly reverse, and remand with directions.

Neb. Rev. Stat. § 25-2301.01 (Reissue 2016) authorizes the district court to grant in forma pauperis status. As relevant to this situation, Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2016) provides that

> [a]n application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application . . . has sufficient funds to pay costs, fees, or security . . . . Such objection may be made by the court on its own motion . . . . An evidentiary hearing shall be conducted on the objection . . . .

[2] The focus of § 25-2301.02 is whether the applicant has sufficient funds. An analysis of an applicant's eligibility will necessarily be dependent on the facts and circumstances presented by that applicant's financial and personal situation. As such, a court should make its determination regarding in forma pauperis status on a case-by-case basis by considering the individual situation of the applicant. In this case, Sabino sought permission to appeal in forma pauperis. On its own motion, the district court challenged Sabino's assertion that she did not have sufficient funds, and accordingly, it held an evidentiary hearing. Following that hearing, the district court denied her motion. In so denying, the district court focused on the facts that Sabino had recently obtained employment and that she resided with a partner who paid her expenses.

We turn first to the court's determination that because Sabino had recently obtained employment, she would soon be able to pay the costs of her appeal. Because of the limited time in which to appeal, we distinguish this case from cases considering whether an applicant has sufficient funds to commence an action in forma pauperis. As a general proposition,

courts should make the appellate in forma pauperis determination by examining the applicant's present ability to pay, and should not base its determination on whether the applicant will have necessary funds in the future or may accumulate funds at a later date.[2] Thus, the district court improperly considered Sabino's future earnings in its determination of forma pauperis status.

In addition to considering Sabino's future income, the district court concluded that Sabino had "no expenses because [her partner's] paying everything." Sabino takes issue with the court's decision "to impute [the partner's] income and/or assets onto [Sabino]."[3]

We acknowledge the existence of case law discussing various approaches to the wholesale imputing of income for in forma pauperis purposes.[4] But we need not address that larger concern, because a review of the district court's decision suggests that it did not impute all of her partner's income to Sabino, but as a practical matter imputed only that portion of his income which was used to pay Sabino's living expenses. On these facts, this limited imputation of income was appropriate.

The record shows that Sabino's partner was supporting his and Sabino's minor child, for whom he has a legal obligation. In addition, Sabino's partner was paying the living expenses of Sabino and her other children, for whom he has no legal

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[2] See *March v. Municipal Court for San Francisco Jud. Dist.*, 7 Cal. 3d 422, 498 P.2d 437, 102 Cal. Rptr. 597 (1972).

[3] Brief for appellant at 10.

[4] See, e.g., *Lee v. McDonald's Corp.*, 231 F.3d 456 (8th Cir. 2000); *United States v. Stone*, 298 F.2d 441 (4th Cir. 1962); *United States v. Scharf*, 354 F. Supp. 450 (E.D. Penn. 1973); *Hill v. State*, 305 Ark. 193, 805 S.W.2d 651 (1991); *State v. Mettenbrink*, 3 Neb. App. 7, 520 N.W.2d 780 (1994); *State v. Vincent*, 883 P.2d 278 (Utah 1994); *Kelsey v. Hanson*, 818 P.2d 590 (Utah App. 1991); *Todd v. Kohl's Department Store*, No. 08-cv-3827, 2011 U.S. Dist. LEXIS 38427 (N.D. Ill. Sept. 15, 2010) (unpublished opinion).

obligation. In considering whether an applicant has sufficient funds for purposes of § 25-2301.02, it was appropriate for the court to consider the source of the funds for Sabino's living expenses.

But even so, any imputed "income" was offset by the living expenses paid. As the record shows, Sabino had $200 in cash; it was error for the court to consider her future pay. Nor is there any evidence that Sabino had other sources of income or money, including other funds of her partner.

In considering whether an individual is entitled to in forma pauperis status, the district court examines a current snapshot of that individual's financial position, and an appellate court reviews that snapshot de novo. It is possible that if taken at a different time, a different snapshot would emerge. We observe that where such in forma pauperis status is granted, our opinion should not be read to preclude a county—which bears the expenses resulting from that status—from seeking a reexamination of the applicant's eligibility at some later point in the proceeding in light of the then-existing circumstances.

We find persuasive Judge Hannon's conclusions in a case with similar, but perhaps even less sympathetic, facts decided by the Nebraska Court of Appeals:

> The findings of the trial court and the evidence would support a finding that [the applicant's] financial condition would have been better if she had maintained the job she once held, if she had selected her friends more carefully, and if she had not trusted someone who was not worthy of trust. These matters might support a conclusion that she has been improvident, perhaps foolish, but the existence of these attributes does not establish the ability to pay the costs. These matters may help to explain why she cannot pay the costs of the appeal, but they do not tend to establish that she had the ability to pay them.[5]

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[5] *Fine v. Fine*, 4 Neb. App. 101, 107, 537 N.W.2d 642, 646 (1995).

In our snapshot of this case, Sabino had about $200, while the cost of an appeal was between $600 and $750. Thus, under § 25-2301.02, it is clear that Sabino lacked "sufficient funds to pay costs, fee, or security." As such, the district court erred in denying Sabino's request to proceed in forma pauperis in her appeal from the divorce decree.

CONCLUSION

The district court's denial of Sabino's motion to proceed in forma pauperis is reversed, and the cause is remanded with directions to grant the motion to proceed in forma pauperis.

Reversed and remanded with directions.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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Rhonda Reiber, Special Administrator of the Estate of Chad Gesin, deceased, appellant, v. County of Gage, Nebraska, and Millard Gustafson, Gage County Sheriff, appellees.

928 N.W.2d 916

Filed June 7, 2019. No. S-18-692.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence, but considers the judgment in a 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. **Statutes.** Statutory interpretation presents a question of law.
4. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony.
5. **Rules of Evidence: Expert Witnesses.** In a bench trial, an expert's testimony will be admitted under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016), and given the weight to which it is entitled.
6. **Negligence: Evidence.** While the existence of a duty and the identification of the applicable standard of care are questions of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.
7. **Negligence: Expert Witnesses.** When the conduct in question involves specialized knowledge, skill, or training, expert testimony may be helpful or even necessary to a determination of what the standard of care requires under particular circumstances.

8. **Trial: Expert Witnesses.** The determination of the weight that should be given expert testimony is uniquely the province of the fact finder.
9. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the exclusive procedure for maintenance of a tort claim against a political subdivision or its officers, agents, or employees.
10. **Political Subdivisions Tort Claims Act: Immunity: Negligence.** The Political Subdivisions Tort Claims Act eliminates, in part, the traditional immunity of political subdivisions for the negligent acts of their employees.
11. **Actions: Dismissal and Nonsuit: Immunity.** A suit that is barred by sovereign immunity is dismissed for lack of subject matter jurisdiction.
12. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
13. **Political Subdivisions Tort Claims Act: Immunity: Waiver: Appeal and Error.** In order to strictly construe the Political Subdivisions Tort Claims Act against a waiver of sovereign immunity, an appellate court broadly reads exemptions from a waiver of sovereign immunity.

Appeal from the District Court for Gage County: Julie D. Smith, Judge. Affirmed.

Lyle J. Koenig, of Koenig Law Firm, for appellant.

Brandy R. Johnson, of Governmental Law, L.L.C., for appellees.

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

Funke, J.

Chad Gesin committed suicide while in the Gage County jail. Gesin's mother Rhonda Reiber, the special administrator of Gesin's estate, brought this negligence action against the County of Gage, Nebraska, the Gage County sheriff, and unknown Gage County sheriff's employees under the Nebraska Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012). Reiber alleged that the defendants failed to follow the jail's established protocol

and knew, or in the exercise of reasonable care should have known, that Gesin was suicidal. Following a bench trial solely on the issue of liability, the district court found that the defendants had exercised due care and that Reiber's action was barred by sovereign immunity under § 13-910(1). Reiber appeals from that judgment. We agree with the findings of the district court. Accordingly, we affirm.

BACKGROUND

Arrest

On July 4, 2013, at 4:30 p.m., Gesin was arrested by Nebraska State Patrol Investigator Neal Trantham in downtown Beatrice, Nebraska, after Trantham observed Gesin making "punching-type motions" toward occupants of a minivan. Trantham testified that Gesin was initially noncompliant. Trantham drew his baton, verbally commanded Gesin to get on the ground, and placed Gesin in handcuffs. Trantham smelled alcohol on Gesin and described him as upset, angry, and agitated. Trantham called for backup, and Officer Shane Maloley of the Beatrice Police Department arrived on the scene.

While at the scene, Maloley told Trantham about a previous contact Maloley had had with Gesin. Maloley stated that in September 2011, he arrested Gesin, and that during that arrest, Gesin was heavily intoxicated with a blood alcohol content of 0.214. Gesin stabbed himself with a knife numerous times in the chest and while in police custody told Maloley that he wanted to die. Maloley determined that Gesin was an immediate danger to himself or others and placed him in emergency protective custody (EPC). Gesin was transported to the hospital and released 3 days later.

Gesin's girlfriend told Trantham that Gesin had assaulted her earlier in the day and had sent her a text message which she thought might be threatening suicide. Trantham asked her go to the Beatrice Police Department where he could later conduct a more indepth interview with her. Trantham then transported Gesin to the Gage County jail.

Booking

At 5:13 p.m., Trantham and Maloley arrived at the jail facility with Gesin. The correctional officers on duty at that time were Christina Lock and Trevor Rue. Trantham told Rue that Gesin was "amped up," which Trantham testified meant to be careful because Gesin might be "likely to fight." Trantham also relayed Maloley's comments that Gesin had stabbed himself during a prior incident.

In accordance with jail policy and procedures, Trantham completed a custody authorization form. One of the questions listed on the form was, "Has this arrestee demonstrated any behaviors that might suggest suicidal tendencies? If yes, what?" Trantham wrote, "Possibly — text message earlier threatening." At that time, Trantham had not actually read the text message. He testified that this written comment referred to "the vague statement that [Gesin's girlfriend] had made to me at the scene." Trantham testified that at the time of booking, based upon his observations and experience, he did not believe that Gesin was at risk to commit suicide, but was merely angry and frustrated about being arrested.

Trantham later read the text message while at the Beatrice Police Department. The message read, "[R]emember what I said kill you for myself." After reading the message, Trantham did not think that the message was a suicidal comment. Trantham testified there was another message that stated, "It's a good thing you can't see what I'm about to do." Trantham described the message as "very vague and open ended" and said that he "absolutely did not think [Gesin] was suicidal."

During the booking process, Trantham did not verbally express a concern to the jail staff that Gesin might be suicidal. The custody authorization form posed the question, "Has there been any indication that the arrestee is acting so negatively toward [his or her] charge(s) that [he or she] might engage in self-harming behavior? If yes, what have you observed?" Trantham wrote, "Not observed." He also wrote that he had

not observed Gesin to have displayed any behaviors that would indicate mental illness.

Gesin's booking process lasted approximately 1 hour and was recorded by the jail's stationary surveillance camera which captured video and audio. The following exchange was recorded and played at trial:

> [Trantham:] How do you spell your last name, Chad?
>
> [Gesin:] Figure it out, you're an investigator, investigate.
>
> [Maloley:] G-E-S-I-N, I've arrested him before.
>
> [Gesin:] On a domestic, right?
>
> [Maloley:] Terroristic threats.
>
> [Gesin:] Terroristic threats, stabbed myself nine fucking times in the fucking chest . . . yeah, shit happens . . . and I didn't go to jail then, did I?
>
> [Maloley:] I EPCed you.
>
> [Gesin:] I was out in three fucking days.
>
> [Maloley:] Good, I'm glad you got better.
>
> [Gesin:] And I beat the charges too, yeah.
>
> [Maloley:] That's good, I heard that, I believe your mom went in and signed a release of prosecution, didn't she?
>
> [Gesin:] I believe she didn't, she says she didn't, she didn't do shit.

Trantham characterized this exchange as Gesin's "bragging about the charges that were dismissed and that he didn't face any consequences for that arrest." Trantham left the jail shortly thereafter.

Maloley testified that Gesin was angry and agitated with Trantham. Maloley did not think an EPC was necessary, because Gesin did not seem suicidal and, unlike the 2011 incident, Gesin had not made a specific threat to end his life. Maloley testified that he would not have anticipated what Gesin later would do and that he would have said something if he thought Gesin was a suicide risk. Prior to leaving the jail facility, Maloley asked Gesin if he could leave without Gesin's giving the jail staff any trouble. Gesin replied, "I

gotta live with these fuckers, you think I'm gonna give them hell?" Maloley testified that based on Gesin's comments, he was reassured that Gesin had calmed down and did not have any concerns about Gesin's safety. Lock testified that once Trantham left, Gesin became less agitated. Gesin complied with all parts of the booking process, including the taking of fingerprints and photographs, and reviewing and signing booking papers.

Evidence at trial focused on several forward-looking statements that Gesin made to jail staff during booking. Such statements, among others, included:

- "Court's open Friday? . . . Am I going to see the judge tomorrow for bail? . . . Monday?"
- "I want to see my discovery packet before I fucking say anything."
- To Rue: "Look, I got to live with you, so I'm not even gonna be rude to you."
- Good thing I get paid tomorrow . . . I can bail myself out tomorrow . . . with a debit card?"

Rue continued the booking process by asking Gesin questions from a standardized medical screening form. Rue asked Gesin: "Do you have a serious mental health condition which may need attention while you are here?" "Have you been hospitalized for emotional problems within the last year?" Gesin verbally answered "no" or shook his head in the negative. Rue asked Gesin: "Have you ever attempted suicide?" "Are you currently thinking about suicide?" Gesin verbally answered "no." Lock provided Gesin with a printed copy of his answers, which he signed.

Gesin took a preliminary breath test which registered his blood alcohol content of .103. Lock testified that Gesin did not appear to be severely intoxicated. She informed Gesin that, based on jail policy, he would be placed in a cell alone until his blood alcohol content lowered to .05.

Lock testified that she had received training in suicide prevention and stated that symptoms of a suicidal inmate included

previous suicide attempts, the presence of suicidal thoughts or plans, unusual reactions to being confined, and emotional withdrawal or isolation. Based on her observations, Gesin presented to her as an ordinary arrestee. She testified that it is common for arrestees to come into jail irritated and agitated about their charges. Lock did not have any concern that Gesin was a suicide risk and saw no reason to place Gesin on suicide watch.

Near the end of booking, Gesin spoke on the telephone with his mother and brother. Gesin asked them to post his bail and said that he would repay them the following day. Gesin expressed concern that he would lose his son and his job, and he became tearful for a brief period. Gesin's mother testified that she did not think Gesin was suicidal when she spoke with him on the telephone.

Gesin's Suicide

At 6:05 p.m., Gesin was escorted from the booking room to a single-male, maximum-security cell due to his intoxication. Gesin was not placed on suicide watch. Had he been, he would have been stripped of his clothing, placed in a suicide smock, and given a blanket which is less likely to tear. Instead, he was provided with a regular blanket and "portable phone" located outside of his cell.

Gage County Sheriff Millard Gustafson testified that jail standards dictate that cell checks for inmates without any special needs are to be conducted once every hour. Checks on inmates who are intoxicated or on suicide watch are conducted four times per hour. Gustafson testified that checks on an inmate under special management are conducted on irregular rather than exact time intervals so that the inmate does not know exactly when the check will occur.

A shift change occurred with Rue's departure, and Officer Shana West came on duty. At 6:15 p.m., West performed the first cell check on Gesin, who appeared to be asleep in his bunk. The jail's telephone records show that Gesin placed

four calls from the portable telephone, between 6:19 p.m. and 6:24 p.m. Lock testified that she heard Gesin pressing keys on the telephone. At 6:40 p.m., Lock and West escorted female inmates back to their cells. At 6:45 p.m., Lock returned to Gesin's cell and found that Gesin had tied a blanket around the cell bars and his neck and appeared to be leaning forward in a seated position. Lock called for assistance and radioed for an ambulance, and she retrieved a hook knife from the booking room. A Gage County sheriff's deputy used the knife to cut Gesin free from the blanket. The deputy performed cardiopulmonary resuscitation on Gesin until the ambulance arrived. Gesin was transported to the hospital, where he was placed on life support. Gesin died on July 9, 2013.

Trial

Reiber, as the special administrator of Gesin's estate, filed suit in the district court for Gage County, asserting claims under the U.S. Constitution, the Nebraska Constitution, 42 U.S.C. § 1983 (2012), and the PSTCA. The lawsuit was removed to the U.S. District Court for the District of Nebraska. The federal court dismissed Reiber's constitutional and § 1983 claims and remanded the matter to the district court for Gage County for proceedings on Reiber's negligence claim under the PSTCA. Gage County and Gustafson (collectively appellees) filed a motion for summary judgment pursuant to § 13-910(1), which the court overruled. The court conducted a bifurcated bench trial on the issue of liability on January 25 and 26, 2018.

At trial, over Reiber's foundation and relevancy objections, the court heard testimony from appellees' expert witness Dr. Terry Davis, a psychiatrist who ran the Region VI Douglas County psychiatric crisis center in Omaha, Nebraska, from 1991 to 2001. Davis testified that the crisis center was essentially a psychiatric emergency room where he evaluated patients brought in by law enforcement or who came voluntarily or who were under a mental health board petition. Davis

would evaluate the individuals for dangerousness to self or others, presence of mental illness, and need for treatment and hospitalization. According to Davis, he evaluated over 8,000 patients while at the crisis center.

Davis opined that the 2011 incident in which Gesin stabbed himself was not a genuine suicidal attempt. Davis provided testimony based on his review of Gesin's medical records from 2011, which other witnesses had not discussed in their testimony. Davis stated that Gesin's medical records indicated that the stab wounds were fairly superficial and that Gesin had denied that the 2011 stabbing was a suicide attempt. Davis agreed with the decision made in 2011 to dismiss the EPC without a commitment.

Davis further testified that from the perspective of a psychiatrist in a clinical setting and based on information known at the time, he would not have thought Gesin to be suicidal in 2013. Davis stated that Gesin had some factors indicating suicidal risk, such as being a white male who had been drinking alcohol, but stated that Gesin's age, previous law violations, lack of a high level of intoxication, and forward-thinking behavior were not risk factors. Therefore, Davis would not have reasonably foreseen the need to undertake suicide precautions with Gesin. Davis also opined that the jail personnel appropriately evaluated and screened Gesin for suicide. The court found in its judgment on the merits that "Davis' testimony was credible, relevant, and helpful."

Following trial, the court determined that Reiber's action was barred under § 13-910(1), because appellees acted with due care in accordance with jail rules and regulations. The court found that even if the action were not barred under § 13-910(1), appellees would have prevailed on the merits of the negligence action, because Gesin's death was not reasonably foreseeable and appellees acted with reasonable care. Regarding the video of Gesin's statements to Maloley during booking, the court found that "it appears that [Gesin] was bragging and insinuating that he stabbed himself as a tactic to get

placed into [EPC] to avoid any criminal prosecution, and that the tactic was successful."

The court concluded that (1) Gesin's death was not reasonably foreseeable to the jail staff; (2) Reiber failed to prove that the jail staff lacked the appropriate training; (3) there was no claim that the jail staff failed to properly respond to an emergency; (4) there was no evidence that different staff members would have prevented Gesin's suicide; (5) it was not reasonably foreseeable that Gesin posed a threat to himself; (6) there was no reason to believe that Gesin needed to be transferred to a mental health facility; (7) Gesin was not placed in a safety cell with a suicide smock, because there was no reasonably foreseeable risk that he would harm himself; and (8) there was no evidence of negligent hiring or supervision.

Reiber appealed. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Reiber assigns, restated, that the district court erred in (1) permitting the expert witness testimony of Davis absent foundation, relevance, and assistance to the fact finder; (2) finding that the jail staff acted with due care in applying the rules of the Jail Standards Board; and (3) finding that appellees acted with reasonable care.

STANDARD OF REVIEW

[1,2] In actions brought pursuant to the PSTCA, the factual findings of a trial court will not be disturbed on appeal unless they are clearly wrong.[2] In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of

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

[2] See *Cingle v. State*, 277 Neb. 957, 766 N.W.2d 381 (2009).

the successful party, who is entitled to every reasonable inference deducible from the evidence.[3]

[3] Statutory interpretation presents a question of law.[4]

[4] An appellate court reviews for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony.[5]

ANALYSIS

We first address Reiber's contention that the district court erred by admitting Davis' testimony. We then discuss the court's conclusion that Reiber's claim is barred by sovereign immunity under § 13-910(1).

No Abuse of Discretion

Reiber raises two arguments in support of his contention that the district court erred in admitting the expert witness testimony of Davis. First, Reiber argues Davis' testimony lacked foundation and relevance, because, as a psychiatrist and forensic psychiatrist, Davis could not render an opinion regarding the standard of care applicable to jailers. Second, Reiber argues Davis' testimony was not helpful to the trier of fact, because Davis' testimony that Gesin's suicide was not reasonably foreseeable amounted to an opinion as to how the court should decide the case.

[5] Whether a witness is qualified as an expert is a preliminary question for the trial court.[6] A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.[7] In a

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[3] *Id*. See, *Moreno v. City of Gering*, 293 Neb. 320, 878 N.W.2d 529 (2016); *Williams v. City of Omaha*, 291 Neb. 403, 865 N.W.2d 779 (2015).

[4] *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007).

[5] See *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018).

[6] *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004); *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[7] *Id.*

bench trial, an expert's testimony will be admitted under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016), and given the weight to which it is entitled.[8]

Evidence rule 702 governs the admissibility of expert testimony and provides: "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." When faced with a proffer of expert scientific testimony, a trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[9] The trial court should focus on the principles and methodology utilized by expert witnesses, and not on the conclusions that they generate.[10] We have held in another context that expert testimony concerning a question of law is generally not admissible.[11]

[6] A negligence action brought under the PSTCA has the same elements as a negligence action brought against a private individual—a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[12] While the existence of a duty and the identification of the applicable standard of care are questions of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.[13] To resolve the issue, a finder of fact must

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[8] *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005).

[9] *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010).

[10] *Id.*

[11] See *id.*

[12] *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

[13] *Cingle, supra* note 2.

determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard.[14]

[7] When one person owes a legal duty to another, the standard of care which defines the scope and extent of the duty is typically general and objective and is often stated as the reasonably prudent person standard, or some variation thereof; that is, what a reasonable person of ordinary prudence would have done in the same or similar circumstances.[15] When the conduct in question involves specialized knowledge, skill, or training, expert testimony may be helpful or even necessary to a determination of what the standard of care requires under particular circumstances.[16]

The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.[17] Here, the parties do not dispute that prison officials owe inmates a legal duty, and we agree.[18] In *Goodenow v. State*,[19] we held that the standard of care by prison officials to inmates is as follows: "A jailer is required to exercise a degree of care necessary to provide reasonably adequate protection for his or her inmates." What constitutes "'reasonably adequate protection' . . . necessarily depends upon what correctional officers knew or should have known about a particular risk of injury before it occurred."[20]

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Bell v. Grow With Me Childcare & Preschool*, 299 Neb. 136, 907 N.W.2d 705 (2018).

[18] See, *Ginapp, supra* note 12; *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000).

[19] *Goodenow, supra* note 18, 259 Neb. at 381, 610 N.W.2d at 23.

[20] *Cingle, supra* note 2, 277 Neb. at 966, 766 N.W.2d at 388 (citing *Goodenow, supra* note 18).

Reiber claims that Davis' testimony lacked foundation and relevance, because Davis had not reviewed the jail's protocols and had not examined Gesin in a clinical setting, and because "the standard of care for a psychiatrist evaluating a patient is not the same as that of a jailer evaluating a prisoner."[21]

Davis testified regarding his 10 years of experience in evaluating psychiatric patients who were admitted to the Douglas County psychiatric crisis center. Davis assessed patients for dangerousness to themselves or others, presence of mental illness, and need for treatment and hospitalization. In preparation for his testimony, Davis reviewed affidavits submitted by Trantham, Lock, and West; the booking video; the medical questionnaires completed during booking; the custody authorization form; and Gesin's hospital records from 2011 and 2013. Based on his experience and review of these materials, Davis opined that Gesin's stabbing incident in 2011 was not a genuine suicide attempt. In addition, Davis opined that, as a psychiatrist who adheres to a higher standard than that applicable to a jailer, he would not have considered Gesin to be a suicide risk based on the information known at the time.

Based on the record, we find that Reiber's claim that appellees knew or should have known Gesin was suicidal concerns an issue of specialized knowledge and that expert testimony would aid a finder of fact in evaluating the claim. Davis is a medical professional with experience assessing suicidal risk. Although as a psychiatrist, Davis' testimony was based upon a more stringent standard of care than that of a jailer, Davis discussed many of the same assessment factors required under the jail's procedures for screening for a suicidal inmate.

[8] We agree with the district court that Reiber's objections do not bear on Davis' qualifications or methodology, but, rather, go to the weight to be given to Davis' testimony. The determination of the weight that should be given expert

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[21] Brief for appellant at 10.

testimony is uniquely the province of the fact finder.[22] As such, we find the court did not abuse its discretion in admitting Davis' testimony. Moreover, Reiber has not argued that she was unfairly prejudiced by the admission of Davis' testimony. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.[23]

Regarding Reiber's second argument, evidence rules 701 and 702[24] allow opinion testimony, whether by a lay or expert witness, only if it is helpful to the trier of fact in making a determination of a fact in issue.[25] "The '"ultimate issue"' rule was an evidentiary rule in many jurisdictions that prohibited witnesses from giving opinions or conclusions on an ultimate fact in issue because such testimony, it was believed, '"usurps the function" or "invades the province" of the jury.'"[26] Evidence rule 704,[27] which abolished the ultimate issue rule in Nebraska, states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Under rule 704, the basic approach to opinions, lay and expert, is to admit them when helpful to the trier of fact.[28] Rule 704 does not lower the bar so as to admit all opinions, because

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[22] *Fredericks Peebles v. Assam*, 300 Neb. 670, 915 N.W.2d 770 (2018).

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

[24] Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 2016), and § 27-702.

[25] See *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

[26] See *State v. Rocha*, 295 Neb. 716, 732, 890 N.W.2d 178, 194 (2017) (quoting 1 McCormick on Evidence § 12 (Kenneth S. Broun et al. eds., 7th ed. 2013 & Supp. 2016), and citing *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826, 94 N.W. 1007 (1903); R. Collin Mangrum, Mangrum on Nebraska Evidence 760 (2016); and Fed. R. Evid. 704).

[27] Neb. Evid. R. 704, Neb. Rev. Stat. § 27-704 (Reissue 2016). See, also, Fed. R. Evid. 704.

[28] *Rocha, supra* note 26.

rules 701 through 703 provide the bases for exclusion.[29] Under these rules, a witness may not give an opinion as to how the case should be decided, but, rather, must leave the conclusions to be drawn by the trier of fact, because such opinions are not helpful.[30]

We disagree with Reiber's claim that Davis gave opinions as to how to decide the case and therefore provided opinions that were not helpful. Davis' testimony went directly to Reiber's theory that appellees failed to adhere to the jail's protocols and knew or should have known that Gesin was suicidal. Davis' testimony was based on evidence in the record and helped the court identify factors which can determine whether an individual in custody poses a suicide risk. Davis' testimony assisted the trier of fact in determining whether appellees' conclusions regarding Gesin's risk of suicide were accurate.

Davis' opinion regarding the reasonable foreseeability of Gesin's suicide cannot be characterized as an opinion as to how the court should decide the case. For example, Davis did not offer the ultimate legal conclusion as to whether appellees were liable for Gesin's death. As Reiber pointed out in her relevance objection, Davis did not offer testimony regarding the standard of care to be applied to a jailer. Rather, Davis offered the court a comparative point of view based on the more specialized and higher standard of care applicable to a psychiatrist. Reiber had a full opportunity to cross-examine Davis and argue to the court that it should not be persuaded by Davis' testimony. As indicated, the court specifically found in its posttrial order that "Davis' testimony was credible, relevant, and helpful." We find the court did not abuse its discretion in admitting Davis' testimony.

Claim Barred Under § 13-910(1)

[9] The PSTCA reflects a limited waiver of governmental immunity and prescribes the exclusive procedure for

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[29] *Id.*

[30] See *id.*

maintenance of a tort claim against a political subdivision or its officers, agents, or employees.[31] Gage County is a political subdivision of the State of Nebraska.[32] The Gage County sheriff is an officer of Gage County.[33] Where an officer or employee of a political subdivision is sued in his or her individual capacity, but is acting within the scope of his or her employment as a government official, the PSTCA applies, and the individual is immune unless the State has expressly waived its sovereign immunity.[34]

[10] The PSTCA eliminates, in part, the traditional immunity of political subdivisions for the negligent acts of their employees.[35] Except as otherwise provided, in all suits brought under the PSTCA, "the political subdivision shall be liable in the same manner and to the same extent as a private individual under like circumstances."[36]

[11] However, § 13-910(1) provides that political subdivisions are immune from suit under the PSTCA for actions based upon the acts or omissions of an employee exercising due care in the execution of a rule or regulation. If a claim comes within the exemption under § 13-910(1), then the claim is barred by sovereign immunity and the political subdivision, officer, or employee cannot be liable. A suit that is barred by sovereign immunity is dismissed for lack of subject matter jurisdiction.[37]

[12,13] 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

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[31] § 13-902; *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007).

[32] § 13-903(1).

[33] See *Koepf v. York County*, 198 Neb. 67, 251 N.W.2d 866 (1977).

[34] See *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

[35] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[36] § 13-908.

[37] See, *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018); *Davis, supra* note 34.

waiver.[38] In order to strictly construe the PSTCA against a waiver of sovereign immunity, we broadly read exemptions from a waiver of sovereign immunity.[39] Section 13-910(1) is clear and unambiguous. Accordingly, the issue is whether Reiber's negligence claim falls within § 13-910(1).

Following a trial on the issue of liability, the district court concluded that "Gesin's death was not reasonably foreseeable . . . and the jailers were acting with due care." The court found that Reiber failed to prove appellees did anything beyond exercising due care in carrying out jail rules and regulations. The jail rules and regulations referred to by the trial court are regulations established by the Jail Standards Board and which are promulgated pursuant to statute.[40] Under Neb. Rev. Stat. § 83-4,126(1) (Reissue 2014), the Jail Standards Board shall have the following authority and responsibility:

> (a) To develop minimum standards for the construction, maintenance, and operation of criminal detention facilities [and]
>
> (b) To perform other duties as may be necessary to carry out the policy of the state regarding criminal detention facilities, juvenile detention facilities, and staff secure juvenile facilities as stated in sections 83-4,124 to 83-4,134.01[.]

The trial court cited to "the rules of the Jail Standards Board" discussed at trial regarding the jail's responsibility to screen inmates for the need for mental health attention,[41] the risk of serious harm to themselves or another person,[42] or the need to place an inmate in a safety cell.[43] The court found that

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[38] *Patterson v. Metropolitan Util. Dist.*, 302 Neb. 442, 923 N.W.2d 717 (2019).

[39] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

[40] Neb. Rev. Stat. § 83-4,124 (Reissue 2014).

[41] 81 Neb. Admin. Code, ch. 4, § 002.07 (2012).

[42] 81 Neb. Admin. Code, ch. 4, § 002.01B (2012).

[43] 81 Neb. Admin. Code, ch. 5, § 003.01C (2014).

Reiber failed to prove appellees did anything beyond exercising due care in carrying out jail rules and regulations.

We agree that the record shows that standard procedures designed to detect an inmate's suicide risk were followed. Trantham, the arresting officer, informed the jail staff of the prior stabbing incident, completed a custody authorization form, did not observe any indication that Gesin might engage in self-harming behavior, and did not believe Gesin to be a suicide risk. Maloley, who placed Gesin in EPC in 2011, did not consider Gesin to be a suicide risk and did not think that an EPC was necessary. Gesin was angry and agitated when he arrived at the jail, but calmed during the booking process. Although Gesin had a blood alcohol level of .103, he was not significantly inebriated, as there was no slurring of speech; his thought process was clear; and he was easily able to answer questions about his Social Security number, place of birth, mother's maiden name, and telephone number. The booking video showed that Gesin exhibited forward-thinking behavior and was focused on posting bail. The jail staff completed a medical questionnaire and asked Gesin whether he had ever attempted suicide and whether he was presently having suicidal thoughts, and Gesin verbally responded in the negative. Lock, who had received training in suicide prevention, testified that Gesin presented as a normal arrestee and saw no reason to place him on suicide watch. Reiber spoke with Gesin minutes before his suicide, and she testified that she did not think that he was suicidal. Davis testified that even he would not have foreseen the suicide. The greater weight of the evidence in the record therefore supports the district court's finding that appellees exercised due care in following jail rules and regulations in order to detect the risk of an inmate's suicidal behavior.

The jail staff followed its policy to place an intoxicated inmate alone in a safety cell. The officers began exercising the precaution of making frequent cell checks on Gesin. Gesin was placed in his cell at 6:05 p.m., West conducted the first cell

check at 6:15 p.m., and Lock heard Gesin using the telephone about 5 minutes later. The next check was conducted at 6:45 p.m., at which time Lock discovered that Gesin was hanging himself. Reiber's claim relies on hindsight and speculation rather than on the information actually known by the jailers. However, we agree with the district court that the evidence showed that under the circumstances, Gesin did not present a known or reasonably foreseeable suicide risk and appellees exercised due care. Reiber offered no expert testimony to establish the foreseeable risk of suicide or lack of due care exercised by appellees. Reading § 13-910(1) broadly, as we must, we conclude that Reiber's claim is based on acts or omissions of appellees exercising due care in the execution of a rule or regulation.

The court did not err when it concluded that Reiber's claim for money damages was barred under § 13-910(1) and that appellees were entitled to judgment in their favor. Because we conclude that appellees are immune from Reiber's claim, we need not consider Reiber's assignment of error regarding the district court's alternative conclusion in favor of appellees on the merits of Reiber's negligence claim.

CONCLUSION

We agree with the district court that Reiber's claim was barred under § 13-910(1). As a result, we affirm the district court's determination that it lacked subject matter jurisdiction over Reiber's claim and that appellees are entitled to judgment in their favor.

Affirmed.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jason P. Sinkey, appellant.

929 N.W.2d 35

Filed June 7, 2019. No. S-18-717.

1. **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.
2. **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.
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: Postconviction: Records: Appeal and Error.** In order to avoid a procedural bar to a future postconviction proceeding, a claim of ineffective assistance of counsel must be presented 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 be able to recognize whether the claim was brought before the appellate court.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Matthew J. Miller 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.

INTRODUCTION

Jason P. Sinkey was convicted of two counts of first degree sexual assault of a child and one count of possession of a firearm by a prohibited person. He appeals. We affirm.

FACTUAL BACKGROUND

Sinkey was charged on August 14, 2017, with two counts of first degree sexual assault of a child and one count of possession of a firearm by a prohibited person. The sexual assault charges arose from incidents occurring on July 10 and 11; the possession of a firearm by a prohibited person charge resulted from a firearm that was found in Sinkey's residence while members of law enforcement were executing a search warrant with respect to the sexual assault charges.

Sinkey was romantically involved with the mother of the 8-year-old victim, Z.P. Z.P. testified that on July 10, 2017, when her mother was out of the home, she was lying on her mother's bed with Sinkey. Z.P. testified that Sinkey told her to take her pants and underwear off, then touched her "privates," by both "st[icking] his tongue into [her] privates" and "lick[ing] his finger" and then rubbing her privates in the same place that he had used his tongue.

Z.P. testified that later that same day, July 10, 2017, Sinkey did the same thing: he "licked" with his tongue and with his finger. Z.P. also testified that Sinkey showed her his penis, which she described in a graphic manner, and asked her to touch it. Z.P. testified that Sinkey told her to keep these activities a secret and not tell her mother or he might go to jail and kill himself.

The next day, July 11, 2017, Z.P. testified that she was in the living room of the apartment she shared with her mother when Sinkey told her to remove her pants and underwear. Z.P. testified that on this occasion, Sinkey just touched her with his finger, which she said stayed outside of her. After this incident, Z.P.'s mother came home and Z.P. told her what Sinkey had done. Z.P. was instructed to take a shower; Z.P.'s mother then had a friend drive her and Z.P. to the police station to report the incident.

Sinkey was arrested later that same day on an outstanding warrant for failure to appear for a court hearing on a traffic offense. He was questioned by a detective with the Omaha Police Department. During the course of that interview, Sinkey admitted that he had licked Z.P.'s vagina and had touched her sexually.

A search of the crime scene was conducted. Following the issuance of a warrant, Sinkey's residence was also searched. During the search of Sinkey's residence, law enforcement found a rifle, ammunition, and other firearm-related items.

Other evidence offered showed that Sinkey had previously been convicted of a felony.

Following a jury trial, Sinkey was found guilty of both counts of first degree sexual assault of a child and one count of possession of a firearm by a prohibited person. Sinkey was sentenced to 55 to 70 years' imprisonment on each sexual assault conviction and 3 to 5 years' imprisonment for the possession of a firearm conviction. The sentence for the possession of a firearm conviction was ordered to be served consecutively to one count of sexual assault and concurrently with the other count of sexual assault. Sinkey appeals.

ASSIGNMENTS OF ERROR

On appeal, Sinkey assigns that (1) there was insufficient evidence to support his convictions and (2) his trial counsel was ineffective.

STANDARD OF REVIEW

[1] 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.[1]

[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

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[1] *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

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.[2]

ANALYSIS

Sufficiency of Evidence.

In his first assignment of error, Sinkey assigns that there was insufficient evidence to support his convictions.

We turn first to Sinkey's convictions for first degree sexual assault of a child. Sinkey contends that the State's allegation was based upon his admission to law enforcement that he "'lick[ed] an eight-year-old's vagina,'" but that his purported admission was not as "explicit or clear as a rational factfinder should require before passing on a defendant's guilt."[3] Sinkey asserts that other than his admission, the State's case rests solely on statements made by Z.P.

Sinkey's contention is without merit. He is correct in that the only evidence to support his convictions was Z.P.'s testimony that Sinkey "licked" and "rubbed" her vagina and Sinkey's confession that he "did lick her" and that he asked Z.P. to not tell anyone. But contrary to his assertion, this testimony is sufficient to support his convictions.

As is relevant on appeal, in order to prove the elements of sexual assault of a child, the State needed to prove that Sinkey subjected Z.P. to sexual penetration. Z.P. testified that on at least two occasions, Sinkey used his tongue in and around her vaginal area and that on three occasions, he used his finger to rub and touch Z.P.'s vaginal area. We review the evidence in a light most favorable to the State. This evidence was sufficient to prove that Sinkey subjected Z.P. to sexual

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[2] *Id.*

[3] Brief for appellant at 11.

penetration, regardless of the content of Sinkey's statement to law enforcement.

In his brief, Sinkey asserts that there was insufficient evidence to support his conviction for possession of a firearm by a prohibited person. Other than that assertion, Sinkey makes no argument with respect to this assignment of error. We conclude that the assertion was inadequate to preserve this issue for appeal.[4]

The evidence was sufficient to support Sinkey's convictions. His first assignment of error is without merit.

Ineffective Assistance of Counsel.

In his second assignment of error, Sinkey contends that his trial counsel was ineffective by failing to adequately cross-examine certain witnesses at trial and failing altogether to cross-examine other witnesses. Sinkey specifically notes concerns with trial counsel's cross-examination of the detective and of the victim's mother. In addition, Sinkey argues that counsel was ineffective in failing to offer any testimony or evidence adverse to the State's defense or present any witnesses "who may have spoken to his client's positive traits or lack of propensity to commit acts like those alleged at trial."[5]

[3-5] 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.

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[4] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[5] Brief for appellant at 12.

[6] *State v. Mrza, supra* note 1.

The determining factor is whether the record is sufficient to adequately review the question.[7] In order to avoid a procedural bar to a future postconviction proceeding, a claim of ineffective assistance of counsel must be presented 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 be able to recognize whether the claim was brought before the appellate court.[8]

We conclude that Sinkey failed to allege ineffective assistance of counsel with sufficient particularity. Sinkey alleges that his defense counsel's performance was inadequate, but he fails to include allegations relating what counsel could have argued or done differently in Sinkey's defense. Sinkey also alleges that his counsel only "lightly" cross-examined the detective and the victim's mother,[9] but again, he fails to detail what questions should have been asked that would have contributed to his defense.

In sum, Sinkey alleged only neutral facts about the evidence presented at trial and the actions of defense counsel and then concluded that defense counsel's performance was deficient. Because Sinkey did not allege specific instances of counsel's ineffectiveness, there is no record upon which this court could decide these allegations. Accordingly, we conclude that Sinkey failed to sufficiently allege ineffective assistance of counsel.

CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

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[7] *Id.*

[8] See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[9] Brief for appellant at 15.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Reginald B. Briggs, appellant.

929 N.W.2d 65

Filed June 14, 2019. Nos. S-17-1183, S-17-1321.

1. **Pleadings: Parties: Judgments: Appeal and Error.** A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown, and an appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.
2. **Rules of Evidence: Judgments: Words and Phrases: 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. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. It reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.
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. ____: ____. The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.
6. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

7. **Constitutional Law: Trial: Joinder.** A defendant has no constitutional right to a separate trial on different charges.
8. **Trial: Joinder: Appeal and Error.** Under Neb. Rev. Stat. § 29-2002 (Reissue 2016), the question of whether offenses are properly joined involves a two-stage analysis. First, a court must determine whether the offenses were sufficiently related to be joinable, and then it must determine whether an otherwise proper joinder was prejudicial to the defendant.
9. ____: ____: ____. There is no error under Neb. Rev. Stat. § 29-2002 (Reissue 2016) if joinder was not prejudicial.
10. ____: ____: ____. A denial of a motion to sever will be reversed only if clear prejudice and an abuse of discretion are shown. An appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.
11. **Trial: Joinder: Proof.** A defendant opposing joinder of charges has the burden of proving prejudice.
12. ____: ____: ____. To prove prejudice in opposing joinder, a defendant must show compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever.
13. **Trial: Joinder.** Severe prejudice occurs when a defendant is deprived of an appreciable chance for an acquittal, a chance that the defendant would have had in a severed trial.
14. **Trial: Joinder: Juries: Evidence.** Joined charges do not usually result in prejudice if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations.
15. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith.
16. ____: ____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.
17. ____: ____. Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime and evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts. Evidence of other crimes or bad acts is also inextricably intertwined with the charged crime if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
18. **Constitutional Law: Juries: Discrimination: Proof.** In order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment, a defendant must show (1) that the group alleged to be excluded is a distinctive group in the community, (2) that the

representation of the group in venires from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

19. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process. In this three-step process, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
20. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** Once the trial court has decided the ultimate question of intentional discrimination in a prosecutor's strike of a prospective juror, the questions on appeal are only whether the prosecutor's reasons were facially race neutral and whether the trial court's final determination regarding purposeful discrimination was clearly erroneous.
21. **Juries: Discrimination: Prosecuting Attorneys.** Whether a prosecutor's reasons for using peremptory challenges are race neutral is a question of law. A trial court's determination that the prosecutor's race-neutral explanation should be believed, on the other hand, frequently involves evaluation of a prosecutor's credibility, which requires deference to the court's findings absent exceptional circumstances.
22. ____: ____: ____. In determining whether a prosecutor's explanation for using a peremptory challenge is race neutral, a court is not required to reject an explanation because it is not persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory.
23. ____: ____: ____. A prosecutor's intuitive assumptions, inarticulable factors, or even hunches can be proper bases for rejecting a potential juror, so long as the reasons are not based on impermissible group bias.
24. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.
25. **Criminal Law: Motions for Mistrial: Proof: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. The defendant must prove that the alleged

error actually prejudiced him or her, rather than creating only the possibility of prejudice.

26. **Motions for Mistrial: Motions to Strike: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.
27. **Assault: Weapons.** First degree assault can serve as the predicate offense of use of a deadly weapon to commit a felony.
28. **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.
29. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial is plainly evident from the record, affects a litigant's substantial right, and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
30. **Sentences: Appeal and Error.** The failure to impose an indeterminate sentence when required by statute constitutes plain error.
31. **Sentences: Pretrial Procedure.** A defendant is not entitled to credit for time served when he or she is awaiting trial and sentencing on charges, but is also serving another sentence.
32. **Habitual Criminals: Sentences.** The habitual criminal statute does not enhance the penalty for prior convictions, but is applied to the penalty for the triggering offense, and thus, the fact that the penalty for a prior conviction was itself enhanced does not result in a double penalty enhancement of the triggering offense. Instead, even convictions that are enhanced under a specific subsequent offense statute can be used as prior convictions so long as they meet the statutory requirement that such convictions resulted in terms of imprisonment of not less than 1 year.
33. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether 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.
34. **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.

35. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeals from the District Court for Douglas County: W. Mark Ashford, Judge. Judgment in No. S-17-1183 affirmed in part, and in part vacated and remanded for resentencing. Judgment in No. S-17-1321 affirmed in part, and in part vacated.

Ernest H. Addison, Jr., and A. Michael Bianchi 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.

Papik, J.

A jury found Reginald B. Briggs guilty of manslaughter, use of a deadly weapon to commit a felony, possession of a deadly weapon by a prohibited person, and pandering. Briggs later pleaded guilty to another charge of pandering, which had been severed from the other charges prior to trial. Briggs now appeals a number of issues pertaining to his convictions and sentences. We find no merit to his various assignments of error. We do find plain error in his sentencing and thus vacate his sentences in part and remand the matter for resentencing.

BACKGROUND

Information and Pretrial Motions.

An amended information charged Briggs with 7 counts: first degree murder with the victim alleged to be Teresa Longo, use of a deadly weapon to commit a felony, possession of a

deadly weapon by a prohibited person, pandering with the victim alleged to be Longo, pandering with the victim alleged to be Raynette Heidt, and two charges of third degree domestic assault. The information also alleged that Briggs was a habitual criminal.

Prior to trial, Briggs filed motions to sever the pandering and domestic assault counts from the other charges. At a hearing on the motions, the State conceded to severance of the domestic assault charges. The district court also granted the motion as to the pandering charge in which Heidt was the alleged victim. The court declined to sever the pandering charge in which Longo was the alleged victim and ordered that it be joined for trial with the murder and weapons charges.

After the district court's order on Briggs' severance motion, the State filed a motion in limine in which it sought an order authorizing it to adduce evidence of Briggs' pandering of Heidt at the trial on the murder, weapons, and pandering of Longo charges. The district court granted the motion in limine. In a written order, it found that evidence of Briggs' pandering of Heidt was inextricably intertwined with the charged crimes.

Evidence Presented at Trial.

A jury trial was held on the murder and weapons charges and on the pandering charge alleging Longo to be the victim. The most relevant evidence for purposes of this appeal will be detailed below.

Much of the evidence concerning pandering came from testimony of Heidt. Heidt testified that she has known Briggs since 2009 and that they began a romantic relationship in December 2013. At some point in 2015, both Briggs and Longo started residing with Heidt and her two children at a house in Omaha, Nebraska. Heidt testified that during that time, she, Briggs, and Longo were engaged in prostitution, with Heidt and Longo acting as prostitutes and Briggs acting as their "pimp" by controlling the finances and

deciding if and when Heidt and Longo were going to engage in prostitution.

Heidt testified that she would place advertisements both for herself and for Longo on a website used to advertise prostitution. Briggs directed her to post the advertisements and provided money to place them. Heidt and Longo engaged in prostitution in various hotels in the area, and the rooms were paid for by Briggs. Briggs set the prices to be charged per hour, and Heidt and Longo would be paid in cash, which they would give to Briggs. Records from various hotels in the area were entered into evidence, showing rooms booked in either Briggs' or Longo's name during the summer of 2015.

Heidt also provided testimony regarding Longo's disappearance. She testified that at some point in the early morning of September 17, 2015, Briggs told Longo to gather her belongings and leave with him. Longo then left with Briggs, taking with her a red suitcase she often took when going out for the evening. Heidt never saw Longo again.

Briggs returned to the house without Longo a few hours later. When he arrived, Briggs washed all of his clothing in the washing machine even though he did not typically do his own laundry. After showering and getting dressed, and while it was still dark outside, Briggs made Heidt drive him to a nearby creek without using the car's headlights. Briggs got out of the car, walked around to the back, and retrieved his jacket, which appeared to be concealing something inside it as he carried it in his arms. When Briggs returned about 5 minutes later, he was still carrying the jacket, but it appeared lighter, as if there was no longer anything inside.

Heidt testified that Briggs owned a shotgun and that as of August 2015, he was keeping the shotgun beneath the stairs of their basement. Heidt testified that the last time she saw the shotgun in that location was the first week in September.

Nathan Jandreau, an acquaintance of Briggs, testified that sometime in September 2015, Briggs came to his home. Jandreau testified that during that visit, Briggs pulled Jandreau

aside and whispered to him that Briggs "fucked up." When asked to explain, Briggs said, "I accidentally shot the bitch." When Jandreau asked whom Briggs had shot, Briggs replied, "the white girl." Jandreau then asked for more details, and Briggs said that "he was trying to scare her and the gun accidentally went off." Briggs added that he had left the body in Jandreau's house.

Jandreau understood Briggs to be referring to a home in which he had previously resided. After Jandreau moved out of that home, no one resided in it, but it was always unlocked and many people sold drugs and guns out of it. Two days after the conversation between Jandreau and Briggs, Jandreau went to that location. As he walked by the bathroom, he saw feet sticking out of the shower. Jandreau left, but later told law enforcement about the body after he was arrested for an unrelated crime at the end of September 2015.

Based on the information provided by Jandreau, police officers obtained a search warrant and visited the home. Upon entering the home, one of the investigating officers smelled an odor he associated with decaying flesh. In the living room area, the officers found a red suitcase. The officers located a female body in the shower. A purse containing identification and debit cards with Longo's name was found near the body. The body was identified as Longo's based on a thumbprint.

An autopsy revealed a large wound in the back of Longo's head. The inside of the skull, where the brain would usually sit, was exposed. The forensic pathologist who performed the autopsy concluded, based on a number of factors, that the cause of death was a close-range shotgun wound to the back of the head. A forensic entomologist analyzed maggots found on Longo's body and determined that she died between September 15 and 21, 2015.

Jury's Verdicts and Sentencing.

The jury did not convict Briggs of the charged crime of first degree murder, but instead convicted him of manslaughter.

It also convicted him of the other charges of use of a deadly weapon to commit a felony, possession of a deadly weapon by a prohibited person, and pandering. Briggs filed a motion for new trial, which was overruled.

The district court determined Briggs qualified as a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2016) and sentenced him accordingly. The district court sentenced Briggs to 20 years' imprisonment for manslaughter, 40 to 50 years' imprisonment for use of a deadly weapon to commit a felony, 10 years' imprisonment for possession of a deadly weapon by a prohibited person, and 10 years' imprisonment for pandering. The sentences for these charges were ordered to be served consecutively, and Briggs was awarded 764 days' credit for time served. Briggs timely appealed.

Disposition of Severed Charges.

Pursuant to a plea agreement, Briggs later entered a plea of no contest to the previously severed charge of pandering involving Heidt and the State dismissed the remaining domestic assault charges. The district court accepted the no contest plea and sentenced Briggs to 10 years' imprisonment with the sentence to be served concurrently with his other sentences. In the sentencing order, the district court awarded Briggs 794 days' credit for time served. Briggs also timely appealed his conviction and sentence for this charge.

ASSIGNMENTS OF ERROR

Briggs assigns nine errors on appeal, which we have condensed and restated as follows: The district court erred (1) in denying the motion to sever the pandering charge, (2) in admitting evidence of Briggs' pandering of Heidt, (3) in denying Briggs' challenges to jury selection, (4) in denying Briggs' motions for mistrial, (5) in denying Briggs' motion to dismiss at the conclusion of the State's case, (6) in denying Briggs' motion for new trial, (7) in finding Briggs to be a habitual criminal, and (8) in imposing excessive sentences.

STANDARD OF REVIEW

[1] A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown, and an appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice. *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018), *disapproved on other grounds, State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018).

[2] 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. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[3] An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. It reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory. *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (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. *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016).

[5] The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion. *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

[6] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

ANALYSIS

Denial of Motion to Sever.

We begin our analysis with Briggs' argument that the district court committed reversible error by not severing the pandering charge involving Longo from the other charges upon which Briggs was tried.

[7] A defendant has no constitutional right to a separate trial on different charges. *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014). Instead, Neb. Rev. Stat. § 29-2002 (Reissue 2016) controls the joinder or separation of charges for trial and states, in relevant part:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses . . . for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

[8] Under these provisions of § 29-2002, the question of whether offenses are properly joined involves a two-stage analysis. First, a court must determine whether the offenses were sufficiently related to be joinable, and then it must determine whether an otherwise proper joinder was prejudicial to the defendant. See *Knutson, supra*.

[9,10] But while subsections (1) and (3) of § 29-2002 present two separate questions, we have held that there is no error under either subsection if joinder was not prejudicial. See *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018), *disapproved on other grounds, State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018). Accordingly, a denial of

a motion to sever will be reversed only if clear prejudice and an abuse of discretion are shown. *Id.* An appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice. *Id.*

[11-13] A defendant opposing joinder of charges has the burden of proving prejudice. *Id.* To carry that burden, a defendant must show compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever. Severe prejudice occurs when a defendant is deprived of an appreciable chance for an acquittal, a chance that the defendant would have had in a severed trial. *Id.*

Briggs argues both that the pandering charge involving Longo was not sufficiently related to the other charges upon which he was tried and that this joinder was prejudicial to him. We, however, need not consider whether the pandering charge was properly joined with the other counts, because, as we will explain, Briggs has not demonstrated prejudice from the joinder.

[14] Joined charges do not usually result in prejudice if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations. *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014). In this case, we believe that the evidence was such that the jury could have easily separated evidence of the charges during deliberations. The evidence that Briggs committed pandering was distinct from the evidence related to the other charges. The evidence of pandering concerned Briggs' acting as a "pimp" for Heidt and Longo between June 1 and September 17, 2015. The evidence of other charges was primarily Longo's disappearance on September 17, the subsequent discovery of her body, and evidence tending to show Briggs' involvement in her death. We perceive little risk that the jury could not separate the charges and associated evidence.

Furthermore, the record demonstrates that the jury did separately evaluate whether the State met its burden as to each

charge. While it convicted Briggs of pandering, it did not convict him of the charged crime of first degree murder. Because Briggs cannot show he was prejudiced by the denial of his motion to sever, this assignment of error lacks merit.

Admission of Evidence That Briggs Pandered Heidt.

We next turn to Briggs' contention that the district court committed reversible error by allowing the State to introduce evidence involving his pandering of Heidt. As noted above, the State charged Briggs with two counts of pandering, one alleging Longo to be the victim and one alleging Heidt to be the victim. The district court severed the pandering charge involving Heidt, but it nonetheless allowed the State to introduce evidence of Briggs' pandering of Heidt at the trial concerning other charges. Briggs contends that this evidence was inadmissible under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404(2) (Reissue 2016). We disagree.

[15-17] Under rule 404(2), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. Rule 404(2) does not apply, however, to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013). Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime and evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts. See *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016). Evidence of other crimes or bad acts is also inextricably intertwined with the charged crime if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime. See *id.*

In this case, the evidence showed that Briggs was pandering Heidt at the same time he was pandering Longo. Indeed,

Heidt had the knowledge to testify about Briggs' relationship with and pandering of Longo because Briggs was pandering her at the same time. Evidence of Heidt's relationship with Briggs and Longo was necessary for the State to present a coherent picture of its allegations that Briggs pandered Longo and eventually killed her. And a complete picture of Heidt's relationship with Briggs and Longo could be portrayed only by allowing evidence of Briggs' pandering of Heidt.

Because the evidence of Briggs' pandering of Heidt was inextricably intertwined with evidence of the charged crimes, rule 404(2) did not apply. This assignment of error also lacks merit.

Challenges to Selection of Jury.

Briggs also argues that the district court committed reversible error by overruling challenges he made to the jury selection in this matter. Briggs makes two separate arguments regarding jury selection. He contends that he was deprived of a jury which accurately and correctly reflected a fair, impartial, and representative cross-section of the community and that the State used peremptory challenges on certain jurors solely because of their race, contrary to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). We take up these challenges in turn.

[18] Briggs contends that there were 42 prospective jurors and that out of this group, there were two African-Americans and one "similarly situated minority." Brief for appellant at 33. This, Briggs claims, violated the fair-cross-section requirement under the Sixth Amendment to the U.S. Constitution. In order to establish a prima facie violation of the fair-cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a distinctive group in the community, (2) that the representation of the group in venires from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group

in the jury selection process. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

Briggs offered little argument or evidence in the trial court in support of a fair-cross-section challenge. His counsel did point out the prospective jurors included two African-Americans and one other juror "who might be considered a person of color," but most of the focus in his challenge to the jury selection was directed at the State's use of peremptory strikes. But even assuming Briggs adequately raised a fair-cross-section challenge in the district court, and even if we assume that the other elements necessary to establish a prima facie violation were present, there is no evidence that underrepresentation of racial minorities was due to systematic exclusion in the jury selection process. Absent such evidence, Briggs cannot prevail on a fair-cross-section claim. See *Thomas, supra*.

Moving to Briggs' challenge under *Batson, supra*, our focus shifts to the State's use of peremptory strikes. Briggs challenges the State's use of peremptory strikes on two prospective jurors, contending that the challenges were used solely because of the prospective jurors' race. We will briefly review the standards for resolving such challenges before applying them in this case.

[19] Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process. *State v. Clifton*, 296 Neb. 135, 892 N.W.2d 112 (2017). In this three-step process, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Id.* First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. *Id.*

[20,21] Once the trial court has decided the ultimate question of intentional discrimination, however, the questions on

appeal are only whether the prosecutor's reasons were facially race neutral and whether the trial court's final determination regarding purposeful discrimination was clearly erroneous. *Id.* Whether a prosecutor's reasons for using peremptory challenges are race neutral is a question of law. *Id.* A trial court's determination that the prosecutor's race-neutral explanation should be believed, on the other hand, frequently involves evaluation of a prosecutor's credibility, which requires deference to the court's findings absent exceptional circumstances. *Id.*

In this case, Briggs contends that the State did not offer a race-neutral reason for excluding two jurors who were racial minorities and that even if the State did offer race-neutral reasons for the strikes, such reasons were not genuine but pretextual. In fact, the State clearly did offer race-neutral reasons for striking the jurors at issue. The first of these prospective jurors was a doctor who had indicated that because of scheduling issues, a clinic with which she was associated would have to close if she were selected as a juror. The State said it struck the juror for this reason. As a reason for striking the second juror at issue, the State pointed to his statements that he was going to be taking his daughter to graduate school in Oregon during the time trial was scheduled and that if selected as a juror, he would have to change his plans and "wouldn't be happy about that at all."

[22] In determining whether a prosecutor's explanation for using a peremptory challenge is race neutral, a court is not required to reject an explanation because it is not persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory. *Clifton, supra*. The reasons the State offered were not inherently discriminatory.

[23] We also reject Briggs' claim that the reasons offered by the State were pretextual. The sole argument Briggs makes in support of this claim is that these jurors stated during voir dire that they could be fair and impartial. But in making this argument, Briggs appears to misunderstand our inquiry. The

State can exercise peremptory strikes on jurors for reasons other than a belief that the juror will not be fair and impartial. Indeed, "[a] prosecutor's intuitive assumptions, inarticulable factors, or even hunches can be proper bases for rejecting a potential juror, so long as the reasons are not based on impermissible group bias." *Clifton*, 296 Neb. at 153, 892 N.W.2d at 129. We do not understand how the fact that these jurors stated they could be fair and impartial shows that the prosecutor's stated reasons for striking them from the jury were a pretext for discrimination. As there is no basis to find that the district court clearly erred in finding that the State's race-neutral explanations were pretextual, Briggs' claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), fails.

Denial of Briggs' Motion to Dismiss.

[24] Briggs next asserts that the district court erred by denying the motion to dismiss he made at the close of the State's case. The record, however, shows that after the State rested and Briggs' motion was denied, Briggs put on evidence of his own. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence. *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016).

By introducing evidence after the denial of his motion to dismiss, Briggs waived the right to challenge the district court's ruling on appeal.

Briggs' Motions for Mistrial.

Briggs also claims the district court erred by denying his motions for a mistrial. Briggs asked the district court to grant a mistrial after the admission of testimony from Heidt that

Briggs moved in with her after he was released from jail. He also argued a mistrial was warranted after the trial court admitted evidence of a telephone call between Briggs and Heidt that took place while Briggs was incarcerated. We cannot say the district court abused its discretion in denying Briggs' requests for a mistrial.

[25] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017). The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id.*

[26] Briggs claims that evidence he was previously incarcerated was prejudicial and warranted a mistrial. After Heidt made reference to Briggs' previous incarceration, however, the district court gave an instruction ordering the jury to disregard the reference to Briggs' being in jail. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *McCurry, supra*. Neither do we believe this is an extraordinary case in which a trial court's admonishment is insufficient to overcome potential prejudice. The jury was already aware that Briggs had a criminal history; he had stipulated that he had a prior felony conviction, and this stipulation was read to the jury at the start of the trial. It would not have come as a shock to any juror that Briggs had spent some time incarcerated.

Briggs fares no better with his argument that he was entitled to a mistrial based on the admission of the recorded telephone call between Briggs and Heidt. In the call, which occurred before Longo's death, Briggs asked Heidt whether Longo was holding money. After being told she was not, Briggs asked Heidt to bring the money to bond him out of jail. The call was thus relevant to the question of whether Briggs was benefiting

from Longo's acts of prostitution. Briggs cannot even show that evidence of the call was improperly admitted, let alone that its admission entitled him to a mistrial. This assignment of error is without merit.

Motion for New Trial.

Briggs claims that the district court should have granted his motion for new trial for various reasons. Most of these reasons can be dispensed with quickly, but the final reason requires more discussion.

With respect to Briggs' claim that the circumstances under which he had the opportunity to depose Jandreau and another witness were unfair, we find that the district court was not obligated to grant a new trial. Briggs complains that these witnesses were granted immunity during the trial and that as a result, he was forced to take their depositions during recesses. Briggs, however, did not ask for a continuance to give him more time to take either deposition. Neither has Briggs shown how he was prejudiced by the timing of these depositions.

Next, Briggs claims that he was entitled to a new trial based on various issues we have already discussed. Briggs says he was denied a fair trial as a result of the admission of evidence regarding the pandering of Heidt and the recorded telephone call between Briggs and Heidt. Briggs also complains about Heidt's stricken statement that Briggs moved in with her after he was released from jail. As we have already explained, we do not find that Briggs was prejudiced by any of the foregoing. Neither do we believe Briggs has identified cumulative error that would entitle him to a new trial.

This brings us to the motion for new trial argument that requires additional discussion. Here, Briggs argues that the district court should have given him a new trial because he did not commit an intentional felony that would support his conviction for use of a deadly weapon to commit a felony. In support of this argument, Briggs points out that this court has interpreted Neb. Rev. Stat. § 28-1205(1) (Reissue 2016), the

use of a deadly weapon to commit a felony statute, to provide that a person cannot be convicted thereunder when the underlying felony is an unintentional crime. See, *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002); *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), *disapproved on other grounds, State v. Irish*, 292 Neb. 513, 873 N.W.2d 161 (2016). As we explained in *Ring*, 233 Neb. at 724, 447 N.W.2d at 911, § 28-1205(1) makes it a crime to use certain weapons "'to commit any felony'" and this is synonymous with "'for the purpose of committing any felony.'" Briggs contends that he did not commit an intentional crime that would support his conviction for use of a deadly weapon to commit a felony.

The State does not contest Briggs' reading of *Pruett* or *Ring*, but contends that Briggs did commit an intentional crime that could serve as the predicate offense for his use of a deadly weapon to commit a felony conviction. The State notes that the jury was instructed to find Briggs guilty of manslaughter if it concluded he killed Longo either intentionally without malice upon a sudden quarrel or unintentionally while in the commission of an unlawful act, and the instructions defined as an unlawful act "Assault in the First Degree, that is, the act of intentionally or knowingly causing serious bodily injury to another person." The State argues that either sudden quarrel manslaughter or first degree assault is an intentional crime and can serve as the basis for a use of a deadly weapon to commit a felony conviction.

[27] We have previously held that first degree assault requires the intent to perform the act which produces the injury and that, because of this intent requirement, first degree assault can serve as the predicate offense of use of a deadly weapon to commit a felony. See, *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009); *State v. Tucker*, 278 Neb. 935, 774 N.W.2d 753 (2009). In both *Sepulveda* and *Tucker*, the defendants were convicted of manslaughter and use of a deadly weapon to commit a felony. And, in both cases, we upheld a use of a weapon conviction on the ground that

intentional assault could form the basis for the unintentional manslaughter conviction and the predicate for the use of a weapon charge.

Faced with the fact that first degree assault could serve as a predicate for the use of a weapon charge, Briggs responds that there was insufficient evidence he committed first degree assault and, in the alternative, that a finding he committed first degree assault cannot be reconciled with the jury's decision not to convict him of first or second degree murder. We take up these arguments in turn.

[28] First, we reject Briggs' argument that there was insufficient evidence of first degree assault. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019).

Viewing the evidence under this deferential standard, we find there was sufficient evidence that Briggs committed first degree assault. Neb. Rev. Stat. § 28-308(1) (Reissue 2016) provides that one commits first degree assault when one "intentionally or knowingly causes serious bodily injury to another person." The evidence showed that Longo was last seen alive leaving with Briggs on September 17, 2015; that she was later found to have been killed as a result of a close-range shotgun wound to the head; that Briggs washed his clothes and traveled to a creek where he appeared to dispose of an object in the early morning hours of September 17; and that Briggs admitted to Jandreau that he had shot Longo. While Briggs told Jandreau that he had shot Longo accidentally, the jury was not obligated to believe his testimony on that point. Viewing this evidence in the light most favorable to the prosecution, we believe the jury could have rationally found that Briggs intentionally caused serious bodily injury to Longo by shooting her in the head.

This leaves Briggs' argument that a determination that he committed first degree assault is inconsistent with the jury's decision not to convict him of first or second degree murder. This argument has some surface appeal. The facts we recounted above upon which the jury could rationally have convicted Briggs of first degree assault would also seem to support a finding of first or at least second degree murder. And yet, as Briggs points out, the jury, despite being instructed on the elements of those offenses, convicted him of manslaughter instead. Accordingly, Briggs argues that a finding he committed first degree assault is inconsistent with the jury's decision not to convict him of first or second degree murder and that therefore, the use of a weapon conviction cannot stand.

But while Briggs' argument may have surface appeal, it is not legally viable. Briggs is asking us to overturn a conviction on one charge because he contends it is inconsistent with a jury's decision not to convict on another. The U.S. Supreme Court has held that a conviction cannot be overturned because of this type of inconsistency. The Supreme Court first reached that conclusion in *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932), and reaffirmed the principle over 50 years later in *U.S. v. Powell*, 469 U.S. 57, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984).

In *Powell*, the inconsistency in the verdict was more apparent than in this case. The defendant was acquitted of possession with intent to distribute cocaine and conspiracy to commit the same but was convicted of several counts of using a telephone in committing those same drug-possession offenses. Even so, the U.S. Supreme Court held that the defendant could not challenge the convictions on the ground they were inconsistent with the acquittals on other counts.

As the Court explained, this type of inconsistent verdict should not necessarily be interpreted "as a windfall to the Government at the defendant's expense," because it is just as possible that the jury reached a proper conclusion on the

conviction and arrived at an inconsistent conclusion on the acquittal through "mistake, compromise, or lenity." *Id.*, 469 U.S. at 65. Given the uncertainty of the cause of the inconsistent verdict and the fact that the prosecution cannot challenge the acquittal, the Court held that a conviction cannot be overturned because it is inconsistent with the jury's decision not to convict on another count. Finally, the Court emphasized that protection against jury irrationality or error is available in the form of sufficiency of the evidence review, but that this review is "independent of the jury's determination that evidence on another count was insufficient." *Id.*, 469 U.S. at 67.

While a minority of state courts have declined to follow the rule adopted in *Dunn* and *Powell*, on state law grounds, see, e.g., *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010) (collecting cases), we find the federal rule adopted in *Dunn*, reaffirmed in *Powell*, and followed by a majority of states to be sound. We also note that the Nebraska Court of Appeals, in reliance on *Dunn* and *Powell*, refused to overturn a conviction on the ground that it was inconsistent with the jury's decision to acquit on another count. See *State v. McBride*, 19 Neb. App. 277, 804 N.W.2d 813 (2011). Instead, consistently with *Powell*, the Court of Appeals determined there was sufficient evidence to support the conviction without regard to the acquittal on the other charge. We have performed the same analysis here and determined there was sufficient evidence to support the conviction for use of a weapon to commit a felony.

Because we find that Briggs cannot challenge his use of a weapon conviction on the ground that it is inconsistent with the jury's decision not to convict him of first or second degree murder, and because we find that there was sufficient evidence to support the use of a weapon conviction, Briggs is not entitled to a new trial on this basis.

Plain Error in Sentencing.

[29] Briggs' final two assignments of error pertain to his sentences. Before addressing those issues, we will consider

the State's contention that there was plain error in the sentences given by the district court. Plain error may be found on appeal when an error unasserted or uncomplained of at trial is plainly evident from the record, affects a litigant's substantial right, and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Samayoa*, 292 Neb. 334, 873 N.W.2d 449 (2015). We agree that the sentences imposed constitute plain error in some respects, as we explain below.

The district court imposed determinate sentences of 20 years' imprisonment for manslaughter and 10 years' imprisonment for possession of a deadly weapon by a prohibited person. Both crimes were alleged to have been committed after the effective date of changes made by 2015 Neb. Laws, L.B. 605, that resulted in the version of Neb. Rev. Stat. § 29-2204 (Supp. 2015) that would have been in place at the time. Accordingly, Briggs' sentences on these charges were governed by that version of § 29-2204, which provided:

> (1) Except when the defendant is found guilty of a Class IA felony, in imposing a sentence upon an offender for any class of felony other than a Class III, IIIA, or IV felony, the court shall fix the minimum and the maximum terms of the sentence to be served within the limits provided by law. The maximum term shall not be greater than the maximum limit provided by law, and:
>
> (a) The minimum term fixed by the court shall be any term of years less than the maximum term imposed by the court; or
>
> (b) The minimum term shall be the minimum limit provided by law.

[30] Because manslaughter is a Class IIA felony and possession of a deadly weapon by a prohibited person is a Class ID felony, the above-quoted portion of § 29-2204 governed the sentences that should have been imposed. This language obligated the district court to impose indeterminate sentences

for these convictions. See *State v. Thompson*, 301 Neb. 472, 919 N.W.2d 122 (2018). As we have recently explained, an indeterminate sentence is ordinarily articulated as either a minimum and maximum term or a range of time for which a defendant is to be incarcerated, as opposed to a determinate sentence, which is when a defendant is sentenced to a single term of years. *Id.* Here, the district court imposed determinate sentences for Briggs' convictions of manslaughter and possession of a deadly weapon by a prohibited person. We have previously found that the failure to impose an indeterminate sentence when required by statute constitutes plain error. *Id.* Given this plain error, we vacate Briggs' sentences for his convictions of manslaughter and possession of a deadly weapon by a prohibited person and remand those counts for resentencing.

[31] We note another instance of plain error in the district court's award of a credit for time served of 794 days at the time of Briggs' sentencing on his plea-based pandering conviction. This followed the district court's award of 764 days of credit for time served for his sentences on the other charges. The district court awarded additional credit for time served because Briggs was incarcerated during the time period between his respective sentencing hearings. But the second award of credit for time served constituted plain error. While Briggs was entitled to credit for time served prior to his initial sentencing in October 2017, he was not entitled to additional credit after that sentencing. After Briggs was sentenced in October 2017, he began serving his sentences on the offenses of which he was convicted at trial. We have held that a defendant is not entitled to credit for time served when he or she is awaiting trial and sentencing on charges, but is also serving another sentence. See *State v. Baker*, 250 Neb. 896, 553 N.W.2d 464 (1996). We thus vacate the district court's award of 794 days' credit for time served and leave in place its initial award of 764 days' credit for time served.

Habitual Criminal Determination.

Returning to Briggs' assignments of error related to sentencing, Briggs asserts that the district court erred by finding that he met the criteria of a habitual criminal under § 29-2221 and sentencing him accordingly.

Section 29-2221(1) provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal . . . .

As part of its attempt to show that Briggs qualified as a habitual criminal, the State submitted evidence of three prior convictions. One of the prior convictions upon which the State relied was a conviction of third degree domestic assault, second offense, involving the same victim. The offense was a Class IV felony for which Briggs was sentenced to a term of 1 to 1 year's imprisonment. Briggs contends that because this offense was under a specific subsequent offense statute, it would be an impermissible "'double penalty enhancement'" to treat this offense as a prior conviction under the habitual criminal statute. Brief for appellant at 46.

[32] Briggs' argument is foreclosed by our opinion in *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016). In that case, we distinguished between triggering convictions and prior convictions under the statute. We explained that a triggering offense is the "offense for which the defendant is currently being sentenced" and a prior offense is "one of the offenses that establishes that the defendant was a habitual criminal at the time he or she committed the triggering offense." *Id.* at 710-11, 879 N.W.2d at 701. We then observed that the habitual criminal statute does not enhance the penalty for prior convictions, but is applied to the penalty for the triggering offense, and that thus, the fact the penalty for a prior

conviction was itself enhanced does not result in a double penalty enhancement of the triggering offense. *Id.* Instead, even convictions that are enhanced under a specific subsequent offense statute can be used as prior convictions so long as they meet the statutory requirement that such convictions resulted in terms of imprisonment of not less than 1 year. *Id.* Briggs' third degree domestic assault, second offense, conviction meets that criteria.

As noted above, the State submitted evidence of three prior convictions. Briggs contends two of those convictions cannot be used as prior convictions for habitual criminal purposes, but apparently concedes that one of the convictions can. The statute requires only two qualifying prior convictions. Having concluded that one of the convictions Briggs challenges qualified and given Briggs' concession that one of the other convictions also qualified, the district court did not err in classifying Briggs as a habitual criminal and we need not determine whether the third conviction qualified as a valid prior conviction under the statute.

Excessive Sentences.

Finally, Briggs argues that his sentences were excessive. Because we have vacated his sentences for manslaughter and possession of a deadly weapon by a prohibited person and remanded the matter for resentencing, we need only consider whether his other sentences were excessive. Each of these sentences was within the appropriate statutory range.

[33-35] 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.*

Briggs concedes that the district court's sentences were within the statutory range, but argues that the district court nonetheless abused its discretion by not seriously considering mitigating factors. Briggs does not, however, actually identify what factors he considers mitigating. We see nothing in the record to suggest that the district court did not properly consider and apply the familiar sentencing factors, and we therefore reject this assignment of error.

CONCLUSION

We find that Briggs' assignments of error are without merit and affirm his convictions. However, we find plain error in his sentencing and therefore vacate his sentences for manslaughter and possession of a deadly weapon by a prohibited person and remand the matter for resentencing for those offenses in accordance with this opinion. We also vacate the district court's award of 794 days' credit for time served.

Judgment in No. S-17-1183 affirmed in part, and in part vacated and remanded for resentencing.
Judgment in No. S-17-1321 affirmed in part, and in part vacated.

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

James D. Bramble, appellee, v. Lori A. Bramble, appellant.

929 N.W.2d 484

Filed June 21, 2019. No. S-18-682.

1. **Judgments: Justiciable Issues.** Justiciability issues that do not involve a factual dispute present a question of law.
2. **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.
3. **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.
4. **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.
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.** As a general rule, a moot case is subject to summary dismissal.
7. **Contempt: Moot Question: Appeal and Error.** An appeal challenging a finding of civil contempt is rendered moot once the contemnor voluntarily purges the contempt.
8. **Contempt: Appeal and Error.** In a civil contempt proceeding, the contemnor has a choice once he or she is found to be in willful contempt of court and a sanction and purge plan is put in place: The contemnor can either seek a stay of the sanction pending an appeal or comply with the purge plan and thereby purge the finding of contempt and end the matter.
9. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it

involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.

10. **Moot Question: Words and Phrases.** The public interest exception to the mootness doctrine requires consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
11. **Moot Question: Appeal and Error.** Application of the public interest exception is inappropriate where the issues presented on appeal do not inherently evade appellate review.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Appeal dismissed.

C.G. (Dooley) Jolly and Travis M. Jacott, of Adams & Sullivan, P.C., L.L.O., for appellant.

Elizabeth Stuht Borchers and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellee.

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

Stacy, J.

This appeal stems from civil contempt proceedings in a dissolution action. The primary question presented is whether a contemnor's full compliance with a purge plan renders moot a subsequent appeal of the finding of contempt. We conclude it does, and we dismiss the appeal.

BACKGROUND

In January 2016, after a trial, the district court for Douglas County entered a decree dissolving the marriage of James D. Bramble and Lori A. Bramble. Both parties moved to alter or amend the decree, and the court thereafter entered an amended decree on February 22, 2016.

As relevant to the issues on appeal, the amended decree awarded the parties joint legal custody of their two minor

children, and Lori was awarded primary physical custody. Regarding the marital home, the amended decree provided:

> The real estate is awarded to [James] as is. The parties have stipulated that the value of the house is $169,000. There is $47,500 of marital equity. [James] shall refinance the house within 60 days of the entry of the Amended Decree to remove [Lori]'s name from the mortgage, and pay [Lori] her share of the equity of $23,750.00. [Lori] shall have until February 29, 2016, to vacate the residence. [Lori] shall leave the house in good condition, and not remove any fixtures or major appliances (except that [Lori] may remove either the clothes washer or the clothes dryer), on her departure. [James] has been paying the mortgage and all expenses since moving out of the marital home, and shall continue to do so until after he takes possession.
>
> [Lori] shall execute a Quitclaim Deed to [James] releasing her interest in the marital residence, whether said interest is marital, legal, equitable, contractual or otherwise, to be held by her attorney, who shall release the deed to the title company or lending institution to be held in escrow pending the refinancing and payment of the marital equity.

Contempt Proceedings

On March 14, 2016, James filed an application for an order to show cause. As relevant to this appeal, James alleged Lori improperly removed several fixtures and items of personal property from the residence. A show cause order was issued, and Lori entered a voluntary appearance.

After a continuance to permit mediation, the contempt application was taken up on October 24, 2016, with both parties represented by counsel. Evidence was adduced, and the matter was continued to January 10, 2017, so additional evidence could be offered. On January 13, the court entered an order

finding that Lori had willfully violated the provisions of the amended decree in the following respects:

> [U]pon her departure, [Lori] removed both the clothes washer and dryer, and replaced the dryer with another unit. Further [Lori] admits to removing the ceiling fans, the dishwasher, range, refrigerator and microwave upon her departure, a direct violation of the Amended Decree, and [Lori] is in [willful] contumacious contempt of this provision.

The January 13 order established a purge plan, but did not impose a sanction for the contempt. The pertinent portions of the order provided:

> IT IS THEREFORE ORDERED that [Lori] is in [willful] contempt of court for violation [of] paragraph 9(f) of the Amended Decree, and shall appear in Douglas County District Court #504 . . . on Monday, March 13, 2017, at 10:30 a.m. for sentencing.
>
> IT IS FURTHER ORDERED that [Lori] may purge herself of contempt by paying the sum of $3,573.00 to [James] no later than March 10, 2017.
>
> IT IS FURTHER ORDERED that [Lori] shall pay to the Clerk of the District Court of Douglas County, Nebraska, the sum of $1,500.00 as an . . . attorney's fee for [James'] attorney, no later than March 10, 2017.
>
> IT IS FURTHER ORDERED that the parties shall inform the court by the close of business March 10, 2017, whether the sentencing hearing is necessary so that the Douglas County Sheriff's Office can allocate their resources.
>
> IT IS FURTHER ORDERED that any requested relief not specifically granted is denied.

Lori filed a timely motion to alter or amend, arguing the order was "not supported by the law or the evidence adduced at trial." She did not object to the procedure ordered by the court or the imposition of a purge plan without a sanction.

The court overruled the motion to alter or amend, and Lori timely appealed.

First Appeal

On appeal, Lori argued the district court erred by finding her in contempt, by imposing a purge plan, and by awarding attorney fees to James. James cross-appealed, assigning the district court erred in not letting him reopen the evidence in the dissolution trial.

In a memorandum opinion issued April 3, 2018,[1] the Nebraska Court of Appeals determined Lori had not appealed from a final order and it dismissed the appeal. The opinion noted that an order of contempt in a postjudgment proceeding to enforce a previous final judgment is a final order,[2] but that "the law in Nebraska has long been that the finding of contempt alone, without an order of sanction is not appealable."[3] Because the district court's January 13, 2017, order did not impose a sanction, the Court of Appeals concluded Lori had not appealed from a final, appealable order. The opinion also sympathized with Lori's predicament:

> In reaching this result, we are cognizant of the difficult position in which Lori is placed. When the district court chooses to in essence impose a purge plan without a sanction, [Lori's] choice is to either (1) follow the directions of the court to avoid sentencing, even though she believes the district court erred in its finding of contempt; or (2) choose not to abide by the court's directives and risk a heavier sanction once sentence is imposed. Once

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[1] *Bramble v. Bramble*, No. A-17-264, 2018 WL 1614352 (Neb. App. Apr. 3, 2018) (selected for posting to court website).

[2] See *id.*, citing *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[3] *Id.* at *3.

> the sanction is imposed, she could then seek a stay of its imposition pending appeal. [Citation omitted.] While we cannot say it was error for the district court to give Lori an opportunity to comply with its order prior to imposing a sanction with a formalized purge plan, the court's order does place Lori in a difficult situation. In any event, her efforts to appeal immediately are premature and we have no alternative other than to dismiss her appeal for lack of jurisdiction.[4]

Regarding James' cross-appeal, the Court of Appeals found the record on appeal was insufficient to support the assignment of error and affirmed the district court's order. The Court of Appeals' mandate issued May 9, 2018.

Proceedings on Remand

On May 18, 2018, the district court ordered Lori to appear on June 11 "for sentencing on a previous finding of . . . contempt." At the June 11 hearing, James' attorney asked the court to reopen the record for the purpose of including additional attorney fees as part of the purge plan.

In an order entered June 11, 2018, the district court reiterated its prior finding of contempt and sentenced Lori to 10 days in jail, ordering her to self-surrender no later than 8 a.m. on Friday, June 15. The order provided that Lori could purge herself of contempt by paying to the clerk of the Douglas County District Court the sum of $5,073 no later than close of business on June 14. The order further provided that if Lori failed to pay the purge amount and failed to self-surrender, a warrant would be issued for her arrest. Finally, the order overruled James' request to reopen the record to submit additional evidence of attorney fees.

Two days later, on June 13, 2018, Lori filed what she captioned as a "Notice of Compliance With Purge Order; and

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[4] *Id.* at *4.

Application for Order." In this filing, Lori stated that at the time of her first appeal, she deposited a $5,000 supersedeas bond with the clerk of the district court and she represented that sum was still on deposit with the clerk. Lori also alleged that on June 12, she paid an additional $73 into the clerk of the district court. Lori asked that the funds deposited with the clerk, totaling $5,073, be used to purge her contempt.

The next day, on June 14, 2018, the district court entered a stipulated order for distribution directing the clerk of the district court to "release to [James] the sum of $5,073" and to "record this transaction in complete satisfaction" of the purge order.

Second Appeal

On July 10, 2018, Lori filed a notice of appeal, purporting to appeal from the contempt orders of January 13, 2017, and June 11, 2018. After Lori filed her opening brief, James moved to summarily dismiss the appeal, arguing it was rendered moot when Lori satisfied the conditions of the contempt order and purged the finding of contempt. Lori opposed summary dismissal, arguing alternatively that (1) the appeal still presents legally cognizable interests or (2) the public interest exception to the mootness doctrine should apply.

The Court of Appeals overruled the motion for summary dismissal and directed the parties to address the mootness issue in the remaining briefing. After briefing was complete, we moved the case to our docket.[5]

ASSIGNMENTS OF ERROR

Lori assigns, slightly restated, that the district court erred in (1) finding her in contempt, (2) making insufficient factual findings to support a finding of willful contempt, (3) finding her in contempt of provisions in the amended decree that were

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

vague, (4) awarding attorney fees to James, and (5) not awarding attorney fees to Lori.

STANDARD OF REVIEW

[1] Justiciability issues that do not involve a factual dispute present a question of law.[6]

ANALYSIS

Before we address James' argument that this appeal of a civil contempt order is moot, we discuss the nature of civil contempt proceedings generally. We have explained that "[c]ivil contempt proceedings are '"'instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce the rights and to administer the remedies to which the court has found them to be entitled . . . ."'"'[7] Civil contempt proceedings are often described as "remedial and coercive in their nature."[8] As such, courts in civil contempt proceedings have broad remedial power, including the power to order "compensatory relief that is limited to a complainant's actual losses sustained because of a contemnor's willful contempt"[9] and the power to order equitable relief.[10]

Historically, Nebraska did not permit appeals to be taken from civil contempt orders imposing only civil, coercive sanctions.[11] But in the 2010 case of *Smeal Fire Apparatus Co. v.*

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[6] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[7] *Smeal Fire Apparatus Co., supra* note 2, 279 Neb. at 672, 782 N.W.2d at 860 (emphasis omitted).

[8] *Id.* (emphasis omitted).

[9] *Id.* at 676, 782 N.W.2d at 862.

[10] *Smeal Fire Apparatus Co., supra* note 2.

[11] See, e.g., *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993), *overruled, Smeal Fire Apparatus Co., supra* note 2; *State ex rel. Kandt v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747 (1987), *overruled, Smeal Fire Apparatus Co., supra* note 2.

Kreikemeier,[12] we held that "a party may appeal from a final order of contempt, regardless whether the court's sanction is labeled criminal or civil."

With this framework in mind, we address James' argument that this appeal is moot because Lori has purged herself of the civil contempt finding she now seeks to challenge.

Appeal Is Moot

[2,3] Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.[13] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[14]

[4-6] 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.[15] 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.[16] As a general rule, a moot case is subject to summary dismissal.[17]

James argues that because Lori voluntary and fully complied with the purge order, she has purged herself of contempt and this appeal is moot. We considered a similar argument in *McFarland v. State*.[18] In that case, a county court judge

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[12] *Smeal Fire Apparatus Co., supra* note 2, 279 Neb. at 707-08, 782 N.W.2d at 882.

[13] *Blakely, supra* note 6.

[14] *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200, 803 N.W.2d 17 (2011).

[15] *Blakely, supra* note 6.

[16] *Id.*

[17] *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

[18] *McFarland v. State*, 165 Neb. 487, 86 N.W.2d 182 (1957).

(respondent) refused to sign an order fixing a time, date, and place for a probate hearing, believing such an order already had been issued. A mandamus action was filed against the respondent in district court, and a peremptory writ of mandamus issued. When the respondent did not comply with the peremptory writ, an alias peremptory writ of mandamus issued, commanding the respondent to comply with the previous writ by signing the order setting a time, date, and place for the probate hearing. When the respondent again refused, he was found in contempt and ordered committed to jail until he purged himself of contempt by signing the order. The respondent then complied with the purge provision and filed a notice of such compliance with the district court. The district court thereafter noted the respondent's compliance with the alias writ of mandamus and suspended execution of the jail sentence. The respondent appealed to challenge the prior commitment order, and a question was raised about whether the appeal was moot. We found it was, and dismissed the appeal, reasoning:

> [I]t is self evident that no issue remains to be decided here. Nothing could be gained by our holding that the commitment was improper for respondent is no longer in jail. He has not been found guilty of criminal contempt, in which case he would be entitled to have his conviction reviewed. Here the purpose of the order to jail was to coerce respondent to comply with the mandamus order of the court. Whether or not [the mandamus] order is correct can properly be determined in an appeal taken therefrom.[19]

[7] Although *McFarland* was decided before *Smeal Fire Apparatus Co.* recognized the right to appeal a civil contempt order, the mootness analysis in *McFarland* is consistent with

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[19] *Id.* at 493-94, 86 N.W.2d at 186.

that of other courts to have considered the issue.[20] We agree with those state[21] and federal[22] courts which hold that an appeal challenging a finding of civil contempt is rendered moot once the contemnor voluntarily purges the contempt. Such appeals do not present a justiciable issue because, given the coercive nature of civil contempt proceedings, once a finding of contempt has been fully purged and obedience with the order has been accomplished, there is no remaining controversy between the parties and no effective relief that can be afforded on appeal.

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[20] See Annot., 33 A.L.R.3d 448 § 26 (1970 & Supp. 2019) (and cases cited therein).

[21] See, e.g., *Belt v. Cabinet for Families*, 520 S.W.3d 406 (Ky. App. 2017) (appeal of contempt proceedings arising out of failure to pay child support rendered moot when contemnor paid full purge amount); *Union Hill Homes Ass'n v. RET Development*, 83 S.W.3d 87 (Mo. App. 2002) (appeal of contempt order rendered moot when contemnor fully complied with purge order and thus purged itself of contempt); *Central Emergency Med. v. State*, 332 Ark. 592, 966 S.W.2d 257 (1998) (appeal of contempt order moot where contemnor purged itself of contempt by paying fine imposed); *Yeager v. Yeager*, 622 S.W.2d 339 (Mo. App. 1981) (husband's appeal of contempt order in dissolution action rendered moot when he paid amounts due and purged himself of contempt); *Herring v. Herring*, 236 Ga. 43, 222 S.E.2d 331 (1976) (civil contempt appeal rendered moot when contemnor paid entire purge amount); *Clement v. Clement*, 295 Minn. 569, 204 N.W.2d 819 (1973); *Reap's Appeal*, 88 Pa. Super. 147 (1926) (civil contemnor has choice to either appeal finding of contempt or purge it by voluntarily paying fine and thus ending matter).

[22] See, e.g., *Marshall v. Whittaker Corp., Berwick Forge, etc.*, 610 F.2d 1141 (3d Cir. 1979) (appeal from civil contempt is moot once civil contempt has been purged); *Securities and Exchange Commission v. Sloan*, 535 F.2d 679 (2d Cir. 1976) (appeal from order of contempt is moot where contemnor purges himself of contempt and no live controversy remains); *Matter of Berry*, 521 F.2d 179 (10th Cir. 1975) (where contemnor has complied and contempt has been purged, appeal of contempt order is moot); *United States v. Watson Chapel School District No. 24*, 446 F.2d 933 (8th Cir. 1971) (when parties comply and have purged themselves of contempt, there is no justiciable controversy and appeal must be dismissed).

An example is the case of *Clement v. Clement*.[23] In that case, the father was found to be in contempt of court for failing to make court-ordered child support payments. He was ordered committed to jail for 45 days unless he purged himself by making an arrears payment of $1,450. A stay of enforcement was ordered for a period of 30 days to permit the father to appeal, but he neither appealed nor paid the purge amount. He was later apprehended, and, the same day, he purged himself of contempt by making the required payment. He then sought appellate review of the order finding him in contempt. The Minnesota Supreme Court dismissed the appeal as moot, reasoning "[t]here is nothing before this court to pass on. [The father] paid monies as he was ordered to do to purge himself of the contempt."[24]

[8] Like the contemnor in *Clement*, Lori was presented with a choice once she was found to be in willful contempt of court and a sanction and purge plan was put in place: She could either seek a stay of the sanction pending an appeal or comply with the purge plan and thereby purge herself of contempt and end the matter.[25] She chose the latter, and fully purged herself of contempt by paying into the clerk of the district court the sum of $5,073, which has since been disbursed to James. The purpose of the civil contempt proceeding—to preserve and enforce the rights of the parties and to compel obedience to the decree[26]—has been accomplished. On these facts, we

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[23] *Clement, supra* note 21.

[24] *Id.* at 569, 204 N.W.2d at 819.

[25] See, e.g., *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987) ("[i]f the appellants believed that the district court incorrectly issued an order, their remedy was to appeal and request a stay pending the appeal"); *In re Marriage of Crow & Gilmore*, 103 S.W.3d 778 (Mo. 2003) (in response to civil contempt order, contemnors have two options: They may purge contempt by complying with order rendering case moot or may appeal contempt order).

[26] See *Smeal Fire Apparatus Co., supra* note 2.

find Lori's appeal seeking to overturn the finding of contempt presents no justiciable issue and is moot.

No Legally Cognizable Interest Remains

Lori does not dispute that she voluntarily and completely complied with the purge order, but she nevertheless urges us to find that she still has a legally cognizable interest in overturning the finding of contempt. Specifically, she argues that because she was "deemed a contemnor"[27] that could have implications if she is involved in future contempt proceedings.

Because Lori has fully purged herself of contempt, she is seeking, in essence, an advisory appellate opinion on whether the contempt order was correct, to use in a future contempt action that may never occur. Our mootness analysis might be different in an appeal where the purge provision has not yet been fully satisfied, but that is not the case here. On these facts, Lori has no legally cognizable interest in this appeal and it is moot.[28]

Public Interest Exception Inapplicable

[9] Lori argues that even if her appeal is moot, we should nevertheless review it under the public interest exception to the mootness doctrine. An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[29] This is not such a case.

[10] The public interest exception to the mootness doctrine requires consideration of the public or private nature of the

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[27] Reply brief for appellant at 3.

[28] See *Professional Firefighters Assn., supra* note 14.

[29] *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018).

question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[30] Lori's appeal challenges the trial court's interpretation of specific terms in her dissolution decree, and findings regarding the parties' particular actions. The questions presented are private, not public, in nature, and the likelihood of the same or similar issues recurring in another case is remote.[31]

[11] Moreover, application of the public interest exception is inappropriate where, as here, the issues presented on appeal do not inherently evade appellate review.[32] As explained above, Lori had an opportunity to challenge the district court's finding of contempt by seeking a stay pending appeal, but instead, she chose to purge herself of contempt and comply with the order. The public interest exception has no application on these facts.

CONCLUSION

This appeal is moot, because Lori has fully and voluntarily purged herself of the civil contempt finding she seeks to overturn. No legally cognizable interest continues to exist, and the public interest exception to the mootness doctrine does not apply. We therefore dismiss this appeal because it presents no justiciable issues.

Appeal dismissed.

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[30] *Id.*

[31] See *Putnam, supra* note 17 (public interest exception does not apply when appeal presents issues that rest on terms of particular sale and particular deeds and bequests, because highly unlikely another case could present similar factual situation).

[32] See *id.*

Nebraska Supreme Court
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State of Nebraska, appellee, v. Arthur D. Ebert, appellant.

929 N.W.2d 478

Filed June 21, 2019. No. S-18-752.

1. **Search and Seizure: Appeal and Error.** The denial of a motion for return of seized property is reviewed for an abuse of discretion.
2. **Courts: Jurisdiction: Search and Seizure: Property.** Neb. Rev. Stat. § 29-820 (Reissue 2016) applies only where the exclusive jurisdiction of a court under Neb. Rev. Stat. § 29-818 (Reissue 2016) has not been invoked.
3. ____: ____: ____: ____. The court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.
4. **Criminal Law: Search and Seizure: Property.** Upon the termination of criminal proceedings, seized property, other than contraband, should be returned to the rightful owner unless the government has a continuing interest in the property.
5. **Criminal Law: Search and Seizure: Property: Presumptions: Proof.** When criminal proceedings have terminated, the person from whom property was seized is presumed to have a right to its return, and the burden is on the government to show that it has a legitimate reason to retain the property.
6. **Property: Presumptions: Evidence.** A presumption of ownership is created by exclusive possession of personal property, and evidence must be offered to overcome that presumption.
7. **Search and Seizure: Property: Presumptions: Title.** Seizure of property from someone is prima facie evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership.
8. ____: ____: ____: ____. The presumptive right to possession of seized property may be overcome when superior title in another is shown by a preponderance of the evidence.

Appeal from the District Court for Stanton County: Mark A. Johnson, Judge. Reversed and remanded for further proceedings.

Bradley A. Ewalt, of Ewalt Law Office, P.C., L.L.O., for appellant.

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

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

Stacy, J.

As part of a plea agreement with Arthur D. Ebert, the State dismissed a charge of theft by unlawful taking. Ebert subsequently filed a motion for return of the property seized from him and originally alleged to be stolen. After conducting an evidentiary hearing, the district court ordered some items of property returned to Ebert and others were returned to his former employer. Ebert appeals. Because the burden of proof was not properly applied, we reverse, and remand for further proceedings.

FACTS

In December 2016, an information was filed in the district court for Stanton County charging Ebert with one count of theft by unlawful taking. The information alleged Ebert had, between the dates of June 6 and November 1, 2016, exercised control over movable property belonging to "3D Metal — Nucor Steel" (3D Metal) with the intent to deprive "him/her thereof." The information listed the movable property as:

> (2) Husky plastic sheeting rolls, (2) DeWalt tool cases each containing tools, (1) Red Milwaukee case with Milwaukee sawzall, (2) JVC tower speakers SX-F7TH, (1) Blue nylon braided rope, (1) Coral blue 1 gallon jug of wiper fluid, (12) Foam nitrile gloves, (2) Milwaukee saw blades, (4) Abus metal locks, (4) AC100+ gold adhesive

> tubes, (1) Stanley vice grip, (4) Pair of white neoprene gloves, (1) Miller brand harness, [and] Miscellaneous assorted tools with (1) tape measure[.]

In a separate case in Stanton County, Ebert was charged with one count of first degree sexual assault and one count of first degree false imprisonment. Pursuant to a plea agreement, Ebert entered guilty pleas to both of those counts and, in exchange, the State dismissed in its entirety the case charging theft by unlawful taking.

Several months after Ebert's theft case was dismissed, he moved for the return of "his property seized from his vehicle by the Stanton County Sheriff's office." At the evidentiary hearing on this motion, an exhibit identifying the seized property was offered and received. The exhibit identified the same items of property that had been listed in the dismissed information charging Ebert with theft by unlawful taking.

Ebert testified that he was employed by 3D Metal from June 6 to November 1, 2016, as a laborer and welder. Ebert conceded that many of the items seized from him actually belonged to 3D Metal. Ultimately, he requested the return of only five items: (1) the nylon harness, (2) a square and level, (3) one of the DeWalt tool cases and included tools, (4) the Milwaukee sawzall, and (5) the JVC speakers. With respect to these five items, we summarize the evidence adduced.

Ebert testified the speakers were gifted to him by his work supervisor, and he claimed to have purchased the other four items. He did not offer receipts for any of the items, but he testified as to the circumstances surrounding their purchase. According to Ebert, he purchased the nylon harness from 3D Metal by having $25 deducted from his weekly paychecks. He purchased the square and level at a department store in the summer of 2016, and he purchased the DeWalt tool case at a yard sale for $125 the week before his arrest. Ebert testified he knew one of the two DeWalt tool cases seized belonged to him, because the other tool case had a serial number written on it by 3D Metal. Ebert testified he purchased the Milwaukee sawzall from a store in Norfolk, Nebraska, in

early June 2016, because he needed it to do a porch repair job for a client.

On cross-examination, Ebert testified he needed tools to do his job at 3D Metal because he mostly did "demolition and refabrication." He testified that he used a truck owned by 3D Metal while he was employed, but the truck stayed on 3D Metal's premises during the evenings. He stated the DeWalt tool case owned by 3D Metal stayed on the truck. Ebert admitted that 3D Metal owned and used Milwaukee sawzalls just like the one seized from him. He stated that 3D Metal kept its sawzalls locked in a cabinet inside the shop and that he did not have a key to the cabinet. He testified that although he had used a different brand of sawzall while employed by 3D Metal, he never used a Milwaukee sawzall during that employment.

The State then called Joe Ledford, an onsite supervisor for 3D Metal. He confirmed that 3D Metal provided work trucks to employees and that the trucks were used only during the day and returned to 3D Metal in the evening. Ledford testified that some tools would remain on the work truck and that others would be locked in a shop overnight. Generally, the trucks would contain a DeWalt toolkit like the two seized from Ebert. And Ledford testified a sawzall was a common tool used on the jobs Ebert did.

Ledford agreed that Ebert purchased a harness from 3D Metal when he began working, but testified that at some point, Ebert reported it had been stolen. Instead of requiring Ebert to buy a new harness, 3D Metal loaned him a spare. Ledford stated that all of the harnesses had serial numbers to identify them, but that he did not bring the paperwork necessary to identify whether the harness seized from Ebert was the one purchased by Ebert or the one loaned to him. Ledford did testify that the harness loaned to Ebert had not been returned after his employment was terminated.

Ledford explained that 3D Metal's general practice was to mark and number its tools with an inscriber, including its DeWalt toolkits. He stated, however, that during the time of

Ebert's employment, 3D Metal was very busy and was purchasing new tools often, and that not all of the new tools were properly marked. Ledford testified that after Ebert's employment ended, he noticed tools were missing from some of his trucks. Ledford thought the DeWalt toolkit and the Milwaukee sawzall belonged to 3D Metal, "[b]ecause that's the kind of tools that I lost about [the] time [Ebert's employment ended]." He admitted he did not "know specifically" that those items belonged to 3D Metal, and he admitted that both were common items that anyone could buy. He also admitted that he lost "a lot" of tools during the time period of Ebert's employment, because 3D Metal was busy and some of its tools got intermingled with tools belonging to other companies.

At the conclusion of the hearing, the State argued "this is . . . Ebert's motion to get the property back. I didn't see any written proof of anything that he ever bought anything." On the record, the court found that Ebert "has failed to prove that the harness is his." It found the square and level should be returned to Ebert, because "there's been no indication that that was owned by anyone other than" him. It found that Ebert had "failed to sustain his burden of proof as to the DeWalt tool case" and had "failed to meet [his] burden of proof" for the return of the sawzall. The court found the speakers should be returned to Ebert, because "there's no one to dispute" his claim of ownership. In all, the court found that Ebert was entitled to the return of the speakers and the square and level; all other items were ordered returned to 3D Metal. The court entered a written order so disposing of the property on July 2, 2018.

Ebert filed this timely appeal, asserting that the district court abused its discretion in not returning all five items of property to him. We moved the case to our docket on our own motion.

STANDARD OF REVIEW

[1] The denial of a motion for return of seized property is reviewed for an abuse of discretion.[1]

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[1] *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

ANALYSIS

Ebert's brief challenges the factual findings made by the trial court, but after reviewing the record, we find a more fundamental error occurred below. As explained below, the trial court incorrectly placed the burden of proof on Ebert. We begin our analysis with an overview of the governing statute, after which we discuss our cases applying that statute.

§ 29-818 Applies

Neb. Rev. Stat. § 29-818 (Reissue 2016) provides in relevant part:

> [P]roperty seized under a search warrant . . . shall be safely kept . . . and shall be so kept so long as necessary for the purpose of being produced as evidence in any trial. . . . [T]he court in which [a complaint has been filed in connection to the property] shall have exclusive jurisdiction for disposition of the property . . . and to determine rights therein, including questions respecting the title, possession, control, and disposition thereof.

For the sake of completeness, we note that another statute, Neb. Rev. Stat. § 29-820 (Reissue 2016), also relates to the disposition of seized property. That statute provides that "[u]nless other disposition is specifically provided by law, when property seized or held is no longer required as evidence, it shall be disposed of by the law enforcement agency on such showing as the law enforcement agency may deem adequate . . . ."

[2,3] We recently addressed the interplay between §§ 29-818 and 29-820 in *State v. McGuire*.[2] *McGuire* held that § 29-820 "applies only where the exclusive jurisdiction of a court under § 29-818 has not been invoked."[3] And *McGuire* reiterated that "the court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition."[4] Because a criminal charge was

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[2] *Id.*

[3] *Id.* at 903, 921 N.W.2d at 84.

[4] *Id.*, citing *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007).

filed against Ebert, § 29-818 is the statute governing disposition here.

Burden of Proof Under § 29-818 Was on State

[4-7] Case law applying and interpreting § 29-818 provides guidance on how proceedings related to a motion for the return of seized property are to be conducted. In *McGuire*, we explained:

> "[T]he general rule is well established that upon the termination of criminal proceedings, seized property, other than contraband, should be returned to the rightful owner unless the government has a continuing interest in the property. . . . While the government is permitted to seize evidence for use in investigation and trial, such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture. . . . Thus, a motion for the return of property is properly denied only if the claimant is not entitled to lawful possession of the property, the property is contraband or subject to forfeiture, or the government has some other continuing interest in the property."[5]

Regarding the burden of proof in such a proceeding, we explained:

> "When criminal proceedings have terminated, the person from whom property was seized is presumed to have a right to its return, and the burden is on the government to show that it has a legitimate reason to retain the property. *It is long established that a presumption of ownership is created by exclusive possession of personal property and that evidence must be offered to overcome that presumption*. One in possession of property has the right to keep it against all but those with better title, and the 'mere fact of seizure' does not require that 'entitlement be established anew.' Seizure of property from someone is prima facie

[5] *Id*. at 906, 921 N.W.2d at 85-86, quoting *Agee, supra* note 4.

> evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership."[6]

Based on the foregoing, once the theft by unlawful taking charge against Ebert was dismissed and the State no longer needed the evidence, Ebert was "presumptively entitled to the return of property seized from him unless the State presented evidence justifying its refusal to do so."[7]

Here, Ebert waived the presumption of possession with respect to all but five of the items seized by conceding on the record that such items belonged to 3D Metal. But Ebert sought the return of (1) the nylon harness, (2) the square and level, (3) one of the DeWalt tool cases and included tools, (4) the Milwaukee sawzall, and (5) the JVC speakers, and the State's only reason for opposing return of these items was that they too belonged to 3D Metal. And although it was the State's burden to prove superior title to these items, the record indicates that both the State and the trial court misapplied that burden of proof to Ebert.

To the extent the trial court's ruling was based on a misapplication of the law regarding the burden of proof, we are not able to review it for an abuse of discretion.[8] We therefore reverse, and remand for further proceedings applying the correct legal framework. Because we are remanding the matter, we take this opportunity to address the quantum of proof the State must meet to overcome Ebert's presumption of ownership.

Preponderance of Evidence Standard

We have not directly addressed what quantum of proof the State must meet to rebut the presumption of ownership and

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[6] *Id.* at 906-07, 921 N.W.2d at 86 (emphasis in original), quoting *Agee, supra* note 4.

[7] *Agee, supra* note 4, 274 Neb. at 453, 741 N.W.2d at 168.

[8] See *McGuire, supra* note 1.

show another has superior title. In *State v. Agee*,[9] we held that when criminal proceedings have terminated, the person from whom the property was seized is "presumed to have a right to its return, and the burden is on the government to show that it has a legitimate reason to retain the property." *Agee* also said a "presumption of ownership is created by exclusive possession of personal property" so that evidence must be offered to overcome that presumption.[10] *McGuire* used similar "presumption" language, as noted above. But no case has yet described the quantum of proof necessary to overcome or rebut the presumption.

The Nebraska Evidence Rules provide that "[i]n all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."[11] More probable than not is generally a preponderance of the evidence standard,[12] commonly used in civil proceedings.[13]

This description of the quantum of proof necessary to overcome the presumption of ownership is generally consistent with that articulated in the case law of other jurisdictions on which we have relied in our jurisprudence addressing motions for the return of seized property. In the case of *State v. Card*,[14] cited by *Agee*, the Washington Court of Appeals explained the State had the burden to prove a greater right of possession than the one from whom property was seized, and was thus required to prove "by a preponderance of the evidence that the property is stolen property."[15] Similarly, in the case of *DeLoge*

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[9] *Agee, supra* note 4, 274 Neb. at 450, 741 N.W.2d at 166.

[10] *Id.*

[11] Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2016).

[12] *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013).

[13] See *State v. Bain*, 292 Neb. 398, 872 N.W.2d 777 (2016).

[14] *State v. Card*, 48 Wash. App. 781, 741 P.2d 65 (1987).

[15] *Id*. at 790, 741 P.2d at 71.

v. State,[16] cited by this court in both *Agee* and *McGuire*, the Wyoming Supreme Court held that postconviction motions for the return of seized property are civil proceedings to which a preponderance of the evidence standard would apply.

[8] We have consistently said that the seizure of property from someone is prima facie evidence of that person's right to possession of the property,[17] and we now hold that the presumptive right to possession of seized property may be overcome when superior title in another is shown by a preponderance of the evidence.

CONCLUSION

It was error as a matter of law to require Ebert, as the proponent of a motion seeking the return of property seized from him, to prove ownership of the property seized. We thus reverse the order and remand this matter for further proceedings applying the correct burden of proof.

Reversed and remanded for
further proceedings.

Freudenberg, J., not participating.

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[16] *DeLoge v. State*, 156 P.3d 1004 (Wyo. 2007).

[17] See, *McGuire, supra* note 1; *Agee, supra* note 4.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Phillip M. Privett, appellant.

929 N.W.2d 505

Filed June 21, 2019. No. S-18-775.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Constitutional Law: Proof.** 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.
3. **Postconviction: Pleadings.** A defendant is required to make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief.
4. **Postconviction: Appeal and Error.** When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support the claim and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.
5. **Effectiveness of Counsel: Pleas: Waiver.** Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge. Thus, when a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
6. **Postconviction: Effectiveness of Counsel: Pleas.** In a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.

7. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
8. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
9. **Effectiveness of Counsel: Appeal and Error.** 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), deficient performance and prejudice, may be addressed in either order.
10. **Effectiveness of Counsel: Proof.** In the context of a claim of ineffectiveness of counsel for failure to investigate, allegations are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.
11. **Effectiveness of Counsel: Pleas: Proof.** Self-serving declarations that a defendant would have gone to trial are not enough to warrant a hearing; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.

Appeal from the District Court for Knox County: James G. Kube, 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, and Papik, JJ.

Cassel, J.

INTRODUCTION

Phillip M. Privett appeals from an order denying his motion for postconviction relief without an evidentiary hearing. He raises two claims of ineffective assistance of trial counsel. Although he asserts that counsel failed to investigate and advise him of a viable defense, his motion failed to allege sufficient facts. He also claims that in response to his hearing impairment, counsel failed to request the court to amplify its voice or employ a telecommunications device. But, the record affirmatively refutes his claim. We affirm.

BACKGROUND

The State charged Privett with first degree murder and use of a firearm to commit a felony. Two attorneys were appointed to represent him. Pursuant to a plea agreement, the State amended the first count to second degree murder and Privett pled no contest to both counts. The district court sentenced him to 30 to 50 years' imprisonment for second degree murder and not less than or more than 10 years' imprisonment for use of a firearm to commit a felony.

On direct appeal, Privett assigned that he received excessive sentences. The Nebraska Court of Appeals summarily affirmed his sentences.

Represented by different counsel, Privett filed an amended motion for postconviction relief, asserting two claims of ineffective assistance of trial counsel. First, he claimed that trial counsel were ineffective when they failed "to adequately investigate and advise Privett as to 'the available options and possible consequences' prior to pleading no contest." Second, he asserted that trial counsel were ineffective for failing "to request continued amplification of the words of [the district court] and the parties at the plea hearing [or] provid[e] a telecommunications device for the deaf."

The district court denied postconviction relief without an evidentiary hearing, finding that Privett did not allege

sufficient facts and that the record affirmatively disproved the claims.

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

ASSIGNMENTS OF ERROR

Privett assigns that the district court erred in denying an evidentiary hearing on his claims for ineffective assistance of trial counsel where counsel (1) failed to advise Privett concerning a viable defense that he lacked capacity to form the intent required to commit murder and (2) failed to request additional amplification or a telecommunications device for the deaf during the proceedings.

We note that in Privett's amended motion for postconviction relief, he claimed counsel were ineffective for failing to advise on a defense of sudden quarrel manslaughter. On appeal, Privett does not assign error to or argue that claim. Therefore, we do not address it.[2]

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.[3]

ANALYSIS

Privett contends that the district court erred in dismissing his claims for ineffective assistance of counsel without an evidentiary hearing. Generally, he argues that his claims did not allege mere conclusions of fact and that the record did not affirmatively disprove his claims. We first recite the general principles

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[1] See, Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018); Neb. Rev. Stat. § 29-3002 (Reissue 2016).

[2] See *State v. Munoz, ante* p. 69, 927 N.W.2d 25 (2019).

[3] *State v. Martinez*, 302 Neb. 526, 924 N.W.2d 295 (2019).

of law regarding postconviction motions and ineffective assistance of counsel; we then turn to Privett's specific claims.

General Principles of Law

[2-4] 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.[4] A defendant is required to make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief.[5] When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support the claim and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.[6]

[5,6] Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge.[7] Thus, when a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.[8] In a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[9] Because Privett pled no contest to the charges, we will consider his allegations that the plea was the result of ineffective assistance of trial counsel.

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[4] *Id.*

[5] *State v. Fox*, 286 Neb. 956, 840 N.W.2d 479 (2013).

[6] *State v. Collins*, 299 Neb. 160, 907 N.W.2d 721 (2018).

[7] *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017).

[8] *Id.*

[9] *Id.*

[7-9] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[10] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[11] When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[12] The two prongs of the ineffective assistance of counsel test under *Strickland*, deficient performance and prejudice, may be addressed in either order.[13]

Defense

Responding to the district court's reasoning, Privett's brief on appeal argues that the district court erred in dismissing his claim without an evidentiary hearing, "because trial counsel's comments during sentencing demonstrate that they knew Privett had no ability to form the necessary intent to commit murder, and that effective assistance required additional investigation from experts other than the State's forensic [psychiatrist, Dr.] Y. Scott Moore."[14]

Privett argues that trial counsel were deficient for failing to investigate into his "unique personal circumstances."[15] But, as

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

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

[12] *Id.*

[13] *Id.*

[14] Brief for appellant at 7.

[15] *Id.* at 11.

the district court correctly determined, trial counsel did conduct a diligent investigation when they filed a notice of intent to rely on the insanity defense and a motion for a psychological examination of Privett. The court granted the motion for a psychological evaluation, which was performed by Dr. Y. Scott Moore. The record shows that Moore is a forensic psychiatrist with the Lincoln Regional Center.

Candidly, Privett's remaining arguments that trial counsel were ineffective for failing to investigate a defense of an inability to form intent, to advise Privett about that defense, and to obtain an evaluation from someone other than Moore are intertwined. We separate them for discussion.

Privett argues that counsel were ineffective for failing to investigate, premising this argument upon counsel's purported knowledge that he could not have formed the requisite intent. To establish counsel's knowledge, Privett relies on two statements made by trial counsel at the sentencing hearing. First, counsel stated, "I think that the post-traumatic stress disorder may have played a role in that as might have the medications he's on." Second, counsel stated, "[W]e won't know exactly what happened and we won't know why it happened." Privett argues that these statements alone dictated that it was necessary for trial counsel to investigate further and, specifically, to hire an independent forensic psychologist.

[10] In the context of a claim of ineffectiveness of counsel for failure to investigate, allegations are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.[16] Privett broadly alleged that further investigation required an independent forensic psychologist, but he did not allege what exculpatory evidence would have been discovered by the forensic psychologist or how that evidence would have affected the outcome of the case. We agree with the district court that the

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

facts alleged were insufficient to show deficient conduct by trial counsel.

Privett argues that trial counsel were ineffective for failing to advise him on a defense where his post-traumatic stress disorder (PTSD) and medications caused him to enter a dissociative state and prevented him from forming the requisite intent. Trial counsel appropriately relied on Moore's evaluations when advising Privett on viable defenses. In Moore's evaluation of Privett's competency for trial, Moore remarked:

> When I talk to [Privett] about the symptoms of PTSD, he tells me that it is mostly a matter of being a little bit "jumpy" and he tells me that if he hears a loud noise, he still has a tendency to "hit the dirt" until he knows what it is.

In the evaluation regarding sanity, Moore stated that Privett confessed to a history of alcohol usage and that with "his new history . . . of having a great many times of no memory of what he had been doing, there is the possibility that . . . Privett was in a state of alcohol blackout at the time of the alleged murder." Further, he opined that "[o]ther than some symptoms of sleep difficulties and some startle reactions described to me . . . , I cannot find any marked symptoms of PTSD in this gentleman."

Moore's evaluations refute the allegation that Privett's PTSD and medications caused him to enter into a dissociative state. And Privett's motion fails to allege facts showing that a different forensic psychologist likely would have concluded otherwise. Without facts to show why trial counsel should not have relied on Moore's evaluations, there was no factual basis for the existence of such defense. With no basis to support the defense's existence, trial counsel had no obligation to advise him of it.[17] Therefore, the district court did not err in finding that the record affirmatively refuted Privett's claim.

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[17] See *Armendariz, supra* note 11.

Finally, Privett asserts that trial counsel were ineffective for failing to obtain an independent forensic psychological evaluation. In a postconviction motion, an allegation that defense counsel was ineffective in failing to procure witnesses favorable to the defendant was properly dismissed without an evidentiary hearing where the motion did not specifically identify the witnesses or the nature of their testimony.[18] Privett failed to sufficiently allege whom trial counsel should have obtained to perform an independent forensic psychological evaluation and what the forensic psychologist would have opined as the explanation for his failure to remember the events surrounding the victim's death. We agree with the district court that the facts alleged are insufficient to show deficient conduct by trial counsel.

Hearing Impairment

Privett contends that trial counsel were ineffective when they failed to inform the court that he could not hear or failed to provide him with a telecommunications device. He alleged that after the court amplified its voice during the sentencing hearing, it then decreased the volume of its voice to a point where he could not hear. He argues that this left him unable to understand the nature of the proceedings against him, which deprived him of his right to due process under the 14th Amendment to the U.S. Constitution.

Nebraska courts have yet to discuss whether counsel is ineffective for failing to inform the court when its hard-of-hearing client cannot hear. But, an Ohio court discussed the issue in an almost identical factual scenario.

In *State v. Thomas*,[19] the defendant claimed that trial counsel was ineffective for failing to request a hearing device for his hearing-impaired client. During the plea hearing, the

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

[19] *State v. Thomas*, Nos. 25331, 25332, 2014 WL 1339070 (Ohio App. Mar. 21, 2014) (unpublished opinion).

court moved the defendant closer to the bench. The defendant affirmed his ability to hear the court and counsel. The court informed the defendant that if he could not hear clearly, to let it know so it could repeat itself. The court inquired several times throughout the plea whether the defendant could hear, and in each instance, the defendant affirmed that he could. The Ohio appellate court determined that the record clearly refuted the claim. Thus, the appellate court concluded that trial counsel's performance was not deficient.

Here, the record shows that Privett heard, understood, and appropriately responded during the proceedings. At the hearing during which Privett entered his pleas, he did not express that he was having any difficulty hearing anything. All of his answers to the court's questions responded directly and appropriately. And contrary to Privett's argument on appeal, the only hearing at which Privett expressed any difficulty in hearing was the sentencing proceeding. During that event, one of Privett's counsel advised the court that Privett did not have any working hearing aids and had told his attorney that he was having difficulty hearing. In response, the court instructed Privett that if he could not hear, he should inform his attorney or raise his hand. Later, Privett did inform the court that he could not hear. At that time, the court stated, "All right. Then what we'll do is postpone this and come back when he has a hearing aid." Privett responded, "No, sir, please don't." The court then asked Privett whether he could tell the court what it was trying to do. Privett responded, "Try to decide what [its] going to do with me, I guess." He then stated that he could sufficiently hear the court and answered all the court's remaining questions without issue.

[11] Self-serving declarations that a defendant would have gone to trial are not enough to warrant a hearing; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.[20]

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[20] *State v. Barrera-Garrido*, 296 Neb. 647, 895 N.W.2d 661 (2017).

Privett's self-serving declaration that the court lowered its voice during the proceeding and that he could not hear is clearly refuted by the record. The record shows that the district court made every effort to ensure that Privett could hear and understand the proceedings, including repeatedly offering to continue the hearing to a later date. Privett declined each invitation to postpone the sentencing. Accordingly, the district court did not err in finding that the record affirmatively disproved Privett's allegation of not being able to hear.

CONCLUSION

For the reasons set forth above, we affirm the final order of the district court.

Affirmed.

Freudenberg, J., not participating.

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

State of Nebraska, appellee, v. Ryan W. Blaha, appellant.

929 N.W.2d 494

Filed June 21, 2019. No. S-18-912.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Judgments: Words and Phrases: 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.
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. **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.
5. **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.
6. ____. 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.

7. **Trial: Judges: Sentences.** The law invests a trial judge with a wide discretion as to the sources and types of information used to assist him or her in determining the sentence to be imposed within statutory limits.
8. **Pleas: Waiver.** Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge.
9. **Effectiveness of Counsel: Pleas.** When a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
10. **Effectiveness of Counsel: 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.
11. **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.
12. ____: ____. 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.
13. **Effectiveness of Counsel: Pleas.** In a plea context, deficiency depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.
14. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty or no contest plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
15. **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.
16. **Effectiveness of Counsel: Proof: Appeal and Error.** An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. General allegations that trial counsel

performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal.

17. **Presentence Reports.** A defendant has a qualified right to review his or her presentence report, and the defendant may, with his or her attorney, examine the presentence report subject to the court's supervision.
18. **Presentence Reports: Waiver: Notice.** A defendant waives his or her qualified right to review the presentence investigation report by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Katie L. Jadlowski for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

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

Cassel, J.

I. INTRODUCTION

Through new counsel, Ryan W. Blaha appeals his criminal convictions and sentences, attacking the sentences imposed and asserting ineffective assistance of trial counsel. Regarding his sentences, we (1) again reject the premise that sentences within statutory limits are never excessive, (2) dispel the notion that sentencing factors have not been adequately considered without specific discussion, and (3) reiterate that a sentencing court may consider a defendant's conduct underlying dismissed charges. Although the record does not allow us to reach one of his four ineffectiveness claims, we find no merit to the others, which are, respectively, refuted by the record, not prejudicial, and insufficiently alleged. We affirm.

II. BACKGROUND

In March 2017, the State charged Blaha with eight counts, including assault in the first degree and use of a deadly weapon to commit a felony. From that time until the plea hearing in July 2018, no pretrial motions were filed. At the hearing, the parties announced a plea agreement, in which Blaha would plead no contest to those two charges and in exchange the State would dismiss the remaining charges. After the district court informed Blaha of his constitutional rights and received his pleas of no contest, the State set forth a factual basis for the charges. The district court accepted Blaha's pleas of no contest, found him guilty beyond a reasonable doubt, and dismissed the remaining charges.

When the court asked trial counsel at the sentencing hearing whether he had any additions or corrections to the presentence investigation report, he directed the court to the documents which already had been shared with the court. Before the sentences were pronounced, trial counsel and the State made arguments. Blaha exercised his right to allocution and expressed remorse and responsibility for his actions. When pronouncing its sentences, the district court discussed mainly the nature of the offense and the amount of violence involved, but also mentioned Blaha's age and mental illness as mitigating factors. It sentenced Blaha to consecutive sentences of 30 to 40 years' imprisonment for assault in the first degree and 15 to 30 years' imprisonment for use of a deadly weapon to commit a felony.

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

III. ASSIGNMENTS OF ERROR

Blaha assigns, restated and reordered, that (1) the district court abused its discretion by imposing excessive sentences and (2) he received ineffective assistance of trial counsel where counsel (a) failed to advise Blaha of the statutory

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

sentencing ranges, (b) failed to correct the State's factual basis for the pleas, (c) failed to engage in pretrial litigation, and (d) failed to allow Blaha to review the presentence investigation report.

IV. STANDARD OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[2] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

[3] 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]

V. ANALYSIS

1. Excessive Sentences

Although Blaha does not dispute that the sentences were within the statutory limits, he contends that the district court abused its discretion by imposing excessive sentences. Before turning to his two arguments, we recall general principles of law.

[4,5] The law governing review of criminal sentences is well settled. 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

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[2] *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

[3] *State v. Chairez*, 302 Neb. 731, 924 N.W.2d 725 (2019).

[4] *Mrza, supra* note 2.

discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[5] 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.[6]

[6] We have repeatedly stated that 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.[7] With these principles in mind, we turn to Blaha's specific arguments.

First, Blaha contends that Neb. Rev. Stat. § 29-2308 (Reissue 2016) has become meaningless. He asserts that effectively, most appellate courts "hold that *almost any* sentence that is within the statutory limits is not an abuse of discretion."[8] Many years ago in *State v. Ruisi*,[9] a divided panel of the Nebraska Court of Appeals articulated a similar proposition. But in *State v. Decker*,[10] we rejected that notion. We quoted the Court of Appeals' dissent, which stated that this court "'has not foreclosed any sentence within statutory limits from being excessive, but it strongly suggests it is a rare exception.'"[11]

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[5] *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

[6] *Id.*

[7] See *id.*

[8] Brief for appellant at 20 (emphasis supplied).

[9] *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000), *disapproved in part, State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[10] *Decker, supra* note 9.

[11] *Id.* at 398, 622 N.W.2d at 917 (quoting *Ruisi, supra* note 9 (Buckley, District Judge, Retired, dissenting)).

Eighteen years later, this remains true. Blaha's first argument lacks merit.

Second, Blaha asserts that "[t]he district court's failure to *adequately* consider and apply the sentencing factors,"[12] including his mentality, motivation for the offense, criminal history, education and work history, and age, "resulted in an unjust, excessive sentence and the court abused its discretion in imposing such a sentence."[13] He relies on his mental deterioration in the preceding days to the events, his mental and behavioral illnesses, his criminal history and profile, his steady employment, and his immaturity.

At the sentencing hearing, the court stated that it did not believe the maximum punishment of 100 years' imprisonment was appropriate, "considering the youth of [Blaha] and his mental illness problems that he had at that time." It discussed the significant tragedy to the victim's family, how the victim did not heal, and how the victim's life changed forever. The court discussed the fact that Blaha shot at other people in the parking lot where the incident occurred and how Blaha did not express remorse to them when issuing its sentences.

We reject the notion that a court does not *adequately* consider sentencing factors when it does not discuss each one of them during the sentencing hearing or in its sentencing order. The record includes the presentence investigation report and shows that the court reviewed the entire report, which contains the information necessary to weigh the sentencing factors. In essence, Blaha quarrels with the weight accorded to these factors by the sentencing court. We do not review sentences de novo, but only for an abuse of discretion.

[7] At oral argument, Blaha offered additional reasoning: that the court improperly considered the facts surrounding the dismissed charges. In *State v. Janis*,[14] we rejected a similar

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[12] Brief for appellant at 13 (emphasis supplied).

[13] *Id.*

[14] *State v. Janis*, 207 Neb. 491, 299 N.W.2d 447 (1980).

argument. There, we stated that the law invests a trial judge with a wide discretion as to the sources and types of information used to assist him or her in determining the sentence to be imposed within statutory limits.[15] Because the court considered the facts underlying the dismissed charges, it did not consider improper sentencing factors. Our review of the record discloses that the court considered relevant factors and did not consider improper factors. We conclude that the district court did not abuse its discretion when imposing the sentences.

2. Ineffective Assistance of Counsel

We begin by reciting the general principles of law that will guide our analysis, then turn to Blaha's specific claims of ineffective assistance of counsel.

[8,9] Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge.[16] Thus, when a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.[17] Here, Blaha asserts only the latter.

[10] Blaha has different counsel on direct appeal. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.[18]

[11-15] Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[19] the

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[15] *Id.*

[16] *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017).

[17] *Id.*

[18] See *Mrza, supra* note 2.

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

defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[20] 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.[21] In a plea context, deficiency depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.[22] When a conviction is based upon a guilty or no contest plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[23] The two prongs of the ineffective assistance of counsel test under *Strickland* may be addressed in either order.[24]

Thus, in reviewing Blaha's claims of ineffective assistance of counsel on direct appeal, we decide 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.[25]

(a) Statutory Sentencing Ranges

Blaha claims that trial counsel was ineffective in failing to advise him of the statutory sentencing ranges and that counsel guaranteed a sentence of 12 to 20 years' imprisonment. He asserts that he was prejudiced by trial counsel's deficient performance, because he relied on the sentencing representations

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[20] *Mrza, supra* note 2.

[21] *Id.*

[22] *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.

[23] See *State v. Manjikian, ante* p. 100, 927 N.W.2d 48 (2019).

[24] See *State v. Martinez*, 302 Neb. 526, 924 N.W.2d 295 (2019).

[25] See *State v. Munoz, ante* p. 69, 927 N.W.2d 25 (2019).

made to him when deciding whether to accept the State's plea offer or go to trial.

But the record shows otherwise. At the plea hearing, the district court informed Blaha that the maximum possible sentence for each offense was 50 years' imprisonment. The court informed Blaha that the sentence for use of a deadly weapon must run consecutively to the sentence for assault. Blaha denied that "anyone made any promises to [him] in exchange for [his] pleas of no contest other than the plea agreement [that was] already set forth." Blaha confirmed that he understood that the court alone would decide his sentences. From these statements, the record affirmatively refutes Blaha's claim that he was not advised of the statutory sentencing ranges and was promised 12 to 20 years' imprisonment. We conclude that this argument is without merit.

(b) Factual Basis

For many years, we have stated that the record necessary to support a plea of guilty or no contest must establish that there is a factual basis for the plea.[26] "The purpose of requiring arraigning judges to inquire into . . . the factual basis lies in ensuring that the defendant has, according to the acts the defendant admits, committed an offense as charged or a lesser included offense."[27]

Before discussing Blaha's claim regarding his counsel's alleged deficiencies in failing to correct a misstatement and an inaccurate statement, we quote extensively from the State's factual basis recited at the plea hearing, emphasizing the portions Blaha challenges.

> [On] January 11th, 2017, . . . officers with the Omaha Police Department were dispatched to the parking lot of [a furniture store] to investigate a shooting.

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

[27] Alan G. Gless, *Nebraska Plea-Based Convictions Practice: A Primer and Commentary*, 79 Neb. L. Rev. 293, 323 (2000).

> Upon arrival officers located the victim, . . . who was suffering from multiple gunshot wounds to his back. The victim . . . indicated that he had been shot by an unknown white male suspect who was armed with a shotgun, had demanded his wallet, and fled in a green Ford Explorer.
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> . . . .
>
> On [the following day], detectives with the homicide unit had received a tip that an individual by the name of *James White* (sic) had spoken to an individual who was identified as the defendant, . . . Blaha, and . . . *Knight* indicated that . . . Blaha had admitted to shooting the victim . . . .
>
> Officers with the Omaha Police Department were granted permission to search [Blaha's] residence. Inside of that residence officers located a cell phone belonging to [Blaha]. *A search of that cell phone revealed a video which showed* [*Blaha*] *burning the wallet that was taken from* [*the victim*], and all of those events occurred here in Douglas County, Nebraska.

Blaha argues that "[t]he State mistakenly interchanged the name of two individuals—White and Knight—and the mistake went uncorrected."[28] Further, he challenges the accuracy of the statement that a video of a burning wallet was found on his cell phone.

The record conclusively establishes that Blaha suffered no prejudice from the prosecutor's misstatement of the informant's name. He challenged the informant's name, which was not an element of either offense. At oral argument, the State correctly pointed out that the informant could have been identified as "informant number 1" and it would have made no difference. Moreover, the record makes it clear that the prosecutor simply misspoke the name in the first instance and corrected it in the same sentence. Blaha did not challenge

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[28] Brief for appellant at 11.

the statement that he admitted to the shooting, which was the essential substance of the factual basis. Blaha was not prejudiced by this mistake.

Likewise, the record conclusively establishes that no prejudice flowed from the other alleged inaccuracy of the factual basis. The statement that police found the video was not necessary to establish the factual basis. Blaha did not challenge how the statement was inaccurate or how it was necessary to establish an element of either crime. The statement was mere surplusage. With or without it, the factual basis was sufficient. Therefore, Blaha was not prejudiced by counsel's allegedly deficient conduct.

Accordingly, this claim also lacks merit.

(c) Pretrial Litigation

[16] Blaha contends that trial counsel was ineffective for failing to engage in any pretrial litigation in the intervening 16 months between filing the information and the plea hearing. Without more, this allegation would not be sufficiently specific to allege deficient performance. An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal.[29]

In *State v. Mrza*,[30] we clarified that the allegations of counsel's deficient performance must be specifically alleged in the assignments of error section of the appellant's brief. Because Blaha's brief was filed before our opinion in *Mrza* was released, we examine his argument for the necessary specificity. Doing so reveals two aspects of his broad allegation.

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[29] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[30] *Mrza, supra* note 2.

In Blaha's brief, he first argues that trial counsel did not attempt to suppress any evidence found during the search of his home or cell phone. But this allegation is also not sufficiently specific. He does not assert any facts to support the existence of a basis upon which counsel could have filed a motion to suppress.

Second, he argues that trial counsel did not attempt to depose two witnesses, whom he identified by name, to "clarif[y] their initial statements to police" that they had been shot at by Blaha, which, he claims, could have put trial counsel in a better position during plea negotiations.[31] But he does not allege what these witnesses would have said that would have differed from their original statements. Once again, it lacks the necessary specificity.

After utilizing Blaha's arguments to expand his assignment, neither matter specifically states how counsel performed deficiently. This assignment lacks merit.

(d) Presentence Investigation Report

Finally, Blaha claims that trial counsel was ineffective in not allowing him to review the presentence investigation report. Specifically, Blaha quarrels with a statement in the report regarding self-gratification and another statement about inflicting maximum harm. Blaha argues that because the record shows that trial counsel received and reviewed the presentence investigation report, counsel should have shared and reviewed the contents of the report with Blaha. He argues that as a result, he was unable to communicate to trial counsel the misrepresentations and erroneous characterizations that the probation officer made in the report.

[17,18] A defendant has a qualified right to review his or her presentence report, and the defendant may, with his or her attorney, examine the presentence report subject to the court's

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[31] Brief for appellant at 11.

supervision.[32] A defendant waives his or her qualified right to review the presentence investigation report by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so.[33]

In *State v. Moyer*,[34] the defendant asserted that trial counsel was ineffective when counsel failed to disclose to the defendant the contents of the presentence investigation report. We noted that the record contained an affirmation from the sentencing hearing that the defendant had the opportunity to discuss with counsel the contents of the presentence investigation report. Although the defendant's failure to object at sentencing effectively waived his right to challenge it on appeal, the question before us was whether the defendant's trial counsel was deficient for failing to disclose the contents of the presentence investigation report to the defendant prior to sentencing. Our decision in *Moyer* relied on *State v. McDermott*,[35] where the district court did conduct an evidentiary hearing and had the benefit of the testimony from the probation officer and trial counsel that they both reviewed the contents of the presentence investigation report with the defendant. In *Moyer*, because we did not have the benefit of a record containing evidence of any conversations between the defendant and trial counsel, we held that the record was insufficient to address the claim on direct appeal.

Here, the record is void of any statement by Blaha or trial counsel that Blaha either reviewed the presentence investigation report or wished to review the report. Nor is there any statement by Blaha that he had the opportunity to review the presentence investigation report. Similar to *Moyer*, we do not have the benefit of a record that contains any conversation about the

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[32] *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

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

[34] *Moyer, supra* note 32.

[35] *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

contents of the presentence investigation report between Blaha and trial counsel or the probation officer. Therefore, we conclude that the record is insufficient to address the claim on direct review.

VI. CONCLUSION

We conclude that there is no merit to the assignments of error we can reach on direct appeal. Accordingly, we affirm Blaha's convictions and sentences.

Affirmed.

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

In re Trust Created by Jack Fenske, also known as Jack B. Fenske and John B. Fenske, deceased. Jennifer Lea Wheeler and Laura Jean Grace, now known as Laura Jean Wilson, appellants, v. Elkhorn Valley Bank & Trust, Trustee of the Jack Fenske, also known as Jack B. Fenske and John B. Fenske, Revocable Trust, appellee.

930 N.W.2d 43

Filed June 28, 2019. No. S-18-262.

1. **Decedents' Estates: Trusts: Equity: Appeal and Error.** The removal of a trustee is a question of equity, and therefore an appellate court reviews the issue de novo on the record.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** An appellate court independently review questions of law decided by a lower court.

Appeal from the County Court for Madison County: Donna F. Taylor, Judge. Affirmed.

David P. Wilson and Jonathan M. Brown, of Walentine O'Toole, L.L.P., for appellants.

Mark D. Fitzgerald, of Fitzgerald, Vetter, Temple & Bartell, for appellee.

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

Papik, J.

Nebraska has adopted a section of the Uniform Trust Code which allows a court to remove a trustee if removal is requested by all beneficiaries, removal best serves the interests of all beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable replacement trustee is available to serve. That provision is at issue in this appeal in which trust beneficiaries challenge a county court order denying their petition to remove the trustee. We conclude that the beneficiaries failed to prove that removal of the trustee was not inconsistent with a material purpose of the trust, and therefore we affirm.

BACKGROUND

Jack Fenske Trust.

Jack Fenske, also known as Jack B. Fenske and John B. Fenske, died on December 25, 1998. His last will and testament, executed about a year before his death, devised most of his property to Elkhorn Valley Bank & Trust (the Bank), as trustee, for the benefit of specific family members. Those family members included the appellants in this case, Jennifer Lea Wheeler (Jennifer) and Laura Jean Grace, now known as Laura Jean Wilson (Laura). The trust provided as follows:

> b. Ninety-five percent (95%) [of the principal balance] for my niece . . . to hold and manage the same until the death of my said niece, with directions to said Trustee to distribute the annual income from the corpus of said trust to [my niece] annually, with the restriction that there be no invasion of the corpus of this trust by my said Trustee except for distribution for educational expenses for my greatnieces [sic], Jennifer . . . and Laura . . . . I further direct that upon the death of my niece . . . the annual income from the corpus of the trust shall be distributed in equal shares annually to my greatnieces [sic], Jennifer . . . and Laura . . . , in equal shares. The Trustee is specifically authorized to invade the corpus at

> any time for distribution to Jennifer . . . and Laura . . . for educational expenses.
>
> c. At the death of Jennifer . . . and Laura . . . , the Trustee shall distribute all remaining corpus and accumulated income, if any, to the heirs of Jennifer . . . and Laura . . . in equal shares.

Fenske's niece died prior to Fenske, and consequently, Jennifer and Laura began receiving income distributions from the trust upon Fenske's death. Trust assets were also available to them for educational purposes. At all times relevant to these proceedings, Jennifer had two adult children and Laura had one adult child.

The parties do not dispute that as of September 2017, the trust property consisted of approximately $52,000 in money market funds, agricultural land assessed at approximately $278,500, and a nearly $30,000 debt owed by Jennifer.

Request for Trustee's Resignation.

It is undisputed that Jennifer, Laura, and their children all support removing the Bank as trustee and replacing it with David P. Wilson, Laura's husband who is an attorney. According to the record, in 2016, Wilson relayed a request that the Bank voluntarily resign as trustee, citing concerns about trust income and an intent to initiate termination of the trust.

The Bank refused to resign. It stated in a letter that the request for the Bank's resignation and the plan to terminate the trust were not consistent with the material terms of the trust, noting that a member of the Bank's trust committee knew Fenske personally and had some insight into why he set up the trust as he had. The Bank offered to discuss concerns about the trust income and the pros and cons of liquidating the trust real estate, but received no response.

"Petition to Modify."

On September 22, 2017, Jennifer and Laura filed a "Petition to Modify" the trust to remove the Bank as trustee and approve Wilson as successor trustee. They invoked Neb. Rev. Stat.

§ 30-3862(b)(4) (Reissue 2016), a provision of the Uniform Trust Code.

According to the petition, there had been a substantial change in circumstances and the removal of the Bank as trustee was requested by all the qualified beneficiaries. Jennifer and Laura further alleged that the removal of the Bank served the interests of all the beneficiaries, that it was not inconsistent with a material purpose of the trust, and that a suitable successor trustee was available. In addition, Jennifer and Laura asserted that they had completed their educational goals, that trust administration fees had exceeded trust income in recent years, and that Wilson was available to serve as successor trustee free of charge.

The Bank filed a general objection to the petition to modify.

Hearing on Petition to Modify.

At the hearing on the petition to modify, Laura testified about the operation of the trust as to herself and Jennifer. Laura stated that she used trust funds to obtain a master of business administration and a law degree and that she would not require additional funds from the trust for educational purposes. Laura testified that Jennifer also obtained money from the trust to fund educational pursuits. To the best of Laura's knowledge, Jennifer would not require additional funds from the trust for educational purposes.

As to Fenske's intentions, Laura characterized Fenske as a frugal man who was generous to his family, including Jennifer and Laura. According to Laura, Fenske never married and viewed her and Jennifer as grandchildren. Based on her knowledge of him, Laura believed that Fenske established the trust to share his assets with his family. In her opinion, removing the Bank as trustee would not frustrate that purpose.

Laura admitted that the Bank had not committed any wrongdoing in administering the trust. Instead, Laura expressed concern about the fees the Bank was charging for its services as trustee. Laura preferred that Wilson serve as trustee, because

she believed he had the necessary knowledge and experience to serve as a competent trustee and he had agreed to serve without charging fees.

Laura acknowledged, however, that reducing the fees charged to the trust was not the only reason motivating the effort to have the Bank removed. She testified that removing the Bank as trustee was part of a plan, which she hoped would culminate in the termination of the trust, the liquidation of the trust assets, and the distribution of the proceeds to the qualified beneficiaries in a manner yet to be determined.

Richard Stafford, the attorney who did Fenske's estate planning as well as other legal work, also testified. Stafford, who had known Fenske since the 1970's, described him as an "old-school farmer," for whom acquiring and holding land was "paramount." According to Stafford, Fenske did not accept the notion that he was not going to own and control his land forever.

Fenske had resisted estate planning for years until he surprised Stafford by discussing a will. Stafford stated that it was possible that Fenske's will and trust document was drafted in one sitting and signed on the same day. Stafford explained that this was likely the reason Fenske's explicit wishes were not included in the document, as they typically would be.

However, Stafford testified that in preparing the will and trust, Fenske expressed the desire to delay vesting in his beneficiaries, because he did not believe his brothers or anyone he knew were capable of handling his estate or his assets according to his wishes and he did not want them "squandered." Stafford also testified that Fenske wanted a trustee "to keep it together as long as it could possibly be kept together" and "to hold on to the land for as long as possible," because Fenske viewed owning agricultural property as a "sign of success."

Stafford testified that Fenske wanted the trustee to be "independent." Moreover, he had a history with the Bank, which operated the only full-time trust department in the area. Fenske also knew the Bank's president, who still held that position

at the time of trial. When asked if there was a reason why a trustee other than the Bank could not carry out the material purposes of the trust, Stafford replied, "No, other than . . . the one thing that I think [Fenske] was really trying to get away from was to have any of his relatives being in charge of his assets."

Regarding Fenske's specific intentions toward the beneficiaries, Stafford stated, "[Fenske] wanted to take care of [his niece] and wanted to keep his assets together for yet another generation while providing educational benefits and the annual income to the interim generation." In Stafford's opinion, Fenske appreciated the value of education, but he appreciated the value of farmwork more.

A trust officer for the Bank described the assets of the trust and the issues confronting the trustee and the beneficiaries. At the time of trial, the trust property included some liquid assets, but the bulk of it was composed of agricultural land that was rented as pasture at fair market value for northeast Nebraska, producing income that did not reflect the value of the land. The trust officer testified that the proximity of the land to Norfolk, Nebraska, gave the land potential for development, but sale of the land would result in significant capital gains taxes that would deplete the principal trust assets. Nonetheless, in its response to the requested resignation, the Bank had expressed a willingness to discuss concerns with the trust income and liquidating the trust real estate.

The county court also received a summary of distributions and fees prepared by the Bank. This indicated that in the previous 6 years, the trustee fees slightly exceeded the distributions of income, but that nearly $240,000 in principal had also been distributed. The Bank's trust officer attributed the principal distributions to Jennifer's and Laura's educational pursuits.

County Court's Order.

After receiving briefs from the parties, the county court issued a written order denying the petition to remove the Bank

as trustee. It found that no substantial change in circumstances had occurred. The county court did conclude that all the qualified beneficiaries had requested removal as required by § 30-3862(b)(4). However, the county court determined that it did not have enough information to determine whether removal would best serve the interests of all qualified beneficiaries.

Furthermore, the county court found that removal would be inconsistent with a material purpose of the trust. On that question, the county court emphasized that Fenske appointed the Bank as trustee and characterized as speculation Jennifer and Laura's position that he appointed the Bank only because he had no family members capable of serving as trustee. The county court also expressed concern with Laura's admission that one of the purposes for removing the trustee was to seek to have the trust terminated, a result the county court described as inconsistent with the terms of the trust.

Finally, the county court concluded that Wilson was not a suitable successor trustee for purposes of § 30-3862(b)(4). While the court acknowledged Wilson's general qualifications to administer a trust, it found he was not suitable to serve as trustee in this case, because he had not been nominated by Fenske and his stated intention to terminate the trust was contrary to its provisions.

Jennifer and Laura now appeal.

ASSIGNMENTS OF ERROR

Jennifer and Laura assign, condensed and restated, that the county court erred in (1) finding that they had not satisfied all the requirements of § 30-3862(b)(4) and (2) applying a "clearly stated provision" standard rather than a "material purpose" standard.

STANDARD OF REVIEW

[1,2] Where a question of equity is presented in a trust administration matter, appellate review of that issue is de novo on the record. See *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 the issue de novo on the record. *Id.* In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

[3,4] Statutory interpretation presents a question of law. *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018). We independently review questions of law decided by a lower court. *Id.*

ANALYSIS

Statutory Authority Governing Trustee Removal.

We begin by setting forth the relevant statutory authority. Section 30-3862, which became operative in 2005, is identical to § 706 of the Uniform Trust Code. It provides authority for courts to remove trustees under various circumstances. Relevant to this appeal, it provides:

> (a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
>
> (b) The court may remove a trustee if:
>
> . . . .
>
> (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

This appears to be this court's first opportunity to interpret and apply this language. Some courts have referred to the grounds for removal set forth above as a "no-fault" removal provision, because it allows for removal with no showing of wrongdoing on the part of the trustee. See, e.g., *In re*

McKinney, 67 A.3d 824 (Pa. Super. 2013); *Litoff v. Albright*, No. NNHCV136037921S, 2014 WL 3584834 (Conn. Super. June 17, 2014) (unpublished opinion). Instead, a court may remove a trustee if the party seeking removal shows that (1) removal is requested by all the beneficiaries, (2) removal of the trustee best serves the interests of all the beneficiaries, (3) removal is not inconsistent with a material purpose of the trust, and (4) a suitable replacement trustee is available.

Jennifer and Laura contend that they demonstrated each of the above elements in this case. No one disputes that removal was requested by all the beneficiaries. But we have occasion to address only one of the other elements that are in dispute—whether removal of the Bank would be inconsistent with a material purpose of the trust. Our analysis of that issue follows in the sections below.

When Is Removal of Trustee Inconsistent With Material Purpose of Trust?

Before turning to whether removal of the Bank would be inconsistent with a material purpose of the trust in this case, we pause to consider what that question entails. Crucial to our analysis is, of course, what it means under § 30-3862(b)(4) for a proposed trustee removal to be "inconsistent with a material purpose of the trust." Nebraska's Uniform Trust Code does not define "material purpose." However, the comments to the Uniform Trust Code provide some guidance, and the Legislature directly referred to sections of the code when adopting it, thereby incorporating those comments. See *In re Trust of Shire*, 299 Neb. 25, 907 N.W.2d 263 (2018).

The most guidance regarding the meaning of "material purpose" can be found in the comment to § 411 of the Uniform Trust Code, a provision that makes the material purposes of a trust relevant to whether termination or modification of a trust is permitted. See Neb. Rev. Stat. § 30-3837 (Reissue 2016). We find the comment to § 411 useful, because the

comment to § 706 of the Uniform Trust Code explains that it is "a specific but more limited application of" § 411. Unif. Trust Code § 706, 7D U.L.A. 254 (2018). The comment to § 411 states:

> In order to be material, the purpose . . . must be of some significance: "Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary's management skills, judgment, or level of maturity."

Unif. Trust Code § 411, 7D U.L.A. 160 (2018), quoting Restatement (Third) of Trusts § 65, comment *d*. (2003).

The Restatement commentary quoted in the comment on the Uniform Trust Code elaborates further on the meaning of material purpose in this context. It provides:

> Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple intended beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Restatement, *supra*, § 65, comment *d.* at 477.

> [A] particular change of trustee . . . might have the effect of materially undermining the contemplated qualities or independence of trustees. A given change might even have the effect of shifting effective control of the trust in such a way as to be inconsistent with a protective management purpose or other material purpose of the trust. Thus, changes of trustees . . . are to be particularly but sympathetically scrutinized for possible conflict with a material trust purpose.

Id., comment *f.* at 481.

Finally, the comment accompanying § 706 states:

> Because of the discretion normally granted to a trustee, the settlor's confidence in the judgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor's choice can weaken or dissolve if a substantial change in the trustee's circumstances occurs.

Unif. Trust Code, *supra*, § 706, 7D U.L.A. 254.

We understand the commentary set forth above to indicate that the question whether the proposed replacement of a trustee is inconsistent with a material purpose of the trust depends on the significance to the settlor of the initial choice of trustee. For example, there may be cases in which there is no indication that the particular trustee or the qualities that trustee brought to the assignment were an important consideration for the settlor. In those types of cases—where the current trustee is merely an incidental means to accomplish ends—removal would not be inconsistent with a material purpose. Courts from other jurisdictions with the same or similar "no-fault" removal provisions have reached that conclusion. See, e.g., *Matter of Trust of Hildebrandt*, 53 Kan. App. 2d 368, 388 P.3d 918 (2017) (where initial trustee was selected by drafting attorney without input from settlor, removal found not to be inconsistent with material purpose); *In re McKinney*, 67 A.3d 824 (Pa. Super. 2013) (where trustee chosen by settlor no longer existed and material purpose could be accomplished by qualified successor trustee, removal found not to be inconsistent with material purpose); *Fleet Bank v. Foote*, No. CV020087512S, 2003 WL 22962488 (Conn. Super. Dec. 2, 2003) (unpublished opinion) (where settlor desired only qualified services and initial trustee no longer existed, removal found not to be inconsistent with material purpose).

On the other hand, however, are cases in which it is important to the settlor that a particular person or entity or a person or entity with particular qualities serve as trustee. The

Uniform Trust Code and the Restatement commentary quoted above indicate that in those circumstances, replacement of the selected trustee with another person or entity or a person or entity that lacked the desired qualities would be inconsistent with a material purpose.

As noted above, one of Jennifer and Laura's assignments of error is that the county court misapplied the "material purpose" standard of § 30-3862(b)(4) by finding that removal of the Bank was not permitted by the terms of the trust. While the county court did state at one point in its order that removal would be inconsistent "with the clearly stated provisions of the trust," it is not clear to us that the county court failed to conduct a proper material purpose inquiry. And, even if it did, it is inconsequential, as we are obligated to reach our own conclusion on appeal as to whether removal would be inconsistent with a material purpose of the trust. See *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). We proceed to that question now.

Removal of Bank Would Be Inconsistent With Material Purpose of Trust.

Unlike cases in which the settlor's considerations must be deduced from entirely circumstantial evidence, the record in this case contains relatively direct evidence of what Fenske hoped to accomplish through the trust and why he selected the Bank to serve as trustee. As noted above, Fenske's attorney, Stafford, provided testimony regarding his understanding of Fenske's estate planning aims. He testified that Fenske's objective was "to keep [the trust assets] together as long as [they] could possibly be kept together." As for why the Bank was selected as trustee, Stafford noted that Fenske had a history with the Bank and a relationship with its president and that that person was still serving as president of the Bank at the time of trial. Stafford also testified that Fenske wanted a trustee who was "independent." Stafford elaborated on the

idea of independence when he was asked if someone other than the Bank could carry out the material purposes of the trust. Stafford responded that "the one thing that I think [Fenske] was really trying to get away from was to have any of his relatives being in charge of his assets."

Based on Stafford's testimony and the terms of the trust, the Bank argues that it would be inconsistent with a material purpose of the trust to replace the Bank with Wilson. The Bank argues that Fenske wanted the trust to be left intact until the deaths of Jennifer and Laura and that it would be inconsistent with his purpose if the Bank was replaced by Wilson as part of an attempt to ultimately terminate the trust. It does appear from both the terms of the trust and Stafford's testimony that it was important to Fenske that the trust assets remain intact until the deaths of Jennifer and Laura. Jennifer and Laura counter, however, that even if the Bank is correct about Fenske's wishes, Wilson could not thwart those wishes as trustee, because he would be bound by the same legal requirements as the Bank and the trust could be terminated only if permitted by the court under a separate motion under § 30-3837.

In the end, we need not resolve whether and to what extent Laura's admission that this motion is part of an attempt to terminate the trust ought to affect the material purpose analysis, because even if it is set to the side, we would find that removal is inconsistent with a material purpose of the trust for another reason. Stafford testified that the Bank was selected because Fenske wanted a trustee that was "independent" and that he did not want a trustee that was a part of his family. This testimony suggests that the selection of the Bank as trustee was more than an incidental means to an end, but that independence from his family was, for Fenske, an important quality in a trustee. The Restatement comments we quoted above recognize that a proposed trustee removal and replacement "might have the effect of materially undermining the contemplated qualities or independence of trustees."

Restatement (Third) of Trusts § 65, comment *f*. at 481 (2003). In our view, replacing the Bank with Wilson, Laura's husband, would do so here. Because we find that removal of the Bank would be inconsistent with a material purpose of the trust, we conclude that the county court did not err in denying Jennifer and Laura's motion.

CONCLUSION

For the foregoing reasons, we affirm the order of the county court that denied Jennifer and Laura's request to remove the Bank as trustee.

Affirmed.

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

U.S. Pipeline, Inc., appellee, v. Northern Natural Gas Company, appellant.

930 N.W.2d 460

Filed June 28, 2019. No. S-18-679.

1. **Trial: Witnesses: Evidence: Appeal and Error.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony; an appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
2. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
3. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court 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.
4. **Judgments: Directed Verdict: Appeal and Error.** In reviewing rulings on motions for directed verdict and judgments notwithstanding the verdict, an appellate court gives the nonmoving party the benefit of all evidence and reasonable inferences in his or her favor, and the question is whether a party is entitled to judgment as a matter of law.
5. **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.
6. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to elements of damages proved.
7. **Contracts: Damages: Appeal and Error.** The issue of whether damages are consequential under a contract is a question of law that an

appellate court reviews de novo, but the factual determinations underlying such a characterization are reviewed for clear error.

8. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
9. **Contracts: Waiver: Damages.** Generally, a contractual waiver or exclusion of consequential damages will be upheld unless the provision is unconscionable.
10. **Contracts: Damages.** Consequential damages, as opposed to direct damages, do not arise directly according to the usual course of things from a breach of contract itself.
11. ____: ____. Direct damages refer to those which the party lost from the contract itself—in other words, the benefit of the bargain—while consequential damages refer to economic harm beyond the immediate scope of the contract.
12. **Trial: Evidence: Appeal and Error.** Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.
13. **Appeal and Error.** An issue not properly presented and passed upon by the trial court may not be raised on appeal.
14. ____. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
15. **Waiver: Appeal and Error.** Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief.
16. **Trial: Directed Verdict: Appeal and Error.** In an appeal of a trial court's refusal to enter a directed verdict, the appellate court should consider solely those grounds urged by the appellant to the trial court in support of its directed verdict motion.
17. ____: ____: ____. If a party fails to set forth certain arguments as grounds in a motion and renewed motion for directed verdict, such arguments will not be properly preserved for appeal.
18. **Contracts: Waiver.** The determination of whether a contractual provision has been waived is a factual determination.
19. **Contracts: Waiver: Damages.** A contractual provision for liquidated damages for delay in performance may be waived.
20. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.

21. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.
22. **Contracts: Waiver.** Even a provision in a written contract that specifies that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

Gregory C. Scaglione, J. Daniel Weidner, Minja Herian, Michele E. Young, and Cassandra M. Langstaff, of Koley Jessen, P.C., L.L.O., for appellant.

Shawn D. Renner and Richard P. Jeffries, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Barrett H. Reasoner, Ayesha Najam, and Ross M. MacDonald, of Gibbs & Bruns, L.L.P., for appellee.

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

Freudenberg, J.

I. NATURE OF CASE

In 2014, a natural gas company solicited bids for a pipeline replacement and relocation project in northern Michigan. The natural gas company accepted a bid from a pipeline company, and the parties entered into a detailed construction contract. The contract provided that the project would be substantially completed by September 2014. However, because of extra work orders by the natural gas company and for various other reasons, the project was not substantially completed by that date. Based on a liquidated damages provision in the contract, the natural gas company withheld the maximum amount of liquidated damages allowable under the contract for the delay in the project's completion. The natural gas company also refused to pay certain costs requested by the pipeline company

related to the extra work orders. At the center of the lawsuit is whether the natural gas company should pay for the costs associated with the extra work and be allowed to withhold liquidated damages.

II. FACTS

1. Pleadings

In January 2016, U.S. Pipeline, Inc., a corporation engaged in the business of constructing oil and gas pipelines and related energy infrastructure facilities, filed a complaint in the district court for Douglas County against Northern Natural Gas Company (Northern), a corporation headquartered in Omaha, Nebraska, and engaged in the business of providing natural gas transportation and storage services. U.S. Pipeline sought compensation under a pipeline replacement and relocation project contract for costs incurred to perform work that was outside of the original contract price (Extra Work). U.S. Pipeline sought relief under a breach of contract theory, as well as alternative theories, including claims for misrepresentation and fraudulent concealment.

In response to U.S. Pipeline's amended complaint, Northern's answer and counter-complaint denied that it owed U.S. Pipeline any compensation for the Extra Work and resources U.S. Pipeline did not anticipate and denied any liability to U.S. Pipeline for U.S. Pipeline's low bid. Northern's counter-complaint further alleged that pursuant to the contract, U.S. Pipeline materially missed the substantial completion date and overbilled Northern for the work it performed. Based on this and a liquidated damages provision within the parties' contract, Northern sought a declaratory judgment upholding Northern's decision to withhold payment of $351,000 from U.S. Pipeline as liquidated damages. Northern also sought a declaration from the district court upholding Northern's withholding of $320,000 in payment from U.S. Pipeline as a credit for U.S. Pipeline's change in the construction plan that resulted in a cost savings.

2. Summary Judgment

Prior to trial, the court granted Northern partial summary judgment on the issue of whether U.S. Pipeline is entitled to indirect or consequential damages. The district court found that U.S. Pipeline admitted that it is not seeking damages for "indirect or consequential damages." The district court overruled Northern's motion for summary judgment on the remaining issues.

3. Motions for Directed Verdict

A bench trial was held pursuant to a jury waiver contained in the parties' contract. At the close of U.S. Pipeline's case, Northern moved for a directed verdict, asserting that (1) U.S. Pipeline's damages were barred by the consequential damages waiver and (2) there was no genuine issue of fact on U.S. Pipeline's misrepresentation/fraudulent concealment claims regarding "geotechnical information." The court denied the motion. Northern later renewed the motion at the close of all the evidence, adding no further new grounds, and the court again denied the motion.

4. Bench Trial

The following evidence was adduced during the parties' 2-week bench trial.

(a) Bidding and Northern's Original Project Plans

In 2013, Northern decided to replace or relocate approximately 29,450 feet, or 5.58 miles, of its Marquette main line (Marquette Replacement) and approximately 8,000 feet, or 1.52 miles, of its Ishpeming branch line (Ishpeming Relocation) (collectively the Project), both located in the Upper Peninsula of Michigan.

Northern designers prepared drawings for the Project. Northern's construction drawings called for the installation of new underground piping using open-cut installation and horizontal directional drilling (HDD) techniques. Generally,

underground pipeline is installed through either an open-cut process or HDD. For an open-cut installation, a trench is excavated and the pipe is placed in the bottom of the trench and covered. An HDD, in contrast, is a steerable, trenchless method of installing underground pipe in an arc along a prescribed bore path by using a surface-launched drilling rig. HDD drilling is more complicated and expensive to install.

Specifically, Northern's construction drawings called for six HDD's—four locations along the Marquette Replacement (including the "Highway 476/Ely Creek" crossing) and two HDD's on the Ishpeming Relocation (including the "Cliffs Road" crossing). In addition, each set of Northern's drawings specified an arc radius of 525 feet on the 12-inch-diameter pipeline and 600 feet on the 6-inch-diameter pipeline. A governmental permit was granted for these specifications. The design arc radius or design radius of curvature is the radius of directional changes along the drill path. The arc radius is determined by several factors, including the desired distance between entry and exit points, the desired drill depth, direction changes for the drill path, and how much the drill stem and installed pipe can bend without being damaged.

In March 2014, Northern opened the bid process for the Marquette Replacement and Ishpeming Relocation. Northern issued notice of a mandatory onsite, pre-bid meeting and route inspection to be held on May 13 and 14, 2014. One of the purposes for the route inspection was to walk the pipeline route to provide bidders a better understanding of the site conditions, project layout, and access issues. Three prospective bidders and their subcontractors, along with Northern representatives, attended the pre-bid meeting and route inspection.

U.S. Pipeline sent Kris Osborn to represent U.S. Pipeline at the meeting and route inspection. Osborn drove to the pipeline on May 13, 2014, but he did not walk the route like other bidders. The meeting and route inspection continued on May 14, but Osborn did not attend. U.S. Pipeline's representative who created its bid for the Project confirmed that he was informed

that Osborn did not walk the pipeline route with the other bidders and Northern's representatives.

Northern used an online bid communication portal called Ariba to receive and transmit bid information to the interested bidders. Northern posted a summary of the meeting and route inspection on Ariba. Northern also posted the bid drawings, a form contract, the scope of work, questions and answers from bidders, meeting and route inspection notices, and summaries of meetings and inspections. U.S. Pipeline accessed the information posted on Ariba.

Among the questions and answers posted on Ariba during the pre-bid phase included a bidder's request that Northern "provide geotechnical information associated with the original 12″ MIM10101 installation." Northern responded by stating, "No geotechnical information associated with the original 12 inch MIM10101 is available." Broadly, geotechnical information is information about the geology and the estimated amount of rock in an area. This type of information provides insight as to the type of blasting that may be required for a drilling project.

Another question posted on Ariba inquired:

> Without any geotechnical information, it is difficult at best to determine how much blasting, rock shield, or import padding to include in the bid.
>
> a. How many CY of ROW blasting does [Northern] want the Contractor to include in the bid?
>
> b. How many LF of ditch blasting does [Northern] want the Contractor to include in the bid?

Northern replied, "[Northern] cannot speculate on the quantity and amount of blasting required for the [P]roject. The onsite visit was designed to familiarize bidders with the site conditions and bid accordingly."

In connection with its proposed work on the Project, Northern submitted "Resource Report No. 6" with the Federal Energy Regulatory Commission (FERC), the commission in charge of interstate pipeline construction and installation projects.

Compiled by an environmental consultant, Resource Report No. 6 estimated that excavators would encounter "approximately 3.77 miles" of "shallow bedrock that may require blasting" along the portion to be replaced on the Marquette main line. Although Resource Report No. 6 was publicly available as part of Northern's FERC filings, Northern did not post a copy of Resource Report No. 6 to Ariba. The contract eventually entered into with U.S. Pipeline, however, expressly advises that "[e]xtensive rock structures occur throughout the area."

In order for geotechnical information to be obtained, a "geotechnical survey" or investigation must be done. A "geotechnical survey" consists of taking exploratory borings to collect soil samples for classification and laboratory analysis. In creating Resource Report No. 6, Northern did not take or analyze bore samples from the Project site. Rather, the report discussed "geological data," which is information that is publicly available from various sources, including a national resource bank of soil and rock information in the area.

U.S. Pipeline and two other companies placed bids on the Project. Northern ultimately awarded the bid for both the Marquette Replacement and Ishpeming Relocation to U.S. Pipeline. U.S. Pipeline and Northern signed the contract at issue on July 24 and August 1, 2014, respectively.

(b) Contract

Under the contract, U.S. Pipeline agreed to fabricate, test, dewater, dry, and install approximately 29,450 feet (5.58 miles) of 12-inch-diameter pipeline for the Marquette Replacement and 8,000 feet (1.52 miles) of 6-inch-diameter pipeline for the Ishpeming Relocation. U.S. Pipeline and Northern agreed on a lump-sum price of $15,312,050 for the completion of the Project. Pursuant to the contract, the substantial completion date for the Project was September 24, 2014. The parties expressly agreed that time was of the essence.

The contract for the Project also provided that liquidated damages due to delayed completion of the Marquette

Replacement were to be set at $11,700 per day beyond the substantial completion date, with a cap of $351,000. The Ishpeming Relocation had a similar liquidated damages provision, but it did not become applicable.

Both parties agreed to a mutual waiver of indirect or consequential damages under the contract. The waiver's language defines consequential damages as

> "INCLUDING BUT NOT LIMITED TO LOSS OF PROFIT, BUSINESS INTERRUPTION, LOSS OF REVENUE, LOSS OF USE, LOSS OF CONTRACT, LOSS OF THROUGHPUT, LOSS OF GOODWILL, INCREASED COST OF WORKING OR LOSS OF BUSINESS OPPORTUNITY[.]"

The contract also contained provisions related to the omission of contractually required work or performance of additional work not specified under the contract, referred to as "Extra Work," under the contract:

> [Northern] may omit work, or may require [U.S. Pipeline] to perform additional work or furnish additional materials or equipment, or the use thereof, in connection with the Work, which are not included in this Agreement (hereinafter referred to as "Extra Work"). Extra Work may be occasioned by material changes in Plans and Specifications or project lay out requiring additional work or materials of a different nature, kind and cost from that contemplated at the time of execution of this Agreement . . . .
>
> All requests for Extra Work must be prepared by [U.S. Pipeline] in the form attached as Exhibit "L" and approved in writing in advance by the [Northern] Representative or [Northern] Vice President of Operations. Such requests shall describe the work to be done and specify the compensation requested therefor . . . .

With regard to payment for any Extra Work incurred, the contract set forth a payment schedule referred to as the "Force Account Work basis." The provisions regarding payment for

Extra Work incurred or work reduced from the contract are as follows:

> In the event unit prices as set forth in Part IV, or other agreed upon rates, are not applicable to any Extra Work, such work shall be paid for on the following basis, hereinafter referred to as the Force Account Work basis . . . .
>
> (i) [U.S. Pipeline's] actual field payroll plus fifteen percent (15%) thereof for overhead and profit, plus [U.S. Pipeline's] actual contribution or payment for insurance coverage, to the extent such are not subject to [Northern] provided insurance coverage, rated on basis of payroll, together with Social Security and unemployment tax or other employer's tax contribution based on payroll, plus cost of union benefits; and
>
> (ii) Actual material costs, as evidenced by invoices from original suppliers or vendors showing [U.S. Pipeline] as purchaser, plus five percent (5%) thereof for [U.S. Pipeline's] overhead and expenses, plus any applicable sales or use taxes assessed and paid in conjunction with such material purchases; and
>
> (iii) Charges for the actual use of equipment, including leased equipment, in accordance with the rate schedule set forth in [the Contract] or other agreed to rates included with the Contract Documents; and
>
> (iv) Charges for third party equipment or services as evidenced by their invoices, plus five percent (5%) thereof.
>
> All such billings for work on the Force Account Work basis shall comprise the total of charges accumulated under (i) through (iv) above and be supported by certified daily payroll records initialed by the [Northern] Representative, a detailed list of material used, and any third party invoices.
>
> . . . .
>
> If changes in the Drawings, reports, or Plans and Specifications cause a decrease in [U.S. Pipeline's] cost or

> time required for the completion of the Work, [Northern], by written notice to [U.S. Pipeline], may make a fair and proportionate adjustment therefor in [Northern's] compensation to [U.S. Pipeline] and time allowed to complete the Work.
>
> If an Extra Work Request decreases the amount of Work to be done, such decrease shall not constitute the basis for a claim for damages or anticipated profits for Work affected by such decrease. [U.S. Pipeline's] compensation shall be reduced to reflect the reduction in Work.

The same section of the contract also provided that U.S. Pipeline would not be entitled to submit a claim for Extra Work or costs, expenses, or time to complete its contractual obligations for delay or inefficiencies arising from U.S. Pipeline's failure to carefully examine or inspect the sites or their conditions, the contract, and other various documentation.

(c) Revision to Open Cut for Ishpeming Relocation

At some point during the course of the Ishpeming Relocation, Northern decided to cancel the HDD of the Cliffs Road crossing and instead switch to an open cut. U.S. Pipeline agreed to the alteration but declined Northern's request for a credit on the difference between the HDD and an open cut. Nevertheless, on their final payment, Northern withheld $320,000 from U.S. Pipeline as a credit for U.S. Pipeline's cost savings attributable to performing an open cut at Cliffs Road instead of a more costly HDD bore.

(d) Revisions for Highway 476/Ely Creek HDD Bore for Marquette Replacement

In the course of the Marquette Replacement, Northern revised and redesigned the specifications for the Highway 476/Ely Creek HDD bore related to the Marquette Replacement.

(i) Redesign of Highway 476/Ely Creek HDD

Heavy rains had flooded a nearby wetland and increased its size via natural accretion. As a result, Northern became concerned that its original design for the Marquette main line would place the exit and entry points of the HDD too close to a wetland. Northern decided that it would need to revise the design for the Highway 476/Ely Creek HDD bore of the Marquette Replacement.

The Highway 476/Ely Creek HDD revision extended the bore entry point beyond the swollen wetland and moved the exit point past a steep grade. Northern received FERC approval for the variance request regarding the Highway 476/Ely Creek HDD.

Northern sent the revised Highway 476/Ely Creek HDD bore specifications to U.S. Pipeline on October 1, 2014. U.S. Pipeline began drilling the Highway 476/Ely Creek HDD in mid-October 2014.

(ii) Revision Due to Power Lines

On October 3, 2014, during the Marquette Replacement, Northern submitted a request to FERC to make another revision to the Highway 476/Ely Creek Crossing HDD plans. Despite Northern's having previously approved an open cut beneath power lines along the Marquette Replacement, a utility company objected to Northern's original design. The utility company required Northern to either change the route of the open cut to be further away from power lines or use an HDD method (Power Line HDD). To accommodate the power lines, Northern again revised and redesigned its initial designs to reflect using the HDD method rather than an open cut at this location. Northern submitted these altered plans to FERC, and FERC approved the revision.

(e) Change Orders

U.S. Pipeline submitted "Change Order 14," regarding the Power Line HDD, and "Change Order 15," regarding Highway 476/Ely Creek, to Northern on October 6, 2014. Both change

orders were in the form that was referred to in the contract as "Exhibit L." Northern approved Change Orders 14 and 15 the following day. Change Orders 14 and 15 cite "Southeast Directional Drilling personnel and equipment" as the reason for the added cost components. Southeast Directional Drilling was the HDD subcontractor used by U.S. Pipeline on the Project.

Additional time was not specifically requested in Change Order 14 or 15, nor were additional expenses for U.S. Pipeline specifically set forth in Change Order 14 or 15. U.S. Pipeline merely specified that a "lump sum" method of payment would be utilized to cover the subcontractor's charges for the requested Extra Work. Northern's construction coordinator on the Project admitted at trial that the work described in Change Orders 14 and 15 constituted Extra Work under the contract.

Following Northern's approval of Change Orders 14 and 15, U.S. Pipeline and its subcontractor signed a subcontract for the Extra Work, and the subcontractor mobilized to the Project site.

The day before U.S. Pipeline began working on the Extra Work, U.S. Pipeline submitted "Change Order 19" to Northern. Change Order 19 pertained to the costs U.S. Pipeline anticipated incurring as a result of having to retain extra crews and equipment for the Extra Work on the Highway 476/Ely Creek and Power Line HDD bores. Using the Force Account Work basis payment method pursuant to the contract, U.S. Pipeline estimated the additional cost of the Extra Work but did not specifically indicate that U.S. Pipeline sought additional time for the task schedule or the substantial completion date.

After receiving Change Order 19 from U.S. Pipeline, Northern gave U.S. Pipeline final approval to begin the Power Line HDD. When the Extra Work on Highway 476/Ely Creek and the Power Line HDD bores commenced, Northern knew U.S. Pipeline expected additional compensation for the Extra Work. At this point, Northern also knew that the Project was already past the substantial completion date.

After the work commenced, in an email on October 24, 2014, Northern disputed U.S. Pipeline's numbers in Change Order 19. Northern suggested that U.S. Pipeline "submit a more equitable work change order that truly reflects the additional costs." U.S. Pipeline stated that it would resubmit Change Order 19 once the HDD's were completed to reflect actual costs. Northern did not respond to U.S. Pipeline's offer to resubmit Change Order 19.

In December 2014, Northern and U.S. Pipeline agreed to meet at Northern's headquarters in Omaha to discuss several disputed and outstanding change orders, including Change Order 19. At the meeting, U.S. Pipeline provided documentation detailing its growing additional costs that related to the HDD Extra Work at issue in Change Order 19. Although the parties reached agreements regarding other various disputed change orders that are not the subject of this litigation, the parties were unable to reach an agreement on Change Order 19.

(f) Completion of Project

The last HDD was completed on December 16, 2014. U.S. Pipeline then proceeded with the remaining "original scope of work" included in the contract. For the Marquette Replacement, this work included hydrotesting the final bore pipe sections, drying the pipeline, performing the final tie-in welds on both sides of the bore, coating the welds, and backfilling.

While U.S. Pipeline worked toward completing the Project, Northern representatives supervised U.S. Pipeline's progress. It is undisputed that U.S. Pipeline did not substantially complete the Marquette Replacement until February 12, 2015. U.S. Pipeline issued its completion affidavit on August 21.

The Extra Work added nearly 1,200 feet to the Highway 476/Ely Creek crossing and a 500-foot bore for the Power Line HDD. The Extra Work, combined with severe winter conditions, delayed substantial completion of the Marquette Replacement by approximately 120 calendar days.

(g) Supplements to Change Order 19

On May 22, 2015, U.S. Pipeline submitted Change Order 19, "Supplement 1," to Northern as Northern had requested in its October 24 response to U.S. Pipeline's original Change Order 19 request. Supplement 1 cited an "increase in the cost and time required for performance of the Work" due to the Extra Work on Highway 476/Ely Creek and the Power Line HDD. Supplement 1 requested delay and inefficiency damages of $7,740,138.75. Northern reviewed and rejected U.S. Pipeline's Supplement 1, determining that U.S. Pipeline's formula for costs was inaccurate and that certain items were missing.

After Northern rejected Supplement 1, U.S. Pipeline submitted Change Order 19, "Supplement 1A," on July 16, 2015. Supplement 1A cited "additional compensation and time for performance of that changed Work" and requested delay and inefficiency damages of $6,729,980.79. After conducting an audit of U.S. Pipeline's records, Northern again rejected U.S. Pipeline's Supplement 1A.

(h) Payment

After making adjustments on other disputed change orders, Northern paid $17.3 million dollars to U.S. Pipeline, less $671,000 that it withheld for liquidated damages ($351,000) and a credit for the lower costs associated with the Cliffs Road modification ($320,000). U.S. Pipeline acknowledged that it underbid the Project, even with factoring in the wrong estimate of rock, and suffered a loss of $11.3 million.

(i) U.S. Pipeline's Expert Testimony Regarding Delay Attributions and Damages

In addition to the evidence presented to establish the facts set forth above, U.S. Pipeline offered expert forensic testimony for the computation of damages under its breach of contract claim. U.S. Pipeline's expert was William Berkowitz, a senior managing director in the construction solutions practice of a consulting firm, with an extensive background in forensic schedule and productivity analysis.

The general subject of Berkowitz' testimony related to U.S. Pipeline's breach of contract claim for Northern's failure to pay for the Extra Work associated with Northern's requested HDD redesigns. At the beginning of this testimony, Northern objected to U.S. Pipeline's expert testimony on the basis of relevance under Neb. Evid. R. 401 and 403. Northern also objected on parol evidence grounds. The court overruled Northern's objections. At the request of Northern, the trial court granted Northern a standing objection on these grounds as to the entirety of Berkowitz' testimony.

Berkowitz testified that he used the Force Account Work basis found within the contract to calculate the costs and damages associated with the Extra Work. Berkowitz testified that he calculated the increased costs associated with the Extra Work to total $5,275,506.01. Berkowitz' report notes that this amount represents the added delays and inefficiencies related to the addition of the Extra Work from October 2014 through February 2015. In his calculations, Berkowitz found that there was a total delay of 141 days to the substantial completion date. Of these 141 days, he computed that 123 of these days were attributed to Northern's HDD redesign and therefore compensable to U.S. Pipeline. The 18 days of delay that Berkowitz attributed to U.S. Pipeline were due to a late start of construction and late mobilization of U.S. Pipeline's subcontractor.

In calculating damages, Berkowitz used a multistep process. First, he determined the actual schedule impact of the Extra Work, comparing the parties' original schedule to the schedule that actually occurred. Berkowitz then quantified which costs were attributable to the addition of the Extra Work, as opposed to costs that would have otherwise occurred. Again, in doing so, he testified that he utilized the Force Account Work basis from the parties' contract. Lastly, Berkowitz testified that he deducted payments that were actually made by Northern during the Project. Berkowitz did not include any costs associated with U.S. Pipeline's claims for negligent misrepresentation or

fraudulent concealment regarding geotechnical information in his damages analysis.

Berkowitz testified that in his analysis quantifying which costs were attributable to each party, he separated U.S. Pipeline's costs into two categories: "delay costs" and "inefficiency" costs, or "unproductive work"/"downtime" costs. In his testimony, Berkowitz specifically defined "delay costs" as time-related costs for activities and materials that must continue for the entire duration of a project and are not necessarily task specific, such as supervision, temporary heating, and fuel costs. Berkowitz defined "inefficiency costs" or "unproductive work/downtime" as costs stemming from tasks that took longer or were more expensive because of Northern's design changes and U.S. Pipeline's having to continue its labors on the Project amidst the intemperate Michigan winter. These additional costs, Berkowitz asserted, were largely a result of the Extra Work. His testimony and report supported this conclusion, finding in his analysis that most construction was completed by the time Northern finally told U.S. Pipeline to move forward with the redesigned projects. While Northern cross-examined Berkowitz concerning his calculations under the Force Account Work basis, Northern did not object to Berkowitz' testimony on foundation grounds.

Berkowitz' final opinion was that, applying the Force Account Work basis as set forth in the contract, U.S. Pipeline incurred a total of $5,275,506.01 in costs related to performing the HDD Extra Work.

(ii) Northern's Expert Testimony Regarding Delay Attributions and Damages

Northern offered contrary expert testimony from a consultant for construction disputes, Anthony Gonzales. Like Berkowitz, Gonzales testified that the delays for the Project totaled 141 days. However, Gonzales opined that these delays were entirely attributable to U.S. Pipeline. Gonzales did not address the accuracy of Berkowitz' calculations for the 123

days Berkowitz testified were attributable to Northern's HDD redesign on the contract's Force Account Work basis.

Gonzales testified that solely U.S. Pipeline's own actions or inactions prevented it from maintaining its productivity throughout the Marquette Replacement portion of the Project. Gonzales concluded that as a result, U.S. Pipeline is responsible for at least $351,000 in liquidated damages per the liquidated damage provision in the contract and U.S. Pipeline was not entitled, under the terms of the contract, to any damages for the Extra Work. However, Gonzales noted that if the contract were not followed, Northern might be responsible for $345,700 in damages to U.S. Pipeline for 20 days of delay attributable to Northern's HDD redesign and subsequent Extra Work.

5. District Court Order

Following the conclusion of the bench trial, the district court awarded judgment in favor of U.S. Pipeline on its claim for breach of contract against Northern. Noting that Berkowitz' methodology and calculations were credible and reliable, the court adopted Berkowitz' calculation of costs associated with the Extra Work based on the Force Account Work basis. The district court summarized Berkowitz' testimony as follows:

> Berkowitz calculated the increased costs associated with the Extra Work to total $5,275,506.01. . . . This amount represents the added delays and inefficiencies which attended the Extra Work from October 2014 through February 2015. The delay costs stem from the fact that by the time [Northern] authorized the Extra Work, [U.S. Pipeline] had largely completed its work on the Project. But for the Extra Work, [U.S. Pipeline] could have significantly reduced its workforce on site and completed the Project by the end of October. The inefficiency costs stem from [U.S. Pipeline] having to continue its labors on the Project amidst the intemperate Michigan winter which slowed its progress. But for the Extra Work,

> [U.S. Pipeline] would not have had to contend with winter conditions.

The court also partially granted Northern's request for a declaratory judgment, stating that Northern was justified under the contract to withhold payment from U.S. Pipeline as a credit for U.S. Pipeline's cost savings attributable to performing an open cut at the Cliffs Road crossing instead of a more costly HDD. However, the court awarded U.S. Pipeline $23,729.06 after it found that the proper amount attributable to such cost savings was $296,270.94 and not $320,000.

Regarding liquidated damages, the district court found that Northern improperly withheld $351,000 in liquidated damages per the contract cap due to delays beyond the substantial completion date. The court concluded that Northern waived its rights to these liquidated damages under the contract, because Northern failed (1) to indicate that the liquidated damages clause would still be enforced even after requesting Extra Work and (2) to send the revised plans for the Extra Work until October 1, 2014, after the substantial completion date. As a result, Northern's request for a declaratory judgment declaring that it had a right under the contract to withhold $351,000 from U.S. Pipeline as liquidated damages was denied.

U.S. Pipeline was awarded damages in the amount of $5,275,506.01 for the Extra Work it performed, and an additional $374,729.06 ($351,000 + $23,729.06) for the amount Northern wrongly withheld, for a total damage award of $5,650.235.07. The court dismissed the remainder of both parties' claims with prejudice.

III. ASSIGNMENTS OF ERROR

Northern assigns that the district court erred in (1) awarding U.S. Pipeline consequential damages on its breach of contract claim, because the contract prohibits such recovery; (2) denying Northern's motion for directed verdict; (3) admitting and failing to strike the testimony of U.S. Pipeline's expert witness that included damages for certain work and conditions

that were expressly assumed by U.S. Pipeline or barred under the contract; and (4) dismissing Northern's claim for liquidated damages.

IV. STANDARD OF REVIEW

[1] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony;[1] an appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.[2]

[2] Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.[3]

[3] In reviewing a judgment awarded in a bench trial of a law action, an appellate court 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.[4]

[4] In reviewing rulings on motions for directed verdict and judgments notwithstanding the verdict, we give the nonmoving party the benefit of all evidence and reasonable inferences in his or her favor, and the question is whether a party is entitled to judgment as a matter of law.[5]

[5] 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.[6]

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[1] *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *First Express Servs. Group v. Easter*, 286 Neb. 912, 840 N.W.2d 465 (2013).

[6] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[6] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to elements of damages proved.[7]

[7] The issue of whether damages are consequential under a contract is a question of law that we review de novo,[8] but the factual determinations underlying such a characterization are reviewed for clear error.[9]

[8] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[10]

V. ANALYSIS

1. Consequential Damages

Northern contends that the district court erred in denying Northern's motion for directed verdict and by entering judgment in favor of U.S. Pipeline for $5,275,506.01, which it describes as being an award of consequential damages. Northern argues that the court erred in denying its original and renewed motions for directed verdict and in awarding "consequential" damages to U.S. Pipeline, because the parties agreed to a mutual waiver of consequential damages within their contract.

The underlying issue of Northern's first two assignments of error relates to the proper characterization of the damages awarded. Stated differently, the central question is whether any portion of the damages awarded by the district court was consequential damages. The issue of whether damages are

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[7] *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994).

[8] *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827 (10th Cir. 2016); *Carnell Const. Corp. v. Danville Redevelopment*, 745 F.3d 703 (4th Cir. 2014); *Chestnut Hill Dev. Corp. v. Otis Elevator Co.*, 739 F. Supp. 692 (D. Mass. 1990); *Richmond Medical Supply v. Clifton*, 235 Va. 584, 369 S.E.2d 407 (1988). Cf. *Adams v. American Cyanamid Co.*, 1 Neb. App. 337, 498 N.W.2d 577 (1992).

[9] See, generally, *Hooper v. Freedom Fin. Group, supra* note 1.

[10] *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014).

consequential under a contract is a question of law that we review de novo,[11] but the factual determinations underlying such a characterization are reviewed for clear error.[12] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.[13] Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.[14] We find that the damages alleged by U.S. Pipeline and awarded by the district court were properly characterized as direct damages and were not consequential damages.

[9] Nebraska courts have consistently upheld the right of contracting parties to privately bargain for the amount of damages to be paid in the event of a breach of contract.[15] This court has explained that "'parties to a contract may override the application of the judicial remedy for breach of a contract'" by bargaining in advance over the amount or type of damages to be paid in the event of breach.[16] Many jurisdictions apply this principle to waivers of consequential damages, as these contractual provisions that purport to waive consequential damages seek to carve out a specific category of damages for which recovery is denied.[17] Generally, a contractual waiver

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[11] *SOLIDFX, LLC v. Jeppesen Sanderson, Inc., supra* note 8; *Carnell Const. Corp. v. Danville Redevelopment, supra* note 8; *Chestnut Hill Dev. Corp. v. Otis Elevator Co., supra* note 8; *Richmond Medical Supply v. Clifton, supra* note 8. Cf. *Adams v. American Cyanamid Co., supra* note 8.

[12] See, generally, *Hooper v. Freedom Fin. Group, supra* note 1.

[13] *Id.*

[14] *Id.*

[15] See, *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002); *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989).

[16] See *Reichert v. Rubloff Hammond, L.L.C., supra* note 15, 264 Neb. at 24, 645 N.W.2d at 527.

[17] See 6 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 19:55 (2012). See, also, *Adams v. American Cyanamid Co., supra* note 8.

or exclusion of consequential damages will be upheld unless the provision is unconscionable.[18]

The parties do not dispute the existence of the waiver of consequential damages in the contract. Nor does U.S. Pipeline argue that the waiver is unconscionable. Rather, the dispute lies with the provision's relevance. Northern asserts that the contract's waiver of consequential damages is controlling and dispositive because the damages alleged and awarded were consequential, whereas U.S. Pipeline argues that the provision is irrelevant because the damages alleged and awarded were direct results of the Extra Work Northern requested U.S. Pipeline to complete under the contract.

The waiver at issue in this case stated that consequential damages were

> "INCLUDING BUT NOT LIMITED TO LOSS OF PROFIT, BUSINESS INTERRUPTION, LOSS OF REVENUE, LOSS OF USE, LOSS OF CONTRACT, LOSS OF THROUGHPUT, LOSS OF GOODWILL, INCREASED COST OF WORKING OR LOSS OF BUSINESS OPPORTUNITY[.]"

Thus, the provision states what kinds of damages would be included under the umbrella of consequential damages rather than addressing the cause of those damages and when they might be deemed consequential rather than direct. The contract does not define direct damages. Further, the terms of this "definition" do not purport to change the common-law definition of "consequential damages." Based on this, we, like the parties, rely on the common law to clarify the meaning of the term.

[10,11] Consequential damages, as opposed to direct damages, do not arise directly according to the usual course of things from a breach of contract itself.[19] Rather, they occur

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[18] See, *Adams v. American Cyanamid Co., supra* note 8; 6 Bruner & O'Connor, Jr., *supra* note 17.

[19] *Creighton University v. General Elec. Co.*, 636 F. Supp. 2d 940 (D. Neb. 2009) (citing *Adams v. American Cyanamid Co., supra* note 8).

as a consequence of special extracontractual circumstances known or reasonably supposed to have been contemplated by the parties when the contract was made.[20] Direct damages refer to those which the party lost from the contract itself—in other words, the benefit of the bargain—while consequential damages refer to economic harm beyond the immediate scope of the contract.[21] One common example of consequential damages is the lost profits or revenues from outside parties, lost business opportunities, or other sums forgone as a result of a breach of contract.[22]

The parties do not disagree as to the definition of consequential damages, but, rather, as to its application to the facts of this case. Northern relies on *Creighton University v. General Elec. Co.*[23] in support of its argument that the damages at issue in this case are consequential as opposed to direct damages. In *Creighton University*, the plaintiff was damaged when it was unable to collect $2.4 million in billings because of "delayed implementation" of a healthcare technology system by the defendant.[24] The plaintiff argued that these losses were direct damages because they "'were naturally expected to follow from breach of the [parties' contract] because the net billings would have been collected had the System been able to process claims in a timely manner

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[20] *Id.*

[21] *Penncro Associates, Inc. v. Sprint Spectrum, L.P.*, 499 F.3d 1151 (10th Cir. 2007) (citing Restatement (Second) of Contracts § 347(a) and comments *a.* and *c.* (1981); Black's Law Dictionary 416-17 (8th ed. 2004); 24 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 64:12 (4th ed. 1993)).

[22] See, e.g., *Penncro Associates, Inc. v. Sprint Spectrum, L.P., supra* note 21; *McCoolidge v. Oyvetsky*, 292 Neb. 955, 874 N.W.2d 892 (2016); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978); *Adams v. American Cyanamid Co., supra* note 8. See, also, Restatement, *supra* note 21, § 351, comments *a.* and *b.*

[23] *Creighton University v. General Elec. Co., supra* note 19.

[24] *Id.* at 942.

. . . .'"[25] The U.S. District Court for Nebraska rejected this argument. Applying Nebraska law, the court repeated the proposition that consequential damages do not arise directly according to the usual course of things from the breach itself; rather, they occur as a consequence of special circumstances known or reasonably supposed to have been contemplated by the parties when the contract was made.[26] The court then concluded that "[l]abeling the $2.4 million in uncollected claims 'direct damages' does not make them so. In fact, the allegation that the claims were uncollectible because they were not submitted within deadlines established by payors shows that the loss of income was attributable to special circumstances."[27]

Northern attempts to argue that *Creighton University* is similar to this case, because U.S. Pipeline is seeking to improperly "label" the damages it seeks as "direct" damages. Thus, Northern asserts that U.S. Pipeline seeks to ignore the mutual waiver of consequential damages in the contract and recover damages for the indirect consequences of the alleged delay or inefficiencies incurred on the Marquette Replacement.

We find no merit in Northern's argument. *Creighton University* is notably distinguishable from the case at bar. In *Creighton University*, the "consequential" damages that the plaintiff was barred from seeking were collections from *third parties*, which plaintiff was unable to collect because of those deficiencies ("lost income" based on "projected cashflow")—not payments due to the plaintiff under the contract for services rendered. The damages incurred in *Creighton University* were the result of lost income or lost business opportunities, which are clearly consequential damages.

In contrast, the damages incurred by U.S. Pipeline and awarded by the district court were simply the revenue due to

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[25] *Id*. at 943.

[26] *Creighton University v. General Elec. Co., supra* note 19.

[27] *Id*. at 943.

U.S. Pipeline under the contract for the work performed. At the time Northern authorized the Extra Work to go forward, it agreed to compensate U.S. Pipeline to perform that Extra Work on a modified time-and-materials basis, called the Force Account Work basis under the contract. This was the basis that the district court determined was utilized by Berkowitz in his calculations. The damages were composed of a subset of the actual, out-of-pocket costs it incurred as a direct result of Northern's HDD-related changes and contractual markups from the Force Account Work basis calculations when applicable. U.S. Pipeline did not seek profits or revenues it lost from third parties or lost business opportunities, or any other sums it had to forgo as the result of the Extra Work. Rather, the district court properly awarded U.S. Pipeline only the benefit of its bargain: the recovery of payments owed to it for fulfilling its obligations under the contract, including completing the HDD Extra Work ordered by Northern. These damages flow directly from the contract.

The value of the bargain to U.S. Pipeline was exactly what it sought in damages in the trial court: the time and materials it expended to complete the Extra Work, however long that took, calculated with the small markups allowed under the contract. Direct damages reflect a failure on the part of the defendant to live up to the bargain it made, or a failure of the promised performance itself.[28] Here, Northern failed to remit payment to U.S. Pipeline pursuant to Extra Work completed directly pursuant to the contract. The damages sought by U.S. Pipeline are precisely what direct damages are defined to be, and the parties' contractual provision does not purport to change this definition.

Accordingly, we find that the damages sought by, and subsequently awarded to, U.S. Pipeline were a direct result of the parties' contractual agreement. We find no merit to Northern's

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[28] 24 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 64:16 (4th ed. 2018).

argument that the district court erred by awarding consequential damages.

2. Admissibility of Berkowitz Testimony and Northern's Motions on Directed Verdict

We also find no merit to Northern's arguments that the district court abused its discretion by admitting and failing to strike Berkowitz' testimony which allegedly included in his damages calculations certain work and conditions expressly assumed by U.S. Pipeline or barred under the contract and that the court erred in denying Northern's motion for directed verdict based on these same alleged deficiencies in Berkowitz' testimony.

Northern's first argument in this regard is little more than a restatement of its assertion that Berkowitz failed to separate any direct damages from consequential damages. As noted above, the damages requested by U.S. Pipeline and subsequently awarded by the district court were direct damages and not consequential damages. Based on this conclusion, we must also conclude that the district court properly admitted and considered Berkowitz' testimony as relevant regarding the calculation of damages.

Northern's second argument is that the court should have sustained Northern's objections to Berkowitz' testimony, because Berkowitz' calculation contained "other damages" that U.S. Pipeline could not recover under the contract.[29] These "other damages" that Northern argues are not contractually compensable include compensation for (1) an 18-day holiday break that U.S. Pipeline took during December 2014 and January 2015; (2) days in which U.S. Pipeline was performing "corrective" work[30]; (3) costs and delays associated with subsurface conditions, which were risks assumed by U.S. Pipeline under the contract; and (4) costs and delays associated with work

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[29] Brief for appellant at 36.

[30] *Id.* at 30.

previously compensated for under Change Orders 14 and 15. Northern asserted in its reply brief and at oral argument that Berkowitz did not utilize the Force Account Work basis as per the contract's requirements when he calculated U.S. Pipeline's damages, but Northern did not specifically assign and specifically argue this in its initial brief.

Northern makes a similar argument in support of its assignment that the court erred in failing to grant its motions for directed verdict. Northern argues that Berkowitz' calculations, the only evidence supporting U.S. Pipeline's damages calculation, were incorrect because Berkowitz included delay damages that were not attributable to Northern in his calculation. Based on this, Northern asserts that U.S. Pipeline failed to prove damages.

[12,13] We find that Northern failed to preserve the errors regarding the methodology and particulars of Berkowitz' calculations. Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.[31] At trial, Northern made only the following objection relative to Berkowitz' testimony: "I object on relevancy, 401, 403, as well as parole [sic] evidence. This testimony is not consistent with the contractor — the change orders that were signed, and so I object on that basis." Northern's objection was not sufficiently specific to alert the trial court that it contested the details or methodology of Berkowitz' calculations, which Northern now takes issue with on appeal. An issue not properly presented and passed upon by the trial court may not be raised on appeal.[32]

[14,15] To the extent that Northern asserted in oral argument that the court erred in admitting Berkowitz' testimony

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[31] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[32] *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989).

because his calculations did not use the Force Account Work basis, Northern failed to preserve this argument by failing to assign it as error and argue it in its initial brief. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[33] Errors not assigned in an appellant's initial brief are thus waived and may not be asserted for the first time in a reply brief.[34]

In any event, the district court made a factual finding that the Force Account Work basis was properly used throughout Berkowitz' calculations. The court found Berkowitz' testimony credible and reliable. And the district court determined that all costs included in Berkowitz' calculations were compensable to U.S. Pipeline as damages incurred pursuant to Northern's breach of contract on the Force Account Work basis. With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.[35] We cannot say that the district court's finding that Berkowitz' calculations were proper under the contract is clearly erroneous.

With respect to its directed verdict arguments, Northern failed to preserve these arguments because they were not presented below in support of the motions for directed verdict. Instead, in support of its motions for directed verdict, Northern argued that (1) U.S. Pipeline's damages were barred by the consequential damages waiver and (2) there was no genuine issue of fact on U.S. Pipeline's misrepresentation/fraudulent concealment claims regarding "geotechnical information."

[16,17] In an appeal of a trial court's refusal to enter a directed verdict, the appellate court should consider solely those grounds urged by the appellant to the trial court in

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[33] *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001).

[34] *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014).

[35] *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

support of its directed verdict motion.[36] If a party fails to set forth certain arguments as grounds in a motion and renewed motion for directed verdict, such arguments will not be properly preserved for appeal.[37] The arguments that Northern makes on appeal concerning the particulars of Berkowitz' calculations were not presented below. They were not set forth as grounds in Northern's motions for directed verdict.[38] As such, we decline to address Northern's additional arguments on this point.

We note that Northern did not assign or argue that the evidence was insufficient to support the district court's judgment and award of damages in favor of U.S. Pipeline. However, based on the totality of our findings above, and viewing the evidence, including Berkowitz' testimony, in the light most favorable to U.S. Pipeline, it is apparent that the evidence was sufficient.

Based on the analysis above, we find that the district court did not err in (1) admitting and relying upon the entirety of Berkowitz' testimony and (2) denying Northern's motions for directed verdict.

3. Northern's Claim for Liquidated Damages

Lastly, Northern assigns that the district court erred in denying Northern's request for a declaratory judgment declaring that it had a right under the contract to withhold $351,000 from U.S. Pipeline as liquidated damages for U.S. Pipeline's failure to meet the September 24, 2014, substantial completion date. Northern contends that because U.S. Pipeline did not request any additional time or a modification of the substantial completion date, the target completion date remained September 24. Because the actual substantial completion date occurred on February 12, 2015, Northern asserts that it was entitled to

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[36] See *Parks v. Merrill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004).

[37] See *id.*

[38] See *id.*

withhold the full liquidated damages cap amount as set forth within the contract.

In its order, the district court determined that because Northern did not send the revised plans for the Extra Work until October 1, 2014, Northern effectively waived its right to seek liquidated damages under the contract. Because of this delay, Change Orders 14, 15, and 19 were also submitted after the substantial completion date.

[18-22] The determination of whether a contractual provision has been waived is a factual determination.[39] A contractual provision for liquidated damages for delay in performance may be waived.[40] Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.[41] In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.[42] A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.[43] Even a provision in a written contract that specifies that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct.[44]

We agree with the district court's analysis of this matter. Northern's argument that U.S. Pipeline cannot avoid liquidated

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[39] See, *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982); *Wiebe Constr. Co. v. School Dist. of Millard*, 198 Neb. 730, 255 N.W.2d 413 (1977).

[40] *Wiebe Constr. Co. v. School Dist. of Millard, supra* note 39.

[41] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P., supra* note 6.

[42] *Id.*

[43] *Id.*

[44] *Pearce v. ELIC Corp., supra* note 39.

damages because it neglected to request additional time on its change orders is unfounded. By requesting the Extra Work, submitting the designs after the passing of the substantial completion date, and further failing to inform U.S. Pipeline that it intended to enforce the liquidated damages provision in the contract, Northern manifested a clear intent to waive the contractual liquidated damages provision. Northern knowingly requested Extra Work that would clearly exceed the substantial completion date. The district court's determination that Northern's conduct amounted to a waiver was supported by the evidence and cannot be said to be clearly wrong.

Northern alternatively argues that the court should have awarded liquidated damages to Northern for three delays it alleges were attributable solely to U.S. Pipeline: (1) U.S. Pipeline's holiday break in December 2014 and January 2015, (2) U.S. Pipeline's corrective work on the pipe replacement in January 2015, (3) and U.S. Pipeline's execution of work performed for Change Orders 14 and 15 from October 15 to December 16, 2014. However, Northern fails to argue why the waiver the district court found to have occurred as to the liquidated damages provision would apply with lesser force to these specific time periods.

The district court did not err in denying Northern's request for a declaratory judgment upholding its decision to withhold $351,000 in liquidated damages.

VI. CONCLUSION

For the reasons set forth above, we affirm the decision of the district court in this matter.

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

State of Nebraska, appellee, v. Clint W. Schriner, appellant.

929 N.W.2d 514

Filed June 28, 2019. No. S-18-893.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment or the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure: Appeal and Error.** When reviewing whether a consent to search was voluntary, as to the historical facts or circumstances leading up to a consent to search, an appellate court reviews the trial court's findings for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which an appellate court reviews independently of the trial court. And where the facts are largely undisputed, the ultimate question is an issue of law.
3. **Police Officers and Sheriffs.** There are three tiers of police encounters under Nebraska law.
4. **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.
5. **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.

6. **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.
7. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
8. ____: ____. In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.
9. **Constitutional Law: Miranda Rights.** *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody."
10. **Arrests: Words and Phrases.** Being in custody does not require an arrest, but refers to situations where a reasonable person in the defendant's situation would not have felt free to leave and, thus, would feel the restraint on freedom of movement of the degree associated with a formal arrest.
11. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination.
12. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** For purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), interrogation refers not only to express questioning, but also to any words or actions on the part of the police that the police

should know are reasonably likely to elicit an incriminating response from the suspect.

13. **Miranda Rights: Evidence.** Statements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation and are admissible.
14. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to a few established and well-delineated exceptions.
15. **Warrantless Searches.** One well-recognized exception to the warrant requirement is a search undertaken with consent.
16. **Constitutional Law: Search and Seizure: Duress.** To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
17. **Constitutional Law: Search and Seizure.** The determination of whether the facts and circumstances constitute a voluntary consent to a search, satisfying the Fourth Amendment, is a question of law.
18. **Search and Seizure.** Whether consent to a search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.
19. **Police Officers and Sheriffs: Search Warrants: Search and Seizure.** A statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion.

Appeal from the District Court for Richardson County: Julie D. Smith, Judge. Affirmed.

Steven J. Mercure, of Nestor & Mercure, 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.

Freudenberg, J.

NATURE OF CASE

Clint W. Schriner was charged with and convicted of manufacturing a controlled substance (marijuana) within 1,000 feet

of a school under Neb. Rev. Stat. § 28-416 (Reissue 2016), a Class II felony, and possession of a controlled substance (methamphetamine) under § 28-416, a Class IV felony. The district court sentenced Schriner to 1 to 5 years' imprisonment and 2 to 2 years' imprisonment respectively, to be served consecutively. Schriner appeals his convictions, solely asserting that the lower court erred in denying his motion to suppress based upon alleged violations of his Fourth Amendment and Fifth Amendment rights during his encounter with law enforcement.

BACKGROUND

Arrest

In October 2016, Richardson County Deputy Sheriff Jonathan Kirkendall was serving civil papers in Humboldt, Nebraska, when he noticed a strong odor of marijuana. Kirkendall was told by local residents that the smell was coming from a neighboring house.

After speaking to these residents, Kirkendall confirmed that the odor was emanating from the identified house. He then approached the house and knocked on the door. Schriner answered the door in his pajamas and came outside to his porch area. When doing so, Schriner shut the door behind him and locked himself out of his house.

When Kirkendall first made contact with Schriner, he observed that there was an overwhelming odor of marijuana being emitted both from within Schriner's residence and from Schriner's person. When asked about the odor, Schriner admitted that he had recently smoked marijuana.

Kirkendall then asked Schriner to remain on the porch while Kirkendall called the sheriff to inquire as to how to proceed. Schriner asked whether he could go inside to get dressed, to which Kirkendall replied, "'Not right now, Sir.'" Schriner then started toward the door, and Kirkendall again asked Schriner to stay out of the residence.

While on the telephone with the sheriff, Kirkendall asked Schriner for consent to search the house. Schriner refused to give consent. Kirkendall told Schriner that the next step was to "request a search warrant," to which Schriner replied, "'Fine. Do what you gotta do.'" At that point, Schriner again attempted to go back inside the house, but Kirkendall told him that he was not allowed to go back inside the house for fear that Schriner would destroy evidence.

Schriner, while still standing on his front porch, used his cell phone to call his sister and told her he was being detained by law enforcement. Specifically, Schriner said, "Hey hun, I got . . . a cop at my door saying because he smells weed outside . . . I'm like detained outside my house right now. . . . And he's . . . talking to the sheriff right now." Schriner testified that in that moment, he believed he was being detained. However, Kirkendall never told Schriner that he was not free to leave.

Schriner asked Kirkendall if a search warrant was going to be granted. Kirkendall responded that the sheriff was "going to write one." At that point, Schriner started asking for leniency. He asked Kirkendall whether he would "cut [him] a break if [he] let [him] in" and whether he would "look the other way for 5 minutes, while [he got] rid of something." That "something," per Schriner, was a small amount of methamphetamine that he did not want to get charged with.

After Schriner disclosed that he had methamphetamine in his residence, Kirkendall discussed with Schriner the possibility of his cooperating on the methamphetamine "aspect of [the situation]." At the same time, Kirkendall again started speaking on the telephone with the sheriff. While Kirkendall was on the telephone, Schriner said that "the neighbors are watching right now" and asked Kirkendall, "Can we go inside the house? Let's just go inside the house. Might as well, you're getting a fucking search warrant."

Schriner also said that he wanted to call his sister to inform her that he was probably going to be arrested. To that, Kirkendall replied, "No, that, that's not, that's not what I'm doing." Schriner was surprised by this response and invited Kirkendall into the residence to "talk about it." Kirkendall accepted the invitation to enter the residence.

Schriner spent approximately 15 minutes trying to get back inside his house. He finally managed to get back inside by removing a windowpane from the back door and manually unlocking it. Upon entering the residence, Schriner led Kirkendall throughout the house, showing him his marijuana grow operation, his various pieces of drug paraphernalia, and the small amount of methamphetamine in his possession. In all, Schriner had approximately 65 marijuana plants, the equipment to grow them, numerous other pieces of drug paraphernalia, and baggies of methamphetamine.

Kirkendall told Schriner that he was going to arrest him, but before actually doing so, Kirkendall let Schriner change his clothes, smoke a cigarette, make various telephone calls, and say good-bye to his pets. Kirkendall and Schriner then walked outside, where Schriner was handcuffed and placed in the patrol vehicle. Kirkendall and another officer then collected the evidence from the house.

Throughout his interaction with law enforcement, without being questioned, Schriner made a number of statements regarding his current situation with law enforcement and the drugs in his possession. Kirkendall generally reacted by indicating he had heard the statements. Kirkendall asked a few questions in response to some of Schriner's remarks. Many of the volunteered statements made by Schriner were incriminating. Notably, after being handcuffed and placed in Kirkendall's patrol vehicle, Schriner made a number of incriminating statements including, "I was growing some weed," "They tend to frown on that," "It helps my back," and "You guys can just lose that meth; you don't know how much I appreciate that."

Motion to Suppress

Based on the evidence, the State charged Schriner with manufacturing a controlled substance (marijuana) within 1,000 feet of a school under § 28-416, a Class II felony; possession of a controlled substance (methamphetamine) under § 28-416, a Class IV felony; and possession of drug paraphernalia under Neb. Rev. Stat. § 28-441 (Reissue 2016), an infraction.

Prior to trial, Schriner moved to suppress the physical evidence seized from his house as well as any statements made to law enforcement during his interaction with Kirkendall. Schriner argued that suppression was warranted based on alleged violations of his Fourth Amendment and Fifth Amendment rights. Schriner argued that the suppression was warranted because (1) he was unlawfully seized, in violation of the Fourth Amendment; (2) his statements were improperly obtained under *Miranda v. Arizona*,[1] in violation of the Fifth Amendment; and (3) his consent to the search was coerced, based on Kirkendall's indication that he had a search warrant, in violation of the Fourth Amendment.

At the hearing, Kirkendall testified as described above, noting that Schriner was not arrested until after he led Kirkendall throughout the house; that he did not give *Miranda* warnings to Schriner during the contact; and that he never told Schriner that he had a search warrant or that one would be granted. In addition to this testimony, the State offered into evidence a 1-hour video recording from Kirkendall's body camera of the interaction. The recording was received into evidence without objection.

Schriner testified at the hearing that he felt like he was detained early during his interaction with Kirkendall and that he allowed Kirkendall inside his residence only because he thought a search warrant was being issued.

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

The district court granted in part and overruled in part Schriner's motion to suppress. The district court granted a portion of Schriner's request to suppress his statements involving a short exchange after Schriner had been informed that he was going to be arrested. Specifically, Kirkendall asked Schriner the following questions while Schriner was handcuffed and placed in the back of Kirkendall's patrol vehicle: "Alright, what's this used for?"; "To smoke oil?"; "Is there any oil in it?"; and "Do you have any additional oil anywhere else?" The district court concluded that these questions by Kirkendall were part of a custodial interrogation without *Miranda* warnings. Thus, the court sustained Schriner's motion to suppress as to his responses to the specific questions listed above.

The district court overruled the remainder of Schriner's motion because the court concluded that (1) the initial seizure of Schriner was appropriate, (2) Schriner's other statements were not made during a custodial interrogation, and (3) Schriner's consent to the search of his residence was not a result of coercion, intimidation, or any improper promises or threats.

Trial

At a bench trial, the State called three witnesses to testify. Kirkendall again testified about his observations during his encounter with Schriner on the day of the arrest and that Schriner's house was located approximately 689 feet from a nearby school. The State also called an evidence custodian and a forensic scientist to testify about the various substances recovered from Schriner's house. The footage from Kirkendall's body camera was admitted into evidence over Schriner's objection.

During trial, Schriner repeatedly renewed his objections regarding physical evidence and Schriner's statements during his encounter with Kirkendall on the same grounds as presented in his motion to suppress. After repeatedly overruling

Schriner's objections, the district court granted a standing objection to preserve the issues for appeal.

During his defense, Schriner asserted an entrapment by estoppel claim. He argued that the signs indicating that his residence was located in a school zone were misplaced. Schriner also presented evidence that he relied on those signs when he purchased his house in 2013 and that he would not have bought the house had he known it was located in a drug-free zone. Further, Schriner called Schriner's attorney's law clerk to testify. She testified that there were numerous "Drug Free Zone" signs around the school and that Schriner's house fell outside their perimeter. In the same vein, Schriner testified that he would not have bought the house had he known it was located in a drug-free zone. However, on cross-examination, Schriner admitted that he owned and lived in the house at issue, he was growing marijuana inside, and he had possessed methamphetamine.

Verdicts and Sentencing

Following trial, the district court rejected Schriner's entrapment by estoppel defense and found Schriner guilty of both the manufacturing charge and the possession charge. The State dismissed the paraphernalia charge.

At a subsequent sentencing hearing, the district court sentenced Schriner to 1 to 5 years' imprisonment on the manufacturing conviction and 2 to 2 years' imprisonment on the possession of methamphetamine conviction, with those sentences to be served consecutively.

ASSIGNMENTS OF ERROR

Schriner assigns that the district court erred by overruling his motion to suppress physical evidence and statements used against him at trial for the following reasons: (1) Law enforcement unlawfully detained and unreasonably seized Schriner and thereby violated his Fourth Amendment rights; (2) law enforcement did not read Schriner his *Miranda* rights after he was arrested and thereby violated his Fifth Amendment

right against self-incrimination; and (3) Schriner's consent to the search of his home was not freely and voluntarily given and was the exploitation of the prior Fourth Amendment violation.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment or the safeguards established by the U.S. Supreme Court in *Miranda*, an appellate court applies a two-part standard of review.[2] Regarding historical facts, an appellate court reviews the trial court's findings for clear error.[3] But whether those facts trigger or violate Fourth Amendment or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[4]

[2] Likewise, we apply the same two-part analysis when reviewing whether a consent to search was voluntary.[5] As to the historical facts or circumstances leading up to a consent to search, we review the trial court's findings for clear error.[6] However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently of the trial court.[7] And where the facts are largely undisputed, the ultimate question is an issue of law.[8]

ANALYSIS

The facts of this case are not in dispute. Rather, the central issues of the case relate to the constitutionality of Schriner

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[2] *State v. Khalil*, 25 Neb. App. 449, 908 N.W.2d 97 (2018). See, also, *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[3] *State v. Khalil, supra* note 2.

[4] *Id.*

[5] *State v. Modlin*, 291 Neb. 660, 867 N.W.2d 609 (2015).

[6] *Id.*

[7] *Id.*

[8] *Id.*

and law enforcement's interaction and the subsequent search of Schriner's residence. Schriner assigns that the district court erred by overruling his motion to suppress physical evidence and statements used against him at trial for the following reasons: (1) Law enforcement unlawfully detained and unreasonably seized Schriner and thereby violated his Fourth Amendment rights, (2) law enforcement did not read Schriner his *Miranda* rights after he was arrested and thereby violated his Fifth Amendment right against self-incrimination, and (3) Schriner's consent to the search of his home was not freely and voluntarily given and was the exploitation of the prior Fourth Amendment violation. We disagree and find that the district court properly resolved Schriner's motion to suppress.

Challenged Seizure or Detention

First, Schriner argues that his initial encounter with law enforcement quickly transformed into a de facto custodial arrest and unreasonable seizure when Schriner was "restrained, confined[,] and detained" on his front porch.[9] In sum, Schriner argues that he reasonably believed he was not free to leave during the encounter and that Kirkendall lacked sufficient cause to detain him. Accordingly, Schriner contends that the court erred in overruling in part his motion to suppress.

The State maintains that law enforcement in this case complied with the Fourth Amendment. The State argues that the contact between law enforcement and Schriner "began as a tier-one police-citizen encounter and evolved into a tier-three police-citizen encounter" upon Schriner's being taken outside and handcuffed by Kirkendall.[10] We agree with the State.

[3-6] There are three tiers of police encounters under Nebraska law. 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

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[9] See brief for appellant at 13.

[10] See brief for appellee at 13.

through noncoercive questioning.[11] 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 v. Ohio*,[12] is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[13] 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.[14] The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention.[15] The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.[16] 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.[17]

[7,8] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[18] In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an

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[11] *State v. Shiffermiller*, 302 Neb. 245, 922 N.W.2d 763 (2019).

[12] *Id.*

[13] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See, also, *State v. Shiffermiller, supra* note 11.

[14] *State v. Shiffermiller, supra* note 11.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *State v. Gilliam*, 292 Neb. 770, 874 N.W.2d 48 (2016).

officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.[19]

Based on the record before us, the contact began when Kirkendall approached Schriner's house and Schriner answered his door. Thereafter, Kirkendall asked Schriner questions regarding the odor of marijuana, which Schriner voluntarily answered. During this early portion of the encounter, Schriner admitted to having recently smoked marijuana. Schriner contends that he was unreasonably seized under the Fourth Amendment at this point. We disagree and find that this contact was merely a first-tier police-citizen encounter, which, as noted above, does not implicate the Fourth Amendment.

Later in the encounter, Schriner was instructed by Kirkendall not to go back into his residence. Kirkendall testified that he did not permit Schriner to enter his residence at this point in order to prevent the loss of evidence while seeking a search warrant. However, Schriner does not point to any evidence that suggests that Kirkendall told Schriner that he was not free to leave during his encounter with law enforcement on his front porch. Schriner was free to move about the porch and leave the porch at any time. In fact, when Schriner stated that he intended to call his sister again to inform her that he was being arrested, Kirkendall replied, "That's not what I'm doing."

Schriner was free to leave the porch at any time. He simply was not allowed to enter his house. Even if we found that Schriner was being detained on his porch, by the time Kirkendall prohibited Schriner from going back into his residence, Schriner had already admitted to smoking and possessing marijuana. This, coupled with Schriner's neighbors' report and the strong odor of marijuana, provided sufficient evidence to support not only reasonable suspicion, but probable cause to justify Schriner's arrest.[20] This temporary restraint

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[19] *Id.*

[20] See *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992).

of Schriner while he was on his porch was not inappropriate under the Fourth Amendment.

In *Illinois v. McArthur*,[21] the U.S. Supreme Court held that police officers did not violate the Fourth Amendment when they detained a man outside his trailer home for approximately 2 hours while other officers obtained a search warrant. In that case, police had probable cause to believe the man's home contained drugs, and they had good reason to fear that unless restrained, the man would destroy the drugs before they returned with a warrant.[22] The officers neither searched the trailer home nor arrested the man before obtaining a warrant, and they restrained the man for a "limited period of time."[23] The U.S. Supreme Court explained that it had "upheld temporary restraints where needed to preserve evidence until police could obtain a warrant" and noted it had found no case in which it had "held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time."[24]

Based on the analysis above, we find that the temporary seizure of Schriner, which was designed to prevent the loss of evidence and which continued for a reasonable period of time while law enforcement diligently obtained a search warrant, was not unlawful. Although a warrant was not ultimately obtained because, as we will discuss below, Schriner eventually consented to the search, the same principles found in *McArthur* apply.

We conclude as a matter of law that the district court did not err in its resolution of Schriner's motion to suppress on the basis of an improper seizure and arrest in violation of the Fourth Amendment.

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[21] *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001).

[22] *Id.*

[23] *Id.*, 531 U.S. at 332.

[24] *Id.*, 531 U.S. at 334.

Challenged Statements

[9,10] Next, Schriner argues that his statements to law enforcement were improperly obtained under *Miranda*,[25] in violation of the Fifth Amendment, and that the district court erred in overruling in part his motion to suppress on that basis. *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody."[26] Being in custody does not require an arrest, but refers to situations where a reasonable person in the defendant's situation would not have felt free to leave and, thus, would feel the restraint on freedom of movement of the degree associated with a formal arrest.[27]

[11] *Miranda* prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination.[28] *Miranda* requires law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed.[29]

[12,13] For purposes of *Miranda*, interrogation "refers not only to express questioning, 'but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'"[30] But it is well founded that statements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation and

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[25] *Miranda v. Arizona, supra* note 1.

[26] *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

[27] See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d. 35 (2009).

[28] *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014).

[29] *Id.*

[30] See *State v. Bauldwin*, 283 Neb. 678, 700, 811 N.W.2d 267, 286 (2012) (ellipsis in original) (quoting *State v. Rogers, supra* note 27).

are admissible.[31] Put more broadly, any statement given freely and voluntarily without compelling influences is admissible in evidence.[32]

We find that Schriner was not in custody for the purposes of *Miranda* and the Fifth Amendment at any point prior to his formal arrest. Further, based on the evidence before us, including the body-camera recording of the entire encounter, Schriner freely volunteered a number of incriminating statements during his interaction with Kirkendall. Beginning very early on in the interaction, Schriner made several incriminating statements to Kirkendall that were not in response to words or actions by Kirkendall that were reasonably likely to elicit an incriminating response. For example, after Schriner's initial admission to having used marijuana, Schriner asked Kirkendall whether he would "cut [him] a break if [he] let [him] in" and whether he would "look the other way for 5 minutes, while [he got] rid of something." And after Schriner, unsolicited, disclosed that he had methamphetamine in his residence, Kirkendall discussed with Schriner the possibility of his cooperating on the methamphetamine "aspect of [the situation]." Following his formal arrest, Schriner made comments such as "I was growing some weed," "It helps my back," and "You guys can just lose that meth; you don't know how much I appreciate that." None of these statements were responsive to an interrogation. Rather, Kirkendall was often collecting evidence and speaking to another officer while Schriner was speaking.

These statements were admissible. The district court did not err in denying in part Schriner's motion to suppress on *Miranda* grounds.

Challenged Consensual Search

Lastly, Schriner assigns that the district court erred in denying in part his motion to suppress because Schriner did not

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[31] *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[32] *State v. Dallmann, supra* note 26.

freely and voluntarily consent to the search of his residence. Specifically, Schriner argues that his consent was coerced, in violation of the Fourth Amendment, based on Kirkendall's indication that he had a search warrant. We find no merit in this contention.

[14,15] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to a few established and well-delineated exceptions.[33] One well-recognized exception to the warrant requirement is a search undertaken with consent.[34]

[16-18] To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne.[35] Consent must be given voluntarily and not as a result of duress or coercion, whether express, implied, physical, or psychological.[36] The determination of whether the facts and circumstances constitute a voluntary consent to a search, satisfying the Fourth Amendment, is a question of law.[37] Whether consent to a search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.[38]

[19] In *State v. Tucker*,[39] we held that consent was not coerced where officers repeatedly asked a suspect for permission to enter his apartment to look for illegal items and threatened to get a search warrant, eventually leading the suspect to step back from the door with his arms raised and his hands upward and outward.[40] We noted in *Tucker* that in situations

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[33] *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

[34] See *id*.

[35] *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001).

[36] *Id.*

[37] *State v. Modlin, supra* note 5.

[38] *Id.*

[39] *State v. Tucker, supra* note 35.

[40] See *id*.

where the searching officer has stated that he could obtain or was in the process of getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation.[41] We also held that "[a] statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion."[42]

Considering the totality of the circumstances, we find that Schriner's consent was voluntary and not coerced. There is no evidence of police pressure. Kirkendall's body-camera recording shows that Schriner acted voluntarily and not due to duress or coercion. As the district court noted in its order on Schriner's motion to suppress, Kirkendall never told Schriner that he already had a search warrant, but, rather, only that the sheriff was going to "write" one. That does not undermine the validity of Schriner's subsequent consent. We find that there is no evidence in the record to support Schriner's contentions that Kirkendall "misrepresented that a warrant was presently being written" and that Kirkendall "falsely asserted that he already had a warrant."[43]

Consequently, we find that there was no Fourth Amendment violation in relation to the validity of Schriner's consent to the search of his residence, and we accordingly conclude that the district court did not err in denying in part Schriner's motion to suppress on this basis.

CONCLUSION

For the reasons set forth above, we affirm the decision of the district court.

Affirmed.

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[41] *Id.*

[42] *Id.* at 948, 636 N.W.2d at 860.

[43] See brief for appellant at 21.

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

Kristina Michelle Dooling, appellee and cross-appellant, v. Shawn Allen Dooling, appellant and cross-appellee.

930 N.W.2d 481

Filed July 5, 2019. No. S-18-191.

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. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate 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. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **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.
4. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
5. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

6. ____: ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
7. **Property Division: Proof.** The burden of proof rests with the party claiming that property is nonmarital.
8. **Property Division: Appeal and Error.** As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate. The date of valuation is reviewed for an abuse of the trial court's discretion.
9. **Property Division.** The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
10. **Property Division: Wages: Equity.** To the extent that employment benefits such as unused sick time, vacation time, and compensatory time have been earned during the marriage, they constitute deferred compensation benefits under Neb. Rev. Stat. § 42-366(8) (Reissue 2016) and are considered part of the marital estate subject to equitable division.
11. **Property Division.** As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
12. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
13. **Divorce: Property Division.** In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2016), a court should consider the income and earning capacity of each party and the general equities of the situation.
14. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
15. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. The ultimate criterion is one of reasonableness.
16. **Modification of Decree: Divorce: Child Custody.** If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.

17. **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.
18. ____: ____. 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.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed in part, affirmed in part as modified, and in part reversed and remanded with directions.

Christopher Perrone, of Perrone Law, for appellant.

Kathryn D. Putnam, of Astley Putnam, P.C., L.L.O., for appellee.

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

Funke, J.

Shawn Allen Dooling appeals from a decree of dissolution, assigning errors related to the issues of child support, division of the marital estate, and alimony. Kristina Michelle Dooling filed a cross-appeal which concerns the issues of child support, division of the marital estate, and the award of joint physical custody. We find error in the court's child support calculation and its division of certain marital assets and determine the parties' remaining arguments to be without merit. Therefore, we affirm in part, affirm in part as modified, and in part reverse and remand with directions.

I. BACKGROUND

Shawn and Kristina were married in May 2001 and divorced in January 2018. Three children were born of the marriage. During the marriage, Shawn was employed as a police officer for the city of La Vista, Nebraska; Kristina worked part time as a paraprofessional at a children's school. When the parties

separated in July 2014, Shawn moved out of the family residence on South River Rock Drive in Papillion, Nebraska. The parties maintained a joint checking account and paid for family expenses from the account. Throughout their separation, the parties followed a shared parenting time schedule.

In July 2015, Kristina filed a complaint for dissolution of marriage in the district court for Sarpy County which requested "the temporary and permanent care, physical custody and control of the minor [children]." Shawn filed an answer and counterclaim which requested joint legal and physical custody. Pursuant to temporary orders entered in August 2015, the parties were awarded joint legal custody and Kristina was awarded "primary possession" of the children. Shawn was awarded parenting time every Wednesday and every other weekend from Friday through Monday. Shawn was ordered to pay monthly child support in the amount of $1,412, maintain all parties on health insurance, pay 72 percent of daycare if daycare was needed, and make the minimum monthly payment of $300 on the parties' Visa credit card. Kristina was awarded exclusive possession of the home and was ordered to pay the mortgage, taxes, and costs on the home, which totaled $1,642 per month. Kristina was ordered to pay the first $480 per year of uninsured health costs for the children. The court did not award temporary alimony.

The family home was sold in May 2016, and the court ordered that the $20,857.44 in proceeds be held in trust pending trial. Trial was held on December 8, 2016, and June 21 and 23, 2017. The issues tried included custody and parenting time, child support, alimony, and division of the parties' assets and debts. The court heard testimony from two La Vista employees, Kristina, and Shawn.

1. Trial

(a) Evidence of Shawn's Employment Benefits

The city clerk of La Vista testified regarding Shawn's employment contract and benefits. According to this witness,

upon leaving employment, a city employee who has attained 10 years of service is paid for unused sick leave for the amount that exceeds 660 accumulated hours up to the maximum of 880 hours. The clerk testified that upon leaving employment, an employee is awarded 100 percent of compensatory (comp) time. The court also heard from La Vista's human resources manager, who stated that comp time is paid out at the end of every fiscal year on September 30, up to a maximum of 75 hours. She also testified that the city matches the police officers' mandatory 7-percent contribution to their pensions. Both witnesses testified that city employees are paid for their unused vacation time upon leaving employment, up to a maximum of 220 hours.

(b) Kristina's Testimony

Kristina testified that during the marriage, she worked part time when school was in session and earned about $10 or $11 an hour. In August 2015, Kristina obtained her first full-time job where she earns $13.50 an hour. She worked 40 hours a week with no 401K and no pension. She testified the parties' balance on their Visa credit card account was $17,737.82 as of October 2015.

Before the parties purchased their house on South River Rock Drive, they owned a house on South 79th Street in La Vista. Kristina asked to be compensated for paying $6,880 to replace the air conditioner in the South 79th Street house in 2010. She claimed she paid for the air conditioner using premarital funds kept in a Canadian bank account. Kristina testified the account originally held approximately $30,000 in Canadian dollars received from a personal injury settlement when she was 16 years old. She claimed she transferred $8,000 out of the Canadian bank account to pay for the air conditioner. She produced a bank statement from February 2001 showing a Canadian bank account held by Kristina and her father contained $29,580.95 in Canadian dollars and another statement from 2015 showing these funds had been depleted. On cross-examination, Kristina admitted that Shawn purchased

a new air conditioner for the South River Rock Drive residence after the parties had separated.

Kristina acknowledged the parties received a check for $20,857.44 in proceeds from the sale of the home on South River Rock Drive. The parties received an additional check in the amount of $2,848.93 from escrow for excess real estate taxes, which they agreed to divide equally. When the home was sold, the parties originally agreed to pay their marital debt from the sale proceeds, but Kristina later claimed that she should receive the majority of the sale proceeds, reasoning she was responsible for making house payments, cleaning the home, painting interior walls, and selling the home "without a realtor." In particular, she noted that to prepare the house for closing, she spent $810 to mudjack the front porch.

Kristina testified that despite the temporary order giving Shawn parenting time every Wednesday and every other weekend, Friday through Monday, she allowed Shawn additional parenting time. At that time, Shawn was working as a detective and as a sniper on the SWAT team and held irregular hours. From approximately January to May 2016, Shawn's parenting time ranged between 5 and 11 overnight visits per month. In lieu of daycare, Shawn picked up the children and took them to school and saw them after school almost every day. Kristina requested the court award joint legal custody and a parenting plan schedule consistent with the temporary order.

(c) Shawn's Testimony

Shawn testified that at the time of trial, he had transferred to a road patrol position and that his hourly wage decreased from $36.04 to $34.54. He asked that the parenting schedule under the temporary order be adjusted to fit his new work schedule. He testified he now works 7 days in a 14-day period, consisting of workdays on Monday, Tuesday, Friday, Saturday, and Sunday during 1 week and Wednesday and Thursday the following week. He asked to be awarded parenting time for the 7 out of 14 days that he is not working.

Shawn testified that during the marriage, Kristina did not express a desire to be repaid for premarital money spent for family purposes. Shawn stated that he knew Kristina sometimes received money from her father and that he did not know when or how much money was spent from the Canadian account. Shawn pointed out that Kristina purchased the air conditioner for the prior home in 2010. He asked that the court give him credit for making certain postseparation payments, including $7,792 on the Visa credit card and about $4,000 to pay off a loan for the new air conditioner in the most recent home.

An exhibit introduced into evidence showed that Shawn received monthly Veterans Affairs disability payments in the amount of $763.36.

2. Decree

The court issued tentative written findings in August 2017 and asked Kristina's counsel to prepare a decree in conformity therewith, after which both parties filed motions for reconsideration. The court then issued supplemental findings which modified the previous findings in several respects. The trial judge retired from the bench shortly thereafter, and the case was reassigned. Kristina's trial counsel withdrew, filed an attorney lien, and was replaced with new counsel.

The new judge entered a decree of dissolution on January 8, 2018. The decree incorporated the prior judge's tentative and supplemental findings and ordered the following:

- The parties were awarded joint legal custody. Kristina was awarded "primary possession" of the children, subject to Shawn's parenting time.
- The parenting plan awarded Shawn 6 of every 14 days and 4 additional weeks of summer parenting time for a total of 172 days of custody of the children.
- Kristina was not awarded any summer parenting time other than her regular parenting time.
- Shawn was ordered to maintain health insurance for the children; the parties were to equally share the costs of the

children's uninsured health expenses; Shawn was ordered to maintain Kristina's health insurance for 6 months.
- Shawn was ordered to pay $882 in monthly child support.
- Shawn was ordered to pay monthly alimony of $500 for a period of 60 months.
- The court valued the marital assets as of August 1, 2015. The decree sometimes referred to this date as the date of separation, even though the parties separated in July 2014.
- The court awarded Kristina $7,690.80 of the house proceeds "for monies expended to make the house marketable" and evenly divided the balance of the proceeds.
- The court equally divided Shawn's retirement, valued at $108,468.41, pursuant to a qualified domestic relations order.
- The court equally divided Shawn's vacation and comp time and ordered Shawn to pay Kristina $5,754.69 within 90 days. The court did not award Kristina any of Shawn's sick time.
- The court ordered Shawn to pay the balance on the parties' Visa credit card and ordered Kristina to pay a $637.73 medical debt.
- Shawn received a tax exemption for two minor children; Kristina received a tax exemption for one minor child.

On January 17, 2018, Kristina filed a motion to alter or amend the decree in several respects. The court overruled the motion on January 30. Shawn timely appealed, and Kristina cross-appealed. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this State.

II. ASSIGNMENTS OF ERROR

Shawn assigns, summarized and restated, that the court erred in (1) calculating Shawn's child support obligation by (a) miscalculating Shawn's income, (b) failing to include insurance premium costs, (c) not awarding Shawn credit for retirement contributions, and (d) not crediting Shawn for the correct number of days he was awarded visitation with the children; (2) awarding Kristina a larger share of the house proceeds and using the house proceeds to pay for the lien filed by Kristina's

attorney; (3) calculating and splitting Shawn's vacation time and comp time and giving Shawn only 90 days to pay Kristina her share of these assets; (4) calculating and dividing the parties' debts; and (5) awarding alimony.

On cross-appeal, Kristina assigns, restated, that the court erred in (1) ordering joint physical custody, (2) failing to award Kristina summer parenting time, (3) failing to include Shawn's disability benefits in the child support calculation, (4) failing to allocate the children's direct expenses and childcare costs, and (5) excluding Shawn's sick time from the marital estate.

III. STANDARD OF REVIEW

[1-3] 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.[1] In a review de novo on the record, an appellate 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.[2] However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[3] 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.[4]

IV. ANALYSIS

In this matter, we discuss the issues of child support, division of the marital estate, alimony, and joint physical custody,

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[1] *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

as well as a number of related concerns raised by the parties. For purposes of efficiency, we will address assignments of error raised in Shawn's appeal and Kristina's cross-appeal together where their arguments pertain to the same predominant issue. In consideration of both the appeal and cross-appeal, we find it appropriate to modify the court's child support calculation and the division of certain marital assets and debts, and we determine the remaining arguments to be without merit.

1. Child Support

Shawn argues that the court abused its discretion in its determination of child support. Shawn asserts that the court did not accurately determine his gross taxable income, the health insurance premium he pays for the children and himself, and his retirement contributions, and did not accurately state the number of days that the court awarded him custody of the children. We find no merit to Shawn's claim regarding his gross taxable income, but determine his other arguments regarding child support do have merit. We also find merit to Kristina's objections to the court's findings regarding Shawn's nontaxable income and its allocation of tax dependency exemptions and childcare expenses.

(a) Gross Taxable Income

[4] In general, child support payments should be set according to the Nebraska Child Support Guidelines.[5] In the child support worksheets adopted by the court, Shawn's gross monthly taxable income was set at $6,637. Shawn argues this figure is not correct, because it reflects his wages at $36.04 per hour and he testified that in his new position, he makes $34.54 per hour. As a result, Shawn argues that his monthly income should have been set at $5,987, which he calculated by multiplying $34.54 per hour by 40 hours per week for 52 weeks per year. Kristina argues that by annualizing Shawn's income based on evidence in the record of a 5-month sample of his

[5] *Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018).

paychecks in 2017, Shawn's monthly income should have been set at $6,643.33.

Under the child support guidelines, all income should be annualized and divided by 12.[6] Kristina's figure differs from the amount set by the court by less than 1 percent, which was calculated based on evidence in the record consisting of a 9-month sample of Shawn's paychecks in 2016. We find no abuse of discretion by the district court in utilizing this evidence to calculate Shawn's gross taxable income.

(b) Tax-Exempt Income

We agree with the parties that the $763.36 that Shawn receives in disability benefits each month should have been included as nontaxable income for purposes of the child support calculation. Under § 4-204, total monthly income for purposes of child support is income of both parties derived from all sources. Income for the purpose of child support is not necessarily synonymous with taxable income.[7]

(c) Health Insurance Premium

Shawn also argues that the court did not use the correct amounts for the health insurance premium that he pays for himself and the children. The child support guidelines provide that the increased cost to the parent for health insurance for the children shall be prorated between the parents. The parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the children.[8] If not otherwise specified in the support order, "health insurance" includes coverage for medical, dental, orthodontic, optometric, substance abuse, and mental health treatment.[9] The court set the health insurance premium Shawn

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[6] Neb. Ct. R. § 4-204 (rev. 2016).

[7] *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[8] See Neb. Ct. R. § 4-215(A) (rev. 2011).

[9] *Id.*

pays for himself at $0 and the amount he pays for the children at $63.80. Shawn submitted evidence that his monthly premium for his own medical insurance is $63.80 and that he pays an additional $8.98 for his dental and vision insurance. Thus, the court erred in setting Shawn's health insurance costs for himself at $0 rather than at the figure supported by the record of $72.78. We also agree with Shawn that the court erred by failing to set the amount that he pays for the children's health insurance coverage at $177.80.

(d) Retirement

Next, Shawn contends that the court erred by incorrectly determining his monthly retirement contribution. The court set Shawn's retirement contribution at $265.48. The undisputed evidence shows that Shawn pays 7 percent in mandatory retirement contributions each month. Having found that the court correctly set Shawn's gross taxable income at $6,637, based on wages he earns working as a police officer, we find that the court erred by failing to set Shawn's monthly retirement contribution at $464.59.

(e) Days of Child Custody

Shawn's final argument on the issue of child support is that the court erred in setting the number of his annual days as a custodial parent at 151. The parenting plan incorporated into the decree awarded Shawn six overnight visits for every 14 days and 4 weeks of summer parenting time. As a result, Shawn has 28 days of child custody when he is utilizing summer parenting time and 144 days during the other 48 weeks of the year, not counting holidays, which are evenly divided. Therefore, as the parties agree, the court should have set Shawn's annual days as a custodial parent at 172 and Kristina's at 193.

(f) Tax Exemptions

The decree awarded Shawn tax dependency exemptions for two of the children and Kristina a tax dependency exemption for one child. However, the child support calculation worksheet

awards each party equal dependency exemptions. We agree with the parties that the child support calculation worksheets should be modified to conform to the decree.

(g) Allocation of Expenses

In her cross-appeal, Kristina argues that because the court calculated child support using worksheet 3, the court erred in failing to account for the children's direct expenses. Neb. Ct. R. § 4-212 (rev. 2011) provides that when child support is to be calculated using worksheet 3, "all reasonable and necessary direct expenditures made solely for the child(ren) such as clothing and extracurricular activities shall be allocated between the parents." We note that Neb. Rev. Stat. § 42-364.17 (Reissue 2016) also requires that 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."

We recently held that it is sufficient if the decree and attachments made the necessary allocations on each of the required items.[10] Here, however, the record does not show that the court allocated the parties' responsibilities with respect to all of these expenses. We therefore remand the cause to the district court with directions to specifically address each party's responsibility for each of these statutorily required obligations based on the record.

To summarize our conclusions regarding child support, we find the district court erred in setting the amount of Shawn's nontaxable income, health insurance costs for himself and the children, retirement contributions, and days as a custodial parent, and in its allocation of tax dependency exemptions. We further find the court erred in not addressing each party's responsibility for the reasonable and necessary expenses of the children based on the record and the expenses set forth in

[10] *Leners v. Leners*, 302 Neb. 904, 925 N.W.2d 704 (2019).

§ 42-364.17. We reverse the award of child support and remand the cause to the district court for a proper calculation of child support, utilizing $763.36 for Shawn's nontaxable income, $72.78 for Shawn's health insurance, $177.80 for Shawn's payment of the children's health insurance, $464.59 for Shawn's retirement contribution, 172 for Shawn's days as a custodial parent and 193 days for Kristina, and two dependency exemptions for Shawn and one for Kristina. We also direct the court to address the parties' responsibility for the expenses listed in § 42-364.17 and rule § 4-212.

2. Division of Marital Assets and Debts

(a) House Sale Proceeds

Shawn asserts that the court erred in its division of the proceeds from the parties' sale of their home. The evidence showed that in May 2016, the parties sold their home on South River Rock Drive and obtained net proceeds in the amount of $20,857.44. Kristina claimed at trial that she should receive the greater share of the proceeds and provided documents showing that she paid $810 to mudjack the front porch in preparation for closing and $6,880 to replace the air conditioner in the parties' previous house on South 79th Street. In its decree, the court awarded Kristina $7,690.80 from the $20,857.44 "for monies expended to make the house marketable" and evenly divided the balance. Based on the record, the court's award of $7,690.80 represents compensation for $810 spent on mudjacking, $6,880 spent on an air conditioner, and an additional 80 cents. Shawn does not object to reimbursing Kristina for the mudjacking costs, but objects to the remaining $6,880.80 of the $7,690.80.

[5-7] In a dissolution of marriage proceeding, "[i]f the parties fail to agree upon a property settlement . . . the court shall order an equitable division of the marital estate."[11] Under Neb.

[11] Neb. Rev. Stat. § 42-366(8) (Reissue 2016).

Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process.[12] The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.[13] The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.[14] Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.[15] Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.[16] The burden of proof rests with the party claiming that property is nonmarital.[17]

Kristina's position at trial was that she was entitled to reimbursement for an air conditioner bought for the South 79th Street home, because she made the purchase using premarital or nonmarital funds. Based on the court's award to Kristina, the court implicitly granted Kristina's requested relief. Yet, the decree specifically stated the award was "for monies expended to make the house marketable," and Shawn persuasively argues on appeal that Kristina's purchase of the air conditioner for the South 79th Street home did not make the home on South Rock River Drive marketable. Shawn argues the award to Kristina was improper, because the court did not conduct an analysis of whether Kristina was entitled to reimbursement for any

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[12] *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018); *Osantowski, supra* note 1.

[13] *Id.*

[14] *Id.*

[15] *Osantowski, supra* note 1.

[16] *Id.*

[17] *Fetherkile, supra* note 12; *Osantowski, supra* note 1.

premarital assets. Kristina appears to agree with this point. In her brief and at oral argument before this court, Kristina abandoned her position that she should be reimbursed for her purchase of the air conditioner, and instead attempts to justify the award using an alternate, post hoc rationalization. Kristina now argues that she is entitled to the greater share of the proceeds based on the equity that she built during the 9-month period in which she was in sole possession of the home. We are not persuaded that this result is justified based on the record. Kristina made this same argument to the district court, and the court did not accept that argument. Kristina's argument is partially based on reimbursement for real estate taxes paid during the operation of the temporary order, yet she already voluntarily split the refund for some of these payments with Shawn. The temporary order required Kristina to make equity contributions because she was awarded sole possession of the home. Kristina's compliance with the temporary order does not entitle her to the benefit of an additional $6,880.80 from the house proceeds.

Based on our de novo review of the record, we conclude that the court erred in its equitable division of the house proceeds and find that a fair and reasonable evaluation of the facts of this case requires that the division of the house proceeds be modified so that Kristina receives $11,238.72 and Shawn receives $9,618.72. We affirm this portion of the decree as modified.

Shawn also argues that the court erred by authorizing a lien in the amount of $5,176.28 filed by Kristina's trial counsel to be paid from the family home proceeds. Because the record shows that Kristina paid the lien from her share of the proceeds, we find this argument to be without merit.

(b) Employment Benefits

(i) Valuation Date Reasonable

Shawn argues that the court erred in ordering him to pay Kristina $5,754.69 from his employment benefits for two

reasons. First, he claims the court erred by awarding Kristina $4,592.40 in unused vacation time and $1,162.29 in comp time, because these figures reflected the value of Shawn's benefits as of September 15, 2015. Shawn argues that the court stated it valued his benefits "at the time of separation" and that the parties separated in July 2014. Therefore, Shawn contends that the court abused its discretion in awarding Kristina any funds from vacation time or comp time, because there was no evidence regarding the value of these benefits as of July 2014.

Second, Shawn argues that the court abused its discretion in ordering him to pay Kristina the $5,754.69 within 90 days. He argues that his employment benefits are not liquid assets and that because he is already obligated to pay child support, alimony, and other debts, he will be unable to comply with the court's decree. Kristina argues in her cross-appeal that the court erred by failing to award her an equal portion of the value of Shawn's unused sick time.

[8] As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate.[18] The date of valuation is reviewed for an abuse of the trial court's discretion.[19]

As discussed in the background section, the court valued the marital assets as of August 1, 2015, but the decree at times referred to the valuation date as the date of separation, which occurred in July 2014. Even so, the record indicates the court chose August 1, 2015, as the valuation date, which reflects the month in which the court entered temporary orders.

We agree with Kristina that the evidence supports using August 1, 2015, as the valuation date, because even though the parties physically separated in July 2014, they maintained their financial lives as a married couple by using a joint checking account to pay for family expenses and did not

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[18] *Osantowski, supra* note 1.

[19] *Id.*

separate financially until the court entered temporary orders. Based on the record, the valuation date applied by the district court was rationally related to the property composing the marital estate.

The city human resources manager testified regarding the value of Shawn's employment benefits and stated that the supporting documents were calculated on a quarterly basis. The court used the third quarter report as evidence of the value of the assets on August 1, 2015. Shawn argues that the court could have reached a more accurate figure by using the second quarter report, but that report was not offered into evidence, and there was no similar evidence offered to prove the value of the employment benefits as of July 2014. Even Shawn stated in his testimony that the valuation date should be July 2015, the month Kristina filed for divorce. We find no abuse of discretion in the court's use of August 1, 2015, as the valuation date.

(ii) Deferred Compensation Benefits

[9] We have not previously addressed whether employee benefits such as accrued sick leave, vacation time, and comp time are considered marital property subject to equitable distribution in a dissolution action. We have long held that the marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.[20] Section 42-366(8) states that for purposes of the division of property in a dissolution of marriage action, "[t]he court shall include as part of the marital estate . . . any pension plans, retirement plans, annuities, and other *deferred compensation benefits* owned by either party, whether vested or not vested."[21] (Emphasis supplied.) Generally, deferred

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[20] *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

[21] See, *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003); *Tyma, supra* note 20; *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981) (cases discussing deferred compensation benefits).

compensation is defined as compensation which is earned in exchange for services rendered.[22] We have held that unvested employee stock options and stock retention shares qualify as "deferred compensation benefits" within the meaning of § 42-366(8).[23] Conversely, we have found that health insurance is not deferred compensation, because insurance is based upon the payment of premiums rather than the rendering of services.[24]

In *Wiech v. Wiech*,[25] the Nebraska Court of Appeals determined that unused sick, vacation, and comp time could be considered part of the marital estate subject to equitable distribution as long as the benefits were acquired during the marriage. Other jurisdictions have similarly held that employment benefits such as these earned during the marriage are considered marital property.[26]

[10] As a result, we hold that to the extent employment benefits such as unused sick time, vacation time, and comp time have been earned during the marriage, they constitute deferred compensation benefits under § 42-366(8) and are considered part of the marital estate subject to equitable division.

(iii) Payment Within 90 Days

We turn to Shawn's argument that the court erred by ordering him to pay Kristina her share of the employment benefits within 90 days. The decree valued Kristina's share of the

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[22] *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005). See *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982).

[23] *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998).

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

[25] *Wiech v. Wiech*, 23 Neb. App. 370, 871 N.W.2d 570 (2015).

[26] *Mann v. Mann*, 778 P.2d 590 (Alaska 1989); *In re Marriage of Moore*, 226 Cal. App. 4th 92, 171 Cal. Rptr. 3d 762 (2014); *In re Marriage of Cardona and Castro*, 316 P.3d 626 (Colo. 2014); *Grund v. Grund*, 151 Misc. 2d 852, 573 N.Y.S.2d 840 (1991); *Marriage of Williams*, 84 Wash. App. 263, 927 P.2d 679 (1996).

vacation time at $4,592.40 and her share of the comp time at $1,162.29, for a total of $5,754.69. Shawn argues that he has access to his employment benefits only upon retirement and presently lacks the funds to be able comply with the court-ordered payment.

According to the collective bargaining agreement governing Shawn's employment, Shawn is correct that he will not receive payment for accrued vacation time until he leaves his employment. As for comp time, the city human resources manager testified, and the agreement confirms, that comp time is paid out at the end of every fiscal year, September 30. However, the agreement contains an additional provision which permits an employee to request to be paid for accrued comp time at any time, and payment will be made by the next payday. The record therefore indicates that Shawn will have available to him $9,618.72 from the house proceeds and $1,162.29 from his share of the comp time to pay Kristina $5,754.69 within 90 days. We find no abuse of discretion by the district court.

(iv) Sick Time

Kristina argues that the court erred by failing to award her half of the value of Shawn's accrued sick time. As discussed, the standard governing the division of marital property is fairness and reasonableness as determined by the facts of each case. Based on the evidence relied upon by the district court, Shawn had accrued 25.97 hours of compensable sick time, and based on this fact, the court could have awarded Kristina $467.98 for sick time.

[11] As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.[27] As we will next show in our analysis of the court's division of the total marital estate, the $467.98 that Kristina

[27] *Osantowski, supra* note 1.

is requesting represents a small portion of the marital estate and declining to award Kristina this amount does not alter the fairness or reasonableness of the division of the total marital estate. We cannot conclude that the court abused its discretion in declining to award Kristina her share of Shawn's unused sick time.

(v) Division of Total Marital Estate

Shawn objects to the court's division of the parties' debts and assets. Under the decree, Shawn was ordered to pay the parties' credit card debt of $17,737.82 and Kristina was ordered to pay $637.73 for the children's unpaid medical costs. Shawn argues that the court failed to list as a debt in the decree a credit union loan. We agree that Shawn produced evidence that he took out this loan to purchase an air conditioner for the home on South River Rock Drive and that this loan should have been listed as a marital debt. The evidence indicates that as of August 1, 2015, the balance of the loan was $3,545.37. We find that Shawn is responsible for paying this amount. Having included this loan as part of the marital estate, the following table represents the division of the parties' total marital estate.

Assets	**Amount**	**Shawn**	**Kristina**
House Proceeds	$ 20,857.44	$ 9,618.72	$11,238.72
Shawn's Retirement	108,468.41	54,234.21	54,234.20
Shawn's Vacation/ Comp Time	11,509.37	5,754.69	5,754.69
TOTAL	$140,835.22	$69,607.62	$71,227.61
Debts			
Credit Card	$ 17,737.82	$17,737.82	$ 0.00
Medical Bills	637.73	0.00	637.73
Loan	3,545.37	3,545.37	0.00
TOTAL	$ 21,920.92	$21,283.19	$ 637.73
Marital Estate	$118,914.30	$48,324.43	$70,589.88

As noted, a district court generally has discretion to award each spouse between one-third and one-half of the marital estate. Having factored in our modifications to the district

court's division of the marital estate, the calculations above show that Shawn has been awarded approximately 41 percent of the marital estate. Following our de novo review of the record, we find no abuse of discretion in the district court's division of the marital estate and affirm this portion of the decree as modified.

3. Alimony

[12,13] Shawn objects to the alimony award of $500 per month for 60 months that he was ordered to pay Kristina. In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.[28] In addition, a court should consider the income and earning capacity of each party and the general equities of the situation.[29] Alimony is not a tool to equalize the parties' income, but a disparity of income or potential income might partially justify an alimony award.[30]

The parties were married in May 2001, and Kristina filed for divorce in July 2015. The evidence indicates a significant disparity in the earning capacity of the parties. Kristina testified that she has no formal educational or work background. During the marriage, Kristina was a stay-at-home mother and she began working part time once the children entered elementary school. She obtained her first full-time job in August 2015 and earned $13.50 an hour, with no opportunities for overtime and no 401K or pension. By comparison, Shawn is a career police officer who has earned approximately $80,000 per year, with a pension and retirement benefits and opportunities to

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[28] *Wiedel v. Wiedel*, 300 Neb. 13, 911 N.W.2d 582 (2018); § 42-365.

[29] *Wiedel, supra* note 28.

[30] *Id.*

be compensated for unused sick, vacation, and comp time. Additionally, the record indicates that without alimony, Kristina is unable to pay her monthly expenses.

[14,15] The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.[31] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.[32] The ultimate criterion is one of reasonableness.[33] An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record.[34] As to the award of alimony here, our de novo review shows that the district court did not abuse its discretion.

4. Custody

Kristina claims that the district court abused its discretion by awarding "de facto joint physical custody" based on her assertions that neither party requested joint physical custody, that the district court failed to specifically find that joint physical custody is in the best interests of the minor children, and that she was denied due process when the court awarded joint physical custody following trial.[35]

In an action for dissolution of marriage involving the custody of minor children, the court is required to make a determination of legal and physical custody based upon the children's best interests.[36] Such determinations shall be made by incorporation into the decree of a parenting plan,

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] See *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[36] Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 2018).

developed either by the parties as approved by the court or by the court after an evidentiary hearing.[37] The minor children may be placed with both parents on a joint physical custody basis where (1) both parents agree or (2) the court specifically finds that joint physical custody is in the best interests of the minor children.[38]

Nebraska's Parenting Act[39] defines joint physical custody as "mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time."[40] Here, the court awarded Kristina "primary possession" of the children and set forth the parenting time in a parenting plan. While "primary possession" is not a statutorily defined term, we have indicated in our opinions that the label that a court uses is not controlling and that the classification of a custody arrangement is ultimately dictated by parenting time.[41]

[16] The parenting plan here awarded Shawn parenting time with the children every Tuesday and Thursday, every other Friday and Saturday, equally divided holidays, and 4 weeks of summer parenting time consisting of two 2-week periods. Under this parenting schedule, Kristina has custody of the children 193 days and Shawn has custody of the children 172 days. We find that this custody arrangement falls within the statutory definition of joint physical custody, as distinguished from sole physical custody with liberal parenting time.[42] If

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[37] See *id*.

[38] § 42-364(3).

[39] Neb. Rev. Stat. §§ 43-2920 to 43-2943 (Reissue 2016).

[40] § 43-2922(12).

[41] See, e.g., *Leners, supra* note 10; *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

[42] See, *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001); *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999); *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013).

trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.[43]

We also determine that Kristina is incorrect in stating that neither party requested joint physical custody and that the court did not find that the court-developed custody arrangement was in the best interests of the children. Shawn filed an answer and counterclaim which requested joint physical custody, and both Shawn and Kristina were questioned at trial regarding Shawn's request for a "50/50" schedule. Because Kristina had notice that Shawn was seeking joint physical custody, and because she had an opportunity to present evidence in opposition to Shawn's proposed custody arrangement, we conclude Kristina was afforded procedural due process.

We further note arguments that Kristina made before the trial court which undermine her contention that she was denied due process. Kristina's motion for reconsideration of the court's tentative findings requested that the court use the joint physical custody worksheet when calculating child support. In her motion for reconsideration following the entry of the decree of dissolution, Kristina did not object to the use of the joint physical custody worksheet, but, rather, requested additional clothing and extracurricular activity expenses premised on the court's use of the joint physical custody worksheet.

The record also indicates that the court made the necessary statutory findings for an award of joint physical custody under § 42-364(3). The court awarded "primary possession" of the children to Kristina, subject to the parenting time as set forth in the parenting plan incorporated into the decree, which the court found was in the best interests of the minor children. In addition, the decree incorporated the prior judge's tentative and supplemental findings, which found that it is in the best interests of the minor children that "primary possession" be awarded to Kristina, subject to the parenting plan.

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[43] *Becher, supra* note 41; *Elsome, supra* note 42.

Kristina's cross-appeal includes objections to the parenting time within the parenting plan. Kristina argues the award of joint physical custody is contrary to the court's determination that she be granted "primary possession" of the children. Kristina assigned error to the court's award of 4 weeks of summer parenting time to Shawn and argues the parenting plan should have remained consistent with the temporary order which in effect would have awarded Kristina sole physical custody with liberal parenting time to Shawn of 130 days.

[17,18] 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.[44] 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.[45]

The record supports the court's determination that the award of joint physical custody pursuant to the court-developed parenting plan was in the children's best interests. It was undisputed that each parent was fit and proper and that the best interests of the children would be served with the ongoing involvement of both Shawn and Kristina. There was no evidence of significant communication difficulties between the parties, and there was evidence that the parties have been able to effectively communicate regarding matters affecting the children. Kristina argues that Shawn had never had the children 50 percent of the time since the parties separated in July 2014. However, the evidence showed that in 2016, the parties agreed that Shawn could exercise more parenting time than allowed under the temporary order. There was evidence that Shawn's house is located near the children's school, that

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[44] *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[45] *Id.*

Kristina drops the children off at Shawn's house, and that Shawn takes the children to school and sees them after school almost every day during the school year. This included days in which Kristina had the children.

The court awarded Kristina the majority of the parenting time in the form of eight overnight visits for every 14 days, and it balanced the children's opportunity to spend time with Shawn by awarding Shawn two extended periods of parenting time over the summer. Kristina argues that the parties should have been awarded the same amount of extended parenting time and that absent extended parenting time, the most that she will be able to travel with the children to visit her family in Canada is 4 days. We conclude it was within the district court's discretion to conclude that declining to award Kristina extended parenting time would not greatly impact the best interests of the children. We find no abuse of discretion in the district court's determination that joint physical custody and the parenting plan incorporated into the decree are in the best interests of the children.

V. CONCLUSION

The district court did not err in its award of alimony and joint physical custody and in developing a parenting plan based upon the best interests of the children. However, the court erred in its calculation of child support and in its division of the marital estate. We therefore affirm in part, affirm the court's division of the marital estate as modified, and in part reverse and remand with directions to recalculate the child support as discussed above.

Affirmed in part, affirmed in part as modified, 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

John A. Garlock and John H. Garlock, appellees, v. 3DS Properties, L.L.C., a Nebraska limited liability company, et al., appellants.

930 N.W.2d 503

Filed July 5, 2019. No. S-18-336.

1. **Arbitration and Award: Appeal and Error.** In reviewing a decision to vacate, modify, or confirm an arbitration award, 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. **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. When determining whether an arbitration clause is governed by the 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.
3. **Contracts: Real Estate.** While more complex transactions may implicate interstate commerce, a simple contract for the sale of residential real estate is an inherently intrastate activity.
4. **Arbitration and Award: Waiver.** As a general rule, voluntary participation in an arbitration proceeding on the merits of a dispute will result in a waiver or forfeiture of the right to later challenge arbitrability. In other words, a party may not voluntarily submit a dispute to arbitration and, after an unfavorable result, petition the courts to find the dispute was not arbitrable.
5. **Arbitration and Award.** If a party clearly and explicitly makes known to the arbitrator, prior to a hearing on the merits, that he or she objects to the arbitrability of an issue, that party's participation in the arbitration will not preclude a later judicial challenge to arbitrability.

6. ____. A party who voluntarily participates in an arbitration proceeding without raising objection may not thereafter rely on Neb. Rev. Stat. § 25-2613(a)(5) (Reissue 2016) to support judicial vacatur.
7. ____. When a party seeks to confirm an arbitration award pursuant to the Uniform Arbitration Act, a court must confirm that award unless a party has sought to vacate, modify, or correct the award and grounds for such vacation, modification, or correction exist.
8. ____. Neb. Rev. Stat. § 25-2612 (Reissue 2016) of the Uniform Arbitration Act does not allow for the exercise of discretion by the court when a request of confirmation is made where there has been no application for vacation or modification.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Reversed and remanded with directions.

Douglas W. Ruge for appellant Ryan Basye.

William J. Bianco, of Bianco Stroh, L.L.C., for appellants 3DS Properties, L.L.C., and Keith Donner.

Justin D. Eichmann and Sarah E. Cavanagh, of Houghton, Bradford & Whitted, P.C., L.L.O., for appellees.

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

Stacy, J.

The purchasers of a home filed suit against the sellers, alleging several defects in the home had been concealed. The district court stayed the lawsuit to permit either mediation or arbitration as provided in the purchase agreement, and the parties proceeded to arbitration. After an arbitration award was entered in favor of the sellers, the purchasers moved the district court to vacate the award, and the sellers moved to confirm it. The district court vacated the award, and the sellers filed this appeal. We reverse, and remand with directions to confirm the arbitration award.

BACKGROUND

On or about March 26, 2015, John A. Garlock and John H. Garlock entered into a purchase agreement with 3DS

Properties, L.L.C. (3DS), for the sale of a home in Omaha, Nebraska. The sellers' disclosure statement had been signed by 3DS member Keith Donner, and the home was listed by Ryan Basye, a licensed real estate agent in Nebraska. After closing, the Garlocks discovered problems with the home.

Lawsuit

On May 13, 2016, the Garlocks filed a complaint in the Douglas County District Court against 3DS, Donner, and Basye, alleging multiple theories of recovery, including a violation of Neb. Rev. Stat. § 76-2,120 (Cum. Supp. 2014), fraudulent concealment, false representation, negligent misrepresentation, and breach of contract. The complaint alleged the "Seller Property Condition Disclosure," signed by Donner, misrepresented the condition of the home. In particular, the complaint alleged the disclosure statement falsely indicated that the roof did not leak, there was no damage to the roof, there was no water seepage in the basement, and there were no structural problems with the property.

Paragraph 35 of the purchase agreement was entitled "Arbitration and Mediation" and provided in relevant part:

> B. Mediation: In the event of any Dispute, any party to the Dispute may seek non-binding mediation in an attempt to resolve the dispute by giving fifteen (15) days written notice of a request for such mediation to all other parties to the Dispute. . . .
>
> C. Arbitration: Any Dispute that is not resolved by informal settlement or mediation shall be resolved exclusively by binding arbitration. Such arbitration shall be administered by the American Arbitration Association and shall be conducted according to the American Arbitration Association's Commercial Rules — Real Estate Industry Arbitration Rules (Including a Mediation Alternative). The arbiter(s) shall apply Nebraska substantive and procedural law to the arbitration proceeding. Arbitration shall be commenced by written demand made by any one or more of the parties to the Dispute given to all other

> parties of the Dispute. . . . The prevailing party shall be entitled to costs and fees of the arbitration and, in the discretion of the arbitrator who shall take into account the relative merits of the opponent's case, the arbiter may award attorney's fees and arbitration costs to the prevailing party.

(Emphasis omitted.) Above the signature line in the purchase agreement appeared a sentence which read: "This contract contains an arbitration provision which may be enforced by the parties." (Emphasis omitted.) This sentence appeared in font which was bolded and capitalized, but was not underlined.

On July 5, 2016, 3DS and Donner jointly moved to dismiss the lawsuit because the purchase agreement required that "any dispute not resolved by informal settlement or mediation shall be resolved exclusively by binding arbitration." Shortly thereafter, Basye filed a motion seeking to "[d]ismiss or [s]tay" the lawsuit for the same reason.

A hearing was held on the motions, but our record does not include a transcription of that proceeding. After the hearing, the court entered an order staying the case and deferring ruling on the motions to dismiss. The court's order, entered September 21, 2016, did not expressly order either mediation or arbitration, but instead stayed the lawsuit "until such time as the parties have either entered into a form of mediation or by agreement . . . submit[ted] to arbitration as set forth in Paragraph C of Section 35." No appeal was taken from this order.[1] Thereafter, the Garlocks filed a written demand for expedited arbitration, and all parties began the arbitration process.

Approximately 6 months later, on March 22, 2017, the Garlocks filed what they styled a "Motion for Rehearing" asking the court to reconsider its order of September 21, 2016, staying the lawsuit. In support, the Garlocks alleged for the first time that the arbitration provision in the purchase

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[1] See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010) (order compelling arbitration or staying judicial proceedings pending arbitration is final order).

agreement violated Neb. Rev. Stat. § 25-2602.02 (Reissue 2016) of Nebraska's Uniform Arbitration Act (UAA)[2] because certain language was not underlined. In response, 3DS and Donner filed another motion to dismiss, again asserting that the purchase agreement required the parties' dispute to be settled by binding arbitration.

On May 16, 2017, a hearing was held on all pending motions and evidence was adduced. Among the exhibits offered were affidavits of the Garlocks in which they averred they had initiated arbitration proceedings, but were dissatisfied with (1) how costly and complex the arbitration process was, (2) the length of time the arbitration was taking, (3) the fact that they would "still need the services of an attorney" during the arbitration, and (4) the discovery limitations they had encountered in arbitration. The Garlocks' affidavits stated that if they had known these things in advance, they would not have agreed to arbitrate.

After receiving evidence and hearing argument, the court took all motions under advisement. At the time of the hearing, all parties were aware that an arbitration hearing was set for June 12 and 13, 2017, in Omaha. However, no party advised the court of this fact, and no party asked to stay or enjoin the imminent arbitration hearing.[3]

Instead, the arbitration took place as scheduled and was completed before the district court ruled on either the Garlocks' motion to reconsider or the motion to dismiss filed by 3DS and Donner. All parties to the district court action participated in the arbitration hearing, and all were represented by counsel.

Arbitration

After the Garlocks filed a written demand for expedited arbitration, the parties selected an arbitrator and the proceedings

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[2] Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016).

[3] See § 25-2603(b) ("[o]n application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate").

were expanded to include discovery and a multiday hearing. The parties agreed to have a court reporter present for the arbitration hearing, which was held in Omaha at an agreed-upon location.

All parties consented to participate in the arbitration and agreed to be bound by it. Before the arbitration hearing, Basye's attorney sent an email addressed to the arbitration company and the Garlocks' attorney, stating: "By this email, my client consents and agrees to be bound by the arbitration. This is contingent on a substantially similar representation by the other parties." At the start of the arbitration hearing on June 12, 2017, the Garlocks' attorney asked the arbitrator to confirm, on the record, each party's consent to arbitrate. The arbitrator then individually confirmed the parties' agreement to proceed with the arbitration and to be bound by it. During the 2-day arbitration hearing that followed, more than 70 exhibits were offered and 12 witnesses testified.

An arbitration award was issued July 14, 2017. The award began by addressing procedural issues and expressly stated that before the arbitration hearing, and again during the hearing, a question was raised whether all parties had agreed to be bound by arbitration. The arbitrator found that "all Respondents agreed in writing to waive any challenge to the binding nature of the arbitration proceedings" and that "[t]he Parties also made the same representation on the record before the close of [the] Hearing." Additionally, the arbitrator acknowledged he had been advised that the Garlocks had "a pending motion before the state court regarding reconsideration of its remand of this matter to arbitration" but that they had "agreed to move forward with the arbitration." The arbitrator further stated: "No motion for continuance was made or pending at the time of [the arbitration] Hearing and no court order presented."

The arbitrator's award then discussed the merits of the Garlocks' claims and found there was "no credible evidence to support" any of the Garlocks' claims against 3DS, Donner, or Basye. The arbitrator ordered the Garlocks to pay the costs of

the arbitration and ordered each party to pay their own attorney fees.

Competing Motions to Vacate and Confirm Arbitration

On August 11, 2017, the Garlocks filed, in the district court action, an "Application to Vacate" the arbitration award. The motion asserted three grounds for vacating the award: (1) The arbitrator was partial to the defendants, (2) the award was contrary to Nebraska public policy, and (3) the arbitrator refused to postpone the arbitration hearing despite a pending motion for rehearing in the district court action.

On September 12, 2017, 3DS and Donner filed another motion to dismiss, this time alleging the lawsuit should be dismissed because binding arbitration had been completed by the parties. Thereafter, on November 14, 3DS and Donner filed a motion seeking judicial confirmation of the arbitration award.

On November 17, 2017, a hearing was held before the district court on all pending motions. Evidence was adduced, and the matter was taken under advisement.

Order Finding Arbitration Void and Vacating Award

In an order entered March 8, 2018, the district court noted that while the motion for rehearing of its order staying the lawsuit was under advisement, "the parties proceeded with arbitration." It recognized that the Garlocks were now seeking to vacate the arbitration award, while 3DS and Donner were seeking to confirm it.

The court first took up the motion for rehearing and found that the arbitration provision in the purchase agreement was unenforceable, citing § 25-2602.02 and reasoning:

> [T]he language "This contract contains [an] arbitration provision which may be enforced by the parties" was not underlined as required by Statute. Although the language was set forth in bold face type, this does not comply with

> [§ 25-2602.02] and our Court has required strict compliance with this Statute in order to enforce [an] arbitration clause. [Citation omitted.] This failure is fatal to the enforcement of the arbitration clause.

The court also stated: "Because this court is of the opinion that the motion for rehearing should be granted, the Court must determine that the arbitration proceedings which the parties involved themselves in while this matter was under advisement, are a nullity."

The court then sustained the Garlocks' motion to vacate the arbitration award, reasoning that the parties "would not have participated in arbitration but for the exigent circumstances and for that reason, this Court determines that the arbitration itself was void." The court also ordered that the costs of the arbitration be reallocated so that the plaintiffs and defendants were each responsible for one-half of the costs. Finally, the court denied both the motion to dismiss and the motion to confirm the arbitration award.

Various Motions After Order Vacating Arbitration Award

In response to the March 8, 2018, order vacating the arbitration award, the defendants filed several motions on March 12, including a motion to reconsider and a motion to alter or amend. The motion to reconsider alleged that because the parties had "willingly participated" in arbitration and agreed to be bound by the results, it was immaterial that the arbitration clause in the purchase agreement did not comply with § 25-2602.02 of the UAA. The motion also alleged there was no evidence to support the court's finding that arbitration took place only due to "exigent circumstances." The motion to alter or amend was filed only by Basye. He generally alleged the court had improperly applied the UAA to invalidate the arbitration agreement when the agreement was governed by the Federal Arbitration Act (FAA).[4]

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[4] 9 U.S.C. §§ 1 to 16 (2012).

In an order entered March 20, 2018, the court overruled the motion to reconsider and the motion to alter or amend. 3DS, Donner, and Basye filed a joint notice of appeal on March 31, appealing from the orders of March 8 and 20.

ASSIGNMENTS OF ERROR

3DS, Donner, and Basye assign, restated and consolidated, that the district court erred by (1) implicitly finding that the FAA did not apply, (2) finding the arbitration provision in the purchase agreement was unenforceable under the UAA, (3) vacating the arbitration award, and (4) failing to confirm the arbitration award.

STANDARD OF REVIEW

[1] In reviewing a decision to vacate, modify, or confirm an arbitration award, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law.[5] However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.[6]

ANALYSIS

Applicable Law

[2] Before addressing the arbitration issues raised by the parties on appeal, we consider whether our analysis is governed by the UAA or 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.[7] When determining whether an arbitration clause is governed by the UAA or the FAA, the initial question is whether the parties' contract evidences a transaction "involving commerce" as defined by the FAA.[8]

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[5] *Ronald J. Palagi, P.C. v. Prospect Funding Holdings*, 302 Neb. 769, 925 N.W.2d 344 (2019); *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (2009).

[6] *Id.*

[7] *Ronald J. Palagi, P.C., supra* note 5.

[8] *Id.*

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.[9] As such, we have held the FAA "'embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause.'"[10]

We applied this reasoning in *Wilczewski v. Charter West Nat. Bank*[11] to hold that an arbitration provision in a purchase agreement for the sale of residential property was governed by the FAA because the residential property was being sold by a bank as part of a foreclosure. We reasoned:

> The nationwide impact of residential real estate lending was a central focus of the Housing and Economic Recovery Act of 2008, which Congress passed in response to a national financial crisis. Generally, residential real estate lending affects interstate commerce. And the sale to the [buyers] was merely the last step of [the selling bank's] loan, foreclosure, acquisition of title, and resale of its security.[12]

But in *Wilczewski*, we confined our holding to the foreclosure sale at issue, which was part of a "comprehensive practice or activity of lending money on residential real estate, enforcing liens, acquiring title, and reselling."[13] And even though the commercial transaction in *Wilczewski* culminated in the sale of a residential home, we distinguished it from transactions that "merely addressed individual sales of residential

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[9] *Wilczewski v. Charter West Nat. Bank*, 295 Neb. 254, 889 N.W.2d 63 (2016).

[10] *Id.* at 260, 889 N.W.2d at 68.

[11] *Wilczewski, supra* note 9.

[12] *Id.* at 263, 889 N.W.2d at 69-70.

[13] *Id*. at 264, 889 N.W.2d at 70.

real estate"[14] and left for another day the question of "whether the FAA applies to a simple contract for the sale of residential real estate."[15]

3DS, Donner, and Basye argue that the FAA applies to the purchase agreement in this case, because "[i]nstruments of interstate commerce were utilized."[16] They point to the use of the internet to advertise the property and the purchase of appliances when preparing the house for sale. But in *Wilczewski*, we held that such tangential details should not control.[17] Rather, we determined the proper inquiry is whether the "program or activity" at issue affects interstate commerce.[18]

[3] In *Wilczewski*, interstate commerce was affected because the sale was part of a program or activity of loaning money secured by residential real estate. But here, the activity involved nothing more than a simple contract for the sale of residential real estate. Although there was evidence that 3DS and Donner are engaged in the business of acquiring and reselling residential real estate for profit, we find this case presents "a simple contract for the sale of residential real estate."[19] And, while more complex transactions may implicate interstate commerce, we hold that a simple contract for the sale of residential real estate is an inherently intrastate activity.[20] On the facts of this case, the UAA governs the purchase agreement. The district court did not err in applying

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[14] *Id.*

[15] *Id.*

[16] Brief for appellant Basye at 25.

[17] *Wilczewski, supra* note 9.

[18] *Id.* at 264, 889 N.W.2d at 70.

[19] *Id.*

[20] See, *Garrison v. Palmas Del Mar Homeowners Ass'n., Inc.*, 538 F. Supp. 2d 468 (2008); *Saneil v. Robards*, 289 F. Supp. 2d 855 (W.D. Ky. 2003); *SI V, LLC v. FMC Corp.*, 223 F. Supp. 2d 1059 (N.D. Cal. 2002); *Cecala v. Moore*, 982 F. Supp. 609 (N.D. Ill. 1997); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012).

the UAA rather than the FAA. The first assignment of error has no merit.

Jurisdiction

Having determined the UAA governs the purchase agreement in this case, we next address our jurisdiction to consider this interlocutory appeal. It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, even where no party has raised the issue.[21]

Section 25-2620 of the UAA provides:

> (a) An appeal may be taken from:
>
> (1) An order denying an application to compel arbitration made under section 25-2603;
>
> (2) An order granting an application to stay arbitration made under subsection (b) of section 25-2603;
>
> (3) An order confirming or denying confirmation of an award;
>
> (4) An order modifying or correcting an award;
>
> (5) An order vacating an award without directing a rehearing; or
>
> (6) A judgment or decree entered pursuant to the provisions of the [UAA].
>
> (b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

This appeal was taken from an order that denied confirmation of an arbitration award and vacated an award without directing a rehearing. We therefore have appellate jurisdiction pursuant to § 25-2620(a)(3) and (5), and it is unnecessary to consider whether the orders appealed from are also final, appealable orders under Neb. Rev. Stat. § 25-1902 (Reissue 2016).[22]

Waiver of Challenge to Arbitrability

The trial court's order of March 8, 2018, and the parties' briefs on appeal focus primarily on the enforceability of the

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[21] See *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

[22] See, generally, *Kremer, supra* note 1.

arbitration provision in the purchase agreement and the arbitrability of the parties' dispute. But given the procedural posture of this case and the parties' agreement on the record before the arbitrator to proceed with arbitration of their dispute, we first address whether the Garlocks' challenge to arbitrability has been waived in this case.

After the litigation was stayed by the district court to permit mediation or arbitration—an order from which no party appealed[23]—all parties voluntarily submitted to and completed binding arbitration. And they did so despite a pending motion for rehearing before the district court that ordered the stay. The arbitrator found that "all Respondents agreed in writing to waive any challenge to the binding nature of the arbitration proceedings" and that "[t]he Parties also made the same representation on the record before the close of [the] Hearing."

Nebraska's appellate courts have not yet addressed whether, or under what circumstances, a party's participation in an arbitration proceeding without objection may result in a waiver of that party's right to subsequently challenge arbitrability under state law. But many other states and several U.S. Circuit Courts of Appeal have considered the question.[24]

[4,5] As a general rule, these courts hold that voluntary participation in an arbitration proceeding on the merits of a dispute will result in a waiver or forfeiture of the right to later challenge arbitrability.[25] In other words, a party may not voluntarily submit a dispute to arbitration and, after an unfavorable result, petition the courts to find the dispute was not

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[23] See *id.*

[24] See Annot., Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability Under State Law, 56 A.L.R.5th 757 (1998).

[25] *Id.*, §§ 2 and 3. See 21 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 57:102 (4th ed. 2017) ("one who voluntarily and without objection participates in arbitration proceedings waives the right to object thereafter to the arbitrability of previously decided issues").

arbitrable.[26] If, however, a party clearly and explicitly makes known to the arbitrator, prior to a hearing on the merits, that he or she objects to the arbitrability of an issue, that party's participation in the arbitration will not preclude a later judicial challenge to arbitrability.[27]

The principle that a party may waive arbitrability by not timely objecting has been effectively codified under the UAA, which authorizes judicial vacatur of an arbitration award when "[t]here was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, *and the party did not participate in the arbitration hearing without raising the objection*[.]"[28]

In the instant case, the conduct of the Garlocks resulted in a waiver of the right to challenge arbitrability. After the district court stayed the lawsuit pending either mediation or arbitration, the Garlocks initiated arbitration proceedings. Six months later, the Garlocks asked the district court to reconsider its stay, but they did not seek a judicial stay of the ongoing arbitration proceedings under § 25-2603(b) despite the fact that the arbitration hearing was imminent. Instead, the Garlocks voluntarily proceeded with the arbitration hearing and never raised an objection to arbitrability before the arbitrator. To the contrary, they expressly agreed on the record to be bound by the decision of the arbitrator, and they asked the arbitrator to secure similar agreements on the record from all other parties, which he did. Thus, while it is possible for a party to participate in

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[26] See, e.g., *Howard Univ. v. Metro. Campus Police Officer's Un.*, 512 F.3d 716 (D.C. Cir. 2008); *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355 (9th Cir. 1983); *Bacon Const. Co. v. Dept. of Public Works*, 294 Conn. 695, 987 A.2d 348 (2010); *First Health Group Corp. v. Ruddick*, 393 Ill. App. 3d 40, 911 N.E.2d 1201, 331 Ill. Dec. 971 (2009).

[27] See, e.g., *Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362 (2d Cir. 2003); *AGCO Corp. v. Anglin*, 216 F.3d 589 (7th Cir. 2000); *Azcon Const. Co. v. Golden Hills Resort*, 498 N.W.2d 630 (S.D. 1993).

[28] § 25-2613(a)(5) (emphasis supplied).

an arbitration and still preserve an objection to arbitrability, the Garlocks did not do so here.

We find, on this record, that all parties voluntarily submitted their dispute to arbitration without objecting to arbitrability, and thereby waived the right to seek a judicial determination that the dispute was not arbitrable.

Court Erred in Ruling on Motion for Rehearing

In their second assignment, 3DS, Donner, and Basye argue the district court erred when it found the arbitration provision in the purchase agreement was unenforceable. Given the context and timing of the court's finding in that regard, we agree the court erred.

The court's finding on arbitrability was not made until after the parties had agreed to be bound by the arbitrator's decision, had participated in the arbitration hearing, and had received the arbitrator's award. Fully aware that the parties' dispute had already been arbitrated, and with the complete record of the arbitration proceeding offered into evidence on the competing motions to vacate and confirm the arbitration award, the court nevertheless granted an earlier motion for rehearing and then concluded, after the fact, that the entire arbitration was a nullity because the arbitration provision in the purchase agreement was unenforceable under the UAA.

But by the time the court ruled on the motion for rehearing, the parties had already consented to, and completed, arbitration. Once the arbitration award was entered, challenges to that award—including claims that there was no enforceable arbitration agreement—were properly taken up in the context of the Garlocks' motion to vacate the award. Thus, instead of ruling on a motion for rehearing that could no longer provide the relief sought, the district court should have proceeded directly to consideration of the Garlocks' application to vacate the arbitration award and the competing motion to confirm the award brought by 3DS and Donner.

Error to Vacate Award Under § 25-2613

Section 25-2613 provides in relevant part:

> (a) Upon application of a party, the court shall vacate an award when:
>
> (1) The award was procured by corruption, fraud, or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party;
>
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or
>
> (6) An arbitrator was subject to disqualification pursuant to section 25-2604.01 and failed, upon receipt of timely demand, to disqualify himself or herself as required by such section.
>
> The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

The Garlocks sought to vacate the award on three grounds: (1) The arbitrator was "partial to the Defendants," (2) the award was "contrary to the public policy" of Nebraska, and (3) the arbitrator "refused to postpone" the arbitration hearing. The Garlocks' first and third grounds for vacatur are recognized in § 25-2613, and their second ground (that the award was contrary to public policy) was recognized by this court in

State v. Henderson[29] as a reason to refuse to enforce an arbitration award.

But at the hearing on the motion to vacate, the Garlocks did not offer evidence to support any of these three grounds. Instead, they offered only the record of the proceedings before the arbitrator and argued the question of arbitrability, claiming the "arbitration clause [in the purchase agreement] is void."

[6] As stated, § 25-2613(a)(5) authorizes vacating an arbitration award when "[t]here was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, *and the party did not participate in the arbitration hearing without raising the objection*[.]" Because the Garlocks voluntarily participated in the arbitration hearing without raising any objection to arbitrability, they may not now rely on § 25-2613(a)(5) to support judicial vacatur.

Without evidence to support any of the three grounds raised in the Garlocks' application, and because the Garlocks cannot rely on § 25-2613(a)(5) to support their request for judicial vacatur, it was error for the district court to vacate the arbitration award.

Error Not to Confirm Award Under § 25-2612

Section 25-2612 provides:

> Within 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 [vacating an award] and 25-2614 [modifying or correcting an award].

[7,8] When a party seeks to confirm an arbitration award pursuant to the UAA, a court must confirm that award unless

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[29] *Henderson, supra* note 5 (holding court may refuse to enforce arbitration award contrary to public policy that is explicit, well defined, and dominant).

a party has sought to vacate, modify, or correct the award and grounds for such vacation, modification, or correction exist.[30] We have stated that "§ 25-2612 does not allow for the exercise of discretion by the court when a request of confirmation is made where there has been no application for vacation or modification."[31]

Here, no party sought to modify the award, and the Garlocks' application to vacate the award was meritless. As such, it was error to overrule the application to confirm the award. Instead, the district court should have confirmed the arbitration award pursuant to § 25-2612 and then entered judgment in conformity therewith pursuant to § 25-2615. For the sake of completeness, we also note that absent a timely application to modify under § 25-2614, it was plain error for the district court to modify the arbitration award by reallocating the arbitration expenses.[32]

CONCLUSION

For the foregoing reasons, we find the second, third, and fourth assignments of error have merit and we reverse, and remand with directions to confirm the arbitration award and to enter judgment in conformity therewith.

Reversed and remanded with directions.

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[30] See *Drummond v. State Farm Mut. Auto. Ins. Co.*, 280 Neb. 258, 785 N.W.2d 829 (2010).

[31] *Id.* at 262, 785 N.W.2d at 833.

[32] See § 25-2611 ("[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees together with other expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award").

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

Elizabeth A. Gomez, now known as Elizabeth A. Tonniges, appellant, v. Patrick W. Gomez, appellee.

930 N.W.2d 515

Filed July 5, 2019. No. S-18-894.

1. **Divorce: Judgments: Appeal and Error.** The meaning of a divorce decree presents a question of law. Accordingly, an appellate court reviews the interpretation of that decree independently of a determination reached by the court below.
2. **Contracts: Evidence.** Contracts found to be ambiguous present a question of fact and permit the consideration of extrinsic evidence to determine the meaning of the contract.
3. **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.
4. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
5. **Visitation.** A party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child.

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

Aaron F. Smeall and Jacob A. Acers, of Smith, Slusky, Pohren & Rogers, L.L.P., for appellant.

Adam R. Little, of Ballew Hazen, P.C., L.L.O., for appellee.

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

Papik, J.

In the course of their divorce proceedings, Patrick W. Gomez and Elizabeth A. Gomez, now known as Elizabeth A. Tonniges, agreed to a stipulated parenting plan. That plan, which was later incorporated in the decree dissolving their marriage, gave Patrick and Elizabeth joint legal and physical custody of their two children and set forth a schedule in which the parents would exercise parenting time. The parenting plan also included a provision that the children "will be enrolled and be participants in the Catholic religion" and set forth several specific Catholic religious activities in which the children would participate. Attendance at Catholic Mass was not mentioned.

Years later, Patrick filed a motion alleging that Elizabeth was not complying with the language in the parenting plan regarding the children's religious participation. In response to Patrick's motion, the district court entered an order requiring Elizabeth either to bring the children to Catholic Mass every weekend in which she was exercising parenting time or to allow Patrick to take the children during her parenting time. It also required the children to attend Catholic Mass on Catholic "Holy Days of Obligation" and required Patrick and Elizabeth to coordinate to ensure their attendance on those days. We find that the parenting plan did not require the Mass attendance ordered by the district court. Accordingly, we vacate that portion of the district court's order requiring Mass attendance. Because there are other parts of the order not challenged by Elizabeth, we otherwise affirm.

BACKGROUND

Dissolution Decree and Parenting Plan.

Patrick and Elizabeth were married in April 2010. During their marriage, the parties had two children, one born in 2011 and the other born in 2013.

Approximately 5 years after their marriage, Elizabeth filed an action for dissolution. In that action, the parties agreed to a stipulated parenting plan that was later approved by the district court and incorporated in a decree dissolving the marriage. Several provisions of that parenting plan are relevant to this appeal.

First, the parenting plan provided that Patrick and Elizabeth would have joint legal and physical custody of their children. With respect to their joint legal custody, the plan elaborated that Patrick and Elizabeth would have "mutual authority and responsibility for making fundamental decisions regarding such things as education, religion and non-emergency medical and/or dental treatment." The plan further required that Patrick and Elizabeth notify each other before making any decision regarding school enrollment, health care, or "participation in religious activities" and that they "discuss these three areas with one another in an effort to reach a consensus on those issues."

The parenting plan also provided details as to how Patrick and Elizabeth would exercise their joint physical custody of the children. Under the plan, Patrick and Elizabeth had equal parenting time with their children. In the ordinary course, one parent would have the children 5 days one week and 2 days the next week and vice versa the following week. The parenting plan also addressed holiday and vacation parenting time.

In addition, the parenting plan included the following provision:

> The parents agree that the children will be enrolled and be participants in the Catholic religion (including First Communion and Confirmation). Further, [Elizabeth] shall allow for the children to attend their formal class (CCD) on her Wednesday parenting time. [Elizabeth] will provide transportation to and from Wednesday class on her parenting time, and if at anytime [Elizabeth] is

> not capable of transporting the children, she shall advise [Patrick] who will then provide transportation.

Patrick's Motion and District Court's Order.

Approximately 2 years after the entry of the decree dissolving the marriage, Patrick filed a motion styled as a "Motion to Enforce Decree and Parenting Plan." In the motion, Patrick alleged that Elizabeth was not complying with the provision of the parenting plan requiring that the children "be enrolled and be participants in the Catholic religion." Patrick alleged that Elizabeth was violating this provision by taking the children to Lutheran church services and activities during her parenting time. He asked that the court enter an order allowing him to take the children to Catholic Mass during Elizabeth's parenting time and prohibiting Elizabeth from allowing the children to participate in activities of any other religious faith.

At a hearing on Patrick's motion, the district court stated that it interpreted the parenting plan's language that the children would be "participants in the Catholic religion" to require the children to follow the tenets of the Catholic faith. The court continued, "[O]ne of the tenets according to [Patrick] is the children have to go to weekend . . . mass. . . . And, also, mass on . . . Holy Days of Obligation."

The district court later entered a written order. In the order, the district court reiterated its conclusion that the language providing that the children would "be enrolled and be participants in the Catholic religion" required the parties to follow the tenets of the Catholic faith and that those tenets required attendance at Catholic Mass every weekend and on Holy Days of Obligation. Accordingly, the order provided that the children must attend Catholic Mass every weekend and provided that if Elizabeth was not taking the children during her parenting time, she was required to allow them to attend with Patrick. The order also required the children to attend Mass

on all Catholic Holy Days of Obligation and required the parents to coordinate to ensure their attendance on those days. Further, the order required the children to attend Catholic Mass while the parents were exercising holiday or vacation parenting time "if it is otherwise feasible to do so." Finally, the order provided that neither party may "take or enroll" the children "in any religion other than the Catholic religion" during their parenting time unless agreed to in writing by both parties.

Elizabeth timely appealed the district court's order.

ASSIGNMENTS OF ERROR

Elizabeth assigns, restated, that the district court erred in (1) interpreting the decree to require attendance at Catholic Mass and (2) granting relief greater than requested by Patrick's motion.

STANDARD OF REVIEW

[1] The meaning of a divorce decree presents a question of law. Accordingly, an appellate court reviews the interpretation of that decree independently of a determination reached by the court below. See *Bayne v. Bayne*, 302 Neb. 858, 925 N.W.2d 687 (2019).

ANALYSIS

Standards Governing Interpretation of Decree.

Elizabeth asks us to reverse the order of the district court to the extent it requires the children to attend Catholic Mass every weekend and on Catholic Holy Days of Obligation. While Patrick's motion was styled as a motion to enforce the decree, the district court's order did not provide relief other than its interpretation of what the decree required. In doing so, the district court appears to have granted declaratory relief. We have recognized that our case law has generally permitted courts to resolve genuine disputes over the meaning of

language in a dissolution decree through declaratory relief. See *Carlson v. Carlson*, 299 Neb. 526, 909 N.W.2d 351 (2018). Both parties also appear to understand the district court's order as providing declaratory relief, focusing their arguments on whether the district court properly interpreted the decree. Before turning to the parties' respective positions on that point, we pause to review the standards that govern the interpretation of the decree.

As noted above, the parenting plan was agreed to by Patrick and Elizabeth and presented to the district court by stipulation. We have recognized, however, that once a court, as here, adopts such an agreement and sets it forth as a judgment of the court, "the contractual character of the . . . agreement is subsumed into the court-ordered judgment." *Rice v. Webb*, 287 Neb. 712, 723, 844 N.W.2d 290, 298-99 (2014).

[2,3] The fact that we are reviewing a judgment as opposed to a contract matters. Contracts found to be ambiguous present a question of fact and permit the consideration of extrinsic evidence to determine the meaning of the contract. See *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015). Not so with decrees. See *Carlson v. Carlson, supra*. 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. *Bayne v. Bayne, supra.* The parties' subjective intentions and interpretations of the language or what the court entering the decree intended are irrelevant. See, *id.*; *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986). This is so even if the language of the decree is ambiguous. See *Bayne v. Bayne, supra*. See, also, *Ryder v. Ryder*, 290 Neb. 648, 861 N.W.2d 449 (2015) (resolving meaning of ambiguous dissolution decree as matter of law).

With these standards in mind, we proceed to consider the interpretations of the decree offered by the parties.

Questions Raised by District Court's Interpretation of Decree.

Patrick and Elizabeth agree that the parenting plan requires that the children take part in those Catholic religious programs explicitly listed therein: "First Communion and Confirmation" and "CCD" classes. The parties divide on whether the parenting plan imposed additional obligations on the parents related to the children's attendance at Catholic Mass. On one side is the interpretation advanced by Elizabeth: The decree requires the children to take part in those Catholic activities specifically mentioned, but does not impose additional obligations such as Mass attendance. Patrick counters that the language requiring that the children "be enrolled and be participants in the Catholic religion" means that the parents are obligated to raise the children in the Catholic faith and are thus obligated to facilitate the children's observance of all the tenets thereof.

[4] Patrick's interpretation was adopted by the district court, but we note that it also raises some difficult questions, both in the context of this case and beyond. Starting with this case, even if Patrick were correct that the parenting plan requires the children to follow all tenets of the Catholic faith, it is not entirely clear how the district court reached the conclusion that the tenets of the Catholic faith required the Mass attendance it ordered. At the hearing on Patrick's motion, the district court suggested it credited Patrick's view that Mass attendance every weekend and on Holy Days of Obligation was required under the Catholic faith. Patrick references an affidavit attached to his motion which he contends set forth his understanding of the tenets of the Catholic faith as it relates to Mass attendance, but that affidavit is not a part of our bill of exceptions. A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Heineman v. Evangelical Luth. Good Sam. Soc.*, 300 Neb. 187, 912 N.W.2d

751 (2018). It thus does not appear there is anything in our record supporting the district court's conclusion that the tenets of the Catholic faith require Mass attendance consistent with the district court's order.

Even setting aside the question of how the district court determined the tenets of the Catholic faith regarding Mass attendance in this case, a more fundamental question remains. Patrick's argument is essentially that the parenting plan requires the children to do all that the Catholic Church requires of its adherents. An inescapable consequence of this interpretation is that the task of deciding what a person must do to be a faithful Catholic is placed squarely before civil courts. Patrick hardly runs away from the notion that his interpretation puts courts in the position of determining and enforcing religious doctrine. To the contrary, his brief is replete with citations to Canon Law and he argues not only that it requires Mass attendance but that a failure to comply with such requirements is a mortal sin. Brief for appellee at 5.

While courts are regularly called upon to decide the extent of obligations imposed by earthly regimes, many courts have questioned whether they may just as readily determine what obligations are imposed by a religious faith. Language from opinions of the U.S. Supreme Court, at a minimum, raises questions about whether courts may pass on matters of religious doctrine. See, e.g., *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 887, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) ("[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim") (superseded by statute as noted in *Sossamon v. Texas*, 563 U.S. 277, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011)); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 450, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969) ("[test employed by lower court] requires the civil court to determine matters at the very core of a religion—the interpretation of

particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role").

Additionally, many other courts have declined to resolve disputes that would require the resolution of questions of religious doctrine. See, e.g., *Wallace v. ConAgra Foods, Inc.*, 920 F. Supp. 2d 995, 996 (D. Minn. 2013) (dismissing case alleging that food manufacturer misrepresented that its food products were "'100% Kosher'" because it would require court to decide questions of religious doctrine), *vacated and remanded on other grounds* 747 F.3d 1025 (8th Cir. 2014); *Abdelhak v. Jewish Press Inc.*, 411 N.J. Super. 211, 985 A.2d 197 (2009) (affirming dismissal of defamation claim premised on alleged statements that plaintiff did not comply with religious requirements because resolution of claim would require court to pass on matters of religious doctrine); *Pielech v. Massasoit Greyhound, Inc.*, 423 Mass. 534, 542, 668 N.E.2d 1298, 1304 (1996) (holding statute was unconstitutional because it would require courts "to determine what actions and beliefs are required of adherents to the Roman Catholic faith"); *Zumno v. Zumno*, 394 Pa. Super. 30, 574 A.2d 1130 (1990) (declining to enforce prenuptial agreement that children would be raised Jewish because, among other reasons, it would excessively entangle court in religious matters); *Lynch v. Uhlenhopp*, 248 Iowa 68, 78 N.W.2d 491 (1956) (declining to enforce language in divorce decree that children shall be raised in Roman Catholic religion as void for uncertainty). See, also, Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 Cath. U.L. Rev. 497 (2005) (collecting similar cases).

At oral argument, Patrick contended that this court has previously held that a court may consider religious questions in the context of a marital dissolution action, citing *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990). *LeDoux*, however, held merely that a court may find that a religious practice

poses a threat to a child's "temporal well-being" and fashion relief to protect the child from that threat. 234 Neb. at 486, 452 N.W.2d at 5. Unlike the cases from other jurisdictions cited above, *LeDoux* did not implicate a question of religious doctrine. Furthermore, at least one reported Nebraska appellate decision, *Hornung v. Hornung*, 1 Neb. App. 6, 485 N.W.2d 335 (1992), has language suggesting a court should not decide whether a practice is required by a religion in the context of a dissolution dispute. In *Hornung*, the Nebraska Court of Appeals reversed a district court order requiring a father to attend Catholic Mass with his children and observed that the district court order was "tantamount to a judicial seal of approval on the mother's belief that it is sinful for the children not to attend Mass every weekend." *Id.* at 10, 485 N.W.2d at 337.

As it turns out, we need not resolve the difficult questions raised by the interpretation advanced by Patrick and adopted by the district court. As we will explain, we conclude this interpretation is not consistent with the four corners of the decree itself. But while we need not address the questions discussed above, we note them for the consideration of practitioners or courts considering a parenting plan that would require judicial resolution of questions of religious doctrine.

Interpretation of Decree.

As we have noted, it is Patrick's position that Elizabeth was required by the decree to take the children to Mass on weekends and Catholic Holy Days of Obligation when she was exercising parenting time or to give up her parenting time and allow Patrick to take them. Patrick contends that this requirement flows from the language that the children are to "be enrolled and be participants in the Catholic religion." We disagree with Patrick's reading.

Initially, we note that we are not presented with any argument or evidence that the terms "enrolled" and "participants" are used as either legal or religious terms of art. We are thus

left to interpret those words in their ordinary, literal sense. See *Shade v. Kirk*, 227 Neb. 775, 777, 420 N.W.2d 284, 286 (1988) (decree must be interpreted "in light of the literal meaning of the language used"). In its ordinary sense, the word "enrolled" suggests only that the children must be registered in some sense in the Catholic faith. See, The New Oxford American Dictionary 566 (2001) (defining "enroll" as "officially register as a member of an institution or a student on a course"); Merriam-Webster's Collegiate Dictionary 385 (10th ed. 2001) (defining "enroll" as "to insert, register, or enter in a list, catalog, or roll"). We do not understand how the requirement that the children be registered as Catholics in some way also compels the Mass attendance ordered by the district court.

This leaves the word "participants." It is Patrick's position that the children will be "participants" in the Catholic religion only if they adhere to all its required observances. We certainly understand that if the children did so, they would qualify as "participants." But our focus is on what the decree *required.* And the word "participant" on its own suggests only that a person take part in something to some degree. See The New Oxford American Dictionary at 1246 (defining "participant" as "a person who takes part in something"). Indeed, it would not be uncommon for persons to be described as "participants" in a given activity even if they do not take part to the fullest. It is only with qualifying language not present here such as "full" that the word "participants" communicates the level of participation Patrick argues the decree required.

To be sure, the children must take part in the Catholic religion to some degree if they are to be fairly described as "participants." But, as we have noted, the parenting plan explicitly requires the children to participate in "First Communion and Confirmation," as well as "CCD" classes, and Elizabeth concedes that she is obligated to facilitate their involvement in those activities. We do not, however, understand the language of the parenting plan to require Elizabeth to also

facilitate their attendance at Catholic Mass as ordered by the district court.

We find additional support for our interpretation in the decree's complete silence as to the children's attendance at Catholic Mass. The decree specifically sets forth a detailed 2-week rotation regarding the regular exercise of parenting time. It also sets forth a holiday parenting time arrangement, covering various enumerated holidays. Additionally, the decree has specific language requiring Elizabeth to take the children to CCD classes on her parenting time. Nowhere, however, is there any mention of a requirement that the parties either have the children attend Catholic Mass on each parent's parenting time or give up that time to the other parent for the other parent to do so. And despite specific allocation of parenting time on a number of holidays, there is no reference to Catholic Holy Days of Obligation as such or a requirement that the parent exercising parenting time on those days bring the children to Mass on those days. In our view, given its silence on these points, the decree is most reasonably interpreted as not addressing attendance at Catholic Mass. See *Bayne v. Bayne*, 302 Neb. 858, 864, 925 N.W.2d 687, 693 (2019) (decree is to be interpreted to, if possible, "bring all of its parts into harmony as far as this can be done by fair and reasonable interpretation").

Finally, we note that at oral argument, Patrick's counsel contended that the children will be able to participate in the activities specifically mentioned in the decree only if they attend Mass as ordered by the court. We discern nothing in our record indicating that is the case and thus do not consider that argument here.

Disposition of Appeal.

[5] As explained above, we conclude that by requiring Elizabeth to either bring the children to Catholic Mass or give up her parenting time, the district court imposed obligations

that were not present in the original decree. The district court's order thus constituted a modification of the decree as opposed to a proper order interpreting it. The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child. See, e.g., *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001). There is no such evidence here. Accordingly, the portions of the district court's order regarding Mass attendance must be vacated.

We note, however, that the district court's order enforcing the decree addressed other issues, which Elizabeth did not appeal. This would include the portion of the district court's order that the parties not allow for the children's participation in religious activities outside the Catholic religion without the written permission of the other parent. Elizabeth did not argue that portion of the district court's order was erroneous and explicitly stated in her reply brief she was not challenging it. As the rest of the order enforcing the decree is not challenged, we affirm in part.

CONCLUSION

We find that the parties' parenting plan did not require the children to attend Catholic Mass. Accordingly, we vacate those portions of the decree ordering such attendance, but otherwise affirm.

Affirmed in part, and in part vacated.

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

Dr. Robert McEwen, appellant, v. Nebraska State College System, appellee.

931 N.W.2d 120

Filed July 12, 2019. No. S-17-638.

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. **Statutes.** The meaning of a statute is a question of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
4. **Rules of the Supreme Court: Appeal and Error.** A petition for further review and supporting memorandum brief must specifically set forth and discuss any error assigned to the Court of Appeals.
5. **Courts: Judgments: Jurisdiction: Appeal and Error.** A district court sitting as an appellate court has the same power to reconsider its orders, both inherently and under Neb. Rev. Stat. § 25-2001 (Reissue 2016), as it does when it is a court of original jurisdiction.
6. **Pleadings: Judgments.** A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title.
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. **Appeal and Error.** A clear distinction exists in Nebraska between proceedings by petition in error and an appeal.
9. **Judgments: Final Orders: Appeal and Error.** A petition in error in the district court to review a judgment or final order of an inferior tribunal is in its nature an independent proceeding having for its purpose

the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with the law.

10. **Courts: Appeal and Error.** An error proceeding is distinct and independent, while the appeal is a mere continuation of the same cause in another court.
11. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
12. **Statutes: Intent.** 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.
13. **Statutes: Intent: Appeal and Error.** An appellate court must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
14. **Statutes: Legislature: Presumptions: Judicial Construction.** In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Nebraska Supreme Court construing and applying that legislation.
15. **Statutes: Appeal and Error.** In interpreting a Nebraska civil procedure statute modeled upon a federal rule of civil procedure, an appellate court may look to federal decisions for guidance.
16. **Statutes: Intent: Appeal and Error.** The purpose of Neb. Rev. Stat. § 25-1329 (Reissue 2016), like many other provisions of Nebraska law, is to save parties from the delay and expense associated with unnecessary appeals, which can often be avoided by providing every reasonable opportunity for a lower court to correct its own mistakes.
17. **Courts: Judgments: Time.** No court is required to persist in error, and, if a 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.
18. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
19. **Judgments: Words and Phrases: Appeal and Error.** A judgment entered by a district court at the conclusion of an error proceeding pursuant to Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 2016) is a "judgment" within the meaning of Neb. Rev. Stat. § 25-1329 (Reissue 2016).

20. **Judgments: Pleadings: Time: Appeal and Error.** A motion to alter or amend a judgment, which motion seeks a substantive alteration of a judgment entered by a district court disposing of a petition in error and which motion is filed within 10 days of the entry of the judgment, will terminate the time for running of appeal pursuant to Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018).
21. **Public Policy.** While the doctrine of stare decisis is entitled to great weight, it is grounded in the public policy that the law should be stable, fostering both equality and predictability of treatment.
22. **Courts: Appeal and Error.** Overruling precedent is justified when the purpose is to eliminate inconsistency.
23. ____: ____. Some of the relevant factors in deciding whether to adhere to the principle of stare decisis include workability, the antiquity of the precedent, whether the decision was well reasoned, whether experience has revealed the precedent's shortcomings, and the reliance interests at stake.
24. **Courts: Case Overruled: Appeal and Error.** The Nebraska Supreme Court's decision in *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007), and cases relying upon it are overruled to the extent they hold that Neb. Rev. Stat. § 25-1329 (Reissue 2016) does not apply to a judgment of a district court acting as an intermediate appellate court.
25. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Petition for further review from the Court of Appeals, Inbody, Riedmann, and Arterburn, Judges, on appeal thereto from the District Court for Dawes County, Derek C. Weimer, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Howard P. Olsen, Jr., and Adam A. Hoesing, of Simmons Olsen Law Firm, P.C., L.L.O., for appellant.

George E. Martin III and Leigh Campbell Joyce, of Baird Holm, L.L.P., for appellee.

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

Cassel, J.

I. INTRODUCTION

In a series of decisions involving appeals, this court determined that a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Reissue 2016) does not apply to a decision of a district court acting as an intermediate appellate court. Thus, in those prior decisions, the motion was held not to terminate the time for appeal to a higher court.[1] The question presented here is whether, given a longstanding distinction between appeals and error proceedings, § 25-1329 applies to a district court's judgment disposing of a petition in error.[2] For numerous reasons, we conclude that it does. And because we conclude that the original reasoning was incomplete and that doing otherwise would exacerbate a "procedural minefield," we overrule several previous decisions to the extent that they held § 25-1329 inapplicable to judgments of a district court acting as an intermediate appellate court. We therefore reverse the Nebraska Court of Appeals' summary dismissal of this appeal and remand the cause for further proceedings.

II. BACKGROUND

Dr. Robert McEwen filed a petition in error in the district court for Dawes County, Nebraska, against the Nebraska State College System (NSCS), a system of three state colleges in Nebraska. He alleged that he was wrongfully terminated from his position as a tenured professor at Chadron State College.

Neither party disputes that the petition in error was timely filed. Responding to the petition in error, NSCS' answer admitted that McEwen was discharged on March 16, 2016, that McEwen timely requested an additional hearing before NSCS' board of trustees under a provision of the collective bargaining agreement, and that on April 18, NSCS' chancellor

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[1] See Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018).

[2] See Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 2016).

denied the additional hearing, thereby finalizing the discharge. McEwen's petition was filed on May 17. District court proceedings followed.

By a judgment styled as a memorandum order, the district court "overruled" his petition on March 31, 2017 (March judgment).

Exactly 10 days later, on April 10, 2017, McEwen moved for a new trial or, in the alternative, for an order vacating the March judgment. The alternative motion stated that it was based on Neb. Rev. Stat. § 25-2001 (Reissue 2016).

After a hearing, the district court overruled both aspects of the motion, doing so by an order entered on May 25, 2017 (May order). Because the court had not conducted a trial and reviewed only a transcript of the administrative proceedings, it concluded that a motion for new trial was not proper. Turning to McEwen's alternative motion to vacate judgment, the court explained that it had made a mistake of fact regarding the presence of an individual at an administrative hearing. But the court concluded that the individual's presence was not the "determining fact" in the court's conclusions regarding the "'17.3'" issue, referring to a section of a collective bargaining agreement. Thus, the court did not change its decision regarding the merits of McEwen's petition in error.

Within 30 days after the May order, McEwen filed a notice of appeal. In case No. A-17-638, the Court of Appeals summarily dismissed the appeal for lack of jurisdiction. The court's summary order explained that McEwen's motion for new trial did not "toll" the time to file a notice of appeal and that McEwen's notice of appeal was not timely filed.

McEwen moved for rehearing in the Court of Appeals. He argued that the May order was itself a final order. He premised this argument upon § 25-2001 and this court's decision in *Capitol Construction v. Skinner*.[3] Notably, McEwen

[3] *Capitol Construction v. Skinner*, 279 Neb. 419, 778 N.W.2d 721 (2010).

discussed two of our cases, *Goodman v. City of Omaha*[4] and *Timmerman v. Neth*,[5] regarding the applicability of a motion to alter or amend a judgment[6] where a district court acts as an intermediate appellate court. Based on this case law, McEwen conceded, as he did at oral argument before this court, that his motion to vacate did not act as a motion to alter or amend the judgment, which would have terminated the running of the appeal time.

By a summary order in case No. A-17-638, the Court of Appeals denied rehearing. The court explained that McEwen's motion to vacate did not "toll" the time to appeal from the March judgment. The court added, "Accordingly, by the time the district court entered [the May] order denying the motion to vacate, [McEwen] could only appeal from that order. However, [McEwen's] brief on appeal argues only that the district court erred by denying his petition in error in the March [judgment]." Thus, the Court of Appeals concluded that it lacked jurisdiction to consider the merits of the March judgment and left in place the dismissal of the appeal from the May order.

McEwen timely petitioned for further review, which we granted.[7]

After oral argument in this court, we requested supplemental briefing by the parties addressing whether, in light of the distinction traditionally recognized between petitions in error and appeals created by various statutes, the Legislature intended for motions to alter or amend a judgment under § 25-1329 to apply to judgments entered in error proceedings and, if so, the proper application of that statute to the case before us. The parties promptly submitted supplemental briefs, which we have considered.

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[4] *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

[5] *Timmerman v. Neth*, 276 Neb. 585, 755 N.W.2d 798 (2008).

[6] See § 25-1329.

[7] See Neb. Ct. R. App. P. § 2-102(F) (rev. 2015).

III. ASSIGNMENTS OF ERROR

McEwen assigns that the Court of Appeals erred in (1) dismissing his appeal for lack of jurisdiction and (2) overruling his subsequent motion for rehearing.

IV. STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[8]

[2] The meaning of a statute is a question of law.[9]

V. ANALYSIS

[3] The Court of Appeals denied McEwen's motion for rehearing, basing its denial on *Capitol Construction v. Skinner*.[10] No doubt relying on prior decisions of this court, the court did not consider whether § 25-1329 affected the time for appeal from the March judgment. And neither party argued that question to the Court of Appeals. But that matters not. Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.[11] If an alternative basis supported jurisdiction, the Court of Appeals was bound to apply it unless it was foreclosed by existing precedent from this court.[12] Here, the Court of Appeals quite reasonably concluded that *Capitol Construction* dictated that it lacked jurisdiction of McEwen's appeal.

1. McEwen's Primary Argument

On further review, McEwen relies primarily on the same argument he presented to the Court of Appeals in support of

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[8] *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 917 N.W.2d 903 (2018).

[9] *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014).

[10] *Capital Construction, supra* note 3.

[11] *Becher v. Becher*, 302 Neb. 720, 925 N.W.2d 67 (2019).

[12] See *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

rehearing there—that the district court's order overruling his alternative motion to vacate was itself a final, appealable order under *Capitol Construction*.

[4] Before turning to that argument, we note that on further review, McEwen has abandoned his argument based on his motion for new trial. The Court of Appeals rejected that argument, and in McEwen's brief in support of his petition for further review, he neither assigns error nor presents argument addressing the motion for new trial. It is well established that a petition for further review and supporting memorandum brief must specifically set forth and discuss any error assigned to the Court of Appeals.[13] Therefore, we do not consider it.

Regarding McEwen's motion to vacate, both his argument and the Court of Appeals' summary disposition rely upon our decision in *Capitol Construction*, which we first summarize and then apply.

(a) *Capitol Construction*

Capitol Construction was an appeal from county court to district court, where the district court dismissed the appeal for lack of progression after the defendants, who brought the appeal, failed to reply to a progression letter.[14] But the progression letter was sent only to the defendants' trial counsel, who failed to either respond or forward the notice to appellate counsel.

Within 10 days of the dismissal, the defendants, through their appellate counsel, filed a motion to reinstate the appeal. The district court denied the motion, and the defendants appealed to the Court of Appeals. This appeal was filed more than 30 days after the dismissal, but within 30 days of the denial of their motion to reinstate.

Before the Court of Appeals, the defendants sought review of the district court's denial of their motion to reinstate. The

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[13] See *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013).

[14] *Capitol Construction, supra* note 3.

Court of Appeals dismissed the appeal as untimely,[15] and we granted further review.

[5] In analyzing the jurisdictional question, we first reiterated our holding in *State v. Hausmann*,[16] that a district court sitting as an appellate court has the same power to reconsider its orders, both inherently and under § 25-2001, as it does when it is a court of original jurisdiction.[17]

We then said that "an order denying a motion to vacate or modify a final order is itself a final, appealable order."[18] But we reasoned the Court of Appeals had jurisdiction, because "[the] later order [was] based upon grounds that [made] it independently final and appealable and the merits of that order [were] the issue raised on appeal."[19] Although it was not necessary to our decision in *Capitol Construction*, we observed that the Court of Appeals did *not* have jurisdiction to consider an appeal challenging the merits of the earlier, progression-based dismissal order. We then recited the familiar proposition that a motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.[20]

(b) Not Independently Final and Appealable

Accepting for the moment the reasoning of *Capitol Construction* to the extent that that decision implicitly relied on *Goodman*, *Timmerman*, and *Hausmann* regarding § 25-1329, McEwen's argument overlooked an important distinction: There

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[15] *Capitol Construction v. Skinner*, 17 Neb. App. 662, 769 N.W.2d 792 (2009), *reversed, Capitol Construction, supra* note 3.

[16] *Hausmann, supra* note 12.

[17] *Capitol Construction, supra* note 3.

[18] *Id.* at 423, 778 N.W.2d at 725.

[19] *Id.* at 425, 778 N.W.2d at 726.

[20] See, e.g., *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000).

was no independent basis for appeal from McEwen's alternative motion to vacate. Although the district court acknowledged a factual misstatement, it did not modify its judgment. There was no intervening new matter, as there was in *Capitol Construction*. On appeal to the Court of Appeals, McEwen's attack ran only to the March judgment. As he stated in his original brief, "The errors assigned relate to [McEwen's] rights under Section 17.3 of the [collective bargaining agreement]."[21] The May order was not based upon grounds that made it independently final and appealable, and the merits of that order were not the issue raised on appeal.

2. Motions to Alter or Amend in Appeals

It follows that unless McEwen's alternative motion to vacate qualified as a motion to alter or amend a judgment pursuant to § 25-1329, his motion did not terminate the time for taking an appeal from the March judgment and his appeal from the May order could not circumvent the outcome that followed. Until we requested supplemental briefing, McEwen took the position that § 25-1329 did not apply. Now, his position has shifted.

Before turning to the specific question that we posed to the parties, we briefly recall the development of a motion to alter or amend a judgment created in 2000,[22] which is codified as § 25-1329, and our case law determining that it does not apply to an appellate decision of a district court acting as an intermediate court of appeals.

(a) *State v. Bellamy*

In *State v. Bellamy*,[23] we acknowledged a statute had been amended to provide that the running of the time for filing a

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[21] Brief for appellant at 18.

[22] See 2000 Neb. Laws, L.B. 921, § 7.

[23] *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

notice of appeal would be terminated not only by a timely motion for new trial[24] or by a timely motion to set aside a verdict or judgment,[25] but, also, by a timely motion to alter or amend a judgment under § 25-1329. This amendment[26] occurred in the same legislation that introduced a motion to alter or amend a judgment into Nebraska's civil procedure statutes.

[6,7] Two important lessons from *Bellamy* suggest that McEwen's motion might qualify as a motion to alter or amend. First, a determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title.[27] This remains true.[28] Thus, it matters not that McEwen's motion was titled as an alternative motion to vacate. Second, 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.[29] McEwen's alternative motion to vacate was filed within 10 days of, and sought substantive alteration of, the March judgment. Thus, his motion seemingly met both of the *Bellamy* criteria.

In *Bellamy*, we implicitly recognized that § 25-1329 was modeled on Fed. R. Civ. P. 59(e) as it then existed.[30] We cited numerous federal cases holding that a motion for reconsideration, if filed within 10 days of the entry of judgment, is the functional equivalent of a motion to alter or amend a judgment brought pursuant to rule 59(e).

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[24] See Neb. Rev. Stat. § 25-1144.01 (Reissue 2016).

[25] See Neb. Rev. Stat. § 25-1315.02 (Reissue 2016).

[26] See 2000 Neb. Laws, L.B. 921, § 15.

[27] See *Bellamy, supra* note 23.

[28] See *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[29] See *Bellamy, supra* note 23.

[30] 28 U.S.C. app. rule 59(e) (2000).

But in *Bellamy*, we did not address whether § 25-1329 applies to a district court's review of a judgment or final order of a lower court or tribunal. Nor did we examine, given that § 25-1329 was modeled on a federal rule which might have prompted us to consider federal interpretive decisions,[31] whether rule 59(e) has been applied in cases where a federal district court reviews the decision of a federal agency.

(b) Inapplicable to Appeals

We were soon forced to confront whether § 25-1329 applies where an appeal is taken to the district court. In several cases, we determined that it did not. We briefly summarize those decisions.

(i) Statutory Appeal From Municipal Tribunal

Goodman v. City of Omaha[32] was the first case to determine whether § 25-1329 applied to a district court's hearing an appeal. The plaintiff appealed an Omaha Zoning Board of Appeals decision, pursuant to Neb. Rev. Stat. § 14-413 (Reissue 1997). The district court affirmed the board's decision. The plaintiff moved for a new trial and moved to alter or amend the judgment. The district court denied both motions. After the plaintiff perfected an appeal to this court, we dismissed the appeal for lack of jurisdiction.

We said, "The present case concerns an *appeal* from a zoning board of appeals to the district court."[33] We explained that decisions of a zoning board of appeals were reviewable by a

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[31] See, e.g., *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016); *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012); *Bailey v. Lund-Ross Constr. Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003) (federal cases construing federal civil procedural rules may be used for guidance in construing equivalent Nebraska civil procedural rules).

[32] *Goodman, supra* note 4.

[33] *Id.* at 543, 742 N.W.2d at 29 (emphasis supplied).

district court pursuant to two specific statutes,[34] but that the scope of the district court's review was limited to the legality or illegality of the board's decision.[35] We relied upon an earlier decision characterizing the district court's role under this statute as an appellate court.[36] We then determined that the district court had functioned as an "intermediate appellate court of appeals, and not as a trial court."[37]

Having determined that the district court was functioning as an intermediate court of appeals, we then explained that the district court's order "was not a judgment, but, rather, was an appellate decision reviewing the judgment rendered by the Board."[38] We relied upon the statutory definition of a judgment as "the final determination of the rights of the parties in an action"[39] and our description of a "judgment" in *Strunk v. Chromy-Strunk* as "a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist."[40]

The outcome in *Goodman* was clear. We held that because the district court was acting as an intermediate court of appeals and not as a trial court, a motion to alter or amend was inappropriate and would not terminate the time for filing an appeal.

(ii) APA Appeals

Timmerman v. Neth[41] extended our decision in *Goodman* to a district court's judicial review of an agency's decision under

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[34] See § 14-413 and Neb. Rev. Stat. § 14-414 (Reissue 1997).

[35] See *Goodman, supra* note 4.

[36] *Id*. (citing *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996)).

[37] *Goodman, supra* note 4, 274 Neb. at 543, 742 N.W.2d at 30.

[38] *Id*. at 544, 742 N.W.2d at 30.

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

[40] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 929, 708 N.W.2d 821, 834 (2006).

[41] *Timmerman, supra* note 5.

the Administrative Procedure Act (APA).[42] There, the plaintiff appealed pursuant to the APA and the district court affirmed the agency's decision. The plaintiff then moved to alter or amend the judgment. The district court overruled the motion, and the plaintiff appealed to the Court of Appeals. While this appeal was taken within 30 days of the district court's order overruling the motion to alter or amend, it was filed more than 30 days after the district court's order affirming the agency decision. Citing our decision in *Goodman*, the Court of Appeals summarily dismissed the appeal as filed out of time. We granted further review.

In *Timmerman*, we adhered to our reasoning in *Goodman*. We held that because the district court was functioning as an intermediate court of appeals, the plaintiff's motion to alter or amend the judgment did not toll the time for perfecting an appeal.[43] We rejected the plaintiff's argument that language in the APA, which referred to the district court's decision in an APA appeal as a "judgment,"[44] and language in the underlying license revocation statute,[45] which also used the word "judgment," called for a different outcome. We explained that "the word 'judgment' refers to different things in different contexts, and is often used generally to refer to the result of any kind of judicial decisionmaking process."[46] We reiterated our "specific holding that a 'judgment,' for purposes of § 25-1329, does not include an appellate decision of a district court."[47]

We later applied the same reasoning in a purported APA appeal.[48] Although we ultimately determined that there had not

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[42] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

[43] See *Timmerman, supra* note 5.

[44] § 84-918(1).

[45] Neb. Rev. Stat. § 60-498.04 (Reissue 2004).

[46] *Timmerman, supra* note 5, 276 Neb. at 589, 755 N.W.2d at 801.

[47] *Id.*

[48] See *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. 735, 884 N.W.2d 687 (2016).

been a final agency decision, our opinion did not question the reasoning from *Goodman* and *Timmerman*.

(iii) Appeals From County Court

We have articulated equivalent reasoning in connection with an appeal from a county court to a district court, which was then appealed to a higher appellate court. In *State v. Hausmann*,[49] we held that while an intermediate appellate court still has jurisdiction over an appeal, it has the inherent power to vacate or modify a final judgment or order.

But in so doing, we emphasized that "in the absence of an applicable rule to the contrary, a motion asking the [district] court to exercise that inherent power does not toll the time for taking an appeal."[50] We explained that a party can move the court to vacate or modify a final order, but that 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.[51] To the extent that our reasoning applied to a motion seeking substantive alteration of the district court judgment and filed within 10 days of its entry, we implicitly followed *Goodman* and *Timmerman*.

3. Petitions in Error

We now turn to the question which prompted us to grant further review. Before examining the parties' arguments, we recall the history of error proceedings in Nebraska and principles of law that flowed from the respective origins of error proceedings and appeals.

(a) History

The writ of error is not of statutory origin, but is derived from the common law.[52] In contrast, the remedy or procedure

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[49] *Hausmann, supra* note 12.

[50] *Id.* at 827, 765 N.W.2d at 225.

[51] *Id.*

[52] 4 C.J.S. *Appeal and Error* § 29 (2019).

by appeal is of civil-law origin and was introduced therefrom into courts of equity and admiralty.[53] A common-law right of appeal does not exist.[54]

Our earliest statutes, including those governing petitions in error, stem from the Ohio Code of Civil Procedure.[55] In 1858, the Territorial Legislature copied most of the Nebraska Code of Civil Procedure from Ohio's code.[56] It was not until Nebraska received statehood that the Legislature replaced actions at law and suits in equity with the civil action and specified that judgments and final orders in civil actions could be reviewed only by appeal.[57] In 1871, the Legislature changed its mind and returned to error proceedings as the method for reviewing judgments and final orders in civil actions. But in 1873, the Legislature began to shift review of district court judgments in equitable and civil actions to appeals.[58] The methods also changed in criminal cases, although it was not until 1982 that the writ of error was eliminated.[59]

Although, in 1905, error proceedings ceased to be a means for this court's review of civil district court judgments and final orders, error proceedings in the district court to review judgments and final orders of courts and tribunals inferior in jurisdiction to the district court lived on.[60] In 1974, the Legislature eliminated the petition in error as a method of obtaining district court review of county court judgments.[61]

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[53] *Id.*, § 41.

[54] *Id.*

[55] See John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001).

[56] See *id.*

[57] See *id.*

[58] See *id.*

[59] See *id.*

[60] See *In re Estate of Berg*, 139 Neb. 99, 296 N.W. 460 (1941).

[61] *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

But petitions in error continue as a means of judicial review of the judgments and final orders of tribunals exercising judicial functions and inferior in jurisdiction to the district court.[62] And that issue provides the basis for the proceeding now before us.

From this history, one can readily perceive that the Legislature did not treat error proceedings and appeals interchangeably. This history delineates two separate and distinct avenues for judicial review. And our case law supports that perception.

(b) Error Proceedings Clearly Distinct From Appeals

[8] Over 120 years ago, we said that a clear distinction exists in this state between proceedings by petition in error and an appeal.[63] It was only a few years later when we explained that one cannot be denied his or her right of review in the appellate courts and that proceedings in error are always resorted to where no other method is pointed out or provided for.[64] This principle remains vital and effective. Where no other method of appeal is provided, one may obtain judicial review by proceedings in error under §§ 25-1901 to 25-1908.[65] The right of appeal in this state is purely statutory; unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.[66]

[9,10] The respective proceedings differ in nature. "The proceeding by petition in error is substantially an independent action, in which the plaintiff, as the moving party, controls

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[62] See § 25-1901.

[63] See *Western Cornice & Mfg. Works v. Leavenworth*, 52 Neb. 418, 72 N.W. 592 (1897).

[64] See *Dodge County v. Acom*, 72 Neb. 71, 100 N.W. 136 (1904).

[65] See *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985).

[66] *From v. Sutton*, 156 Neb. 411, 56 N.W.2d 441 (1953). See, also, *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

both the pleading and the process of the court."[67] A petition in error in the district court to review a judgment or final order of an inferior tribunal is in its nature an independent proceeding having for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with the law.[68] It is in the *nature of a new action* in that a petition in error is required to be filed, and a summons is required to be issued upon the written praecipe of the petitioner in error.[69] The term "appeal" is a process of civil-law origin and removes the cause entirely, subjecting the facts as well as the law to a review and retrial.[70] An error proceeding is distinct and independent, while the appeal is a mere continuation of the same cause in another court.[71] The dispositions of each also differ.

> When judgment of reversal is entered in the error proceeding, that proceeding is at an end. When rendered on appeal, the same cause is still pending and undisposed of. But when, on appeal, the judgment of reversal also remands the cause for further proceedings in the inferior tribunal, it is manifest that the cause is fully disposed of so far as the district court is concerned.[72]

We have said that the subjects of review on petition in error and an appeal are so distinctively different and dissimilar that the provisions of the statute relating to each question cannot be taken together and construed as if they were one law and effect given to every provision.[73]

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[67] *Polk v. Covell*, 43 Neb. 884, 890, 62 N.W. 240, 242 (1895).

[68] See *Dovel v. School Dist. No. 23*, 166 Neb. 548, 90 N.W.2d 58 (1958).

[69] See *id*. (emphasis supplied).

[70] *Consolidated Credit Corporation v. Berger*, 141 Neb. 598, 4 N.W.2d 571 (1942).

[71] See *Ribble v. Furmin*, 69 Neb. 38, 94 N.W. 967 (1903).

[72] *Id*. at 43, 94 N.W. at 969.

[73] *Consolidated Credit Corporation, supra* note 70.

We acknowledge that our case law has not always spoken consistently. In *Hooper Telephone Co. v. Nebraska Telephone Co.*,[74] we stated that the word "'appeal'" is a word of "general application in the law. Ordinarily [it] refer[s] to the removal of proceedings from one court or tribunal to another for review." And in *McClellan v. Board of Equal. of Douglas Cty.*,[75] we observed that it is now common for our court to refer to an "'appeal by petition in error,'" citing six cases using this imprecise description.

[11-13] Ultimately, it is the Legislature's intention in enacting § 25-1329 that matters. Statutory language is to be given its plain and ordinary meaning.[76] 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.[77] An appellate court must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.[78] In our effort to determine the Legislature's intent regarding § 25-1329, we sought the parties' assistance. We turn to their arguments.

(c) Parties' Arguments

McEwen first argues, essentially, that an error proceeding under §§ 25-1901 to 25-1908 is a type of original civil action under Neb. Rev. Stat. § 25-101 (Reissue 2016) which abolished the distinctions between actions at law and suits in equity and substituted one form of action, called a civil action.

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[74] *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 255, 147 N.W. 674, 678 (1914).

[75] *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 591, 748 N.W.2d 66, 74 (2008).

[76] *Patterson v. Metropolitan Util. Dist.*, 302 Neb. 442, 923 N.W.2d 717 (2019).

[77] *State v. Phillips*, 302 Neb. 686, 924 N.W.2d 699 (2019).

[78] *Id.*

Viewing a petition in error as an original civil action, he reasons that it results in a judgment within the meaning of both §§ 25-1301(1) and 25-1329.

Backing away slightly, he suggests that there is no reason to believe the Legislature did not intend the term "judgment" in § 25-1329 to include a decision by a court or judge in a petition in error. He urges that we abandon *Goodman* and subsequent case law, characterizing *Goodman* as "not entirely consistent" with legislative intent.[79] And he characterizes our existing jurisprudence in "appealing orders of judicial review from a district court" as a "procedural minefield."[80]

NSCS relies upon our statement in *McClellan* that the distinction between the two methods of review "has largely been to distinguish the method of perfecting each or to explain each method's peculiar rules of joinder of parties."[81] It urges that we read §§ 25-1329, 25-1301, and 25-1901 in pari materia with Neb. Rev. Stat. § 25-1931 (Reissue 2016). It observes that both §§ 25-1901 and 25-1931 (which specifies the time for commencing a proceeding under § 25-1901) address steps taken after a judgment is *rendered* or a final order is made, in contrast to § 25-1329, which contemplates an action to be taken after the *entry* of a judgment. These differences, it argues, suggest ambiguity in the statutes. It would resolve the ambiguity by looking to legislative history, which shows that prior to 1999, § 25-1931 used "rendition" to describe the action taken by the inferior tribunal; that in 1999, the word "rendition" was changed to "entry"; and that in 2000, it was changed back to "rendition."[82] This, it argues, shows that the Legislature has "made the 'rendition' of the decision . . . the starting time for commencing the review process in the case

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[79] Supplemental brief for appellant at 6.

[80] *Id.* at 7.

[81] *McClellan, supra* note 75, 275 Neb. at 590, 748 N.W.2d at 73.

[82] See, § 25-1931 (Reissue 1995); 1999 Neb. Laws, L.B. 43, § 12; 2000 Neb. Laws, L.B. 921, § 16.

of petition in error proceedings, but the 'entry' of the decision . . . the starting time for commencing the review process in other proceedings."[83] It then argues that because § 25-1329 uses the word "entry," this statute does not apply to decisions rendered by the district court in petition in error proceedings. NSCS also suggests that the Legislature has acquiesced in our decisions.

(d) Applicable to Judgments on Petitions in Error

For well over 100 years, we have referred to a district court's decision disposing of a petition in error under §§ 25-1901 to 25-1908 as a "judgment."[84] And as recited above, we have described an error proceeding as substantially an independent action,[85] in its nature an independent proceeding,[86] in the nature of a new action,[87] and distinct and independent.[88] It is true that the scope of review in an error proceeding is limited.[89] But the limited scope of review does not affect the nature of the proceeding or detract from its significance to the parties.

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[83] Supplemental brief for appellee at 6.

[84] See, e.g., *Butler Cty. Landfill v. Butler Cty. Bd. of Supervisors*, 299 Neb. 422, 908 N.W.2d 661 (2018); *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988); *Anania v. City of Omaha*, 170 Neb. 160, 102 N.W.2d 49 (1960); *Dovel, supra* note 68; *Olsen v. Grosshans*, 160 Neb. 543, 71 N.W.2d 90 (1955); *Consolidated Credit Corporation, supra* note 70; *Ribble, supra* note 71; *Bennett v. Otto*, 68 Neb. 652, 94 N.W. 807 (1903); *Slobodisky v. Curtis*, 58 Neb. 211, 78 N.W. 522 (1899); *Tootle, Hosea & Co. v. Jones*, 19 Neb. 588, 27 N.W. 635 (1886); *Newlove v. Woodward*, 9 Neb. 502, 4 N.W. 237 (1880).

[85] *Polk, supra* note 67.

[86] *Dovel, supra* note 68.

[87] *Id.*

[88] *Ribble, supra* note 71.

[89] See *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997) (court is to determine whether tribunal acted within its jurisdiction and whether decision rendered is supported by sufficient relevant evidence).

[14] Our decisions using this terminology and describing an error proceeding's nature shaped the Legislature's crafting of the language in § 25-1329. In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Nebraska Supreme Court construing and applying that legislation.[90] And in this instance, NSCS cites to legislative history demonstrating the Legislature's familiarity with the subject. Thus, we are confident the Legislature understood that an error proceeding in the district court is distinct and independent from an appeal.

From the amendments to § 25-1931, NSCS reasons that because the "rendition of the judgment"[91] by the "tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court"[92] starts the time for commencement of an error proceeding in the district court, this somehow means that the *judgment of the district court* at the conclusion of the error proceeding is not "entered" within the meaning of § 25-1329. We disagree. An appeal from the *district court's* disposition of the proceeding is governed by § 25-1912, which uses both the term "rendered" and the term "entry" to establish time limits on appeals and specifically contemplates termination of the appeal time by a timely motion to alter or amend a judgment. Thus, the proper contrast is between §§ 25-1931 and 25-1912, which shows that the Legislature understood the difference between commencing an error proceeding in district court and commencing an appeal to the Court of Appeals from a district court's judgment in an error proceeding. Rather than supporting NSCS' position, this contrast supports applying § 25-1329.

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[90] *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995).

[91] See § 25-1931.

[92] See § 25-1901.

[15] Because § 25-1329 was modeled on a federal rule, we look to federal decisions for guidance. As noted above, § 25-1329, when first adopted, was identical to a federal rule of civil procedure. We have frequently said that because the Nebraska Court Rules of Pleading in Civil Cases are modeled after the Federal Rules of Civil Procedure, we may look to federal decisions for guidance in interpreting the Nebraska rules.[93] We have interpreted a Nebraska criminal procedure statute using federal decisions, because the statute was patterned on a federal rule of criminal procedure.[94] We now articulate an equivalent principle: In interpreting a Nebraska civil procedure statute modeled upon a federal rule of civil procedure, we may look to federal decisions for guidance.

Rule 59(e) has been applied in numerous proceedings before federal district courts reviewing final agency decisions.[95] Thus, where a federal district court reviews an agency decision and enters a judgment, and a party files a timely motion under rule 59(e), the time for appeal runs from the date of entry of the court's disposing of the motion.[96] Because the Legislature modeled § 25-1329 on a federal rule that applied to federal district courts, including proceedings where the federal court reviewed an agency decision, this suggests that it

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[93] E.g., *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018).

[94] See *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

[95] See, *Maxmed Healthcare, Inc. v. Price*, 860 F.3d 335 (5th Cir. 2017) (Departmental Appeals Board Medicare Appeals Council decision); *Bass v. U.S. Dept. of Agriculture*, 211 F.3d 959 (5th Cir. 2000) (Farm Service Agency decision); *Ashley v. Commissioner, Social Security Administration*, 707 Fed. Appx. 939 (11th Cir. 2017) (Commissioner of Social Security Administration decision); *Leak v. Runyon*, No. 95-1392, 1996 WL 386609 (4th Cir. July 11, 1996) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 91 F.3d 131 (4th Cir. 1996)) (U.S. Postal Service decision).

[96] See Fed. R. App. P. 4(a)(4).

intended § 25-1329 to apply to error proceedings commenced in a Nebraska district court.

[16,17] And this leads us to the purpose of the statute, which is obvious: The purpose of § 25-1329, like many other provisions of Nebraska law, is to save parties from the delay and expense associated with unnecessary appeals, which can often be avoided by providing every reasonable opportunity for a lower court to correct its own mistakes. As we have said before, no court is required to persist in error, and, if a 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.[97] Section 25-1329 enables a district court in an error proceeding, a court which is no less susceptible of error than any other, to give thoughtful consideration to an assertion that it has made a mistake, without prejudicing the rights of the party making the assertion. And it encourages a party to do so in good faith, knowing that its right to appeal will not be lost because of continued running of the time for appeal. We look to the purpose of § 25-1329 and give it a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

[18] While we agree, as NSCS reminds us, that where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent,[98] the presumption fails here for three reasons. First, and most important, we have not previously construed the application of § 25-1329 specifically to an error proceeding under §§ 25-1901 to 25-1908. Second, given the presumption that the Legislature is familiar with our case law regarding error proceedings, including our characterization of the clear distinction between a petition in error and an appeal

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[97] See *Pinnacle Enters. v. City of Papillion*, 302 Neb. 297, 923 N.W.2d 372 (2019).

[98] See *State v. Coble*, 299 Neb. 434, 908 N.W.2d 646 (2018).

and our repeated use of the term "judgment" to describe a district court's decision disposing of a petition in error, the Legislature might well have not understood our decisions in *Goodman*, *Timmerman*, and *Hausmann* as bearing on petitions in error. Finally, NSCS' argument in brief mainly relies on decisions that predate the enactment of § 25-1329. The only amendment to date, adopted in 2004, added a "springing" effect to the terminating motions identified in § 25-1912(3),[99] and was no doubt prompted by our decision in *Macke v. Pierce*[100] regarding a motion for new trial.

[19,20] We conclude that a judgment entered by a district court at the conclusion of an error proceeding pursuant to §§ 25-1901 to 25-1908 is a "judgment" within the meaning of § 25-1329. It naturally follows that a motion to alter or amend a judgment, which motion seeks a substantive alteration of a judgment entered by a district court disposing of a petition in error and which motion is filed within 10 days of the entry of the judgment, will terminate the time for running of appeal pursuant to § 25-1912(3). Consequently, we must reverse the Court of Appeals' summary dismissal.

4. Clearing "Procedural Minefield"

We now turn to McEwen's request that, to use his metaphor, we clear the "procedural minefield."[101] This is not something that we undertake lightly.

Prior to our decision today, an anomalous situation already existed. Where a district court acted as a trial court and entered a judgment, a timely motion to alter or amend the judgment terminated the time for taking an appeal.[102] A similar statute

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[99] See 2004 Neb. Laws, L.B. 1207, §§ 3 to 5.

[100] *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002) (superseded by statute as stated in *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015)).

[101] Supplemental brief for appellant at 7.

[102] See § 25-1912(3) (Reissue 2016).

accomplished the same result regarding a county court judgment.[103] For both this court and the Court of Appeals, our appellate rules,[104] which are consistent with statutory procedures governing such appeals,[105] enabled us to entertain motions for rehearing without jeopardizing a party's ability to pursue any subsequent appeals which might be available. Only where a district court acted as an intermediate appellate court did a party filing a motion to alter or amend a judgment do so at his or her peril.

But after today's decision, without reassessing *Goodman*, *Timmerman*, and *Hausmann*, the procedural minefield would still exist, with boundaries less clear than before. In the generic or colloquial sense, some "appeals" to the district court would be subject to § 25-1329, while others would not. Not only is legislative acquiescence a legitimate concern, we must also consider the doctrine of stare decisis.

[21-23] We have said that while the doctrine of stare decisis is entitled to great weight, it is grounded in the public policy that the law should be stable, fostering both equality and predictability of treatment.[106] And we have recognized that overruling precedent is justified when the purpose is to eliminate inconsistency.[107] Thus, we said that remaining true to an intrinsically sounder doctrine better serves the values of stare decisis than following a more recently decided case inconsistent with the decisions that came before it.[108] As the U.S. Supreme Court has identified, some of the relevant factors in deciding whether to adhere to the principle of stare decisis include workability, the antiquity of the precedent, whether the

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[103] See Neb. Rev. Stat. § 25-2729(3) (Reissue 2016).

[104] See § 2-102(F)(1) and Neb. Ct. R. App. P. § 2-113 (rev. 2012).

[105] See Neb. Rev. Stat. §§ 25-1924 and 25-1926 (Reissue 2016).

[106] See *Heckman, supra* note 66.

[107] See *id.*

[108] *Id.*

decision was well reasoned, whether experience has revealed the precedent's shortcomings, and the reliance interests at stake.[109] The Court explained that "reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions."[110]

Here, reconciling our case law with the purpose of the statute would eliminate the inconsistency in application of § 25-1329 and best achieve the obvious purpose of the statute. Not only would we eliminate inconsistency in the treatment of appeals versus error proceedings, we would also harmonize the opportunity for "rehearing" at all levels of Nebraska's court system. This would foster equality and enhance predictability.

Turning to the factors identified by the U.S. Supreme Court, we conclude that all weigh in favor of corrective action. Maintaining a single area carved out from the application of § 25-1329 has proved unworkable: It promoted a procedural trap for parties and their counsel and, in its area of operation, defeated the statutory purpose. Regarding antiquity of the precedent, the earliest decision, in *Goodman*, dates back only to 2007. While the rationale may have appeared sound at the time *Goodman* was decided, inconsistency with other statutory language quickly became apparent. The *Timmerman* court acknowledged as much.[111] And the language in Neb. Rev. Stat. § 25-2733 (Reissue 2016) directly contradicts the core holding of *Goodman* in the context of appeals from county court to district court. Section 25-2733(1) specifies that on appeal from the county court, the district court shall "render a *judgment* which may affirm, affirm but modify, or reverse the judgment or final order of the county court" and

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[109] See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

[110] *Id.*, 558 U.S. at 365.

[111] See *Timmerman, supra* note 5.

that if the district court reverses, "it may enter *judgment* in accordance with its findings or remand the case . . . for further proceedings consistent with the *judgment* of the district court." (Emphasis supplied.) Section 25-2733(3) specifies that the "*judgment* of the district court shall vacate the judgment in the county court" and that "interest on the amount of the *judgment* in the district court . . . shall run from the date of entry of the [county court] judgment." (Emphasis supplied.) This language already existed in § 25-2733 in 2000, when § 25-1329 was added to our statutes, and although § 25-2733 was amended in the same legislation,[112] the references to a "judgment" in the district court on appeal from the county court remained unchanged. An unspoken premise in *Goodman* was that a proceeding followed by an appeal (or a series of appeals) results in one, and only one, judgment. We conclude that the language of our appeals statutes, read together, refutes that premise. In short, experience has revealed our precedent's shortcomings. And neither party identifies, nor can we discern, any reliance interests that would be affected.

[24] We therefore overrule our decision in *Goodman*[113] and cases directly[114] or inferentially[115] relying upon it to the extent they hold that § 25-1329 does not apply to a judgment of a district court acting as an intermediate appellate court.

VI. CONCLUSION

[25] We conclude that McEwen's alternative motion to vacate qualified as a motion to alter or amend a judgment within the meaning of § 25-1329. The summary dismissal of McEwen's appeal must be reversed. We recognize that upon

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[112] See 2000 Neb. Laws, L.B. 921, § 27.

[113] *Goodman, supra* note 4.

[114] See *Timmerman, supra* note 5.

[115] See, *Jacob, supra* note 48; *Capitol Construction, supra* note 3; *Hausmann, supra* note 12.

reversing a decision of the Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error that the Court of Appeals did not reach.[116] However, the Court of Appeals did not proceed past the initial jurisdictional issue presented, and neither this court nor the Court of Appeals has heard argument upon or meaningfully considered the underlying merits of the appeal. We conclude that those issues should be addressed by the Court of Appeals in the first instance. The decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals for further proceedings.

Reversed and remanded for
further proceedings.

Miller-Lerman, J., not participating.

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[116] See *Hausmann, supra* note 12.

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

State of Nebraska, appellee, v. Tammy J. Ettleman, appellant.

930 N.W.2d 538

Filed July 12, 2019. No. S-17-782.

1. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in the case of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Criminal Law: Intent: Minors.** The Class IIIA felony of child abuse under Neb. Rev. Stat. § 28-707(4) (Reissue 2016) is required to have been committed knowingly and intentionally.
4. **Criminal Law: Intent: Words and Phrases.** Under Neb. Rev. Stat. § 28-201 (Reissue 2016), one commits criminal attempt if he or she intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be.
5. **Pleas.** Requiring a factual basis ensures that a defendant actually committed an offense at least as serious as the one to which he or she is willing to plead guilty.
6. **Double Jeopardy: Pleas: Appeal and Error.** The Double Jeopardy Clause is not violated when a criminal defendant pleads guilty while reserving his or her right to appeal, prevails on appeal, and consequently must either replead, endure further pretrial proceedings, or go to trial.
7. **Pleas: Appeal and Error.** The remedy for an inadequate factual basis is an order vacating the guilty plea and restoring both parties to their positions prior to the trial court's acceptance of the plea. If an appellate court determines that a plea has been accepted without an adequate factual basis, the plea, the judgment of conviction, and the sentence must be vacated, the dismissed charges reinstated, and the defendant allowed to replead or to proceed to trial.

8. **Pleas.** Where it is possible to establish a factual basis to the charges to which the defendant had entered a plea, the State should be given the opportunity to establish a factual basis.

Petition for further review from the Court of Appeals, Riedmann, Bishop, and Welch, Judges, on appeal thereto from the District Court for Saunders County, Mary C. Gilbride, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Thomas J. Klein, Saunders 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.

Miller-Lerman, J.

NATURE OF CASE

We granted the State's petition for further review of the decision of the Nebraska Court of Appeals which reversed Tammy J. Ettleman's plea-based conviction for felony child abuse. The Court of Appeals concluded that the factual basis presented by the State was not sufficient to support Ettleman's no contest plea and therefore "reverse[d] the order of the district court [for Saunders County] which accepted that no contest plea and . . . vacate[d] Ettleman's conviction for felony child abuse." *State v. Ettleman*, No. A-17-782, 2018 WL 3902173 at *5 (Neb. App. Aug. 14, 2018) (selected for posting to court website). Ettleman had also pled no contest to a count of attempted possession of a controlled substance, and the Court of Appeals affirmed that plea-based conviction. However, the Court of Appeals reasoned that "because the district court ordered only one sentence for both convictions," it must vacate the sentence and remand the matter for

resentencing on Ettleman's conviction for attempted possession of a controlled substance. *Id.* at *1.

The State claims on further review that the Court of Appeals erred both when it found there was not a sufficient factual basis for the plea to felony child abuse and when it "suggest[ed]" that Ettleman could not be subject to retrial on the child abuse charge upon remand.

We conclude that the Court of Appeals did not err when it found that there was not a sufficient factual basis for the felony child abuse plea. However, we determine that the Court of Appeals erred in its disposition, because it focused only on the conviction for felony child abuse rather than setting forth a remedy focused on the entire plea agreement. We therefore affirm in part and in part reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions as set forth herein.

STATEMENT OF FACTS

In its memorandum opinion, the Court of Appeals set forth the facts of this case for which we find support in the record as follows:

> On January 17, 2017, the State filed an information charging Ettleman with: count I, delivery of a controlled substance, a Class II felony, pursuant to Neb. Rev. Stat. § 28-416 (Reissue 2016); count II, aiding and abetting delivery of a controlled substance, a Class II felony, pursuant to § 28-416 and Neb. Rev. Stat. § 28-206 (Reissue 2016); and count III, child abuse, a Class IIIA felony, pursuant to Neb. Rev. Stat. § 28-707 (Reissue 2016).
>
> On March 27, 2017, pursuant to a plea agreement, Ettleman pled "no contest" to an amended count I (now attempted possession of a controlled substance, a Class I misdemeanor, pursuant to Neb. Rev. Stat. § 28-201 (Reissue 2016)) and count III (child abuse); the State agreed to dismiss count II (aiding and abetting delivery of

a controlled substance). The State provided the following factual basis:

"On November 28, 2016, officers with III Corps Drug Task Force and Cedar Bluffs Police Department executed a search warrant on the residence of Tanya Brainard, Cedar Bluffs, Saunders County. In the course of that search warrant, the investigation discovered that the defendant, Tammy Ettleman, had been providing narcotics to Tanya Brainard and that a significant balance was remaining.

"In the course of the investigation, [Ettleman] agreed to — arrived at Tanya Brainard's home a few blocks away in exchange — to receive some of the past due account, as well as sell some new pills, that being oxycodone. [Ettleman] indicated that she had her 11-year-old son, identified by initials CE, born in 2005, with her and that he was still in his PJs.

"While the officers were still present, [Ettleman] arrived at the Brainard residence with her son, CE, and for the purpose of the plea agreement, did attempt to possess oxycodone, a Schedule II narcotic substance. These events [occurred] in Saunders County." When asked if there were any comments to the factual basis, Ettleman's attorney stated, "Would address those at sentencing, Your Honor." The district court proceeded to find the "factual basis sufficient to convict [Ettleman] on her no contest pleas." The court found the pleas were entered into knowingly and voluntarily, and found Ettleman guilty as charged in count I as amended and count III. The matter was then scheduled for sentencing.

At the sentencing hearing, Ettleman said she realized she made mistakes, "but [she] would never put [her] son in danger." She acknowledged giving Brainard "a couple pills here and there, which [she] should not have done, and that was a huge mistake." She said she was not "this big drug dealer," rather, she felt sorry for Brainard. She

> "did not take [her son] there trying to put him into any danger whatsoever. [She] would never do that." She went on to say, "I love my son very much, and, you know, I went in there, asked if [Brainard] was there and went out. That was all that it was. It was not trying to put him in danger at all, you know." She said she was "taken aback" when she came in "for the status hearing" after being told it was going to be a misdemeanor, "and then they threw this felony child abuse in on me." The court proceeded to order one sentence of 24 months' probation for both convictions (without any noted separation or apportionment of the sentence between the two convictions), with various conditions, including serving 90 days in jail (to be served in three waivable 30-day terms). The court's written order of probation was filed June 26, 2017. Ettleman timely appealed.

State v. Ettleman, No. A-17-782, 2018 WL 3902173 at *1-2 (Neb. App. Aug. 14, 2018) (selected for posting to court website). To clarify the sentencing, we note that in its order, the district court set forth the length and terms of probation as being applicable to both convictions but it stated that the jail time was specifically applicable to the conviction for attempted possession of a controlled substance.

Ettleman claimed on appeal to the Court of Appeals that the district court erred when it found that the State had presented a sufficient factual basis to support her plea of no contest to felony child abuse. We have long held that a factual basis is required to show that a plea was made understandingly and knowingly, see *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and that a challenge to the understandingly and voluntary nature of the plea can be made on appeal, see *State v. Mason*, 187 Neb. 675, 193 N.W.2d 576 (1972). The Court of Appeals found merit to Ettleman's claim that the factual basis was insufficient. The Court of Appeals first rejected the State's argument that Ettleman had waived a challenge to the factual basis when she did not object to the factual basis

in the district court. The Court of Appeals cited our decision in *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016), in which we reasoned that a sufficient factual basis is a requirement for a finding that a plea was entered into understandingly and voluntarily and that, because one of the limited challenges that may be made to a plea-based conviction on appeal is whether the plea was understandingly and voluntarily made, a defendant does not waive a challenge to the factual basis when he or she enters a plea. See, *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018); *State v. Schiesser*, 24 Neb. App. 407, 888 N.W.2d 736 (2016). The State does not challenge this ruling on further review.

The Court of Appeals then identified the elements of felony child abuse as set forth in Neb. Rev. Stat. § 28-707(1) (Reissue 2016), which provides in relevant part:

> A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or physical or mental health;
>
> (b) Cruelly confined or cruelly punished;
>
> (c) Deprived of necessary food, clothing, shelter, or care;
>
> (d) Placed in a situation to be sexually exploited . . . ;
>
> (e) Placed in a situation to be sexually abused . . . ; or
>
> (f) Placed in a situation to be a trafficking victim . . . .

Under § 28-707(4), if the child abuse offense is committed knowingly and intentionally and does not result in serious bodily injury or death, it is a Class IIIA felony.

The Court of Appeals determined that based on the plain language of § 28-707(1), the factual basis that was set forth by the State at Ettleman's plea hearing did not show that Ettleman knowingly and intentionally placed her son in a situation that endangered his life or physical or mental health, nor did it show a basis for any of the other ways set forth in the statute for committing child abuse. The Court of Appeals

acknowledged that it could look beyond the factual basis given at the plea hearing and consider other material when deciding whether a factual basis existed. The Court of Appeals therefore examined the presentence investigation report and noted that it contained further details regarding the events that gave rise to the charges against Ettleman.

After considering the record as a whole, including information in the presentence investigation report, the Court of Appeals stated:

> Ettleman took her son to her friend's house at approximately 8:30 in the evening, and immediately left when she realized her friend was not home. While we acknowledge that Ettleman went to the home to sell prescription medication, an illegal action, we fail to see, based on these facts, how Ettleman knowingly and intentionally exposed her child's life or physical or mental health to danger or the peril of probable harm or loss.

State v. Ettleman, No. A-17-782, 2018 WL 3902173 at *4 (Neb. App. Aug. 14, 2018) (selected for posting to court website). The Court of Appeals concluded that the record did not show a sufficient factual basis to meet the elements under § 28-707(1) and (4) and that therefore, the district court abused its discretion when it accepted Ettleman's no contest plea to felony child abuse and when it found her guilty of that offense.

Based on this conclusion, the Court of Appeals determined that the proper disposition of the appeal was to "reverse the order of the district court which accepted that no contest plea" and to "vacate Ettleman's conviction for felony child abuse." *State v. Ettleman*, 2018 WL 3902173 at *5. The Court of Appeals acknowledged that the State had urged in its brief that if the factual basis was insufficient, then the proper remedy would be to "'undo the *entire* plea bargain, and return the parties to square one and start over.'" *Id.* at *4. The Court of Appeals responded to the State's argument by stating that "the State's ability to further prosecute Ettleman is a matter to be

determined at the trial level before it can be considered on appeal." *Id.*

Contrary to the State's urging that the "proper remedy is to undo the *entire* plea bargain," brief for appellee at 6-7, the Court of Appeals vacated Ettleman's plea-based conviction for felony child abuse but affirmed her plea-based conviction for attempted possession of a controlled substance. The Court of Appeals noted that the district court "provided only one sentence for both convictions," *State v. Ettleman*, 2018 WL 3902173 at *1, and it therefore vacated Ettleman's sentence and remanded the matter to the district court for resentencing on the remaining conviction for attempted possession of a controlled substance.

We granted the State's petition for further review.

ASSIGNMENTS OF ERROR

On further review, the State claims that the Court of Appeals erred when it found that Ettleman's plea to felony child abuse was not supported by a factual basis and when it therefore reversed her conviction for that offense. The State further claims that the Court of Appeals erred when it "suggest[ed]" that Ettleman would not be subject to retrial on the felony child abuse charge. The State contends that if the plea to felony child abuse was in fact not supported by a factual basis, then the proper disposition upon remand is either (1) the State is given an opportunity to establish a factual basis or (2) the entire plea agreement is set aside and the original charges are reinstated.

STANDARD OF REVIEW

[1,2] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in the case of an abuse of discretion. See *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018). 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*.

ANALYSIS

The Factual Basis in This Case Was Not Sufficient to Support the Plea to Felony Child Abuse.

The State claims that the Court of Appeals erred when it found that Ettleman's plea to felony child abuse was not supported by a factual basis. We have long stated that a trial court is accorded discretion in deciding to accept a guilty plea. See *State v. Clemens, supra*. However, we are aware that we have not spoken on the particular level of probable guilt for the factual basis inquiry. We are further aware that there is a range of "proof" which various courts have required. For example, some courts have held that a court does not need to be convinced beyond a reasonable doubt that the defendant is guilty, e.g., *Maes v. State*, 114 P.3d 708 (Wyo. 2005), but only that the record demonstrates the facts to support the elements of the offense, e.g., *Rhoades v. State*, 848 N.W.2d 22 (Iowa 2014), or that the factual basis must supply evidence about the elements from which the court could reasonably conclude that the defendant is guilty, e.g., *Rhoades v. State*, 675 N.E.2d 698 (Ind. 1996). However, the comment to the ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-1.6(a), commentary at 68 (3d ed. 1999), has summarized this area and stated as follows:

> The matter is left largely to the discretion of the judge, as the circumstances of the case will dictate both the degree and kind of inquiry that is necessary. This approach is consistent with the Federal Rules of Criminal Procedure and most other authorities, except for the Model Code of Pre-Arraignment Procedure, which states that there must be "reasonable cause" to believe the defendant is guilty. The purpose of this language, according to the commentary to that provision, is to assure at the taking of a guilty

plea that there is at least a factual showing sufficient to hold a defendant after a preliminary hearing.

We determine that in this case, we need not resolve the issue of the proper level of probable guilt for the factual basis inquiry because under each of the standards, the factual basis was not sufficient and the Court of Appeals did not err when it found that the factual basis for felony child abuse was insufficient.

We generally read the Court of Appeals' opinion as determining that although § 28-707(1) sets forth various ways in which a person might commit child abuse, the only one that was arguably supported by the facts of this case was that set forth in subsection (1)(a), which provides that one commits child abuse if he or she causes or permits a minor child to be "[p]laced in a situation that endangers his or her life or physical or mental health." The Court of Appeals determined that there was no evidence that Ettleman's child was actually placed in a situation that endangered his life or physical or mental health; instead, the evidence was that she took him to the home of a friend and that at the time they entered, it was occupied by law enforcement officers. The Court of Appeals reasoned that although Ettleman went to the home with the intention of committing an illegal act by selling prescription medication, there was no evidence of any situation at the house that in fact endangered the child's life or physical or mental health. We too recognize that Ettleman went to Tanya Brainard's house to sell prescription medication, and we do not condone Ettleman's conduct. But, we find no assertion or evidence in the record that the child was endangered when Ettleman embarked upon or drove to Brainard's house or upon entering the house.

On further review, the State challenges the completeness of the Court of Appeals' review of the record, in particular, its consideration of the presentence investigation report. It disputes the Court of Appeals' characterization of certain aspects of the record. The State highlights information from

an investigative report prepared by Christian Frerichs, a law enforcement officer involved in Ettleman's arrest. Frerichs' report was included in the presentence investigation report. Frerichs' report indicates that he and other officers executed a search warrant at Brainard's house, during which they gained access to Brainard's cell phone. Frerichs discovered text message conversations with Ettleman which indicated that Ettleman had previously sold prescription medication to Brainard and that Brainard owed Ettleman "a significant amount of money for past drug debts."

Frerichs initiated a text messaging conversation with Ettleman using Brainard's cell phone and posing as Brainard. Frerichs sent Ettleman texts indicating that Ettleman could collect some of the amounts that were due if she brought additional pills to Brainard's house. Ettleman texted in reply that Brainard owed her $430, and Frerichs, posing as Brainard, said that Ettleman could collect approximately $300 of that amount because "a buyer [was] coming to town shortly and . . . they would have cash in hand." After discussing quantities and price, Ettleman offered to bring approximately 40 pills to Brainard's house.

Ettleman arrived at Brainard's house and, after texting Brainard (Frerichs) to announce her arrival, Ettleman "walked into Brainard's residence along with her 11 year old son." Ettleman was met by two officers. Ettleman asked where Brainard was, and after she was told that Brainard was not there, Ettleman returned to her van to wait for Brainard's return. Frerichs asked the other officers to go speak with Ettleman; they did so, and eventually Ettleman returned with them to the residence where Frerichs told her that he—rather than Brainard—had been exchanging text messages with her.

The State points to information in Frerichs' report as factual support for Ettleman's plea to felony child abuse. The State asserts that "Ettleman knowingly took her son to a substantial drug deal to deliver 44 [pills] to a person who already owed over $400 for drugs." Brief for appellee in support of petition

for further review at 6-7. The State further asserts that "there would also be an unknown person present who ostensibly had money to pay for the drugs Ettleman was bringing." *Id*. at 7. The State contends that Ettleman should have been "highly suspect of a promise . . . that an unknown party had cash in had [sic] to pay for the drugs" and that it "should have been readily apparent that there was a substantial chance that Ettleman was being set up for a robbery." *Id.* The State further contends that "to willingly allow her son inside the house where [a robbery might] have occurred at least negligently placed him in a situation that endangered his physical health." *Id*.

[3] We note that in this case, Ettleman was charged in count III as having committed the Class IIIA felony of child abuse, which, under § 28-707(4), is required to have been committed knowingly and intentionally. She was not charged with a crime committed negligently under the criminal statutes. When the alleged abuse does not result in serious bodily injury, the abuse is committed negligently and is a Class I misdemeanor under § 28-707(3). But, contrary to the State's urging, the felony child abuse to which Ettleman pled could not be supported by a negligent act. The statute under which Ettleman was charged requires that the child actually be "[p]laced in a situation that endangers" the child. § 28-707(1)(a). Regardless of what Ettleman believed regarding the situation in Brainard's house, the situation that actually existed was composed of the fact that there were a number of law enforcement officers inside the house. It is not accurate to conclude that the child was actually endangered by the presence of law enforcement officers.

Despite the facts on the ground, the State's argument relies on inferences that Ettleman should have "known" that the person who allegedly had money to buy pills would be at Brainard's house, that she was possibly being set up for a robbery, and that the unknown person posed a threat to her and her son. It is not clear from Frerichs' report that Ettleman was told that the buyer would be at Brainard's house; the record shows

only that she was told that the buyer would be "coming to town shortly." The State's rationale is that Ettleman speculated that she was being set up for a robbery because Frerichs, posing as Brainard, texted that an unnamed person had cash to buy pills. Even if it could reasonably be inferred that Ettleman believed she was being set up for a robbery, it requires further inferences to find that she went to a house to be robbed and knowingly and intentionally brought her child to the house to place him in the middle of a robbery.

[4,5] More to the point, the information in Frerichs' report makes clear that the State's fanciful scenario depicting an unknown person who intended to rob Ettleman was not the situation that actually existed in the house into which Ettleman brought her son and, as noted, the State makes no claim that Ettleman's child was endangered during the drive to Brainard's house. In reality, as noted, the situation in the house was that there were law enforcement officers conducting an investigation. Even if one could reasonably find that the State's robbery scenario was the situation that Ettleman believed was present in Brainard's house, such evidence would at best support a conviction for the lower-graded offense of attempted child abuse to which she did not plead. Under Neb. Rev. Stat. § 28-201(1) (Reissue 2016), one commits criminal attempt if he or she "[i]ntentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be," and § 28-201(4)(d) provides that criminal attempt is a Class IV felony when the crime attempted is a Class III or Class IIIA felony. In *State v. Jost*, 219 Neb. 162, 169, 361 N.W.2d 526, 531 (1985), this court reasoned that requiring a factual basis "[e]nsures that a defendant actually committed an offense at least as serious as the one to which he is willing to plead guilty."

The State appears to argue that a factual basis exists for either attempted felony child abuse based on circumstances Ettleman believed to be present or misdemeanor child abuse based on negligent action on Ettleman's part. But the charge

to which Ettleman pled was Class IIIA felony child abuse, a conviction which required that she knowingly and intentionally caused or permitted the child to be placed in a situation that endangered his life or physical or mental health. Nothing in the record indicates that such a situation actually existed in the house into which Ettleman brought the child, and because in reality there was no such evidence, a fortiori, there was no evidence that she knowingly and intentionally placed her child in such a situation.

As relevant to this appeal, § 28-707(1) prohibits knowingly, intentionally, or negligently causing or permitting a minor child to be placed in a situation that endangers his or her life or physical or mental health. It is certainly conceivable that one could knowingly, intentionally, or negligently endanger a child's physical or mental health by voluntarily taking the child along on a prearranged drug deal, if in fact that is the situation into which the child is being placed.

But, we agree with the Court of Appeals' conclusion that the record in this case did not provide a factual basis to support a plea to Class IIIA felony child abuse. In this case, we have a dubious factual basis and no statement from Ettleman that the factual basis is sufficient to support a conviction for the charge to which she is pleading. Our opinion today should not be read to preclude a defendant from being treated as having waived an objection to the sufficiency of the State's factual basis where the record of a plea colloquy demonstrates that the trial court specifically asked the defendant or his or her counsel whether the factual basis provided by the State is sufficient to support the plea and the defendant failed to object to its sufficiency upon inquiry by the court. We therefore conclude that the Court of Appeals did not err when it found that Ettleman's plea to felony child abuse was not supported by a factual basis.

Proper Disposition.

The State argues alternatively that in the event we conclude there was not a sufficient factual basis to support

Ettleman's plea to felony child abuse, the Court of Appeals erred in its disposition of this matter. The State specifically claims that the Court of Appeals erred when it "suggest[ed]" that Ettleman could not be subject to retrial on the felony child abuse charge. The State further argues that the Court of Appeals erred when it reversed only Ettleman's conviction for felony child abuse rather than disposing of the appeal in a manner that encompassed the entire plea agreement. We agree with the State that the disposition by the Court of Appeals was not comprehensive, and instead, we render a disposition as indicated below.

[6] We first address the State's argument that the Court of Appeals "suggest[ed]" Ettleman could not be retried on remand. We do not read the Court of Appeals' opinion as making such a suggestion. Instead, we note the Court of Appeals stated that "the State's ability to further prosecute Ettleman is a matter to be determined at the trial level before it can be considered on appeal." *State v. Ettleman*, A-17-782, 2018 WL 3902173 at *4 (Neb. App. Aug. 14, 2018) (selected for posting to court website). The Court of Appeals therefore properly left the question of the State's further action to be determined on remand. We note, however, that we know of no authority to the effect that either a trial court's erroneous acceptance of a plea or the determination by an appellate court that the factual basis was not sufficient acts as an acquittal or an event that implicates double jeopardy concerns. To the contrary, there is persuasive authority that "'[t]he Double Jeopardy Clause is not violated when a criminal defendant pleads guilty while reserving his right to appeal, prevails on appeal, and consequently must either re-plead, endure further pre-trial proceedings, or go to trial.'" *U.S. v. Rea*, 300 F.3d 952, 959 (8th Cir. 2002) (quoting *U.S. v. Martinez-Gaytan*, 213 F.3d 890 (5th Cir. 2000)). See *United States v. Scott*, 437 U.S. 82, 90-91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (stating "venerable principle[]" of double jeopardy jurisprudence that "[the] successful appeal of a judgment of conviction, on any ground other than the

insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge"). See, also, *State v. Szpyrka*, 223 Ariz. 390, 224 P.3d 206 (Ariz. App. 2010) (stating in case where factual basis underlying plea agreement became erroneous, repleading or retrial not precluded by Double Jeopardy Clause). As discussed below, the case should proceed on remand as if the district court had properly rejected Ettleman's plea to felony child abuse for lack of a factual basis, and all pending charges remained viable.

We do not appear to have previously addressed how an appellate court should remedy the situation when it determines that a plea was not valid because it was not supported by a factual basis. As discussed above, we have stated that a sufficient factual basis is a requirement for finding that a plea was understandingly and voluntarily entered and hence valid. See *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016). That is, if there was not a sufficient factual basis, the plea was not made understandingly and voluntarily and therefore the court should not have accepted the plea. It logically follows that, as the State suggests, a proper remedy on appeal would put Ettleman and the State back where they would have been if the court had properly refused the plea which lacked a sufficient factual basis. And, in this case, the State does not claim it relied on the plea to its detriment or that invalidation of the plea precludes it from obtaining a valid conviction.

[7] Putting the parties back where they would have been, as we have determined, appears to be the approach of other jurisdictions. For example, the Supreme Court of New Jersey in *State v. Campfield*, 213 N.J. 218, 232, 61 A.3d 1258, 1266 (2013), reasoned:

> The remedy for an inadequate factual basis is an order vacating the guilty plea and restoring both parties to their positions prior to the trial court's acceptance of the plea. [*State v. Barboza*, 115 N.J. 415, 558 A.2d 1303 (1989)]. If an appellate court determines that "a plea has been accepted without an adequate factual basis, the plea,

> the judgment of conviction, and the sentence must be vacated, the dismissed charges reinstated, and defendant allowed to re-plead or to proceed to trial." [*Id*. at 420, 558 A.2d at 1305].

[8] In a similar vein, the Supreme Court of Iowa in *State v. Gines*, 844 N.W.2d 437 (Iowa 2014), held that where on remand it was possible to establish a factual basis to the charges to which the defendant had entered a plea, the State should be given the opportunity to establish a factual basis. But if the State could not establish a factual basis for the specific charges to which the defendant had earlier entered a plea, then the State would not have received the benefit of its plea bargain (which agreement may have contained other features such as dismissal of other charges or refraining from seeking enhancement). The *Gines* court reasoned that "if the State cannot establish the required factual basis . . . , we must put the State back in the position it was in before making the plea agreement," which included, inter alia, "reinstat[ing] any charges or sentencing enhancements dismissed from the [operative] information in contemplation of the plea agreement." 844 N.W.2d at 442. See, also, *U.S. v. Tunning*, 69 F.3d 107, 115 (6th Cir. 1995) (describing "'two remedy' rule" under which federal appellate court either remands to allow government to establish factual basis or vacates plea and remands for defendant to plead anew).

We determine that the appropriate remedy in this case is to reverse in part the Court of Appeals' decision with directions to vacate the plea and remand the matter to the district court for further proceedings. The district court should first determine whether the State can establish a proper factual basis for Ettleman's plea to Class IIIA felony child abuse, keeping in mind our analysis herein and the analysis of the Court of Appeals in its opinion, which led to the conclusion that the record as it stands did not provide a sufficient factual basis. If the State cannot establish a factual basis for the plea that was entered, then the court should put the State and Ettleman

back in the position they were in before the court accepted the plea agreement.

Our disposition differs from that of the Court of Appeals which limited its remedy to reversal of the felony child abuse conviction and vacation of the sentence imposed for both convictions. Contrary to the disposition of the Court of Appeals, we reverse the conviction for felony child abuse and give the State an opportunity to establish a proper factual basis therefor. Failing that, we conclude that in order to put the parties back in the position prior to acceptance of the invalid plea to felony child abuse, the remedy requires not only that the conviction for felony child abuse be reversed and the sentence for both convictions vacated but also that the conviction for attempted possession of a controlled substance be reversed. Because the plea agreement was negotiated as a whole, if one part of the plea agreement was not supported by a factual basis and should not have been accepted, then the entire integrated plea should not have been accepted. And, as noted earlier, in this case, the court imposed a single sentence of probation for both counts which further suggests that the pleas could reasonably be viewed as parts of one agreement.

Upon remand, if the State cannot establish a factual basis for felony child abuse, Ettleman's pleas to both counts should be vacated and the parties allowed to either negotiate a new plea agreement or proceed to trial on the charges in the operative information prior to the agreement that resulted in Ettleman's pleas. Allowing the parties to proceed in such manner permits reinstatement of the charges set forth in the operative information, including charges that were dismissed or downgraded as part of the plea agreement. See, *State v. Gines*, 844 N.W.2d 437 (Iowa 2014); *State v. Campfield*, 213 N.J. 218, 61 A.3d 1258 (2013).

CONCLUSION

We affirm the Court of Appeals' decision to the extent it determined that the factual basis for felony child abuse

was not sufficient and reversed that conviction. However, we reverse the remainder of the decision of the Court of Appeals. We remand the matter to the Court of Appeals with directions to reverse both convictions, vacate the sentence, and remand the matter to the district court with instructions to afford the State the opportunity to provide a sufficient factual basis to support the validity of a plea to felony child abuse and, failing that, restore the parties to the position they were in before making the plea agreement, including reinstating the charges in the operative information.

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

Freudenberg, J., dissenting.

I respectfully dissent from the majority's conclusion that the district court abused its discretion when it found a sufficient factual basis existed to support the appellant's no contest plea to the offense of child abuse pursuant to Neb. Rev. Stat. § 28-707(1) (Reissue 2016). It is my opinion that the factual basis provided by the State prior to the appellant's voluntarily entering her no contest plea provided sufficient information to reasonably establish that the alleged crime had occurred. See § 28-707(1).

As stated in the majority opinion, the relevant portion of § 28-707(1) states: "A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) Placed in a situation that endangers his or her life or physical or mental health." The factual basis provided to the district court reasonably established that the appellant knowingly caused or permitted her 11-year-old son to be placed in a situation that endangered his mental health.

To fairly apply an abuse of discretion standard to the district court's ruling, a liberal reading of the provided factual basis should occur. See, generally, 1A Charles Alan Wright & Andrew D. Leipold, Federal Practice and Procedure § 179 (3d ed. 2008 & Supp. 2019) (indicating that federal courts

have broad discretion in making factual basis decision). The information provided by the State and not timely contested by the appellant clearly shows that the appellant had, on several previous occasions, illegally distributed prescription narcotics to Tanya Brainard and was owed money by Brainard for those transactions. After incurring such debt, Brainard provided law enforcement information regarding the appellant's distribution activities. Law enforcement, posing as Brainard, then contacted the appellant. The appellant agreed to provide prescription narcotics to Brainard for a drug transaction on that same day involving an undisclosed third party. The appellant gathered the narcotics and her 11-year-old son and placed both in her vehicle for transport to Brainard's residence.

The fact that the appellant knowingly and intentionally placed her son in the vehicle to accompany her in the commission of a felony drug transaction is sufficient to establish she had "endanger[ed]" his mental health under § 28-707(1). Black's Law Dictionary defines "endangerment" as: "The act or an instance of putting someone or something in danger; exposure to peril or harm." Black's Law Dictionary 644 (10th ed. 2014). Under this definition and the standard set forth by Nebraska law, actual harm is not required to occur under an endangerment standard—merely the exposure to potential harm is sufficient. Under such standard, the district court clearly did not abuse its discretion by finding that a factual basis existed to support the entry of the appellant's no contest plea. For this reason, I dissent.

While I dissent in the majority's decision regarding the existence of a sufficient factual basis, I fully agree with the remainder of the majority opinion. I specifically address the procedural tactic utilized by the appellant in this matter.

The parties informed the district court that a plea agreement had been reached. As part of the plea hearing, the State provided a factual basis. When the district court inquired as to the appellant's opinion regarding the sufficiency of the factual basis, the appellant raised no challenge and her attorney

simply stated that he "[w]ould address those at sentencing . . . ." After this exchange, the appellant, with no further comment from her or her attorney, entered a no contest plea to the amended charges. If the appellant had concerns or issues with the sufficiency of the factual basis provided, she was not required to enter a no contest plea to felony child abuse at that time. She had a right to a trial and to fully contest the charge.

The approach taken by the appellant should be disfavored by this court, and such approach has been addressed in the majority opinion. It is clear that the record from the plea hearing does not contain a statement from the appellant affirming the sufficiency of the factual basis provided by the State. The absence of such acknowledgment has allowed the appellant to raise this subsequent challenge. However, as suggested by the majority, an expansion of the trial court's plea colloquy to include an inquiry regarding the sufficiency of the factual basis would directly address such issue. An affirmative response from a criminal defendant would, in most circumstances, act as a waiver of a later sufficiency challenge. Any response short of an affirmative response places the trial court on notice that further inquiry is warranted and, depending on the results, may ultimately require the trial court to reject the proffered plea. I believe such clarification will adequately address future attempts of gamesmanship similar to that utilized during the appellant's plea hearing.

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

Marissa Renee Blank, appellant, v. Caleb Robert Blank, appellee.

930 N.W.2d 523

Filed July 12, 2019. No. S-18-751.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Evidence: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Due Process.** Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.
5. **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.
6. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
7. **Child Custody.** The factual inquiry for awarding joint custody is substantially different from that for an award of sole custody.

8. ____. When a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.
9. ____. 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.
10. ____. A trial court's decision to award joint legal or physical custody can be made without parental agreement or consent so long as it is in the child's best interests.
11. ____. The best interests of the child are the primary consideration for developing custodial plans.
12. ____. In considering a child's best interests in the development of custodial plans, it is a common occurrence and a court is permitted to supply a party with final decisionmaking authority in some areas to avoid future impasses which could negatively affect the child while maintaining both parents' rights to consultation and participation in important decisions.

Appeal from the District Court for Phelps County: Terri S. Harder, Judge. Affirmed.

Jeffrey P. Ensz, of Lieske, Lieske & Ensz, P.C., L.L.O., for appellant.

John D. Icenogle, of Bruner Frank, L.L.C., for appellee.

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

Funke, J.

Marissa Renee Blank appeals the district court's decree of dissolution dissolving her marriage to Caleb Robert Blank and awarding joint legal and physical custody of the parties' two minor children. On appeal, Marissa claims the court erred in awarding joint custody without advance notice when neither

party made such request. Marissa also claims the court erred in determining that the case did not involve domestic abuse and in not making the statutorily required additional findings. Finally, Marissa claims the court abused its discretion in determining joint custody was in the children's best interests. For the reasons set forth herein, we affirm.

BACKGROUND

Marissa and Caleb were married on May 19, 2011. The parties have two minor children: a daughter, who was born in 2011, and a son, who was born in 2014.

Marissa filed a complaint for dissolution of marriage in February 2017. In the complaint, Marissa stated, "I am and my spouse is able to provide support for the child(ren)" and asked that the court "[a]ward [j]oint legal custody of the children of this marriage." Caleb signed a voluntary appearance acknowledging receipt of a copy of the complaint.

At the same time the complaint was filed, Marissa offered a proposed parent-created parenting plan which was signed by both parties. This proposed plan outlined that Marissa would have legal custody in that she "shall have the legal responsibility and authority to make final decisions concerning the parenting functions necessary to raising the child(ren)." The proposed plan additionally listed Marissa's residence as the principal place of residence subject to the terms of the plan. As to parenting time and holidays, the proposed plan detailed that the parties' work schedules would dictate the parenting times and indicated that the parties would be able to work together to minimize either party's paying for daycare. No order adopting this plan was entered by the district court.

Caleb filed another proposed parenting plan signed by both parties on May 11, 2017. This proposed plan established that the "parties shall share joint legal and physical custody of the minor children and as such, shall maintain the legal responsibility and authority to make final decisions concerning the parenting functions necessary for raising the minor children."

The proposed plan explained that the children's principal residences would be with both Marissa and Caleb and outlined a parenting time schedule for Caleb. This plan also contained references to the parties' ability to coordinate adjustments to the schedule and discuss parenting decisions with each other. Again, no order adopting the plan was entered by the district court.

On May 23, 2017, Caleb filed a motion for temporary orders seeking "joint temporary legal and physical care, custody[,] and control" of the children. Following a hearing on the motion, the court entered a "Temporary Order/Parenting Plan." That order awarded temporary legal and physical custody to Marissa and declared that each parent have full and equal access to the children's education and medical records and the authority to make emergency decisions affecting the health or safety of the children. The order further provided a parenting plan with continuous and easy telephone access and midweek, every-other-weekend, and alternating-holiday parenting time.

A trial was held on the complaint in June 2018 on the remaining issues to be decided, including "custody of the parties' two minor children, parenting time, and financial issues concerning the children."

Marissa testified as to the care of the children. She opined that throughout the children's lives, she was the primary caretaker. She explained that she took 2 months off work to stay home after their daughter was born, that she worked only part time after returning to the work force, and that she would split her work shifts in order to go home to breastfeed because their daughter "wouldn't take a bottle." Marissa further explained that she was primarily the one to take the children to events and activities. Marissa testified that Caleb would take care of the children when she was working and he was off but that when both parents where available to care for the children, the responsibilities fell solely on her. Marissa also testified that following the temporary order, the children were performing

well, and that the schedule is very structured for their benefit. Marissa testified about the parties' working relationship and agreed they have made accommodations for each other with regard to the children's care. Marissa further testified that following the temporary order, the parties were able to communicate and work together civilly. Marissa testified that both she and Caleb have new relationships and, with those parties, new houses in which the children stay.

Marissa asserted that she was the primary parent to take the children to the doctor when they were sick and that the parties agreed not to vaccinate the children. However, Marissa did admit Caleb was the one who took the children to the doctor for chicken pox and lice following the temporary order.

Caleb testified that the parties shared the childcare responsibilities equally when both parents were home. However, Caleb explained that because he works more, Marissa would watch the children more when he was not home. Caleb explained that when Marissa was working, he would make supper, prepare baths, and put the children to bed. Caleb also testified that while he initially agreed not to vaccinate the children, he would now seek to have them vaccinated if given legal custody.

Caleb admitted that he had punched a couple of holes in a basement wall within 2 or 3 years prior to trial while the children were upstairs in the home. Caleb explained, "An argument, I honestly do not recall what it was about, escalated; and I just — I got really angry. So I walked away. I went into the basement of the marital home, and I punched the wall." Caleb also admitted that he had "open hand smacked" Marissa at one point due to a disagreement which occurred "so far in the past." Marissa agreed on rebuttal to her attorney's questioning that Caleb "slapped you at some point in the relationship." However, Caleb also testified that while Marissa was watching their son, she kicked a hole in a door out of frustration, and testimony was received that Marissa is more physical with the children than Caleb.

Marissa requested that the court grant her sole custody and testified that she did not believe a shared custody arrangement was in the children's best interests. Specifically, Marissa responded as follows to questioning on direct examination:

> Q [by Marissa's counsel:] There was some talk — well, maybe not. Rather do you believe that a shared custody arrangement where you split time would be in the children's best interest?
>
> A [by Marissa:] No.
>
> Q Why do you feel that way?
>
> A I feel that way because Caleb rushed into a new relationship, not only a new relationship but a new relationship where she had kids as well. And I don't feel that his relationship with the kids was a strong enough bond for them not to worry if he's still going to love them.
>
> . . . .
>
> Q Do you believe there's any question as to who the primary caretaker was during your marriage between you and Caleb?
>
> . . . .
>
> A No.
>
> Q Who was the primary caretaker?
>
> A It was me.
>
> Q Do you believe — is that part of your reason why you believe that a shared custody arrangement would not be appropriate?
>
> A Yes.

In response to questioning on cross-examination about her concerns "about joint custody" because Caleb had "rushed into a . . . relationship," Marissa agreed that she began her new relationship and moved in with her significant other before Caleb's new relationship. Counsel for Marissa argued during closing argument that this case is not appropriate for joint custody or a shared custody arrangement, "as clearly there's enough conflict in here that that could create a problem

for the children" and cause a "significant upheaval" of the children's current structure, which was working.

Caleb, in turn, requested that the court award him full custody. Alternatively, Caleb asked for an award of joint custody, responding as follows on direct examination:

> Q [by Caleb's counsel:] And if the Court doesn't grant you sole legal and physical custody, are you asking the Court to award you joint?
>
> A Yes.
>
> Q Are you willing to coparent with [Marissa]?
>
> A Yes.
>
> Q And how would you go about doing that?
>
> A Communication, open mindedness. I understand and respect that she is their mother, and they will always love her as they will always love me. And I will do my best to foster a positive relationship with their mother as I feel is needed for them.
>
> . . . .
>
> Q . . . Do you believe that joint custody is a viable option?
>
> A It could be.
>
> Q Are you willing to work for it?
>
> A Yes.
>
> . . . .
>
> Q Do you believe that it's in the children's best interest that joint legal custody be granted?
>
> A Yes.

Counsel for Caleb also addressed joint custody during closing arguments, asserting, "[I]t's [not] good public policy to throw out joint custody simply because [Marissa] doesn't want to put in any effort to do it" and "We've heard a lot of testimony from [Caleb] who says he's been more than willing to attempt to coparent as a joint family."

Following trial, the court entered a decree dissolving the marriage and awarding the parties joint legal and physical custody of the children. Additionally, the decree ordered that, in

the event of impasses after discussion of major issues, Caleb "shall make the decision with respect to issues of health and religion" and Marissa "shall make the decision on education." The court specifically found this was not a domestic abuse case as defined in Nebraska's Parenting Act, that the parties have the ability to coparent and make contributions to the children, and that joint custody is in the children's best interests. The court again declared that each parent have full and equal access to the children's education and medical records and the authority to make emergency decisions affecting the health or safety of the children. In an attached parenting plan, the court instructed that the parties share parenting time on a week-on-week-off basis with assigned midweek and holiday parenting times for the parent who does not have the children at that time.

ASSIGNMENTS OF ERROR

Marissa assigns, restated, that the district court erred in (1) awarding joint physical custody without advanced notice when neither party made such request, (2) not finding this to be a domestic abuse case and failing to make the statutorily required additional findings in awarding joint physical custody, and (3) abusing its discretion in determining joint physical custody was in the children's best interests.

STANDARD OF REVIEW

[1-3] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[1] A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted

[1] *Erin W. v. Charissa W.*, 297 Neb. 143, 897 N.W.2d 858 (2017).

for disposition.[2] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[3]

ANALYSIS

Notice of Joint Custody Consideration

Neb. Rev. Stat. § 42-364(1)(b) (Reissue 2016) requires a court to determine physical custody based upon the best interests of a child and such determination shall be made by incorporating (i) a parenting plan developed by the parties, if approved by the court, or (ii) a parenting plan developed by the court based upon evidence produced after a hearing in open court if no parenting plan is developed by the parties and approved by the court. Section 42-364(3) allows for a joint physical custody award if (a) both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) 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.

Marissa contends that the district court erred in awarding joint physical custody because neither party made such a request prior to trial and the court did not provide notice of its consideration. In arguing the parties lacked notice and an opportunity to be heard on the issue of joint physical custody, Marissa cites *Hill v. Hill*,[4] a Nebraska Court of Appeals case utilizing our opinion in *Zahl v. Zahl*.[5]

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[2] *Whitesides v. Whitesides*, 290 Neb. 116, 858 N.W.2d 858 (2015).

[3] *Erin W., supra* note 1.

[4] *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013).

[5] *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[4-6] Both *Zahl* and *Hill* evaluated the notice requirement under a due process analysis. Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.[6] 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.[7] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[8]

[7,8] The parties in *Zahl* both sought sole custody of their child. However, after a general custody hearing in which the parties only presented evidence on why he or she would be the best sole custodian, the trial court awarded joint legal and physical custody.[9] No reference to joint custody was made during or prior to the hearing absent the mother's testimony at the end of the hearing that she would be willing to cooperate if joint custody was imposed.[10] In reversing the trial court's decision, we explained that the factual inquiry for awarding joint custody is substantially different from that for an award of sole custody.[11] As such and because neither party requested it, the parties were not put on notice that joint custody was in issue and the parties were entitled to a new hearing with such notice.[12] We held that when a trial court determines at a general custody hearing that joint physical custody is, or may be, in a

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[6] *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

[7] *Id.*

[8] *Id.*

[9] *Zahl, supra* note 5.

[10] *Id.*

[11] See *id.*

[12] *Id.*

child's best interests, but neither party requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.[13]

Similarly, in *Hill*, both parties requested sole custody, neither party requested joint physical custody prior to trial, and both parties presented evidence on their requests for sole custody.[14] The only evidence presented on joint custody was testimony from the father that, while he wanted sole custody, he was willing to perform under a joint custody arrangement if ordered.[15] Nevertheless, the trial court awarded joint physical custody.[16] Utilizing our holding in *Zahl*, the Court of Appeals reversed the trial court's decision, concluding the trial court had abused its discretion in not giving the parties an opportunity to present evidence on the issue before imposing joint physical custody.[17]

The instant case is distinguishable from the facts of *Zahl* and *Hill*. Unlike the parties in those cases, Marissa and Caleb had notice prior to trial that joint custody was at issue. In the complaint, Marissa asked for "[j]oint legal custody," did not request a specific physical custody arrangement, and provided that both parents were capable of providing support for the children and were fit and proper people to have care, custody, and control of the children. In his May 11, 2017, proposed parenting plan which was signed by Marissa, Caleb requested that the "parties . . . share joint legal and physical custody of the minor children." This plan proposed designating both Marissa's and Caleb's homes as the children's principal residences and contained references to the parties' ability to coordinate adjustments to the schedule and discuss parenting decisions with

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[13] See *id*.

[14] *Hill, supra* note 4.

[15] *Id.*

[16] *Id.*

[17] *Id.*

each other. Finally, in his May 23 motion for temporary orders, Caleb again sought joint legal and physical care, custody, and control of the children. Accordingly, these filings provided Marissa and Caleb reasonable notice unlike the complete lack of prior notice in *Zahl* and *Hill*.

Moreover, it is clear from the record that Marissa understood joint physical custody was at issue during the trial. As the first witness, Marissa responded to direct examination from her counsel questioning whether she believed "a shared custody arrangement where [she would] split time" with Caleb was in the children's best interests. Testifying she did not believe such shared custody was appropriate, Marissa explained the reasons why she did not support joint custody, namely her opinion that Caleb rushed into a new relationship with another person with children and her belief that she was the primary caretaker of the children while they were married. In closing arguments, Marissa's counsel again addressed the question of joint physical custody, arguing this case is not appropriate for joint custody or a shared custody arrangement "as clearly there's enough conflict in here that that could create a problem for the children" and cause a "significant upheaval" of the children's current structure, which was working.

Considering all of the above, Marissa had reasonable notice that joint custody was at issue during the trial, had an opportunity to be heard on the issue of joint custody during the trial, and presented evidence on the issue of joint custody during the trial. As such, the district court did not err in considering joint physical custody.

Domestic Abuse Determination

Marissa argues awarding joint physical custody constituted an abuse of discretion because Caleb testified that he "open hand smacked" Marissa once during the parties' marriage and punched holes in the basement walls. Marissa argues this testimony established Caleb committed domestic intimate partner abuse against her. However, the district court determined

this was not a domestic abuse case as defined by Nebraska's Parenting Act. As such, the court made no additional findings pursuant to Neb. Rev. Stat. § 43-2932(3) (Reissue 2016).

Nebraska's Parenting Act establishes certain requirements for the development of a parenting plan in cases where a parent is found to have committed child abuse or neglect, child abandonment, or domestic intimate partner abuse or to have interfered with the other parent's access to the child.[18] Section 43-2932(3) explains the additional requirements if a court determines a parent committed domestic abuse, stating:

> If a parent is found to have engaged in any activity specified in subsection (1) of this section, the court shall not order legal or physical custody to be given to that parent without making special written findings that the child and other parent can be adequately protected from harm by such limits as it may impose under such subsection. The parent found to have engaged in the behavior specified in subsection (1) of this section has the burden of proving that legal or physical custody, parenting time, visitation, or other access to that parent will not endanger the child or the other parent.

Under Neb. Rev. Stat. § 43-2922(8) (Reissue 2016), "[d]omestic intimate partner abuse" means an act of abuse as defined in Neb. Rev. Stat. § 42-903 (Reissue 2016) and a pattern or history of abuse evidenced by one or more of the following acts:

> Physical or sexual assault, threats of physical assault or sexual assault, stalking, harassment, mental cruelty, emotional abuse, intimidation, isolation, economic abuse, or coercion against any current or past intimate partner, or an abuser using a child to establish or maintain power and control over any current or past intimate partner, and, when they contribute to the coercion or intimidation of an intimate partner, acts of child abuse or neglect or

[18] § 43-2932.

> threats of such acts, cruel mistreatment or cruel neglect of an animal as defined in section 28-1008, or threats of such acts, and other acts of abuse, assault, or harassment, or threats of such acts against other family or household members.

The first sentence of § 43-2922(8) directs us to § 42-903(1)(a) to determine if domestic abuse occurred. Section 42-903(1)(a) defines "[a]buse" as "[a]ttempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument" to a family or household member. Spouses and former spouses are considered household members.[19]

Returning to § 43-2922(8), we must examine the remainder of the factors which would require the making of special written findings. After identifying an act of abuse per § 42-903(1)(a), the rest of § 43-2922 is puzzling. The language indicates that the act of abuse previously identified must be coupled with a "pattern" or "history," suggesting that before the factual findings are required, the Legislature wanted more than one act of abuse.[20] In contrast, § 43-2922 also states "one" act, suggesting perhaps a single act of abuse would trigger the requirement for specific factual findings. There are further interpretations not posited here.

Because of the word "and" before "pattern" or "history," we believe the most logical reading of § 43-2922 is that there must be more than one act of abuse. However, if the Legislature intended that one act be sufficient, it can revise the statutory language.

However, we need not resolve the tension here to determine there was a failure of proof before the trial court. In this case, no evidence was received that Caleb's actions caused or were intended to cause bodily injury or placed Marissa in fear of such injury and the record does not demonstrate a pattern or history of similar acts.

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[19] See § 42-903(3).

[20] See § 43-2922(8).

As to the slapping incident, Caleb testified that he "open hand smacked" Marissa at one point during their relationship due to a disagreement which occurred "so far in the past." He did not recall any other surrounding circumstances and provided no testimony on the cause, effect, or intent of the action. While Marissa answered "Yes" to questioning as to whether Caleb "slapped [her] at some point during the relationship," she offered no other testimony or evidence on the incident.

Though we agree that an "open hand smack[]" may intend, cause, or place someone in fear of the requisite bodily injury, we have no evidence that such was the case here. There is no testimony on the severity, effect, or surrounding circumstances on which we can rely to determine the intention or result of the action. No evidence was adduced as to any redness, bruising, swelling, or other injury sustained. Marissa never contended that Caleb placed her in fear of bodily injury or in fear for her or the children's safety.

In addition, there is no testimony of a pattern or history of similar actions. An appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[21] Without more, we cannot say the district court erred in its determination that the testimony on the "open hand smack[]" did not amount to domestic intimate partner abuse.

The record is similarly void of details as to the circumstances surrounding Caleb's punching holes in the basement wall. Caleb testified that he punched these holes 2 or 3 years prior to trial, explaining, "An argument, I honestly do not recall what it was about, escalated; and I just — I got really angry. So I walked away. I went into the basement of the marital home, and I punched the wall." Although Caleb testified the children were in the house, he explained they were not with him when he punched the wall. No other testimony

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[21] See *Erin W., supra* note 1.

or evidence was received on when this occurred, the context of the argument, if anyone else was in the basement, how long after the argument took place Caleb punched the wall, whether Caleb had a history of similar acts, or any other information that would inform whether Caleb intentionally placed Marissa in fear of bodily injury. Again, on the record before us, we cannot say the district court erred in its determination that the testimony on Caleb's punching holes in the basement wall did not amount to domestic intimate partner abuse.

Sufficiency of Evidence

Marissa assigns the court abused its discretion in awarding joint physical custody, arguing the evidence presented at trial did not justify such an award. Specifically, Marissa claims the evidence demonstrated the parties' relationship was "replete with conflict."[22]

[9] Marissa is correct 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.[23] However, we have also noted that § 42-364(3)(b) specifically provides that a court may order joint custody "if 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."[24] 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

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[22] Brief for appellant at 12.

[23] See *Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017).

[24] Accord *Leners v. Leners*, 302 Neb. 904, 925 N.W.2d 704 (2019).

continued to have difficulty communicating and cooperating with one another.[25]

In this case, there was sufficient evidence to support the court's determination that joint custody was in the children's best interests. Marissa and Caleb testified that both parties watched and cared for the children during the parties' relationship. Both parties explained that they have been communicating and working together civilly while the temporary custody order has been in place and have each made accommodations for the other with regard to the children's care. Marissa and Caleb detailed that when the children got chicken pox and lice during the pendency of these proceedings, Marissa communicated the issues to Caleb, Caleb took them to treatment, and Marissa and Caleb communicated about the implementation of the treatment. There was testimony concerning the parties' decision not to vaccinate the children and Caleb's openness to do so in the future, but nothing in the record or decree demonstrates that the court relied on this testimony in making its physical custody determination. Although Marissa testified that she did not believe joint custody was appropriate due to Caleb's new relationship and her being the children's primary caretaker, Caleb testified that joint custody would be a viable option that he would be willing to work for utilizing "[c]ommunication" and "open mindedness."

As previously stated, an appellate court reviews de novo on the record the trial court's determinations of custody; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[26] Taking into account that the trial judge heard and observed the witnesses and the evidence presented[27] on the parties' relationships with their children, ability

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[25] See *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

[26] *Erin W., supra* note 1.

[27] See *id*.

to parent, communication, and history of working together for the children's care, the district court did not err in determining that joint custody was in the children's best interests.

Division of Decisionmaking Authority

Marissa makes an additional argument in her brief that the court's division of final decisionmaking authority, which awarded Marissa final authority over education issues and Caleb final authority over health and religion issues, is "entirely counter to the law regarding joint custody."[28] Marissa makes no specific argument on why such division is improper, and her assignments of error challenge only the court's award of joint physical custody. Nevertheless, the court acted within its authority in dividing the final decisionmaking duties between the parties.

[10] "Joint legal custody" is the mutual authority and responsibility of the parents for making mutual fundamental decisions regarding the child's welfare, including choices regarding education and health.[29] A trial court's decision to award joint legal or physical custody can be made without parental agreement or consent so long as it is in the child's best interests.[30]

[11,12] The best interests of the child are the primary consideration for developing custodial plans. In considering such best interests, it is a common occurrence and a court is permitted to supply a party with final decisionmaking authority in some areas to avoid future impasses which could negatively affect the child while maintaining both parents' rights to consultation and participation in important decisions.[31] Such grants of

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[28] Brief for appellant at 12.

[29] § 43-2922(11).

[30] § 42-364(3).

[31] See, e.g., *Boyer v. Boyer*, 24 Neb. App. 434, 889 N.W.2d 832 (2017); *State on behalf of Maddox S. v. Matthew E.*, 23 Neb. App. 500, 873 N.W.2d 208 (2016).

final decisionmaking authority were made in this case, and we find no violation of the court's discretion to do so.

CONCLUSION

The parties had sufficient notice and opportunity to be heard on the issue of joint physical custody, and the record fails to establish by a preponderance of the evidence that this is a domestic abuse case requiring additional findings under § 43-2932(3). As such, and because there was sufficient evidence to support the court's finding that joint physical custody is in the children's best interests, the district court did not err in awarding joint physical custody. Accordingly, we affirm.

Affirmed.

Miller-Lerman, J., concurring.

I concur with the majority reading of Neb. Rev. Stat. § 43-2922 (Reissue 2016) to the effect that before special findings under § 43-2922 are required, the evidence must show an act of abuse as defined in Neb. Rev. Stat. § 42-903 (Reissue 2016) and, in addition (per § 43-2922), a pattern or history of abuse.

The majority concludes that there was not sufficient evidence to find an act of abuse under § 42-903 on this record. I disagree.

Section 42-903(1)(a) defines "[a]buse" as, inter alia, "[a]ttempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument" to a family or household member.

On this record, both parties agree that during a "[d]isagreement," Caleb "slapped" or "open hand smacked" Marissa.

I believe these undisputed facts show that Caleb was "[a]ttempting to cause . . . bodily injury," § 42-903(1)(a), and therefore, that "an act of abuse" for purposes of § 43-2922 was shown. However, because there was no "pattern" or "history" as those terms are used in the text of § 43-2922, I agree with

the majority that the court was not required to make special findings under § 43-2922.

Papik, J., concurring.

I agree with the court's determination that the district court was not required to make special written findings under Neb. Rev. Stat. § 43-2932 (Reissue 2016) because the record did not show that Caleb committed domestic intimate partner abuse. While the court reaches that conclusion by finding a lack of evidence that a slap caused bodily injury or was an attempt to cause bodily injury, I write separately to note that I would reach the same conclusion via a different route.

As the court points out, domestic intimate partner abuse is defined by Neb. Rev. Stat. § 43-2922(8) (Reissue 2016) as follows:

> [A]n act of abuse as defined in section 42-903 and a pattern or history of abuse evidenced by one or more of the following acts: Physical or sexual assault, threats of physical assault or sexual assault, stalking, harassment, mental cruelty, emotional abuse, intimidation, isolation, economic abuse, or coercion against any current or past intimate partner, or an abuser using a child to establish or maintain power and control over any current or past intimate partner, and, when they contribute to the coercion or intimidation of an intimate partner, acts of child abuse or neglect or threats of such acts, cruel mistreatment or cruel neglect of an animal as defined in section 28-1008, or threats of such acts, and other acts of abuse, assault, or harassment, or threats of such acts against other family or household members.

The court suggests that a single act of abuse under Neb. Rev. Stat. § 42-903 (Reissue 2016) might qualify as domestic intimate partner abuse under one possible interpretation of this definition. While the court does acknowledge that this is not the most logical reading, I would go further and hold that the text cannot be interpreted in this way.

The definition of domestic intimate partner abuse has two elements separated by the word "and." § 43-2922(8). The first element is an act of abuse under § 42-903. The second element is a "pattern or history of abuse." § 43-2922(8). The statute goes on to provide that the second element, the pattern or history of abuse, must be evidenced by "one or more" of a number of enumerated acts, some of which again include the word "abuse." *Id.* If, however, a single instance of abuse could count as the act of abuse for the first element and establish the requisite pattern or history, the pattern or history element of the statute would serve no purpose. This runs counter to our practice of giving effect to all parts of a statute and rejecting interpretations that would render parts of the statute superfluous. See *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018).

I can see only one way that this statute could be interpreted to allow for a single instance of abuse to satisfy the definition: to give the word "and" separating the two elements of the definition discussed above a disjunctive rather than conjunctive meaning. See § 43-2922(8). We do have some precedent for departing from the ordinary, grammatical meaning of "and" and "or" in some cases. We have said that we may do so where "a strict reading would lead to an absurd or unreasonable result and defeat the intent of the statute." See, e.g., *Hoiengs v. County of Adams*, 245 Neb. 877, 900-01, 516 N.W.2d 223, 240 (1994).

I have some questions about how judges are to go about determining that a particular policy result is absurd or unreasonable given that it is the Legislature's function to declare public policy rather than ours. See, e.g., *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018). See, also, John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387 (2003). It seems to me that this practice can be squared with the judiciary's role in a system of separated powers only if it is limited to instances in which the result of applying the grammatical meaning of the text is so bizarre that the Legislature

could not possibly have intended it. See Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 237-38 (2012).

I cannot say that the result reached by interpreting this statute to mean what it says meets this test. While there are undoubtedly policy arguments for imposing the additional parenting plan requirements of § 43-2932 even when there has been a single act of abuse, it is not unthinkable that the Legislature would require both an act of abuse and a pattern or history before imposing these requirements. Drawing the precise line at which these requirements apply strikes me as a matter of legislative judgment, which is subject to reconsideration not by this court, but, if it so chooses, by the Legislature.

Because I do not understand the requirements of § 43-2932 to be triggered by a single act of abuse, I do not believe the statute applied in this case. There was evidence that Caleb slapped Marissa, but Marissa has not shown us additional evidence sufficient to demonstrate a pattern or history. I would affirm the decision of the district court on this basis.

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

Foundation One Bank, a banking corporation, appellant, v. Jason Svoboda, an individual, et al., appellees, and Lehr, Inc., intervenor-appellee.

931 N.W.2d 431

Filed July 12, 2019. No. S-18-784.

1. **Judgments: Pleadings.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.
2. **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.
3. **Jury Instructions: Appeal and Error.** Where jury instructions are claimed deficient on appeal and such issue was not raised at trial, an appellate court reviews for plain error.
4. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Directed Verdict: Appeal and Error.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
6. **Rules of the Supreme Court: Pleadings: Moot Question.** A denial of a motion for judgment on the pleadings under Neb. Ct. R. Pldg. § 6-1112(c) is generally moot on appeal after the case has been tried on the merits.

7. **Fraud: Proof.** A proper fraudulent misrepresentation claim requires a party to prove that (1) a representation was made; (2) the representation was false; (3) when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely on it; and (6) the plaintiff suffered damage as a result.
8. **Directed Verdict.** In a motion for directed verdict, the moving party admits the truth of all well-pleaded facts, together with all reasonable inferences to be drawn therefrom.
9. **Replevin: Damages.** In a replevin case, when a defendant or intervenor is found to have ownership and right of possession of property, the replevin statutes necessarily place the issue of damages at issue.

Appeal from the District Court for Platte County: Robert R. Steinke, Judge. Affirmed.

Aaron F. Smeall and Jacob A. Acers, of Smith, Slusky, Pohren & Rogers, L.L.P., for appellant.

Brian J. Brislen, Eric W. Tiritilli, and Karson S. Kampfe, of Lamson, Dugan & Murray, L.L.P., for intervenor-appellee.

No appearance for appellees.

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

Miller-Lerman, J.

I. NATURE OF CASE

The plaintiff, Foundation One Bank (Foundation One), appeals from the judgment entered by the district court for Platte County upon the verdict of the jury in favor of defendant-intervenor, Lehr, Inc. Foundation One sought replevin of two motor vehicles pledged by Jason Svoboda as collateral to secure payment of a loan. Lehr intervened in the case and sought possession of the motor vehicles. The jury determined that Lehr was entitled to possession of two disputed motor vehicles, and because Foundation One had

sold one of the vehicles for $95,000, the jury awarded Lehr $95,000. Foundation One claims that the district court erred in several respects in connection with its jury instructions and when it denied Foundation One's motions for judgment on the pleadings and for a directed verdict. We affirm and, in so doing, reiterate that in a replevin case, a defendant or intervenor's general denial and assertion of ownership necessarily place the questions of possession, ownership, and damages before the jury under Neb. Rev. Stat. § 25-1093 et seq. (Reissue 2016).

II. STATEMENT OF FACTS

In 2016, Svoboda sought a commercial loan from Foundation One for his struggling automobile business. Svoboda had been in the automobile business before, operating as RPM Motors, Inc., an entity which had become an inactive Nebraska corporation. Svoboda claimed he needed a loan to consolidate debt from that business. On March 25, 2016, Svoboda and Foundation One executed a promissory note and commercial security agreement for a $200,000 loan. Svoboda offered various motor vehicles as collateral to secure the loan, and purported to grant Foundation One a security interest in that property, including a 2005 Mack CV 713 Truck (2005 Mack) and a 2014 Mack GU 800 Conventional Cab (2014 Mack). The present dispute between the parties concerns only the 2005 Mack and the 2014 Mack.

Svoboda provided Foundation One with a manufacturer's certificate of origin (MCO) for the 2005 Mack and a certificate of title for the 2014 Mack. The MCO for the 2005 Mack showed the original transfer from Dallas Mack Sales, L.P., to Lehr on February 24, 2005, followed by an undated transfer from RPM Motors to "RPM Motors/Jason Svoboda." Notably, the MCO contained a gap; the assignments on the MCO did not include a transfer from Lehr to RPM Motors. The title for the 2014 Mack indicated it had been purchased by Svoboda from RPM Motors on December 30, 2013.

In an attempt to protect its priority to a lien on the vehicles, and as part of the $200,000 loan between Foundation One and Svoboda individually, Foundation One paid off other liens on the disputed motor vehicles totaling $85,141.40.

Svoboda soon defaulted on the promissory note. After receiving numerous reports of fraudulent behavior, the Nebraska Motor Vehicle Industry Licensing Board closed RPM Motors in March 2016. Svoboda was ultimately convicted of title fraud for obtaining a second MCO on a vehicle and pledging both MCO's to separate banks as collateral to secure loans.

Foundation One filed a replevin action in the district court for Platte County to recover the collateral pledged as security for the loan to Svoboda. Lehr was not named among the defendants. The district court determined that Foundation One was entitled to possession of the property and entered an order of delivery.

At this point, Lehr moved to intervene, alleging that "at all relevant times herein, . . . Lehr . . . was the owner of record and in possession of: 2014 Mack and 2005 Mack." Lehr further alleged that Svoboda had fraudulently claimed title on the vehicles when he pledged them to Foundation One as collateral for the loan.

The district court permitted Lehr to intervene and partially granted its motion to reconsider the order of replevin. The district court vacated its order with regard to the 2005 Mack, but overruled Lehr's motion with regard to the 2014 Mack and other collateral. Foundation One replevied the 2014 Mack and sold it for $95,000.

Prior to trial, Foundation One filed a motion for judgment on the pleadings against all defendants. With regard to Lehr, Foundation One generally argued that Lehr could not obtain relief on its complaint in intervention, because within the body of the pleading, Lehr sought declaratory relief and the 2014 Mack had already been sold. The district court granted judgment on the pleadings regarding the original

defendants and denied the motion with regard to Lehr's complaint in intervention.

A jury trial was held in May 2018. Evidence submitted at trial showed that Lehr is a corporation owned by the Lehr family and operates a feeding and livestock business in Platte County. With respect to the 2005 Mack, on February 24, 2005, Lehr purchased the 2005 Mack from Dallas Mack Sales. Dallas Mack Sales transferred title to the 2005 Mack to Lehr through an MCO, and Lehr obtained a title to the 2005 Mack. This title was dated before the sale and issuance date of the Foundation One "title" it received from Svoboda. With respect to the 2014 Mack, on June 12, 2013, Lehr purchased the 2014 Mack from RPM Motors, the auto business formerly owned by Svoboda and for which Lance Lehr (Lance) was working at the time as a salesperson. Lehr received a title to the 2014 Mack showing RPM Motors as the seller and Lehr as the purchaser. Lance and his father testified that they never gave Svoboda the title to the 2014 Mack after they received it and did not give Svoboda any rights or interest in either the 2005 Mack or the 2014 Mack.

Lance testified that the 2005 Mack and the 2014 Mack remained in Lehr's possession on its premises and were used by the family at the feedlot every day. In particular, to feed their cattle, Lehr attached auger mixing containers, known as boxes, to the trucks' chassis.

At the close of evidence, Lehr and Foundation One each moved for a directed verdict. The court overruled both motions. No evidence was submitted thereafter.

Both Foundation One and Lehr submitted proposed jury instructions, but only one of Foundation One's requested instructions is relevant to this appeal. Foundation One requested an instruction that Lehr had the burden of proof to show Svoboda committed fraud against Lehr by pledging the vehicles. However, Lehr's position throughout the case has been that Svoboda committed fraud only against Foundation

One. The court rejected all of the proposed jury instructions and used its own instructions.

The jury determined that Lehr was entitled to possession of the two disputed motor vehicles and was entitled to damages in the amount of $95,000 as a result of Foundation One's sale of the 2014 Mack. The district court entered judgment according to the verdict.

Foundation One appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Foundation One claims, restated, that the district court erred when it rejected its proposed instruction regarding fraud, failed to instruct the jury on various issues, and failed to grant its motions for judgment on the pleadings and for a directed verdict. With regard to the jury instructions, Foundation One contends, inter alia, that the jury should have received information on (1) the weight given to a certificate of title or MCO, (2) when a party may receive an offset for damages for a special benefit conferred, (3) the burden of proof for an affirmative defense of fraud, and (4) which party must suffer the loss between two innocent victims of fraud.

IV. STANDARDS OF REVIEW

[1] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. *Denali Real Estate v. Denali Custom Builders*, 302 Neb. 984, 926 N.W.2d 610 (2019).

[2] 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).

[3,4] Where jury instructions are claimed deficient on appeal and such issue was not raised at trial, an appellate

court reviews for plain error. See *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id*.

[5] 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. *Denali Real Estate v. Denali Custom Builders, supra*.

Appellate courts independently decide questions of law. *Id*.

V. ANALYSIS

As explained below, we find no merit to Foundation One's assignments of error regarding denial of its pretrial motion for judgment on the pleadings, its four claims regarding jury instructions, and denial of its motion for a directed verdict.

1. Motion For Judgment on the Pleadings

[6] Foundation One claims that the district court erred when it denied its pretrial motion for judgment on the pleadings with respect to Lehr. A denial of a motion for judgment on the pleadings under Neb. Ct. R. Pldg. § 6-1112(c) is generally moot on appeal after the case has been tried on the merits. See *Denali Real Estate v. Denali Custom Builders, supra*. That principle applies here, and this assignment of error is without merit.

The thrust of Foundation One's argument seems to be that Lehr's mention of declaratory relief in its "Complaint in Intervention" precluded the relief of possession and damages. As we discuss below in our analysis of the denial of the directed verdict, the issues of possession and damages were

integral to the resolution of the case after Lehr intervened. See *School District v. Shoemaker*, 5 Neb. 36 (1876).

2. Jury Instructions

(a) Proposed Jury Instruction on "Affirmative Defense of Fraud"

Foundation One claims that the district court erred when it rejected its proposed jury instruction to the effect that Lehr had the burden of proof to establish that Svoboda committed a fraud on Foundation One. In this case, Lehr had no such burden and, even if it did, Foundation One's proposed instruction was an incorrect statement of the law.

As stated above, 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, supra*.

Foundation One's proposed instruction stated, inter alia, that Lehr has the burden of proving, by the greater weight of the evidence, each and all of the following:

> 1. That Svododa made the claimed representation [to Foundation One];
>
> 2. That the representation was false;
>
> 3. That the representation was made fraudulently;
>
> 4. That when Svoboda made the representation, he intended it would be relied upon;
>
> 5. That this representation substantially contributed to [Foundation One's] decision to enter into the Promissory Note and Security Agreement.

[7] This suggested instruction omits several elements necessary to the assertion of a fraudulent misrepresentation claim. A proper fraudulent misrepresentation claim requires a party to prove that (1) a representation was made; (2) the representation was false; (3) when made, the representation was known

to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely on it; and (6) the plaintiff suffered damage as a result. See *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018). With respect to element (5) above, the reliance by the plaintiff on the representation must be justifiable. *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012). Foundation One's proposed instruction omitted the elements of reasonable reliance by and damages to the plaintiff and was not a correct statement of the law.

Even if the claims alleged in the complaint in intervention or the evidence admitted at trial could have supported a fraudulent misrepresentation instruction in this case, Foundation One's proffered instruction is not a correct statement of the law. Accordingly, the district court properly rejected the fraud instruction proposed by Foundation One.

(b) Other Jury Instructions

Foundation One next claims that the district court erred by failing to instruct the jury (1) that possession of a title is prima facie evidence of ownership, (2) that the jury could consider Foundation One's payments on the vehicles' liens when it calculated damages, or (3) on the law regarding fraud perpetuated against two innocent parties. None of these instructions were requested by Foundation One. Because Foundation One raises issues regarding these instructions for the first time on appeal, we review for plain error. See *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014). We do not find plain error.

With regard to the instruction pertaining to the effect of the MCO and title to the vehicles, the evidence was undisputed that neither Svoboda nor Foundation One had possession of the 2005 Mack or the 2014 Mack. Under Neb. Rev. Stat. § 60-140 (Cum. Supp. 2008), in the absence of physical possession of the vehicles, Foundation One did not gain an interest or right to

the vehicles through the MCO and title it offered at trial. The relevant portion of § 60-140(1) provides:

> [No] person acquiring a vehicle from the owner thereof . . . shall acquire any right, title, claim, or interest in or to such vehicle until the acquiring person has had delivered to him or her physical possession of such vehicle and (a) a certificate of title or a duly executed manufacturer's or importer's certificate with such assignments as are necessary to show title in the purchaser . . . .

According to the evidence, on its face, the MCO for the 2005 Mack showed a break in the chain of ownership between Lehr and Svoboda and did not show clear title in Foundation One. For the several reasons recited above, an instruction on the effect of entitlement by virtue of a title was not warranted by the evidence.

With regard to Foundation One's assignment of error regarding calculation of damages, we find no prejudice. The jury was provided all the evidence it needed to calculate damages if it was so inclined. The jury received evidence of the 2014 Mack's purchase price, replacement value, and sale value; the value of the box; and the liens paid on both vehicles as part of the terms of the loan to Svoboda. The jury ultimately made special findings with regard to damages and "how much money it will take to compensate Lehr for the conversion of the 2014 Mack." Because the jury had all the evidence related to the financial consequences related to the vehicle, Foundation One was not prejudiced by purported omission of further instructions on the calculation of damages.

With respect to Foundation One's assertion that the district court should have instructed the jury about the law when fraud is perpetrated against two innocent parties, this instruction is not warranted by the evidence. Although Lehr asserted that Foundation One was defrauded, Lehr did not allege nor was there evidence that Lehr was also a victim of fraud. Thus, the proposed instruction would not have been appropriate.

We find no plain error in the district court's purported failure to give the jury instructions first proposed on appeal, because they were not supported by the evidence or did not prejudice any party.

3. Motion for Directed Verdict

Finally, Foundation One contends that the district court erred when it overruled its motion for a directed verdict, because it claims the complaint in intervention sought a declaration of the rights of the parties but did not seek appropriate relief. The factual basis for Foundation One's position was the fact that the 2014 Mack had already been replevied and sold by Foundation One. Foundation One thus claims a mere declaration of rights would be meaningless relief. Foundation One misconstrues the "Complaint in Intervention" and the law of replevin. It was not error to overrule the motion for a directed verdict.

[8] As stated above, 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. *Denali Real Estate v. Denali Custom Builders*, 302 Neb. 984, 926 N.W.2d 610 (2019). In a motion for directed verdict, the moving party admits the truth of all well-pleaded facts, together with all reasonable inferences to be drawn therefrom. See *id*.

Taken together, the pleadings properly placed possession and ownership of the 2005 Mack and the 2014 Mack, along with damages for the sale of the 2014 Mack, before the jury. Under our replevin statutes, § 25-1093 et seq., a plaintiff may initially obtain delivery of claimed property, but a defendant who succeeds at trial will obtain the return of his or her property and damages. See § 25-10,103. Further, in a situation like the one presented here, where the property is no longer in the possession of the plaintiff, § 25-10,104(1) provides that the judgment "shall be for a return of the property or the value

thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit."

[9] We have long held that in a replevin case, when a defendant or intervenor is found to have ownership and right of possession of property, the replevin statutes necessarily place the issue of damages at issue. In *School District v. Shoemaker*, 5 Neb. 36 (1876), we considered a case where a defendant in a replevin action had not specifically prayed for damages. We noted that under an earlier version of the replevin statute, the law places before the jury both the questions of who possesses the property and what are the just and proper damages for the defendant. *Id*. We held that it remained the law that a general denial by a party in a replevin action is sufficient to require the fact finder to consider damages upon finding that a party is entitled to the possession of property. *Id*. The principle logically applies to a party appearing by intervention. Regarding the issues before the jury in *School District v. Shoemaker*, we summarized the law and stated:

> [The] law is mandatory, and therefore the jury are "bound to inquire into the right of property, and the right of possession of the defendant, and if they shall find him entitled to either, they shall assess such damages as are right and proper." Under the statute both these questions are in issue and are subjects of inquiry by the jury, whether the defendant pleads a general denial, or new matter as a defense, or a demand for damages.

5 Neb. at 38. See § 25-10,103.

The factual allegations in Lehr's complaint in intervention mandated that the jury consider both possession and damages once Lehr asserted ownership of the property in this replevin action. See § 25-10,103. Resolving every controverted fact in Lehr's favor and giving it the benefit of every inference, reasonable minds could conclude Lehr was entitled to ownership and possession of the 2005 Mack and the 2014 Mack. Such findings would be sufficient to entitle Lehr to relief, including

damages, plus "the value of [its] possession," since the 2014 Mack could not be returned. See § 25-10,104(1). The district court did not err when it overruled Foundation One's motion for a directed verdict in its favor.

VI. CONCLUSION

Following a jury trial, judgment was entered in favor of Lehr. Foundation One's pretrial motion for judgment on the pleadings is moot under the circumstances. Foundation One's proposed instruction regarding fraud was not a correct statement of the law, and Foundation One was not prejudiced by the district court's rejection of the instruction. With regard to jury instructions suggested for the first time on appeal, we find no plain error. Finally, because of the nature of a replevin action, under § 25-1093 et seq., the jury in this case necessarily decided issues of possession of the contested vehicles and, on finding in favor of Lehr, damages. The district court did not err as a matter of law when it overruled Foundation One's motion for a directed verdict in its favor. Accordingly, we affirm the judgment of the district court.

Affirmed.

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

State of Nebraska ex rel. Douglas J. Peterson, Attorney General, and Scott Frakes, director of the Nebraska Department of Correctional Services, appellees, v. Senator Laura Ebke, chairperson of the Judiciary Committee of the Nebraska Legislature, et al., appellants.

930 N.W.2d 551

Filed July 12, 2019. No. S-18-795.

1. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, appellate courts review mootness determinations under the same standard of review as other jurisdictional questions.
2. **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.
3. **Jurisdiction.** An actual case or controversy is necessary for the exercise of judicial power.
4. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
5. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation.
6. **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.
7. **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.

8. **Moot Question.** The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.
9. **Legislature: Contracts: Time.** The typical understanding of state legislative bodies is that, with the limited exception of valid contractual obligations with third parties, pending matters die at the expiration of the legislative body's 2-year term.
10. **Legislature.** Any current legislative body represents the people who elected it and should have power equal to its predecessor.
11. ____. The will of the past electorate should not control the future electorate and its representatives.
12. **Legislature: Time.** The authority of a legislature is limited to the period of its own existence.
13. **Public Purpose: Statutes.** An investigatory committee, being the mere agency of the body which appointed it, dies when the body itself dies, unless it is continued by law.
14. **Legislature: Time.** The general rule is that the period of legislative existence is its 2-year term, and committee investigations and attendant subpoenas automatically expire upon the expiration of that term.
15. **Legislature.** The Nebraska Unicameral Legislature, while unique because it is not a bicameral system, is not a continuing body.
16. **Constitutional Law: Legislature.** The Nebraska Constitution is not a grant, but, rather, is a restriction on the legislative power in light of the otherwise plenary power of the people of each state to do as they will.
17. **Legislature: Time.** Because the Nebraska Legislature is not a continuing body, a particular legislature's biennium period of existence ceases at the end its biennium term.
18. **Legislature: Time: Presumptions.** Like other pending matters, committee investigations and attendant subpoenas are presumed to cease to exist at the end of the term in which they commenced.
19. **Legislature: Statutes: Time.** There is no applicable statute or legislative rule providing for the continuing viability of pending subpoenas issued by an investigatory committee of a prior biennium term.
20. **Moot Question: Appeal and Error.** Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.
21. **Moot Question: Words and Phrases.** In determining whether the public interest exception should be invoked, the court considers the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Appeal and motion to substitute parties dismissed.

William M. Connolly and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellants.

Douglas J. Peterson, Attorney General, Ryan S. Post, James D. Smith, and David A. Lopez for appellees.

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

Per Curiam.

I. NATURE OF CASE

The underlying action in this case involves resistance to an investigatory subpoena issued during the 105th Legislature by the Judiciary Committee of the Nebraska Legislature, with the approval of the Executive Committee of the 105th Legislature. The subpoena commanded the attendance of the director of the Department of Correctional Services to testify at a scheduled committee hearing. Before the scheduled hearing, the State of Nebraska, represented by the Attorney General, and the director of the Department of Correctional Services (collectively the Department) sued the senators who were on the Judiciary Committee and the Executive Board of the Legislative Council at the time the subpoena was issued, as well as the Clerk of the Legislature who signed the subpoena (collectively the Senators). The Department alleged, among other things, that the Legislature as a whole did not vote to approve the investigation or the issuance of the subpoena; thus, the subpoena was not in the discharge of any duty imposed by the Legislative Council, by statute, or by a resolution of the Legislature, as described by Neb. Rev. Stat. § 50-401 (Reissue 2010). The Department filed an action to quash the subpoena pursuant to Neb. Rev. Stat. § 50-406 (Cum. Supp. 2018), and also sought, as to the Senators, declaratory judgment under the Uniform

Declaratory Judgments Act[1] and injunctive relief in relation to various aspects of the procedure leading up to and including the subpoena. Before the Senators filed an answer to the complaint, the court granted the Department's motion to quash the subpoena and denied the Senators' motion to dismiss. The Senators appeal from the court's order. The Department asserts that the appeal is moot because the subpoena was "issued by a committee of a Legislature which no longer exists."[2] We agree and hold that there is no longer a case and controversy as required for the exercise of our judicial power. A determination of the underlying merits of the dispute would be purely advisory.

II. BACKGROUND

1. Internal Complaint Under § 84-907.10

On March 21, 2018, Senator Ernie Chambers filed a complaint under Neb. Rev. Stat. § 84-907.10(1) (Reissue 2014) with Senator Dan Watermeier, chairperson of the Executive Board of the Legislative Council of the 105th Legislature. Chambers' complaint questioned, among other things, whether the Nebraska Department of Correctional Services followed applicable state and federal laws in selecting the substances for execution by lethal injection and in allegedly withholding notices and public access to various documents, in violation of Neb. Rev. Stat. §§ 84-906.01 (Reissue 2014) and 84-907(2) (Cum. Supp. 2018). The complaint also alleged that the Department of Correctional Services' protocol violated the prohibition against cruel and unusual punishment found in the U.S. and Nebraska Constitutions, because the paralytic agent of the four-drug protocol served no valid purpose and would mask any signs of the condemned prisoner's distress, pain, or suffering during the execution.

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[1] Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2016).

[2] Brief for appellees at 8.

2. Complaint Forwarded to Judiciary Committee

Watermeier referred the internal complaint to Senator Laura Ebke, as chairperson of the Judiciary Committee of the 105th Legislature, pursuant to § 84-907.10(2), which requires the chairperson or committee staff member of the Executive Board to refer the complaint to "the standing committee of the Legislature which has subject matter jurisdiction over the issue involved in the rule or regulation or which has traditionally handled the issue." Apparently, there was no objection, as provided for by rule 6, § 2(a), of the Rules of the 105th Nebraska Unicameral Legislature, Second Session (2018), that the matter had been referred to the wrong committee.

3. Public Hearing

The Judiciary Committee of the 105th Legislature apparently chose to forgo requesting a written response from the agency as described in § 84-907.10(3). Instead, on April 9, 2018, the Judiciary Committee elected, by majority vote, to conduct a public hearing pursuant to § 50-406 and rule 3, § 1, of the Rules of the 105th Nebraska Unicameral Legislature, and it sent a letter to the chairperson of the Executive Board so stating. The investigation sought to address concerns relating to the Department of Correctional Services' rules and regulations outlining the protocol for execution of the death penalty, codified at title 69, chapter 11, of the Nebraska Administrative Code. The concerns related to the process by which the protocol was adopted, its constitutionality, and whether it is consistent with the Legislature's intent when it passed 2009 Neb. Laws, L.B. 36. The hearing was scheduled for May 8.

Section 50-406 provides in full:

> In the discharge of any duty imposed by the Legislative Council, by statute, or by a resolution of the Legislature, the council, any committee thereof, and any standing or special committee created by statute or resolution of the Legislature may hold public hearings and may administer

> oaths, issue subpoenas when the committee has received prior approval by a majority vote of the Executive Board of the Legislative Council to issue subpoenas in connection with the specific inquiry or investigation in question, compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony, and cause the depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in the district court. The council or the committee may require any state agency, political subdivision, or person to provide information relevant to the committee's work, and the state agency, political subdivision, or person shall provide the information requested within thirty days after the request except as provided for in a subpoena. The statute or resolution creating a committee may prescribe limitations on the authority granted by this section.
>
> Litigation to compel or quash compliance with authority exercised pursuant to this section shall be advanced on the trial docket and heard and decided by the court as quickly as possible. Either party may appeal to the Court of Appeals within ten days after a decision is rendered.
>
> The district court of Lancaster County has jurisdiction over all litigation arising under this section. In all such litigation the executive board shall provide for legal representation for the council or committee.

Section 50-401 creates the Legislative Council, "which shall consist of all of the members of the Legislature" and shall have as its function "to consider legislative policies between sessions of the Legislature and carry out the duties imposed by section 50-402." Neb. Rev. Stat. § 50-402(8) (Reissue 2010), in turn, provides that it shall be the duty of the Legislative Council to

> set up subcommittees within the executive board to carry out functions such as investigation of any area which it may decide is in the public interest with power to employ

such additional personnel as may be needed to carry out the intent and activities of the executive board or the Legislature.

Rule 3, § 1, of the Rules of the 105th Nebraska Unicameral Legislature, in part, described committee investigatory hearings:

> (a) Each committee of the Legislature is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Legislature, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, and to take such testimony, as it deems advisable. Each committee may make investigation into any matter within its jurisdiction, may report such hearings as may be had by it, and may present to the Legislature for its consideration any final reports and recommendations for action resulting from such investigations.
>
> (b) A committee's subject-matter jurisdiction extends to all matters specified in the act creating the committee, or to all matters reasonably comprehended in the name of the committee. A committee's particular jurisdiction extends to any bill, resolution, or other measure referred to it by the Legislature, until final report of the measure has been made by the committee to the Legislature. A committee's particular jurisdiction shall also include review of the budgets of agencies, boards, and commissions reasonably encompassed in its subject-matter jurisdiction.
>
> (c) No committee may exercise any of the above mentioned powers in a manner contrary to the Rules of the Legislature or in a manner which exceeds the scope of the act defining the purpose of the committee.

Rule 3, § 21, of the Rules of the 105th Nebraska Unicameral Legislature described the subpoena powers of committees in relation to such hearings:

> It is within the inherent power of any legislative committee to gather information pursuant to its regular

functions, and to conduct investigations of matters within its subject-matter jurisdiction.

A committee's power of subpoena should not be exercised unless the committee has determined that no other method of securing the desired information would be successful or practicable, and that the matter is of primary importance to the welfare of the State of Nebraska.

A committee of the Legislature conducting an investigation and gathering information, whether pursuant to legislative direction or pursuant to its regular functions of oversight and bill preparation, shall observe the following procedures in addition to regular committee procedures whenever subpoenas are issued:

(A) Issuance of Subpoenas.

(i) A committee may, by a majority vote of all of its members taken at a meeting properly called, issue a subpoena requiring a person to appear before the committee and be examined in reference to any matter within the scope of the inquiry or investigation being conducted by the committee, but only when the committee has received prior approval by a majority vote of the Executive Board to issue subpoenas in connection with the specific inquiry or investigation in question.

. . . .

(iii) While the Legislature is in session, a committee deciding to issue subpoenas must promptly report each issuance to the Legislature. A record shall be made in the Journal reflecting the date the subpoena was issued, to whom it was issued, for what purpose it was issued, and the date on which testimony or production of documents is to take place. Under extraordinary circumstances, the identity of the person subpoenaed may be withheld from publication if necessary to protect the safety of an individual or the confidentiality of the matters to be heard.

(iv) A person subpoenaed to attend a hearing of a committee shall receive the same fees and allowances as a

person subpoenaed to give testimony in an action pending in a court of record.

(B) Notice to Witnesses.

. . . .

(ii) Any person who is served with a subpoena to attend a hearing of a committee shall also be served with a copy of the act defining the purpose of the committee, a copy of the rules under which the committee functions, a general statement informing him or her of the subject matter of the committee's investigation or inquiry, and a notice that he or she may be accompanied at the hearing by counsel of his or her own choosing.

. . . .

(G) Contempt.

. . . .

The chairperson of a committee may apply to the Legislature or, during the interim, to the district court of any county to compel obedience by proceedings for contempt.

(H) Penalties.

(i) A person guilty of contempt under the provision of these rules shall be subject to punishment pursuant to RRS 50-105 and 50-106 during the session, or to RRS 50-407 when the Legislature is not in session.

(ii) If a committee fails in any material respect to comply with the requirements of these rules, any person subject to a subpoena or a subpoena duces tecum who is injured by such failure shall be relieved of any requirement to attend the hearing for which the subpoena was issued or, if present, to testify or produce evidence therein; and such failure shall be a complete defense in any proceeding against such person for contempt or other punishment.

4. Decision to Issue Subpoena

On April 10, 2018, the Judiciary Committee formally invited Scott Frakes, director of the Department of Correctional

Services, to testify at the hearing. Frakes did not respond to the invitation. On April 18, Ebke asked the Executive Board to provide approval to the Judiciary Committee to issue a subpoena and possible subpoenas duces tecum to Frakes. While there was some discussion at the meeting of the Executive Board as to whether to give Frakes more time to respond to the invitation so that he could attend the hearing voluntarily, April 18 was the day of adjournment for the legislative session. A majority (by one vote) of the Executive Board voted to approve the Judiciary Committee's issuance of a subpoena.

(a) Subpoena

A subpoena was issued to Frakes on April 24, 2018. The subpoena states: "Pursuant to statutory section 50-406 R.R.S., the Judiciary Committee of the Nebraska Legislature hereby compels your presence to testify at 9:00 a.m. on Tuesday, May 8, 2018, in Room 1113 of the Nebraska State Capitol Building, 1445 K Street, Lincoln, NE 68508." The subpoena was signed by Ebke, as the chairperson of the Judiciary Committee of the Nebraska Legislature, and by the Clerk of the Nebraska Legislature.

(b) Informational Letter

On April 25, 2018, the Judiciary Committee sent Frakes an informational letter pursuant to rule 3, § 21(B)(ii), of the Rules of the 105th Nebraska Unicameral Legislature. The letter explained that a majority of the Judiciary Committee had voted to conduct a hearing related to concerns over the Department of Correctional Services' execution protocol and, after obtaining the approval of the Executive Board, a majority of the Legislative Council had voted to subpoena Frakes' testimony. The Judiciary Committee explained that after Frakes had ignored a series of attempts to contact him and make arrangements for his voluntary testimony, the committee had determined that there was no method other than a subpoena of securing his attendance at the hearing. The letter informed Frakes that he could be accompanied at the hearing

by counsel of his own choosing. It did not specify whether Frakes would receive any compensation in the form of fees and allowances for his time.

5. Complaint

On May 1, 2018, before the scheduled date of the hearing, the Department sued the Senators. The complaint generally set forth the facts already described and asserted that the district court had jurisdiction over the action under Neb. Rev. Stat. § 24-302 (Reissue 2016) and §§ 25-21,149 and 50-406.

In what was designated as its first cause of action, the Department focused on its conclusion that § 84-907.10 did not authorize the Judiciary Committee to hold hearings or issue subpoenas in relation to internal complaints thereunder. The Department requested a declaration that in issuing the subpoena, the Senators had violated § 50-406 and rule 3, § 1 or § 21, of the Rules of the 105th Nebraska Unicameral Legislature. The Department also asked the court to enjoin the Senators from future acts violating these provisions.

In its designated second cause of action, the Department focused on its allegation that the subpoena was not issued in the discharge of a duty imposed by the Legislative Council, by statute, or by a resolution of the Legislature, as required by § 50-406. According to the Department, all of these duties can be imposed only by a majority vote of the Legislative Council, which is the entire Legislature. Because no vote by the entire Legislature was held in relation to the hearing and subpoena at issue, the Department asserted that the hearing and subpoena were not in the discharge of any of the three duties specified by § 50-406. The Department again requested that the court declare that the Senators violated § 50-406 and enjoin the Senators from similar future acts violating § 50-406.

In its designated third cause of action, the Department focused on allegations that Watermeier had referred Chambers' internal complaint to the wrong committee, asserting that the Government, Military and Veterans Affairs Committee was the standing committee with "subject-matter jurisdiction"

over the issues involved in the internal complaint. Further, in its third cause of action, the Department highlighted its allegations that the Senators failed to follow rule 3, § 21(B)(ii), of the Rules of the 105th Nebraska Unicameral Legislature by failing to serve Frakes with a copy of the act defining the purpose of the Judiciary Committee and by not offering to pay him fees and allowances commensurate with those given to persons subpoenaed to give testimony in an action pending in a court. Finally, in its designated third cause of action, the Department asserted that the vote of the Judiciary Committee had not been "properly called." The Department asserted that in the process of issuing the subpoena, the Senators had thereby violated rule 3, § 21(A)(i) and (iv) and (B)(ii), of the Rules of the 105th Nebraska Unicameral Legislature. The Department asked for a declaration that the Senators "failed in all material respects to comply with the requirements of the Rules of the Nebraska Unicameral Legislature and accordingly, . . . Frakes is relieved of any requirement to attend the hearing for which the subpoena was issued pursuant to Rule 3, Section 21(H)(ii) of the Rules of the Nebraska Unicameral Legislature."

In its designated fourth cause of action, the Department asserted that the Senators' actions were not within the sphere of legitimate legislative activity and that by virtue of the subpoena, the Senators sought to exercise a power properly belonging to the judicial branch by determining a case and controversy regarding the Department's compliance with the Administrative Procedure Act, the constitutionality of the execution protocol, and any other conflicts between the execution protocol and state and federal laws and regulations. The Department requested a declaration that the Senators thereby violated the separation of powers provision in the Nebraska Constitution, Neb. Const. art. II, § 1, and asked that the court enjoin the Senators from future acts violating article II, § 1.

In its fifth and final designated cause of action, the Department requested that pursuant to § 50-406, the court

quash the subpoena, due to the alleged violations of Neb. Const. art. II, § 1; § 50-406; and rule 3, §§ 1 and 21, of the Rules of the 105th Nebraska Unicameral Legislature.

In its prayer for relief, in addition to the relief requested within its five causes of action, the Department asked for costs.

6. Motion to Quash

The day after filing its complaint, the Department filed a motion to quash subpoena. The motion stated that the grounds for the motion had been set forth in the complaint and included, but were not limited to, the Senators' alleged violations when issuing the subpoena of §§ 50-406 and 84-907.10 and rule 3, §§ 1 and 21, of the Rules of the 105th Nebraska Unicameral Legislature. The motion also described that pursuant to § 50-406, the matter "'shall be advanced on the court docket and heard and decided by the court as quickly as possible.'"

7. Order Staying Subpoena and Hearing

Pursuant to a stipulation, on May 4, 2018, the court stayed the subpoena and the "subpoena's hearing date" until "such time as the Court finally resolves the issues raised in the Complaint."

8. Motion to Dismiss

On May 10, 2018, the Senators moved to dismiss the complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1), (4), (5), and (6), on the alternative grounds that (1) the named defendants were absolutely immune from litigation pursuant to the Neb. Const. art. III, § 26, the speech and debate clause; (2) the judiciary lacks the authority under separation of powers principles to declare the Judiciary Committee's actions unconstitutional, issue a permanent injunction against the Judiciary Committee or its members, quash the subpoena, or enter a money judgment against the Judiciary Committee or its members; (3) § 50-406 is overbroad and violates the speech and debate and separation of powers clauses to the extent it gives

courts the power to oversee legislative committees' authority to hold public hearings, make specific inquiry or investigation, compel the production of documents or testimony, and require a state agency to provide information relevant to the committee's work; (4) the Attorney General lacks standing to sue members of the Legislature, given the Attorney General's duty to defend the Legislature imposed by Neb. Rev. Stat. § 84-209 (Reissue 2014); and (5) service was improper because the Attorney General attempted to serve process on each of the individual defendants by sending the summonses by certified mail to the Attorney General's own offices.

9. Hearing on Motion to Dismiss and Motion to Quash

A hearing was held on the Senators' motion to dismiss and the Department's motion to quash. At the hearing, the Senators focused on legislative immunity, arguing that the analysis "starts and ends with" the fact that committee issuance of investigatory subpoenas is within the legitimate legislative sphere and thus the district court lacked jurisdiction to "pass judgment on the committee's processes and motives for issuing the subpoena." The Senators asserted that § 50-406 could not waive, through legislative enactment, a constitutionally protected immunity.

The Department responded that while it agreed the members of the Legislature would be immune from litigation stemming from a lawfully issued subpoena, this subpoena was not lawfully issued. The Department also asserted that the Senators could not rely on § 50-406 in issuing the subpoena while at the same time challenging as unconstitutional the language of § 50-406 purporting to grant the district court for Lancaster County jurisdiction over litigation to compel or quash compliance with authority exercised pursuant to § 50-406.

On the underlying merits of the motion to quash, the Senators argued that the investigatory subpoena was within its authority to review and consider whether adjustments are

necessary to its laws pertaining to the death penalty and delegating to the executive branch the development of the death penalty protocol. The Department argued that the subpoena at issue was not legislative and that the Senators failed to comply with the procedure set forth in § 84-907.10.

10. Order Denying Dismissal and Sustaining Motion to Quash

The court ruled on both the Senators' motion to dismiss and the Department's motion to quash in an order dated August 8, 2018.

The court overruled the Senators' motion to dismiss. The court's reasoning for this ruling was that the motion raised "several issues, including novel questions under Nebraska's Constitution[,] that our appellate courts have not yet addressed." Thus, the court "decline[d] to sustain the Motion [to dismiss]."

The court granted the Department's motion to quash. The court reasoned that while the subpoena may have satisfied the requirement that it receive prior approval by a majority vote of the Executive Board of the Legislative Council, the subpoena was not "'[i]n the discharge of any duty imposed by the Legislative Council, by statute, or by a resolution of the Legislature . . . .'" The court noted that the Legislative Council and the Executive Board are distinct decisionmaking bodies and that § 50-402 refers to the Legislative Council as having the duty of collecting information, while Neb. Rev. Stat. § 50-401.01 (Cum. Supp. 2018), describes the Executive Board's duties as administrative, such as hiring staff and contracting for professional services. The court did not specifically address rule 3, § 21, of the Rules of the 105th Nebraska Unicameral Legislature.

11. Notice of Appeal and Appellate Motions

On August 20, 2018, the Senators filed their notice of appeal. On January 9, 2019, the 106th Nebraska Legislature

commenced. Because the 105th Legislature sat in an even year, the end of the 105th Legislature was the end of a biennium. The new biennium commenced with the 106th Legislature in 2019. Several of the named senators are no longer in office. The Department filed a "Suggestion of Mootness" based on this change of circumstances.

III. ASSIGNMENTS OF ERROR

The Senators assign that the lower court erred in (1) not finding that the Senators are absolutely immune from litigation under Nebraska's speech and debate clause; (2) not finding that § 50-406, on its face, violates the Nebraska Constitution's speech and debate and separation of powers clauses; (3) not finding that § 50-406, as applied to legislative subpoenas, violates the Nebraska Constitution's speech and debate and separation of powers clauses; (4) not finding that the Attorney General lacked standing or capacity to sue the Senators; (5) not dismissing the complaint; (6) finding that the Judiciary Committee was not discharging a duty imposed by the Legislative Council, by statute, or by resolution in the Legislature; (7) not finding that the Judiciary Committee had jurisdiction to investigate, hold hearings, and issue subpoenas independent of § 50-406; and (8) granting the Department's motion to quash.

IV. STANDARD OF REVIEW

[1,2] Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions.[3] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[4]

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[3] See *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016).

[4] *Id.*

V. ANALYSIS

[3,4] Mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction.[5] An actual case or controversy is necessary for the exercise of judicial power.[6] In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.[7] Therefore, as a general rule, a moot case is subject to summary dismissal.[8] It is well established that when a party or parties are aware that appellate issues have become moot during the pendency of the appeal and such mootness is not reflected in the record, in the interest of judicial economy, a party may file a suggestion of mootness in the Nebraska Supreme Court or Nebraska Court of Appeals as to the issue or issues claimed to be moot.[9]

[5-8] Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation.[10] 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.[11] 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.[12] The central question in a mootness analysis is whether changes in circumstances

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[5] *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017).

[6] *Weatherly v. Cochran*, 301 Neb. 426, 918 N.W.2d 868 (2018).

[7] *BryanLGH v. Nebraska Dept. of Health & Human Servs.*, 276 Neb. 596, 755 N.W.2d 807 (2008).

[8] *Id.*

[9] *Id.*

[10] *Nebuda v. Dodge Cty. Sch. Dist. 0062*, 290 Neb. 740, 861 N.W.2d 742 (2015).

[11] *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018).

[12] *Id.*

that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.[13]

The change in circumstances that the Department argues renders this appeal moot is the commencement of the 106th Legislature. We agree. The underlying complaint challenged the subpoena that was issued by the 105th Legislature to attend a hearing to be conducted by the Judiciary Committee of the 105th Legislature. The 105th Legislature, sitting in 2018, was the last legislative year of a biennium term. The order that is the subject of this appeal, which quashed the subpoena as unlawfully issued and which refused to dismiss the Department's action on the ground of legislative immunity, was issued during that prior biennium term and before the commencement of the present biennium term. The hearing Frakes resisted attending was never held and, as we will explain, the investigation, hearing, and subpoena at issue automatically expired upon the completion of the legislative biennium in which the investigation took place. This eradicated the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation.

[9-12] The typical understanding of state legislative bodies is that, with the limited exception of valid contractual obligations with third parties,[14] pending matters die at the expiration of the legislative body's 2-year term.[15] This understanding derives from policies dating back to British parliamentary function, which disfavored entrenchment and sought to avoid the "dead hand problem."[16] Any current legislative body represents the people who elected it and should have power equal to

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[13] *Nebuda v. Dodge Cty. Sch. Dist. 0062, supra* note 10.

[14] See *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 544 N.W.2d 344 (1996).

[15] See Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 Iowa L. Rev. 1401 (2010).

[16] *Id*. at 1428. See, *McGrain v. Daugherty*, 273 U.S. 135, 47 S. Ct. 319, 71 L. Ed. 580 (1927); Thomas Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States (1801).

its predecessor.[17] The will of the past electorate should not control the future electorate and its representatives.[18] Recognizing these principles, we held in *State ex rel. Stenberg v. Moore*[19] that a past legislature impermissibly bound future legislatures by passing a law declaring null and void certain future legislation in the event it failed to include specified estimates and appropriations. "'The authority of a legislature,'" we observed, "'is limited to the period of its own existence.'"[20] We held that the law in question violated Neb. Const. art. III, §§ 1, 13, and 14, because it attempted to restrict the constitutional power of a succeeding legislature to legislate.[21]

[13] An investigatory committee, "being the mere agency of the body which appointed it, dies when the body itself dies, unless it is continued by law."[22] In such circumstances, an outstanding subpoena to attend an investigatory hearing by the committee also dies. It is a pending matter that dies at the expiration of the legislative body's 2-year term. Thus, in *Eastland v. United States Servicemen's Fund*,[23] the U.S. Supreme Court indicated that an action to enjoin enforcement of the investigatory subpoena issued by the U.S. House of Representatives had automatically expired during the pendency of the litigation, due to the cessation of the legislative term in which an investigatory subpoena had been issued. In subsequent cases, the U.S. District Court for the District of Columbia has explicitly held that subpoenas issued by an investigatory committee of the House of Representatives

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[17] See Bruhl, *supra* note 15.

[18] See *id.*

[19] *State ex rel. Stenberg v. Moore, supra* note 14.

[20] *Id.* at 594, 544 N.W.2d at 348, quoting *Frost v. State*, 172 N.W.2d 575 (Iowa 1969).

[21] *State ex rel. Stenberg v. Moore, supra* note 14.

[22] *Tipton v. Parker*, 71 Ark. 193, 196, 74 S.W. 298, 299 (1903).

[23] *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975).

during one term expire upon a new term, because the prior House of Representatives has at that point ceased to exist as a legal entity.[24] This, in turn, renders moot any litigation seeking to avoid or enforce compliance with the subpoena.[25] This is analogous to federal decisions holding that with the expiration of a grand jury, so too expires the ability of the court to enforce a grand jury subpoena, rendering moot challenges relating to the subpoena.[26]

The only state cases addressing the continued life of an investigatory committee focus on the power of a committee to act after adjournment sine die, as opposed to the end of a term, but those courts hold that committees have the authority to do so only when it is specifically conferred.[27] State courts have not had occasion to address whether investigatory subpoenas automatically expire between legislative terms. At least one state decision has, however, held that subpoenas issued by standing committees of municipal councils automatically expire by reason of new elections.[28]

[14] The general rule is that the period of legislative existence is its 2-year term, and committee investigations and attendant subpoenas automatically expire upon the expiration of that term. It is true that the U.S. Senate, as opposed to the House of Representatives, has been characterized as a "'continuing body.'"[29] This is by virtue of the fact that its

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[24] See, *Committee on Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008); *United States v. American Tel. & Tel. Co.*, 551 F.2d 384 (D.C. Cir. 1976).

[25] See *id.*

[26] See, *In re Grand Jury Proceedings*, 744 F.3d 211 (1st Cir. 2014); *Loubriel v. United States*, 9 F.2d 807 (2d Cir. 1926); *United States v. Collins*, 146 F. 553 (D. Or. 1906).

[27] See 1 Norman J. Singer and J.D. Shambie Singer, Sutherland Statutory Construction § 12:17 (7th ed. 2010). See, also, *Tipton v. Parker, supra* note 22; *Brown et al., Aplnts. v. Brancato et al.*, 321 Pa. 54, 184 A. 89 (1936).

[28] See *Balt. v. Comm. on Legislative Invest.*, 341 Md. 23, 668 A.2d 33 (1995).

[29] *McGrain v. Daugherty, supra* note 16, 273 U.S. at 181.

members are elected for 6 years and so divided into classes that the seats of only one-third become vacant at the end of each Congress, with two-thirds (or a quorum) always continuing into the next Congress, save as vacancies may occur through death or resignation.[30] Further, the Senate, unlike the House of Representatives, does not adopt new procedural rules or readopt the old procedural rules upon each new term; the old rules of the Senate remain in effect and are revised only on rare occasion.[31] But even with such continuing existence, it is not entirely clear that Senate investigatory subpoenas automatically continue to be enforceable after the Senate's term has ended, without reissuance or other affirmative acts by the senators holding office in the new term.[32] It has been held that even the Senate cannot exercise its inherent contempt powers to enforce an investigatory subpoena after adjournment sine die—let alone after expiration of its term.[33]

[15,16] In any event, no state legislative body has been similarly described as a "continuing body." We hold that the Nebraska Unicameral Legislature, while unique because it is not a bicameral system, is likewise not a "continuing body." The Nebraska Constitution is not a grant, but, rather, is a restriction on the legislative power[34] in light of the otherwise "plenary power of the people of each state to do as they will."[35] The constitutional provisions restricting the power of the legislature describe 2-year biennium terms that begin with odd-numbered years and end with the following even-numbered

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[30] See *id*.

[31] Bruhl, *supra* note 15.

[32] See, *Eastland v. United States Servicemen's Fund, supra* note 23; Bruhl, *supra* note 15. See, also, *Marshall v. Gordon,* 243 U.S. 521, 37 S. Ct. 448, 61 L. Ed. 881 (1917); *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970). But see 28 U.S.C. § 1365 (2012).

[33] See *United States v. Fort, supra* note 32. But see 28 U.S.C. § 1365.

[34] *State ex rel. Stenberg v. Moore, supra* note 14.

[35] 16 Am. Jur. 2d *Constitutional Law* § 42 at 384 (2009).

year. Neb. Const. art. III, § 10, describes the length of legislative sessions in odd versus even-numbered years and states that only in an odd-numbered year may "[b]ills and resolutions under consideration by the Legislature upon adjournment . . . be considered at the next regular session, as if there had been no such adjournment." There is no analogous constitutional provision for the U.S. Senate. Furthermore, approximately one-half of the members of the Nebraska Unicameral Legislature are subject to staggered elections for their 4-year terms,[36] not the mere one-third of the U.S. Senate. And the existence of staggered elective terms, which seems to be the only basis for equating our Legislature to the U.S. Senate, is a relatively new phenomenon. In the bicameral era, members of the Legislature, including both the House of Representatives and the Senate, were elected for terms consisting of only 2 years.[37] At the inception of the unicameral era, the members of the new one-house Legislature were elected only for 2-year terms.[38] This continued, despite an intervening constitutional amendment,[39] until the voters adopted an amendment for staggered 4-year terms in 1962.[40] The parties have not pointed to, nor has our research disclosed, any legislative text or history from 1962 stating any intent to make the Nebraska Legislature a "continuing body."[41] Finally, unlike in the Senate, all procedural rules of the Nebraska Unicameral Legislature are adopted by a majority vote at the "commencement of each regular session in odd-numbered years," and the adopted rules "govern the Legislature for a period of two years."[42] This

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[36] See, Neb. Const. art. III, § 7; Neb. Rev. Stat. § 32-508 (Reissue 2016).

[37] See, Neb. Const. art. II, § 4 (1875); Neb. Const. art. III, § 7 (1920).

[38] See Neb. Const. art. III, § 7 (1935).

[39] See *id*. (1961).

[40] See *id.* (1963).

[41] See 1961 Neb. Laws, ch. 247, § 1, p. 733.

[42] Rule 2, § 1(a), Nebraska Unicameral Legislature, 106th Leg., 1st Sess. 9 (2019). See, also, *id.*, 105th Leg., 2d Sess. 9 (2018).

demonstrates the Legislature's collective understanding that it is not a "continuing body," but, rather, is a new Legislature established at the regular legislative session commencing in each odd-numbered year. Obviously, that session would next follow the general election in each even-numbered year, at which a new term begins for approximately one-half of its members. The Legislature itself numbers its sessions consistent with that understanding.

[17,18] Because the Nebraska Legislature is not a "continuing body," a particular legislature's biennium period of existence ceases at the end its biennium term. Like other pending matters, committee investigations and attendant subpoenas are presumed to cease to exist at the end of the term in which they commenced. The committee investigation dies when the body dies, unless it is continued by a valid law.

[19] And there is no applicable statute or legislative rule providing for the continuing viability of pending subpoenas issued by an investigatory committee of a prior biennium term. We need not decide whether such a statute or rule, if it existed, would be an impermissible restriction on future legislatures, like the statute addressed in *State ex rel. Stenberg v. Moore*.[43] The applicable statutes and procedural rules of the 105th Legislature contemplated the expiration of investigatory committees at the end of each biennium term and, by necessary implication, the expiration of the expired committees' pending hearings and attendant subpoenas. Neb. Rev. Stat. § 50-410 (Reissue 2010), describes that the Legislative Council "shall meet at least once in each biennium." Rule 3, § 2(c), provided that the membership of all standing and select committees shall continue only during the duration of the biennium. Under this rule, new membership of committees was to be appointed at the beginning of each session beginning in odd-numbered years and continue only until the regular session in the next subsequent odd-numbered year.

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[43] *State ex rel. Stenberg v. Moore, supra* note 14.

Similarly, at the commencement of each regular session in odd-numbered years, new members of the executive board were to be elected.[44]

While rule 3, § 1(b), described the power of committees to sit and act during session, recesses, and adjourned periods, and it stated that committees had "jurisdiction" "until final report," it did not purport to address a new biennium legislative term and the survivability of subpoenas beyond the commencement of the odd-numbered year during which the committee will be reconstituted with new members. Further, rule 3, § 1(c), explained that "[n]o committee may exercise any of the above mentioned powers in a manner contrary to the Rules of the Legislature or in a manner which exceeds the scope of the act defining the purpose of the committee."

Thus, the Judiciary Committee's investigation at issue in this appeal automatically expired with the expiration of the Legislature in which it had begun, and the subpoena that was the subject of the district court's order presently appealed from died with it. While it might be argued under different circumstances that a failure to appear, as subpoenaed, at a past legislature's investigatory hearing is a historical fact subjecting the witness to contempt even after a new legislature commences, that did not occur here. The scheduled hearing was never held. Because the subpoena has expired and the hearing was never held, no real controversy presently exists regarding the subpoena's enforceability against Frakes.

As the enforceability against Frakes was the only issue determined in the court's order quashing the subpoena pursuant to § 50-406, the court's order in that regard is moot. It follows that no real controversy presently exists concerning the Senators' immunity defenses to Frakes' challenges under § 50-406 to the subpoena's enforceability, and the district court's order denying the Senators' motion to dismiss Frakes'

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[44] Rule 1, § 1.

challenges under § 50-406 are likewise moot.[45] We do not consider to be presently before us in this interlocutory appeal the court's ruling on the Senators' motion to dismiss as it pertained to other claims brought by the Department outside of § 50-406 and, thus, outside of a special proceeding.[46] Those claims appear to still be pending below, and the Department is free to voluntarily dismiss those claims or either party may request a ruling by the district court that the claims are moot.

[20,21] Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.[47] In determining whether the public interest exception should be invoked, the court considers the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[48] While this case involves questions of a public nature, it is not at all clear that the same or a similar problem is likely to recur and, relatedly, that there is a need to provide future guidance for public officials. Indeed, in the event that the Judiciary Committee of the current or future bienniums were to similarly issue a similar subpoena, the statutes and rules governing the issuance, enforcement, and resistance to investigatory subpoenas may have changed. We will not issue an opinion on a hypothetical set of facts that are unlikely to recur.

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[45] See, *Alabama v. North Carolina*, 560 U.S. 330, 130 S. Ct. 2295, 176 L. Ed. 2d 1070 (2010); *Pennsylvania v. Lockheed Martin Corp.*, 681 F.3d 503 (3d Cir. 2012).

[46] See, *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); Neb. Rev. Stat. §§ 25-1301 (Cum. Supp. 2018) and 25-1911 and 25-1902 (Reissue 2016).

[47] *Weatherly v. Cochran, supra* note 6.

[48] *Id.*

VI. CONCLUSION

Because the Nebraska Legislature, like most state legislative entities, is not a continuing body, the subpoenas at issue expired at the commencement of the 106th Legislature. Even if we were to agree with the Senators' legal position, we could not grant the relief they seek. This prevents this court from reaching the substantive issues raised by the parties.

We therefore dismiss the appeal as moot. We also dismiss as moot the Department's appellate motion to substitute the named senators who are no longer in office with their successors in the 106th Nebraska Legislature, which motion the Department explained "should not be construed as conceding any issue pertaining to the continued justiciability of this case on mootness or any other basis." The Department is free to make such motion below if it wishes to still pursue any claims set forth in the complaint outside of § 50-406.

Appeal and motion to substitute parties dismissed.

Miller-Lerman, J., concurring.

I concur in the per curiam decision, but write separately to address the timing of a future similar case, if any.

Among the features of Nebraska's unique Unicameral system is the fact that the Legislature reconstitutes itself every 2 years. The Nebraska Legislature is not a continuing body. As a result, the subpoena issued by the 105th Legislature ceased to be a demand of the Legislature and issues related to its issuance became moot.

This circumstance leaves unanswered the underlying substantive issues identified in the per curiam opinion including: whether the Nebraska Department of Correctional Services' rules and regulations outlining the protocol for execution of the death penalty, and the process by which the protocol was adopted, were constitutional and consistent with Nebraska statutes; whether delegation of development of the death penalty protocol to the executive branch would benefit from more

strict legislative boundaries; whether the department followed applicable state and federal law in selecting the substances for lethal injection; and whether notices and public access to various documents were consistent with Nebraska statutes.

The foregoing issues could be addressed by a similar subpoena issued by the 106th Legislature timed in a manner which would forestall mootness. Were the current or future Legislatures to act earlier in the biennium, a court challenge, if any, could mature and the Judiciary at all levels would be obligated to advance consideration of the case.

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

Anne E. VanSkiver, appellee, v.
Todd J. VanSkiver, appellant.

930 N.W.2d 569

Filed July 12, 2019. No. S-18-852.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Modification of Decree: Visitation.** Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children.
3. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
4. **Modification of Decree: Visitation: Proof.** The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child.
5. **Modification of Decree: Visitation.** The best interests of the children are primary and paramount considerations in determining and modifying visitation rights.
6. **Courts: Child Custody: Visitation.** Under Nebraska law, the court is responsible for developing and approving a parenting plan, and it has a nondelegable duty to determine questions of custody and parenting time of minor children according to their best interests. The authority to determine custody and visitation cannot be delegated to a third party, because it is a judicial function.

Appeal from the District Court for Adams County: Stephen R. Illingworth, Judge. Affirmed as modified.

Mitchell C. Stehlik, of Stehlik Law Firm, P.C., L.L.O., for appellant.

Lucinda Cordes Glen for appellee.

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

Stacy, J.

The marriage of Anne E. VanSkiver and Todd J. VanSkiver was dissolved in April 2015. Anne was granted legal and physical custody of the parties' two minor children, subject to a parenting plan agreed to by the parties and approved by the court. In July 2017, Anne moved to modify and suspend Todd's parenting time pending family therapy, alleging that his erratic and threatening behavior had escalated and that the children were frightened of him. The district court did not order family therapy, but did modify the parenting plan. Todd filed this timely appeal. We affirm as modified.

FACTS

Anne and Todd married in 2000, and in October 2009, she filed a complaint to dissolve the marriage. After years of contentious litigation, the parties reached a settlement agreement and the marriage was dissolved in April 2015. Anne was awarded legal and physical custody of the parties' two minor children, and Todd was awarded parenting time pursuant to an agreed-upon parenting plan. Under the plan, Todd had parenting time every Monday and Wednesday evening from 5:30 to 7:30 and the second weekend of every month from 5:30 p.m. on Friday until 5:30 p.m. on Sunday. The plan also set forth a rotating holiday parenting time schedule.

In July 2017, Anne sought to modify Todd's parenting time, asking that it be suspended pending family therapy. She alleged that since the entry of the decree, Todd had "become increasingly angry, threatening, harassing, and erratic" to her,

the children, and others. She alleged that she had obtained a protection order against Todd due to this new behavior, that he had violated the protection order, and that the children "fear[ed] for their safety" when they were with Todd. She asked that Todd's parenting time be modified in an appropriate manner and suspended until the children were comfortable with him after family therapy. Todd's answer denied Anne's allegations and alleged that no material change in circumstances had occurred.

Trial on the complaint to modify was held May 2, 2018. Anne testified that she obtained a protection order against Todd on May 25, 2017, based on threats he made to her, such as "tic toc . . . time is running out," "[w]atch out from being alone in the dark," and "[t]he sands of time are closing in." She testified she understood these statements to be threats that Todd was going to harm or kill her. Anne further testified that Todd violated this protection order in June 2017 by sending similar text messages, including some alluding to digging her grave.

The protection order was still in effect at the time of trial, and thus Todd was precluded from having contact with Anne. Because of this, Todd had been contacting the older child, who was born in 2002 and was 15 at the time of trial, to arrange parenting time. Anne testified that Todd often had dinner with the children two nights a week, but that he had not exercised his weekend parenting time for approximately 1 year (since May 2017). Anne said the children had expressed concerns to her about spending time with Todd. She testified that Todd had "become more frightening" since the time of the divorce, and she asked that his parenting time be modified to occur only "when the kids wanted to see [him]."

On cross-examination, Anne testified that Todd made daily threats to her during the marriage. She admitted being frightened of him prior to the divorce. On redirect, she explained that since the divorce, Todd's "whole demeanor" had changed,

in addition to the "way he is with the kids." She testified that the children were now "scared of him," had realized "that he's crazy," and were "afraid."

A licensed independent mental health practitioner testified that he had provided counseling services for both children during the fall and winter of 2017 and for the younger child in April 2018. The practitioner testified that the relationship between the younger child and Todd was "strained" and "poorly-formed." He did not think the relationship was improving. The practitioner admitted he had never met Todd.

At the time of trial, Todd was on probation for violating the protection order Anne obtained against him and his probation was subject to various conditions. Todd's probation officer testified that a motion to revoke probation was pending because Todd had failed to comply with certain conditions, including completion of a 36-week education class and not possessing firearms. The record indicates Todd was dismissed from the education class due to disruptive behavior and noncompliance with course rules. The probation officer noted that revocation proceedings remained pending and that Todd had denied the allegations of the motion to revoke.

The older child's school counselor testified that she began seeing him weekly at the beginning of the 2017-18 school year. Some weeks she sees him more than once, because the child seeks her out for additional counseling if he is having a difficult day. The counselor testified that she works with the child to help him destress and cope with his anxiety so that he can focus on his schoolwork. She testified the child often has stomach aches due to his anxiety and sometimes needs to go home from school. The counselor testified that one source of the child's stress and anxiety was contact with his father. The counselor had viewed some text correspondence between the child and Todd and opined that Todd's messages were inappropriate. She also opined that the child felt a responsibility to shelter and protect the younger child from his father. The

counselor had discussed these issues with Anne, but had never met Todd.

The older child testified in chambers. The parties' lawyers were present, but the parents were not. He was 15 years old at the time of trial and a high school freshman. His younger brother was 11 years old. He stated that his preference would be that he would like "little to no time" with his father, except maybe on holidays and Christmas. He thought that less contact with his father would be a big stress relief for him. He testified he was worried about his younger brother's safety, because he thought his father could possibly hurt him. The child explained that Todd is "unpredictable" and that he never knew when Todd was "going to outburst and into rage." He testified he was afraid of his father, and he thought his brother was afraid too. He asked that any parenting time with his father be limited to when the children wanted to see him. The child was unsure whether joint counseling with his father would help, because he did not think his father would be open to it. He stated he does not really bring up issues to his father, because his father "brush[es] them off." He testified he was fearful that his father and grandmother might attempt to kidnap him as some sort of "vendetta."

The child testified that on one occasion when his father picked them up for a visit, there was a gun in the back seat of the car, next to where his younger brother was riding. He also described an incident where his father got angry with his younger brother and grabbed the child's face during a card game, but otherwise testified Todd had never physically struck either of them. He stated his father often called him names, such as "mother fucker," "master baitor," "wiener," "wanger," and "wise ass." He stated the name calling made him feel "[e]motionally drained." He testified the relationship with his father was causing him stress. However, the child said he did not mind being the go-between to set up visits with his father.

Todd testified that he did not believe any change in the parenting plan was warranted. He stated that communicating with the older child directly to set up visitation times was generally working. He denied ever calling the older child names, even in a joking manner. He also denied ever having a gun in the vehicle when he picked up the boys. Todd's mother testified that she had never heard him call the boys names or threaten them.

On August 17, 2018, the district court entered an order modifying the parenting time. The order made specific factual findings, including the following:

> [T]he Court observed the conduct and demeanor of [Anne] and [Todd] during the modification hearing. [Anne] is clearly afraid of [Todd]. She is distressed to be in the same room with him. As to [Todd], he has total disrespect for [Anne], the Court and anyone in a position of authority. During [Anne's] testimony the Court observed his mocking behavior, laughing during testimony and general contemptuous attitude. . . .
>
> . . . .
>
> The Court has consistently forced children to go on visitations with non custodial parents when they did not want to go and the children were not at risk for mental or physical harm. This case is different. These children have been and are at risk for mental abuse from their father. [Todd] has consistently shown signs of extreme anger, contempt for authority, a total disregard of the rules functioning citizens are required to live by and a pattern of threats and intimidation to his children and former wife. . . . The Court will therefore enter an order to allow the boys to see their father at their discretion. Hopefully [Todd] will seek mental health counseling to help him repair his relationship with his boys.

The court's order then provided:

> 1. There has been a material change in circumstances warranting a modification of [Todd's] parenting time.

> Paragraph V, time sharing on page 3 of the parenting plan is modified as follows:
>
> The Father shall have parenting time as follows:
>
> A. Monday and Wednesday evenings of each week from 5:30 P.M. to 7:30 P.M. The boys may decline to go on these visits if [Todd] acts in a threatening manner.
>
> B. Holidays and special days - the boys shall decide if they wish to see their father on the holidays and special days set out in the parenting plan.
>
> 2. There will be no overnight visitations until [Todd] engages in individual mental health counseling and then counseling with the boys. He may then petition the Court for additional parenting time.

Todd filed this timely appeal, and we moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Todd assigns that the district court abused its discretion in (1) determining a material change in circumstances had occurred since the entry of the decree, (2) delegating to the minor children the right to determine whether to exercise parenting time with Todd, and (3) limiting his parenting time.

STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.[1]

ANALYSIS

Material Change in Circumstances

[2-5] Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change

[1] *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016). See *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

of circumstances affecting the best interests of the children.[2] A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.[3] The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child.[4] The best interests of the children are primary and paramount considerations in determining and modifying visitation rights.[5]

Todd argues Anne failed to show a material change in circumstances that would support modifying his parenting time. Bluntly put, his contention is that Anne was afraid of him at the time of their divorce due to his threatening behavior, so the fact that she remains afraid of him due to his threatening behavior is nothing new. We do not find Todd's contention persuasive.

The evidence does show that Anne was afraid of Todd and felt threatened by his behaviors at the time of their divorce. But it also shows that Todd's behavior has escalated since that time, to the point where Anne had to obtain a protection order against him. Perhaps more important, regardless of the relationship between Todd and Anne, there is evidence that the circumstances of the relationship between Todd and the children has deteriorated. Anne testified Todd's behavior has escalated, his demeanor toward the children has changed, and the children are afraid of him. The older child confirmed he was afraid of his father, and there was evidence that child was experiencing significant stress as a result of his father's harmful behavior and mental abuse. On this record, we find Anne

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[2] *Berndt v. Berndt*, 25 Neb. App. 272, 904 N.W.2d 24 (2017).

[3] *Id.*

[4] *Id.*

[5] *Id.*

has shown a material change in circumstances affecting the best interests of the children. Todd's first assignment of error is meritless.

Modification of Parenting Time

[6] In his second assignment of error, Todd argues the district court erred in "delegating to the minor children the right to determine whether to exercise parenting time."[6] Under Nebraska law, the court is responsible for developing and approving a parenting plan.[7] Both this court[8] and the Court of Appeals[9] have held that a trial court has a nondelegable duty to determine questions of custody and parenting time of minor children according to their best interests. And we have emphasized that the authority to determine custody and visitation cannot be delegated to a third party, because it is a judicial function.[10]

Todd's argument that there has been an improper delegation of the court's authority to establish parenting time is premised on the assumption that when the court modified his parenting time, it retained the specific blocks of scheduled parenting time awarded previously, but authorized the children to decide, based on Todd's behavior, whether he could exercise that parenting time. This is a plausible interpretation of the court's language, but we are not convinced on de novo review that it is the proper one.

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[6] Brief for appellant at 16.

[7] See Neb. Rev. Stat. § 43-2929 (Reissue 2016).

[8] See, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[9] See, *Barth v. Barth*, 22 Neb. App. 241, 851 N.W.2d 104 (2014); *Mark J. v. Darla B.*, 21 Neb. App. 770, 842 N.W.2d 832 (2014); *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995).

[10] See *Ensrud, supra* note 8.

No Improper Delegation

We are guided by the court's expressed intentions. Before articulating the terms of the modified parenting plan, the court stated its intent was to "enter an order to allow the boys to see their father at their discretion." This does not suggest to us that the court intended to retain any enforceable parenting time with Todd. To the contrary, we understand the court as stating an intent to completely eliminate Todd's enforceable parenting time, while simultaneously acknowledging the practical reality that the boys may at times still wish to spend time with their father.

The remainder of the court's order is consistent with this intention. The order expressly eliminated Todd's overnight parenting time and provided that if Todd "engages in individual mental health counseling and then counseling with the boys . . . [h]e may then petition the Court for additional parenting time."

We acknowledge the court's order provided that the boys could "decide if they wish to see their father" on holidays and "may decline to go on" the Monday and Wednesday evening visits, but we do not understand this language as delegating to the children the judicial duty of establishing the parenting schedule. Instead, the order eliminated all of Todd's scheduled parenting time and recognized the reality that the boys, now ages 16 and 12, may want to spend time with their father despite the fact Todd has no enforceable parenting time schedule. Contrary to Todd's contention, the children were not given discretion to set the parenting time schedule, nor were they given authority to determine whether or when Todd could exercise parenting time.

Indeed, were we to adopt Todd's interpretation of the court's order, it would be inconsistent with the court's factual findings and difficult to enforce. The district court articulated genuine concern about Todd's escalating behavior and its negative effect on the children, which the court described as mental abuse, and

it would be inconsistent for the court to then award Todd specific parenting time contingent on the children's determination of whether Todd was acting in a threatening manner. Moreover, were we to construe the order of modification in this fashion, the only way to enforce it would be for Todd to bring a contempt action against his children, and we cannot imagine that was the court's intention.

Construed in context with the other provisions of the court's order of modification, we find the court developed a modified parenting plan designed to protect the children from Todd's harmful behavior by suspending all of his scheduled parenting time. We find this construction is not only supported by the record but is consistent with the court's stated intention in modifying the parenting plan. To the extent the language of the modification order could be read otherwise, we modify it on de novo review for the sake of clarity.

In doing so, we reject Todd's claim that the court has improperly delegated decisions about parenting time to the minor children. Instead, we clarify that the court has modified Todd's parenting time by suspending it entirely. Todd's second assignment of error is meritless.

No Abuse of Discretion

In his final assignment of error, Todd argues the court abused its discretion in limiting his parenting time. Having clarified that the court actually suspended Todd's parenting time altogether, we find no abuse of discretion.

The record is replete with evidence that Todd's threatening behavior toward Anne and the children has escalated since the decree was entered and the original parenting plan was approved. The older child testified he is afraid of his father, and the court specifically found Todd's behavior amounted to mental abuse of the children. Evidence showed Todd violated the protection order Anne obtained against him and had been noncompliant with the terms of his probation, indicating an

unwillingness to acknowledge or change his behavior. As the court noted, the evidence established that "[Todd] has consistently shown signs of extreme anger, contempt for authority, a total disregard of the rules functioning citizens are required to live by and a pattern of threats and intimidation to his children and former wife."

On this record, we find no abuse of discretion in suspending Todd's scheduled parenting time.

CONCLUSION

The order of modification was warranted by a material change in circumstances, and the court did not improperly delegate its authority to determine parenting time. Instead, as modified by this court for clarity, the district court's order suspended Todd's parenting time entirely. Because the record supports this modification, we affirm the order of the district court as modified.

Affirmed as modified.

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

State of Nebraska, appellee, v. Nikko A. Jenkins, appellant.

931 N.W.2d 851

Filed July 19, 2019. Nos. S-17-577, S-17-657.

1. **Courts: Trial: Mental Competency: Appeal and Error.** 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. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
2. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty or no contest plea, and an appellate court will overturn that decision only where there is an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **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.
5. **Trial: Mental Competency.** The competency standard includes both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him or her and (2) whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding.
6. **Pleas.** To support a finding that a plea of guilty or no contest has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.

7. ____. To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
8. ____. A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.
9. ____. A plea of no contest means that the defendant is not contesting the charge.
10. **Courts: Trial: Mental Competency.** The question of competency to represent oneself at trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
11. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.
12. **Constitutional Law: Right to Counsel: Waiver.** A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the Sixth Amendment and Neb. Const. art. I, § 11.
13. **Trial: Right to Counsel: Waiver.** The standard for determining whether a defendant is competent to waive counsel is the same as the standard for determining whether a defendant is competent to stand trial.
14. **Right to Counsel: Waiver.** The competence that is required of a defendant seeking to waive his or her right to counsel is the competence to waive the right, not the competence to represent himself or herself.
15. **Constitutional Law: Right to Counsel: Waiver.** In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently.
16. **Right to Counsel: Waiver: Appeal and Error.** When a criminal defendant has waived the right to counsel, an appellate court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel.
17. **Criminal Law: Right to Counsel: Waiver.** A knowing and intelligent waiver of the right to counsel can be inferred from conduct, and consideration may be given to a defendant's familiarity with the criminal justice system.
18. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute presents a question of law, which an appellate court independently reviews.
19. **Constitutional Law: Statutes: Sentences.** An ex post facto law is a law which purports to apply to events that occurred before the law's

enactment and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed.

20. ____: ____: ____. There are four types of ex post facto laws: those which (1) punish as a crime an act previously committed which was innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.
21. ____: ____: ____. The Ex Post Facto Clause bars only application of a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
22. **Criminal Law: Statutes: Legislature: Sentences.** Generally, when the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.
23. **Constitutional Law: Initiative and Referendum.** The constitutional provisions with respect to the right of referendum reserved to the people should be construed to make effective the powers reserved.
24. **Statutes: Initiative and Referendum.** Upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures.
25. **Constitutional Law: Sentences: Death Penalty: Mental Competency.** The Eighth Amendment forbids executing a prisoner whose mental illness makes him or her unable to reach a rational understanding of the reason for his or her execution.
26. **Constitutional Law: Sentences: Death Penalty.** U.S. Supreme Court precedent forecloses any argument that the death penalty violates the Constitution under all circumstances.
27. **Sentences: Death Penalty: Appeal and Error.** In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.
28. **Rules of Evidence: Sentences: Death Penalty.** In a capital sentencing proceeding, the Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances.
29. **Pleas: Sentences.** A no contest plea constitutes an admission of all the elements of the offenses, but not an admission to any aggravating circumstance for sentencing purposes.

30. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** A sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by the Nebraska Supreme Court.
31. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
32. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** In a capital sentencing proceeding, a sentencer may consider as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
33. **Sentences: Aggravating and Mitigating Circumstances: Proof.** In a capital sentencing proceeding, the risk of nonproduction and nonpersuasion as to mitigating circumstances is on the defendant.

Appeals from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

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

Nikko A. Jenkins, pro se.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Brian William Stull and Amy Fettig, of American Civil Liberties Union Foundation, and Amy A. Miller, of American Civil Liberties Union of Nebraska Foundation, for amici curiae National Alliance on Mental Illness et al.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ., and Bishop and Welch, Judges.

Cassel, J.

I. INTRODUCTION

In consolidated appeals, one of which involved the death penalty, Nikko A. Jenkins challenges his competency to

represent himself, enter no contest pleas, proceed to sentencing, and receive the death penalty. He also makes several challenges to the death penalty. Finding no abuse of discretion by the district court and no constitutional infirmity regarding the death penalty, we affirm.

II. BACKGROUND

We begin by setting forth a brief background. Additional facts will be discussed, as necessary, in the analysis section.

In August 2013, Jenkins shot and killed four individuals in three separate incidents in Omaha, Nebraska. In October, the State filed two criminal cases against him. In case No. CR 13-2768, the State charged Jenkins with four counts each of murder in the first degree, use of a deadly weapon (firearm) to commit a felony, and possession of a deadly weapon by a prohibited person. The information contained a "Notice of Aggravators" for each count of murder. In case No. CR 13-2769, the State charged Jenkins with two counts of possession of a deadly weapon by a prohibited person. The cases were eventually consolidated. Because Jenkins remained mute at the arraignment, the court entered pleas of not guilty to all counts.

Jenkins' competency was an issue throughout the proceedings. The court held a number of hearings and received extensive evidence. In February 2014, the court found Jenkins competent to stand trial. Although psychiatrists disagreed regarding whether Jenkins was competent to stand trial and whether he was mentally ill, the court acknowledged the psychiatrists' testimony that a person can be mentally ill and still be competent to stand trial.

In March 2014, the court held a hearing during which it found that Jenkins voluntarily, knowingly, and intelligently waived his right to counsel. It granted Jenkins' motion to represent himself and appointed the public defender's office to provide an attorney to advise Jenkins. After a hearing 11 days later, the court accepted Jenkins' waiver of his right to a jury trial.

In April 2014, Jenkins ultimately entered a plea of no contest to every count. He did not agree with the factual basis provided by the State and stated that "even though [his] physical person may have been in the act of these things [he] was not in that moment because of [his] psychosis condition of psychotic mania." The court accepted Jenkins' pleas of no contest and found him guilty of the charges. Jenkins waived his right to have a jury determine whether the aggravating circumstances alleged by the State were true, stating that he would rather have a three-judge panel make that determination. The court accepted the waiver after ascertaining that it was made freely, voluntarily, and knowingly.

Approximately 1 week later, the court appointed the public defender's office to represent Jenkins in the death penalty phase. Because counsel believed Jenkins was not competent to proceed with the sentencing phase, the court held a hearing on the matter. In July 2014—approximately 4 months after finding Jenkins to be competent—the court entered an order finding that Jenkins was not competent to proceed with the sentencing phase. The court expressed concern that the two psychiatrists who believed Jenkins was competent to proceed did not believe that he had a major mental illness. The court worried that if the psychiatrists were wrong as to whether Jenkins had a major mental illness, "it places doubt as to their other opinion that [Jenkins] is competent."

After lengthy evaluation and rehabilitation efforts, the court held a status hearing in February 2015 regarding Jenkins' competency. It received a report authored by two clinical psychologists and a psychiatrist, who opined that Jenkins was competent to proceed with sentencing. In March, the court found that Jenkins was competent to proceed with the death penalty phase.

The court set the sentencing hearing before a three-judge panel to commence on July 7, 2015. However, the court postponed the hearing after the Nebraska Legislature passed a law repealing the death penalty. Through a referendum process, enough votes were gathered to stay the repeal of the death

penalty until the issue was placed on the ballot for the general election in November 2016.

Meanwhile, a psychiatrist opined in December 2015 that Jenkins was not competent. The court allowed further evaluation of Jenkins and received evidence during a June 2016 competency hearing. In September, the court found that Jenkins was competent to proceed with the sentencing phase. It subsequently rejected Jenkins' challenges to the death penalty.

In November 2016, the death penalty sentencing phase began. The three-judge panel unanimously found beyond a reasonable doubt the existence of six aggravating circumstances. It then proceeded with a hearing on mitigating circumstances. The panel received comprehensive evidence regarding, among other things, Jenkins' mental health and his time in solitary confinement.

In May 2017, the three-judge panel entered a 30-page sentencing order. The panel found no statutory mitigators existed. The panel found two nonstatutory mitigators to be considered in the weighing process: Jenkins' bad childhood and his mental health—that he had "a personality disorder of narcissistic, antisocial, and borderline."

The panel unanimously determined that the mitigating circumstances did not approach or exceed the weight given to the aggravating circumstances. With regard to proportionality in comparison with other cases around the state, the panel stated that Jenkins' "commission of these four murders over a ten day period is one of the worst killing sprees in the history of this state." Thus, the panel found that sentences of death were not excessive or disproportionate to the penalty imposed in similar cases.

The panel imposed a sentence of death for each of the four counts of murder in the first degree. It imposed consecutive sentences of 45 to 50 years' imprisonment on all other counts. Because the sentences involved capital punishment, this automatic appeal followed.[1]

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[1] See Neb. Rev. Stat. § 29-2525 (Cum. Supp. 2018).

III. ASSIGNMENTS OF ERROR

Jenkins claims that the district court erred in accepting his pleas of no contest for two primary reasons: (1) He was not competent to enter them and (2) they lacked a factual basis or affirmative evidence of a valid waiver of trial rights.

He assigns that the court erred in finding him to be competent to proceed pro se and that his convictions and his sentences are constitutionally infirm, because they were the product of the trial court's erroneous determination that he was competent to proceed to trial and sentencing.

Jenkins makes several challenges concerning the death penalty. He assigns that the court erred in denying his motion to preclude the death penalty as a violation of the ex post facto prohibitions and in denying his motion to find Nebraska's statutory death penalty sentencing procedure is unconstitutional. Jenkins claims that the death penalty is cruel and unusual punishment when imposed upon seriously mentally ill offenders and individuals with intellectual disability. He further assigns that the death penalty in all cases violates the Eighth Amendment to the U.S. Constitution and Neb. Const. art. I, § 9.

Jenkins also alleges that the sentencing panel committed error. He assigns that the panel erred by sentencing him to death based on facts alleged during the plea proceeding. He also assigns that the panel erred by failing to give meaningful consideration to his mental illness, his unfulfilled requests for commitment before the crime, and the debilitating impact of solitary confinement.

Additionally, Jenkins filed a pro se brief. He argued that his counsel was ineffective by failing to bring Jenkins' attempted suicide to the attention of the court when it was contemplating Jenkins' competency. However, Jenkins failed to assign any 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.[2] Although we decline

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[2] *State v. Dill*, 300 Neb. 344, 913 N.W.2d 470 (2018).

to resolve this alleged error, we note that during a hearing on competency, Jenkins' counsel asked one of the State's experts about Jenkins' suicide attempts and one of Jenkins' experts also discussed those attempts.

IV. ANALYSIS

1. Acceptance of Pleas

Jenkins contends that the court abused its discretion in accepting his no contest pleas for a variety of reasons. He claims that he was not competent to enter pleas. In the same vein, he alleges that there was no affirmative evidence of a knowing, voluntary, and intelligent waiver of trial rights. Jenkins also argues that no factual basis existed for the pleas.

(a) Standard of Review

[1] 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. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[3]

[2,3] A trial court is given discretion as to whether to accept a guilty or no contest plea, and an appellate court will overturn that decision only where there is an abuse of discretion.[4] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[5]

(b) Additional Background

(i) Competency

During a November 2013 hearing, the court received Dr. Bruce D. Gutnik's November 8 psychiatric diagnostic competence evaluation. Gutnik opined that Jenkins suffered

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[3] *State v. Fox*, 282 Neb. 957, 806 N.W.2d 883 (2011).

[4] See *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018).

[5] *Id.*

from "Schizophrenia, Continuous, Severe." Gutnik noted that Jenkins had hallucinations and delusions and "blunted affect." Gutnik could not rule out "Schizoaffective or Other Specified Personality Disorder." Gutnik opined that Jenkins was not competent to stand trial, but that Jenkins' competence could be restored with appropriate treatment, including antipsychotic medications. The court ordered that Jenkins be evaluated for competence to stand trial by staff at the Lincoln Regional Center.

In February 2014, the court held a competency hearing. Psychiatrist Y. Scott Moore opined that Jenkins was competent for trial. He based that determination on Jenkins' ability to understand three prongs: (1) awareness of the charges against him, (2) understanding of legal procedures and the functions of the people in the courtroom, and (3) ability to make a rational defense. Moore believed that Jenkins' primary diagnosis was antisocial personality disorder, that there was a "very slim" likelihood of Jenkins' having any other psychotic illness, and that Jenkins was mostly malingering.

Other evidence pointed to the contrary. Dr. Eugene C. Oliveto performed a mental health evaluation on Jenkins 2 days prior to the hearing and arrived at an "Axis I" diagnosis of schizophrenia and posttraumatic stress disorder. In 2009, Dr. Natalie Baker had opined that Jenkins had psychosis not otherwise specified and bipolar disorder—an opinion which Gutnik noted during the 2014 competency hearing. According to Gutnik, hallucinations and delusions are the two primary signs of psychosis and a review of Jenkins' records showed a history of hallucinations dating back to age 8. Thus, Gutnik testified that if Jenkins was malingering, he had been doing so since he was 8.

On February 20, 2014, the court found Jenkins competent to stand trial.

(ii) Plea Hearing

In April 2014, the court held a hearing on Jenkins' pro se motion to plead guilty to all felony counts. Several times

during the hearing, Jenkins changed how he wished to plead. He ultimately entered no contest pleas to all charges.

Initially, Jenkins entered a guilty plea to each charge in case No. CR 13-2768 and a not guilty plea to both charges in case No. CR 13-2769. The court then advised Jenkins of the litany of constitutional rights he was giving up by entering guilty pleas. Jenkins interjected to ask whether the not guilty pleas would hinder anything, because he did not want "to be sitting in, you know, Douglas County, you know, eight months, 23-hour-a-day confinement, when I ain't did nothing." The court advised that a trial would be held on those charges. Jenkins stated that he understood the constitutional rights he would be waiving. He followed that by stating he had already filed a habeas corpus action in federal court.

The court recited the elements for all of the charges and advised Jenkins as to the penalties. Upon Jenkins' request, the court allowed him to plead no contest to the weapons charges in both cases. Before the court accepted those pleas, Jenkins stated that he wished to submit crime scene photographs for the record.

When the court asked if the pleas of guilty and no contest were Jenkins' free and voluntary acts, Jenkins answered that they were voluntary but not free. He believed that judicial officers had been unethical and had violated his rights and that he saw "no other choice but to take these matters to another jurisdiction." The court then asked, "Are you freely, knowingly and voluntarily entering these pleas of guilty and no contest?" Jenkins answered, "Yes." Jenkins also stated that he understood he was giving up constitutional rights and waiving any motions pending now or in the future.

The court asked for a factual basis for all charges, and the prosecutor supplied a lengthy recitation. The prosecutor stated that on August 11, 2013, police were called to a location in Omaha, Nebraska, and found the bodies of Jorge Cajiga-Ruiz and Juan Uribe-Pena deceased in a pickup truck with their pockets "kind of turned inside out in their pants." The investigation revealed that the victims were lured by Jenkins' sister

and cousin under the premise of performing acts of prostitution. Jenkins interjected, "I know you were gonna lie like this." The prosecutor stated that Jenkins shot the victims in the head with a shotgun loaded with a "deer slug." The victims were robbed with their billfolds taken. An autopsy showed that Cajiga-Ruiz died of a single gunshot wound to the head, which first passed through his right hand, and that Uribe-Pena died of a single gunshot wound to the head or face.

The prosecutor stated that on August 19, 2013, the police were called to "18th and Clark Streets" and observed Curtis Bradford with "obvious gunshot wounds to the head." Police found a deer slug, consistent with the deer slug used at the earlier homicides. The autopsy showed that Bradford had two gunshot wounds to the head and that the entrance was the back of the head. The prosecutor continued:

> In the course of the investigation by the Omaha Police Department, there were witnesses. A witness who was in a vehicle with . . . Jenkins[] and his sister . . . who had — was upset with . . . Bradford, apparently.
>
> MR. JENKINS: He's lying. Liar.
>
> [Prosecutor]: They set up that they were going to do — perform some sort of another act of either a robbery or a burglary, some kind of a jacking. They picked up . . . Bradford. He had gloves on, was dressed in a dark outfit. They let him hold a .9 millimeter Hi-Point Carbine rifle as they went to this location. Once they got to a location where he was murdered, at 1804 North 18th Street, [Jenkins' sister] shot him once in the head. And then . . . Jenkins said, this is how you do it, and — and proceeded to use a shotgun with a deer slug —
>
> MR. JENKINS: Liar.
>
> [Prosecutor]: — and shot . . . Bradford in the head also.
>
> MR. JENKINS: Fucking liar.

The prosecutor stated that on August 21, 2013, as Andrea Kruger was driving home from work at approximately 1:30 or 2 a.m., she was stopped at "168th and Fort Street" by a vehicle occupied by Jenkins, his uncle, his sister, and his

cousin. Jenkins got out of his vehicle and pulled Kruger from her vehicle, because he wanted her sport utility vehicle to "rob or jack other people." After Jenkins shot Kruger several times, he and his uncle took her vehicle. An autopsy showed that Kruger's cause of death was gunshot wounds to the head, neck, and back.

According to the prosecutor, police obtained a search warrant for a bag that Jenkins carried into an apartment. The bag contained a "Remington Model Express Magnum Pump 12-gauge shotgun with a cut barrel and butt stock and a Hi-Point Carbine Model 995 rifle." Spent shell casings recovered from the Kruger murder scene were determined to have been fired by the Hi-Point carbine that was found in the bag. That same carbine had Bradford's DNA on it. Ballistics evidence showed that the spent rifle slug from the Bradford crime scene was fired from the shotgun recovered from the bag. During an interview with Omaha police officers, Jenkins said he fired the weapons and killed the four victims. Police also obtained video from businesses located at 168th and Fort Streets which showed Jenkins and his uncle in the area around the time of Kruger's murder. Further corroboration came from Jenkins' cousin, who was present at the first and last murders, and from one of Jenkins' sisters concerning Bradford's murder. For purposes of the factual basis, the court received a certified copy of a felony conviction for Jenkins.

Jenkins disputed the accuracy of the factual basis. He explained that while his "physical person may have been in the act of these things [he] was not in that moment because of [his] psychosis condition of psychotic mania . . . and manic episode that [he] was within." Jenkins stated that he heard the voice of "Apophis" prior to the crimes. The court inquired whether Jenkins understood that entry of a guilty plea waived the right to enter a plea of not guilty by reason of insanity. Jenkins responded that he understood. He asserted that Apophis ordered him to sacrifice the victims. The court asked if Jenkins purposely and with deliberate and premeditated malice killed Cajiga-Ruiz. Jenkins answered: "[T]he last thing I could

remember was I'm in a car. The next thing I know I'm in front of this truck and I'm in front of these individuals. It wasn't premeditated. The demonic force led me to them just like to the other victims." He stated, "I don't recall in the moment of shooting them." Similarly, when asked if he remembered killing Bradford, Jenkins answered that he remembered being with Bradford and hearing Apophis. With regard to Kruger's murder, Jenkins recalled seeing a vehicle pull up behind his, hearing Apophis, and getting out of his vehicle.

The court expressed concern about accepting the guilty pleas due to Jenkins' disagreement with the factual basis. The court stated that it would accept a no contest plea to all of the charges, to which Jenkins agreed. After Jenkins entered pleas of no contest to all counts, he then asked if the court was going to accept crime scene photographs for purpose of his appeals. The court advised that it did not need to receive any evidence at that time. It then accepted the factual basis by the State and found Jenkins guilty of the charges.

(c) Discussion

(i) Competency

[4,5] The first hurdle is whether Jenkins was competent to plead no contest. 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.[6] The competency standard includes both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him or her and (2) whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding.[7]

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[6] *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.

[7] See *State v. Fox, supra* note 3.

In finding Jenkins competent, the court considered the evidence received at the competency hearing along with its colloquy with Jenkins during that hearing. Although the experts disagreed, there was expert testimony that Jenkins was competent. The court reasoned that its colloquy with Jenkins showed that he could "comprehend his rights, convey his reasons why he believed his rights had and were being violated, and to follow the request of the Court as to the timeliness of submitting his grievances."

The court's interactions with Jenkins are important. At the time of the court's competency determination, it had observed Jenkins on a number of occasions. The U.S. Supreme Court has recognized that "the trial judge, particularly one . . . who presided over [a defendant's] competency hearings . . . , will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[8]

Here, the court based its competency determination on expert testimony and its own discussion with Jenkins. Sufficient evidence supports the court's determination of competency; therefore, we will not disturb it.

(ii) Validity of Pleas

[6,7] In considering the validity of Jenkins' pleas, we recall well-known principles. A plea of no contest is equivalent to a plea of guilty.[9] To support a finding that a plea of guilty or no contest has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.[10] To support a plea of guilty or no contest, the

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[8] *Indiana v. Edwards*, 554 U.S. 164, 177, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

[9] *State v. Wilkinson*, 293 Neb. 876, 881 N.W.2d 850 (2016).

[10] See *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.[11]

[8,9] A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.[12] Jenkins contends that his pleas lacked a factual basis, because he disagreed with the prosecutor's version of the facts. But a plea of no contest does not admit the allegations of the charge; instead, it merely declares that the defendant does not choose to defend.[13] Such a plea means that the defendant is not contesting the *charge*.[14] We find no requirement that a defendant agree with the factual basis. If the State presents sufficient facts to support the elements of the crime charged and the defendant chooses not to defend the charge, no more is required. We conclude that the State supplied a sufficient factual basis.

Jenkins' other challenges to his pleas are likewise unpersuasive. He argues that the record demonstrated he did not make a knowing, voluntary, and intelligent waiver of his rights. He further contends that his pleas were the product of psychologically coercive conditions of solitary confinement.

The record supports a finding that Jenkins entered valid pleas. The bill of exceptions shows that the court informed Jenkins of the rights he would be waiving by entering a guilty or no contest plea and that Jenkins responded he understood. We agree that some of Jenkins' statements can be read to show confusion. But the court, having interacted with Jenkins on numerous occasions by the time of the plea hearing, was in the best position to assess the validity of his waiver of trial rights. Further, the court held a competency hearing before accepting Jenkins' pleas and, with the benefit

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[11] *State v. Wilkinson, supra* note 9.

[12] *Id.*

[13] See 21 Am. Jur. 2d *Criminal Law* § 645 (2016).

[14] See *In re Interest of Verle O.*, 13 Neb. App. 256, 691 N.W.2d 177 (2005).

of expert evidence, found Jenkins competent. We cannot say that the court abused its discretion in accepting Jenkins' pleas of no contest.

2. Waiver of Counsel

Jenkins claims that the court committed reversible error when it allowed him to proceed pro se. He contends that the court failed to adequately advise him of the pitfalls of pro se representation.

(a) Standard of Review

[10] The question of competency to represent oneself at trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[15]

[11] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.[16]

(b) Additional Background

Less than 1 month after the court found Jenkins competent to stand trial, it held a hearing on Jenkins' request to dismiss his counsel and to proceed pro se. The court told Jenkins that the charges he faced were "extremely serious," that representing himself would be "extremely difficult," that Jenkins' counsel was "probably one of the best defense attorneys in this entire area," and that Jenkins was "placing [his] defense at risk" if he did not want counsel to represent him.

The court found that Jenkins voluntarily, knowingly, and intelligently waived his right to counsel. It granted Jenkins' motion to represent himself and appointed the public defender's office to provide an attorney to advise Jenkins.

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[15] *State v. Lewis*, 280 Neb. 246, 785 N.W.2d 834 (2010).

[16] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

(c) Discussion

[12] A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the Sixth Amendment and Neb. Const. art. I, § 11.[17] However, a criminal defendant's right to conduct his or her own defense is not violated when the court determines that a defendant competent to stand trial nevertheless suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without counsel.[18] The two-part inquiry into whether a court should accept a defendant's waiver of counsel is, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing, intelligent, and voluntary.[19]

(i) Competency

[13] The standard for determining whether a defendant is competent to waive counsel is the same as the standard for determining whether a defendant is competent to stand trial.[20] Here, the court accepted Jenkins' waiver of counsel less than 1 month after finding that Jenkins was competent to stand trial—a determination that we have concluded was supported by sufficient evidence. And unlike in *State v. Lewis*,[21] where the record showed that the defendant suffered from severe mental illness, the court here did not find that Jenkins was impaired by a serious mental illness or lacked mental competency to conduct trial proceedings by himself.

[14] We are mindful that the competency question is not whether a defendant can ably represent himself or herself. "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*,

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[17] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[18] *State v. Lewis, supra* note 15.

[19] See *State v. Hessler, supra* note 16.

[20] *Id.*

[21] *State v. Lewis, supra* note 15.

not the competence to represent himself."[22] Indeed, "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[23] The court recognized during the hearing that it had declared Jenkins competent to stand trial, and sufficient evidence supports that finding. Thus, Jenkins was also competent to waive his right to counsel.

(ii) Validity of Waiver

[15,16] In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently.[24] When a criminal defendant has waived the right to counsel, this court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel.[25] Formal warnings do not have to be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel.[26] In other words, a formalistic litany is not required to show such a waiver was knowingly and intelligently made.[27]

Jenkins' waiver of counsel was voluntary. Like in *State v. Dunster*,[28] no promises or threats were made to encourage the waiver of the right to counsel and the defendant prepared his own written motion to discharge counsel. Moreover, the decision to discharge counsel and proceed pro se was not forced upon Jenkins; rather, Jenkins wished to handle matters

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[22] *Godinez v. Moran*, 509 U.S. 389, 399, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (emphasis in original).

[23] *Id.*, 509 U.S. at 400 (emphasis in original).

[24] *State v. Ely, supra* note 17.

[25] *State v. Hessler, supra* note 16.

[26] *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009), *overruled in part on other grounds, State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

[27] *Id.*

[28] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

in a particular way and was dissatisfied with his counsel's failure to file certain motions that counsel believed to be frivolous.

[17] The record shows that Jenkins knowingly and intelligently waived his right to counsel. A knowing and intelligent waiver can be inferred from conduct, and consideration may be given to a defendant's familiarity with the criminal justice system.[29] Jenkins, as a convicted felon at the time of the instant charges, had prior involvement with the criminal justice system. And counsel represented Jenkins in proceedings leading up to the hearing on Jenkins' motion to discharge counsel. The fact that Jenkins was represented during earlier proceedings indicates that he was aware of his right to counsel and that he knew what he would forgo if he waived counsel.[30] The court warned Jenkins that it would be difficult to represent himself. But a waiver of counsel need not be prudent, just knowing and intelligent.[31]

The court's determination that Jenkins' waiver of counsel was voluntary, knowing, and intelligent was not clearly erroneous. Jenkins knew that he had the right to legal counsel and that he faced potential sentences of death. Further, the court appointed Jenkins' prior counsel to provide advice.

3. Competency to Proceed to Sentencing

Jenkins claims that his convictions and sentences are constitutionally infirm as the product of the trial court's erroneous determination that he was competent to proceed to trial and sentencing.

(a) Standard of Review

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. The trial court's

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[29] See *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

[30] See *State v. Hessler, supra* note 16.

[31] *State v. Ely, supra* note 17.

determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[32]

(b) Additional Background

Above, we summarized evidence as to Jenkins' competency prior to entry of his pleas. The court also held several postplea competency hearings, which we discuss next.

(i) July 2014

In July 2014, the court held a hearing on Jenkins' competency to proceed with the death penalty phase. Gutnik, who evaluated Jenkins on four occasions over a number of years, testified that he looks at consistency over time in determining whether a person is accurately relating auditory and visual hallucinations. Gutnik testified that Jenkins consistently spoke about seeing various Egyptian gods and about hearing the voice of an Egyptian god. Gutnik stated that records from psychiatrists when Jenkins was 8 years old mentioned auditory and visual hallucinations. Gutnik noted that symptoms had been reported on multiple occasions unrelated to legal issues, and he questioned what a person's motivation would be to say he or she was hearing things when there was no secondary gain involved. Gutnik observed that Jenkins had a long history of self-mutilation, some of it having to do with delusional beliefs about emissaries from Egyptian folklore and some of it coming from his mood swings.

Gutnik opined that Jenkins was incompetent to "stand trial." Although Jenkins understood that he had an attorney and that a judge would be present during the death penalty phase, Gutnik testified that Jenkins did not understand that he had been convicted. Gutnik did not believe that Jenkins had "the ability to meet the stress of a real trial without his rationality or judgment breaking down." Gutnik testified that Jenkins could "probably" be restored to competency, but that he would need to be in a hospital and treated with medications.

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[32] *State v. Fox, supra* note 3.

Dr. Jane Dahlke, a psychiatrist who evaluated Jenkins when he was 8 years old, testified that he was hospitalized for 11 days. Jenkins' mother brought him to the hospital due to statements of self-harm and increasing aggression toward others. Dahlke diagnosed him with oppositional defiant disorder and attention deficit hyperactive disorder. At that time, the field of psychiatry was not diagnosing 8-year-old children with bipolar disorder. But based on the records of her observations, Dahlke now would have diagnosed Jenkins with some form of childhood bipolar disorder. She noted in her records that Jenkins talked about hearing voices that would tell him to steal and had nightmares about his father shooting his mother. He reported auditory hallucinations and seeing "black spirits." Because Dahlke did not see any reason for Jenkins to feign mental illness or to have any secondary gain for doing so, she felt that Jenkins was experiencing what he reported.

Moore differed, testifying that he believed Jenkins was competent to proceed to sentencing. He had evaluated Jenkins three times, most recently a month earlier. In Moore's experience with schizophrenics, those hearing voices "block off" and/or "look to the side" and are unable to continue giving attention to Moore. But Jenkins differed; he said he heard voices all of the time, and at no point during the evaluation was Jenkins distracted. Moore thought that all the symptoms Jenkins reported were fabricated. Moore believed that Jenkins had been malingering all along, including when he was 8 years old, and using fanciful stories to try to explain his behavior and not be held accountable for it. Moore opined that a person can be psychotic and competent at the same time. He explained: "A person who is psychotic can understand all of the procedures against him. He may disagree with them, but he understands them and can work up a defense with his attorney."

Baker first encountered Jenkins in 2009 and last saw him in February 2013. She did not examine Jenkins for the purpose of determining whether he was competent. She noted psychotic symptoms, such as Jenkins' reports of being paranoid and of auditory hallucinations where he heard a voice that he called

Apophis. In a December 2009 note, Baker stated that Jenkins appeared to be attempting to use mental health symptoms for secondary gain, including to avoid legal consequences in court for recent behaviors. Baker opined in February 2013 that Jenkins appeared to be mentally ill and was an imminent danger to others.

Dr. Klaus Hartmann, a forensic psychiatrist, first met Jenkins during a June 2014 evaluation. He opined that Jenkins was competent to proceed to sentencing. Hartmann did not believe that Jenkins had a major mental disorder; rather, Hartmann felt that Jenkins had a personality disorder which accounted for his symptoms.

Hartmann also thought that many of Jenkins' symptoms appeared contrived. He testified that they were "a caricature of mental illness rather than a real mental illness," that Jenkins overelaborated, and that Jenkins "produces additional symptoms that just simply are not in keeping with my experience." Hartmann found it unusual that Jenkins "parades his mental illness," when most people with mental illness do not come forward to say they are sick. According to Hartmann, most people who are psychotic do not understand that they are psychotic, which is part of having lost touch with reality. He remarked that although Jenkins would say he had no memory of events, in further questioning, Jenkins understood and remembered clearly some of the matters.

Dr. Martin W. Wetzel saw Jenkins for a psychiatric consultation in March 2013. According to his report, Jenkins expressed bizarre auditory hallucinations that "did not appear to be consistent with typical symptoms of a psychotic disorder." Wetzel's assessment was "Bipolar Disorder NOS, Probable"; "PTSD, Probable"; "Antisocial and Narcissistic PD Traits"; and "Polysubstance Dependence in a Controlled Environment." The report stated: "The patient has an unusual list of demands, the first of which has been placement in a psychiatric hospital. This could be related to a singular motive or a combination of motives, including malingering and/or a sense of disease."

Following the July 2014 hearing, the court found that Jenkins was not competent to proceed with sentencing.

(ii) February and March 2015

In February 2015, the court held a status hearing regarding Jenkins' competency. Jenkins informed the court that he had been stable the past 6 months and was competent to proceed.

The court received a 31-page report submitted by Jennifer Cimpl Bohn, a clinical psychologist; Rajeev Chaturvedi, a psychiatrist; and Mario J. Scalora, a consulting clinical psychologist. The report detailed observations from Lincoln Regional Center sessions and a discussion of current competency-related abilities. They opined that Jenkins was competent to proceed with sentencing, that he demonstrated an adequate factual understanding of the proceedings, and that he demonstrated the ability to rationally apply such knowledge to his own case. Their diagnosis was "Other Specified Personality Disorder (e.g., Mixed Personality Features - Antisocial, Narcissistic, and Borderline)," malingering, polysubstance dependence, and a history of posttraumatic stress disorder.

The report contained extensive background information. It included a discussion that Jenkins' hearing voices at a young age may have actually been the voices of children with Jenkins and that his sleeping difficulties and nightmares related to violent events he had witnessed. The report noted that a February 2012 record from a "Mental Illness Review Team" indicated that Jenkins "referred to his presentation of symptoms as a 'skit' in conversations with his mother and girlfriend." A record 2 months later revealed that after Jenkins broke a fire suppression sprinkler and flooded a section of the unit, staff reported that Jenkins said "'he would continue to act insane until he got the mental health treatment he was entitled to'" and that actions such as breaking sprinkler heads and smearing feces "'would get immediate response[s] from mental health. He stated he was a smart man and knew how to get the responses from mental health so he could get the treatment he needed.'" The report contrasted

letters written by Jenkins on the same day in 2012: Several of the letters were written in a pyramid design, with comments about schizophrenia and Egyptian gods and goddesses, and the need for emergency hearings; whereas a different letter was written in typical form with a clear request for a copy of Jenkins' records.

The report documented instances in which Jenkins appeared to use symptoms of mental illness for secondary gain. In January 2013, Jenkins obtained access to restricted property after he stated that Apophis wanted him to harm himself. After cutting himself, Jenkins refused to have sutures removed if his restrictive status was not decreased. According to a mental health contact note, Jenkins said he "could ignore Apophis if allowed access to ear buds or paper in his room." In February, Jenkins broke another fire suppression sprinkler in his room and staff reported that Jenkins said he was hearing voices and would break another sprinkler head if put back in the same cell.

According to the report, a psychiatrist indicated in April 2013 that Jenkins "appeared to be 'performing.'" The psychiatrist mentioned that Jenkins told his mother he "was 'going to try to get a psychiatric diagnosis so he could get paid,' seemingly in reference to obtaining disability benefits." That psychiatrist diagnosed Jenkins with "'Antisocial Personality with narcissistic features vs. Narcissistic Personality with antisocial features.'"

The report noted that Jenkins had requested on numerous occasions to be diagnosed with schizoaffective disorder. When challenged that such requests suggested that Jenkins was "more interested in the prescription and diagnosis being documented, as opposed to actually receiving treatment for mental health problems," Jenkins "generally changed the topic or grinned and remained silent." According to the report, Jenkins had remarked that asking for certain medications in the past "resulted in him obtaining diagnoses that he perceives as favorable for his legal strategies."

The report stated that Jenkins had an "inflated view of himself consistent with narcissistic traits." It elaborated:

> Jenkins repeatedly made statements about being a "mastermind," "strategist," "chess player," and engaging in "psychological warfare," in reference to the legal proceedings and his assertions that he will be able to have governmental agencies held liable for his actions by stating certain things (e.g., that he needs treatment in a different placement), obtaining a documentation trail, and then exhibiting certain behaviors (e.g., self-harm). When describing his actions to have others held liable for his actions, he demonstrated significant forethought, outlining how he strategizes to achieve his goals, and that the fruits of his labor have been realized by [the Department of Correctional Services'] being criticized for their actions.

Jenkins also made repeated comments about not wanting to be found competent. The report explained:

> He described how it was his intent to be found competent for trial because he wanted to enter a guilty plea so he would have grounds to appeal later on, but wanted to be found incompetent after the conviction, and as a result, behaved in such a way to achieve that goal. In a similar manner, . . . Jenkins repeatedly highlighted how being diagnosed with a mental illness by Drs. Baker, Oliveto, and Gutnik has benefitted him, and sought to pressure [Lincoln Regional Center] personnel into providing a similar diagnosis by stating that those were "medical doctors" with many years of experience. While he repeatedly asserted suffering from "severe" mental illness, . . . Jenkins never appeared bothered by the symptoms. At times, [he] became confrontational and intimidating. There was no indication of psychotic process throughout these discussions, and he sporadically, almost as an afterthought, would assert that he heard auditory hallucinations and suffered from delusions (e.g.,

reference to returning to his cell to "bask in [his] insanities," or that he would go to his cell to converse with "the spiritual realm").

In August 2014, Jenkins was administered a test to assess his self-report of symptoms. The results showed "a pattern of markedly elevated sub-scores that is strongly characteristic of an individual feigning a mental disorder." The test contained eight primary scales, and Jenkins' scores were in the "definite feigning range" on four scales, in the "probable feigning range" on three scales, and in the "indeterminate range" on one scale.

The report stated that Jenkins had been inconsistent in his report of psychotic symptoms. Although records suggested that Jenkins reported hallucinatory experiences as a child, providers at the facility where Jenkins was hospitalized "characterized those symptoms as reactions to traumatic experiences (i.e., nightmares) or real experiences (i.e., older boys who instructed him to steal)." According to the report, "The lack of further report of such symptoms until over a decade later provides credence to that initial conceptualization of those symptoms." The report stated that Jenkins' self-report as an adult "has been inconsistent over time, with the exception of a common theme of hearing the voices of Apophis and other gods/demons in the last few years." The report provided several reasons, which we do not detail here, why Jenkins' assertions that he "always" heard those voices since childhood lacked credibility.

In March 2015, the court found that Jenkins was competent to proceed with the death penalty phase.

(iii) December 2015

In December 2015, shortly after Gutnik evaluated Jenkins and opined that he was not competent, the court held a hearing. Gutnik believed that Jenkins was deteriorating over time due to being kept in isolation. Upon the State's motion, the court stated that it would allow doctors from the Lincoln Regional Center to evaluate Jenkins.

(iv) June 2016

The court next held a competency hearing in June 2016. By that time, Cimpl Bohn, Chaturvedi, and Scalora had jointly evaluated Jenkins beginning in January 2016 and continuing until their report was authored on May 10. The team saw Jenkins once in January, March, and April.

Cimpl Bohn opined that Jenkins had "a significant severe personality disorder marked by antisocial, narcissistic and borderline traits." She believed that Jenkins was malingering other psychiatric symptoms. Cimpl Bohn testified that Jenkins' presentation of psychotic symptoms and his self-report of such symptoms was not validated by behavioral observations or record review. With regard to malingering, Cimpl Bohn testified that Jenkins' self-harming clearly had a secondary gain component. And psychological testing helped confirm the malingering diagnosis. Cimpl Bohn testified that a person can have a mental illness and still be malingering, but she felt that Jenkins suffered from a severe personality disorder and not from a psychotic disorder or a major affective mood disorder.

Cimpl Bohn testified that in "short bursts," Gutnik could have mistaken Jenkins' bizarre and dramatic behavior for a type of mental illness. She felt that the psychiatrist who offered a diagnosis of schizoaffective disorder in July 2015 "seemed to be struck by some of the dramatic nature of . . . Jenkins' statements about auditory hallucinations." She noted that the psychiatrist's record reflected that Jenkins' thought process was organized and logical, that his speech was generally normal and understandable, and that he was coherent. Cimpl Bohn testified that if the diagnosis was schizoaffective disorder or schizophrenia, one would expect to see some disorganization of the thought process and not just reported hallucinations or delusions. She noted that the psychiatrist's notes raised concerns about malingering or secondary gain and suspicion that Jenkins was self-harming to get out of segregation.

Cimpl Bohn opined that Jenkins was competent to proceed. In making that determination, she considered whether Jenkins

possessed a factual understanding of the legal system and legal proceedings, an ability to apply that to the individual's own case, and a rational ability to consult with counsel. Cimpl Bohn felt that Jenkins would struggle with developing rapport with counsel, because his narcissism was a significant barrier. She opined that Jenkins' difficulties in working with counsel stemmed from a personality disorder. She explained that Jenkins believed he was "smarter than anybody in the room" and that any strategy was going to be flawed if it was not Jenkins' own.

Gutnik recounted his interactions with Jenkins. He first saw Jenkins in March 2011. When he next saw Jenkins in November 2013, Gutnik concluded that Jenkins was not competent and diagnosed him with "schizophrenia versus schizoaffective disorder, depressed type, and rule out personality disorder otherwise not specified." When Gutnik saw Jenkins in May 2014 and April and December 2015, Gutnik concluded that Jenkins remained psychotic with the same diagnoses. Gutnik saw Jenkins in June 2016 and found that Jenkins continued to have schizoaffective disorder.

Gutnik testified that Jenkins' multiple mutilations of his own penis would be an indication of severe mental illness. He thought a person would "have to be fairly out of touch and psychotic to be able to not react to that level of pain." Gutnik noted that four other psychiatrists thought Jenkins was psychotic and that Jenkins' delusions about Egyptian gods dated back to 2009—before the crimes at issue. Gutnik did not believe that Jenkins was malingering, because "he has been consistently psychotic every time that I've seen him."

On September 20, 2016, the court entered an order on Jenkins' motion to determine whether he was competent to proceed with the sentencing phase. The court recognized the competing opinions of Gutnik and Cimpl Bohn. It stated that Gutnik saw Jenkins on a limited basis, whereas Cimpl Bohn and her staff had regular communication with Jenkins. The court also found it significant that during Jenkins' testimony at the May 2016 competency hearing, Jenkins ably

followed the questions of his attorney and supplied appropriate answers. The court accepted the opinion of Cimpl Bohn and found that Jenkins was competent to proceed with the sentencing phase.

(c) Discussion

We begin by addressing what would at first blush appear to be inconsistent decisions regarding Jenkins' competence. In February 2014, the court found Jenkins competent to stand trial. Subsequently, it allowed Jenkins to waive his right to counsel, to enter pleas of no contest, and to waive his right to have a jury determine whether aggravating circumstances existed. Then, in July, the court found that Jenkins was not competent to proceed with sentencing. From the timing of events, it would appear that the court's reversal was precipitated by its reappointment of counsel and counsel's motion to determine whether Jenkins was competent.

The court's order reflects that it found Jenkins to be not competent only out of an abundance of caution. Its order contained the following quote: "'If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken.'"[33] The court explained: "This Court must be satisfied that [Jenkins] is competent to proceed with the sentencing phase of a death penalty case. The fact that this is a death penalty case heightens the concern and consideration of this Court." The court prudently allowed a lengthy evaluation process to occur, and in September 2016, the court found that Jenkins was competent to proceed with sentencing.

The record shows that the court received conflicting expert evidence throughout the proceedings as to Jenkins' competency. The court also had abundant opportunities to interact with and observe Jenkins. Ultimately, the court accepted Cimpl Bohn's

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[33] *State v. Campbell*, 192 Neb. 629, 631, 223 N.W.2d 662, 663 (1974).

opinion that Jenkins was competent. Sufficient evidence in the record supports the court's determination; therefore, we will not disturb the court's finding of competency.

4. Ex Post Facto Challenge

Jenkins contends that the court erred by denying his motion to preclude the death penalty as a violation of the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions.[34] We disagree.

(a) Standard of Review

[18] The constitutionality of a statute presents a question of law, which an appellate court independently reviews.[35]

(b) Additional Background

In May 2015, the Nebraska Legislature passed 2015 Neb. Laws, L.B. 268—which abolished the death penalty in Nebraska—and then overrode the Governor's veto of the bill. The Legislature adjourned sine die on May 29. Because L.B. 268 did not contain an emergency clause, it was to take effect on August 30.[36]

Following the passage of L.B. 268, opponents of the bill sponsored a referendum petition to repeal it. On August 26, 2015, the opponents filed with the Nebraska Secretary of State signatures of approximately 166,000 Nebraskans in support of the referendum. On October 16, the Secretary of State certified the validity of sufficient signatures. Enough signatures were verified to suspend the operation of L.B. 268 until the referendum was approved or rejected by the electors at the upcoming election. During the November 2016 election, the referendum passed and L.B. 268 was repealed, that is, in the language of the constitution, the act of the Legislature was "reject[ed]."[37]

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[34] U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16.

[35] *State v. Stone*, 298 Neb. 53, 902 N.W.2d 197 (2017).

[36] See Neb. Const. art. III, § 27.

[37] See Neb. Const. art. III, § 3.

(c) Discussion

Jenkins' ex post facto argument focuses on his uncertainty as to whether the repeal of the death penalty was in effect for a period of time. We first explain that there is technically no ex post facto violation for Jenkins, then we resolve the issue presented by Jenkins under what we sometimes refer to as the "*Randolph* doctrine."[38]

[19-21] An ex post facto law is a law which purports to apply to events that occurred before the law's enactment and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed.[39] There are four types of ex post facto laws: those which (1) punish as a crime an act previously committed which was innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.[40] The Ex Post Facto Clause "bars only application of a law that '"changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."'"[41] The clause's underlying purpose is to "assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[42]

Here, the death penalty was in effect at the time of Jenkins' crimes in 2013. It was also in effect at the time that Jenkins was sentenced. Because the repeal of the repeal of the death penalty did not inflict a greater punishment than that available when Jenkins committed the crimes, there is no ex post facto law.

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[38] See *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971).

[39] See *State v. Amaya*, 298 Neb. 70, 902 N.W.2d 675 (2017).

[40] *Id.*

[41] *State v. Kantaras*, 294 Neb. 960, 972, 885 N.W.2d 558, 567 (2016).

[42] *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[22] But Jenkins also claims that under *State v. Randolph*,[43] a defendant is entitled to take advantage of any reduction in penalties before final disposition. Under the *Randolph* doctrine, generally, when the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.[44]

This contention presupposes that L.B. 268 became operative. Jenkins contends that it took effect on August 30, 2015, and remained in effect until October 16, when the Secretary of State confirmed the validity and number of signatures. On the other hand, the State argues that the bill never went into effect, because its operation was suspended by the referendum petition until approved by Nebraska voters. We agree with the State.

We pause to discuss the referendum process provided for in the Nebraska Constitution.[45] As pertinent here, petitions invoking the referendum must be signed by not less than 5 percent of Nebraska's registered voters and filed in the Secretary of State's office within 90 days after the Legislature which passed the bill adjourned sine die.[46] "Upon the receipt of the petitions, the Secretary of State, with the aid and assistance of the election commissioner or county clerk, shall determine the validity and sufficiency of signatures on the pages of the filed petition."[47] The Secretary of State must total the valid signatures and determine whether constitutional and statutory requirements have been met.[48] With two exceptions not applicable here, an act is suspended from taking effect prior to a

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[43] *State v. Randolph, supra* note 38.

[44] *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

[45] See Neb. Const. art. III, § 3.

[46] See *id.*

[47] Neb. Rev. Stat. § 32-1409(1) (Reissue 2016).

[48] § 32-1409(3).

referendum election when the referendum petition is signed by at least 10 percent of the state's registered voters.[49]

We reject the notion that signatures must be verified and certified before the act's operation will be suspended. An earlier case implicitly determined that this notion is not correct.[50] That case presented the following pertinent timeline of events in 1965:

- July 1: The legislative bill at issue became law.
- August 17: The Legislature adjourned sine dine.
- September 29: A referendum petition and affidavit as to persons contributing things of value in connection with the petition were filed.
- November 15: Additional certificates and a supplemental statement were filed in connection with the petition.
- December 13: The Secretary of State certified that valid signatures of more than 10 percent of electors had been filed.

Our decision noted that there were sufficient signatures to suspend the act from taking effect; there was no suggestion that the act went into effect on November 17 (3 calendar months after adjournment) and remained in effect until December 13 (when the Secretary of State certified that the petition contained signatures of more than the 10-percent requirement).

[23] Jenkins' notion conflicts with several fundamental principles. The power of referendum must be liberally construed to promote the democratic process.[51] The power is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.[52] The constitutional provisions with respect to the right of referendum reserved to the people should be construed to make effective the powers reserved.[53]

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[49] See, Neb. Const. art. III, § 3; *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

[50] *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966).

[51] See *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

[52] See *id.*

[53] See *Pony Lake Sch. Dist. v. State Committee for Reorg., supra* note 49.

Stated another way, the provisions authorizing the referendum should be construed in such a manner that the legislative power reserved in the people is effectual.[54] The right of referendum should not be circumscribed by narrow and strict interpretation of the statutes pertaining to its exercise.[55]

Jenkins' contention—that suspension cannot occur until a sufficient number of signatures are certified—would make ineffectual the people's power to suspend an act's operation. Whether an act went into effect, and for how long, would depend upon how quickly the Secretary of State and election officials counted and verified signatures. Jenkins' argument demonstrates the absurdity of such a view. Because the Secretary of State was unable to confirm that a sufficient number of voters signed the petitions until October 16, 2015, Jenkins contends that L.B. 268 went into effect on August 30, thereby changing all death sentences to life imprisonment and changing the status of any defendant facing a potential death sentence to a defendant facing a maximum sentence of life imprisonment. Such an interpretation would defeat the purpose of this referendum—to preserve the death penalty. Our constitution demands that the power of referendum not be impaired by ministerial tasks appurtenant to the process. Having produced the signatures necessary to suspend the act's operation, the people were entitled to implementation of their will.

[24] We conclude that upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures. And Jenkins did not dispute either the sufficiency of the signatures or the outcome of the referendum election. Accordingly, the filing of petitions on August 26, 2015—prior to the effective date of L.B. 268—suspended its operation until Nebraskans

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[54] See *id.*

[55] See *Hargesheimer v. Gale, supra* note 51.

effectively rejected the bill by voting to repeal it. Because L.B. 268 never went into effect, the *Randolph* doctrine has no application.

5. Constitutionality of Death Penalty Procedure

Jenkins argues that Nebraska's death penalty scheme violates the 6th and 14th Amendments to the U.S. Constitution and Neb. Const. art. I, §§ 3 and 6. He contends that Nebraska's statutory procedure is unconstitutional because, he asserts, it does not require a jury to find each fact necessary to impose a sentence of death.

(a) Standard of Review

The constitutionality of a statute presents a question of law, which an appellate court independently reviews.[56]

(b) Additional Background

Under Nebraska law, a jury's participation in the death penalty sentencing phase, if not waived,[57] ceases after the determination of aggravating circumstances.[58] If no aggravating circumstance is found to exist, the court enters a sentence of life imprisonment without parole.[59] But if the jury finds that one or more aggravating circumstances exist, the court convenes a panel of three judges to receive evidence of mitigation and sentence excessiveness or disproportionality.[60] In determining an appropriate sentence, the panel considers whether the aggravating circumstances as determined to exist justified imposition of a death sentence, whether mitigating circumstances existed which approached or exceeded the weight given to the aggravating circumstances, or whether the sentence of death

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[56] *State v. Stone, supra* note 35.

[57] See Neb. Rev. Stat. § 29-2520(3) (Cum. Supp. 2018).

[58] § 29-2520(4)(g).

[59] § 29-2520(4)(h).

[60] *Id.*

was excessive or disproportionate to the penalty imposed in similar cases.[61]

(c) Discussion

Jenkins argues that Nebraska's scheme violates the Sixth Amendment, relying upon the U.S. Supreme Court's decision in *Hurst v. Florida*.[62] In that decision, the opinion includes a statement that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[63] According to Jenkins, Nebraska's law is contrary to *Hurst* because judges determine the existence or nonexistence of mitigating circumstances and perform the weighing process. He takes the position that the determination of the existence of mitigating factors, the weighing process of the aggravating and mitigating circumstances, and the proportionality review must be performed by a jury. Because Jenkins waived a jury and expressly stated he would "rather have the judges" for sentencing, we doubt he has standing to attack the constitutionality of Nebraska's procedure on the grounds he asserts.[64] But, in any event, he is wrong.

We recently discussed *Hurst* in detail in *State v. Lotter*.[65] We rejected an argument that *Hurst* held a jury must find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. In doing so, we cited a number of federal and state courts reaching the same conclusion, but acknowledged that the view was not universal.[66] Further, we recognized our previous decision[67] that earlier U.S. Supreme Court precedent—upon which *Hurst*

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[61] Neb. Rev. Stat. § 29-2522 (Cum. Supp. 2018).

[62] *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

[63] *Id.*, 136 S. Ct. at 619.

[64] See *U.S. v. Skinner*, 25 F.3d 1314 (6th Cir. 1994).

[65] See *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), *cert. denied* No. 18-8415, 2019 WL 1229787 (U.S. June 17, 2019).

[66] See *id.*

[67] See *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

was based—did not require the determination of a mitigating circumstance, the balancing function, or the proportionality review to be undertaken by a jury. Nothing in *Hurst* requires a reexamination of that conclusion. This assignment of error lacks merit.

6. Whether Death Penalty Is Cruel and Unusual Punishment When Imposed on Seriously Mentally Ill Offenders and Individuals With Intellectual Disability

Jenkins begins his argument that the death penalty is cruel and unusual punishment when imposed on certain offenders by pointing to U.S. Supreme Court precedent[68] declaring that the Eighth Amendment prohibits the execution of individuals with mental retardation. And he correctly observes that the Nebraska Legislature responded by precluding the imposition of the death penalty on any person with an intellectual disability.[69] We agree with Jenkins' general assertions that a person with an intellectual disability may not be executed. However, Jenkins does not assert or argue that he suffers from an intellectual disability. Therefore, whether Jenkins should be ineligible for the death penalty on that basis is not before us.

[25] Unlike situations of intellectual disability, neither the U.S. Supreme Court nor the Nebraska Legislature has explicitly precluded the death penalty for an individual with a severe mental illness. Rather, the Supreme Court has held that the Eighth Amendment forbids executing a prisoner whose mental illness makes him or her unable to "reach a rational understanding of the reason for [his or her] execution."[70] Whether a prisoner has any particular mental illness is not determinative; rather, what matters is whether a prisoner has

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[68] See *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[69] See Neb. Rev. Stat. § 28-105.01(2) (Cum. Supp. 2018).

[70] *Panetti v. Quarterman*, 551 U.S. 930, 958, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007).

a rational understanding of why he or she is to be executed.[71] The Supreme Court explained:

> [The] standard [of *Panetti v. Quarterman*[72]] focuses on whether a mental disorder has had a particular *effect*: an inability to rationally understand why the State is seeking execution. . . . Conversely, that standard has no interest in establishing any precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension.[73]

We observe that other courts have determined a diagnosis of schizophrenia or paranoid schizophrenia[74] does not preclude a death sentence where the defendant is competent to be executed.

Jenkins does not argue that he lacks the requisite understanding of the reason for his execution. Rather, he argues that the same rationale for exempting the intellectually disabled from the death penalty should apply to exempt defendants who are seriously mentally ill from that punishment. We decline to vary from the principle articulated in *Panetti*.

Moreover, we are not persuaded that, even if we were to stray beyond *Panetti*, Jenkins would qualify for relief. The record reveals a conflict in expert opinion as to whether Jenkins suffered from a serious or severe mental illness.

Some professionals had no doubt that Jenkins was severely mentally ill. Oliveto and Gutnik diagnosed Jenkins with schizophrenia. A different psychiatrist diagnosed Jenkins with schizoaffective disorder, bipolar type. Psychiatrists Baker and

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[71] See *Madison v. Alabama*, 586 U.S. 265, 139 S. Ct. 718, 203 L. Ed. 2d 103 (2019).

[72] *Panetti v. Quarterman, supra* note 70.

[73] *Madison v. Alabama, supra* note 71, 586 U.S. at 278.

[74] See, *Lindsay v. State*, No. CR-15-1061, 2019 WL 1105024 (Ala. App. Mar. 8, 2019); *Ferguson v. State*, 112 So. 3d 1154 (Fla. 2012); *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Com. v. Jermyn*, 551 Pa. 96, 709 A.2d 849 (1998); *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Wetzel expressed that Jenkins could have a severe mental illness or that he could be malingering.

Other professionals opined that Jenkins was not severely mentally ill. Dr. Mark Weilage, who met with Jenkins in 2012, concluded that Jenkins had no major mental illness. Hartmann did not believe Jenkins had a major mental disorder. Moore believed that Jenkins' main diagnosis was antisocial personality disorder. Cimpl Bohn, Chaturvedi, and Scalora opined that Jenkins suffered from a significant severe personality disorder marked by antisocial, narcissistic, and borderline traits and that he malingered other symptoms. Psychiatrist Dr. Cheryl Jack met with Jenkins in April 2013, and her impression was "'Axis I: No diagnosis; and Axis II: Antisocial Personality, with narcissistic features vs. Narcissistic Personal[i]ty with antisocial features.'" And in December 2009, Baker concluded that Jenkins' symptoms were "'more behavioral/Axis II in nature.'"

There is no doubt that Jenkins exhibited abnormal behaviors. But a number of experts believed that he was malingering. A test revealed scores indicative of feigning a mental disorder. In support of the view that Jenkins was not malingering, some—Gutnik, in particular—pointed to Jenkins' having hallucinations dating back to age 8. But Dahlke's 1995 psychological report revealed a misunderstanding as to the reported hallucinations:

> A previous report had said [Jenkins] heard voices telling him to do bad things. On further inquiry, [Jenkins] said these are real voices of these older boys, and he only hears them when the boys are there with him. There was no evidence of psychosis or auditory hallucination in this interview. It may be that [Jenkins] misunderstood the question in the previous interview.

A December 1997 medical report—when Jenkins was age 11—stated that Jenkins denied auditory and/or visual hallucinations. A psychiatric assessment from July 1999 likewise stated that Jenkins denied any auditory or visual hallucinations.

The record contains credible expert testimony that Jenkins has been feigning mental illness. We are not persuaded that Jenkins suffers from a serious mental illness. Thus, we need not determine in this case whether either the U.S. Constitution or the Nebraska Constitution would prohibit imposing capital punishment on an offender who actually suffers from a serious mental illness. A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.[75]

7. Whether Death Penalty Violates Eighth Amendment and Neb. Const. art. I, § 9, in All Cases

Jenkins asserts that the death penalty in all cases violates both the federal and state Constitutions. He contends this is so "[f]or all of the reasons set forth by Justice Breyer in G*lossip v. Gross*[76] . . . ."[77] In *Glossip*, Justice Breyer authored a dissenting opinion explaining why he "believe[d] it highly likely that the death penalty violates the Eighth Amendment"[78] and Justice Scalia offered a persuasive rebuttal in a concurring opinion.[79] But more importantly, the majority of the U.S. Supreme Court expressly recognized "it is settled that capital punishment is constitutional."[80]

Justice Breyer believed that the death penalty was unreliable. In *Glossip*, he pointed to evidence that innocent people have been convicted, sentenced to death, and executed. But

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[75] *Stewart v. Heineman*, 296 Neb. 262, 892 N.W.2d 542 (2017).

[76] See *Glossip v. Gross*, 576 U.S. 863, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015) (Breyer, J., dissenting; Ginsburg, J., joins).

[77] Brief for appellant at 139.

[78] *Glossip v. Gross, supra* note 76, 576 U.S. at 946.

[79] See *Glossip v. Gross, supra* note 76 (Scalia, J., concurring; Thomas, J., joins).

[80] *Id.*, 576 U.S. at 869. See *Bucklew v. Precythe*, 587 U.S. 119, 139 S. Ct. 1112, 203 L. Ed. 2d 521 (2019).

Justice Scalia reasoned that "it is *convictions*, not *punishments*, that are unreliable."[81] He asserted, "That same pressure [to secure a conviction] would exist, and the same risk of wrongful convictions, if horrendous death-penalty cases were converted into equally horrendous life-without-parole cases."[82]

Justice Breyer viewed the death penalty as being imposed arbitrarily. He cited studies indicating that comparative egregiousness of the crime often did not affect application of the death penalty and other studies showing that circumstances such as race, gender, or geography often do affect its application. But "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."[83] Justice Scalia described variance in judgments as a consequence of trial by jury and reasoned that "the fact that some defendants receive mercy from their jury no more renders the underlying punishment 'cruel' than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned."[84]

Justice Breyer also felt that the death penalty was cruel due to excessively long delays before execution. But a majority of the U.S. Supreme Court stated that "[t]he answer is not . . . to reward those who interpose delay with a decree ending capital punishment by judicial fiat."[85]

Justice Breyer believed that lengthy delays undermined the penological justification. A punishment is unconstitutional if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless

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[81] *Glossip v. Gross, supra* note 76, 576 U.S. at 895 (Scalia, J., concurring; Thomas, J., joins) (emphasis in original).

[82] *Id.*

[83] *McCleskey v. Kemp*, 481 U.S. 279, 312, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

[84] *Glossip v. Gross, supra* note 76, 576 U.S. at 896 (Scalia, J., concurring; Thomas, J., joins).

[85] *Bucklew v. Precythe, supra* note 80, 587 U.S. at 149-50.

and needless imposition of pain and suffering."[86] The two punishment goals that the death penalty is said to serve are deterrence of capital crimes by prospective offenders and retribution.[87] This record does not refute the existence of these goals, and the people's judgment speaks in support of their continued vitality.

Jenkins also asserted that the death penalty runs against evolving standards of decency. He pointed out that it is prohibited by 19 (now 21)[88] states and that at least 4 states have governor-imposed moratoria. But as Justice Scalia observed:

> Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have "changed radically," . . . and has sought to replace the judgments of the People with their own standards of decency.[89]

Less than 3 years ago, Nebraskans had the opportunity to eliminate the death penalty and 61 percent voted to retain capital punishment.[90] This vote demonstrates that the people of Nebraska do not view the death penalty as being contrary to standards of decency. As the majority of the U.S. Supreme Court recently explained: That the Constitution allows capital punishment "doesn't mean the American people must

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[86] *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

[87] See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

[88] See, *State v. Gregory*, 192 Wash. 2d 1, 427 P.3d 621 (2018) (holding that death penalty, as administered in State of Washington, violated state constitution); N.H. Rev. Stat. Ann. § 630:1 (2019).

[89] *Glossip v. Gross, supra* note 76, 576 U.S. at 899 (Scalia, J., concurring; Thomas, J., joins).

[90] See Legislative Journal, 150th Leg., 1st Sess. 18 (Jan. 4, 2017) (showing 320,719 votes to retain legislation eliminating death penalty and 494,151 votes to repeal such legislation).

continue to use the death penalty. The same Constitution that permits States to authorize capital punishment also allows them to outlaw it. But it does mean that the judiciary bears no license to end a debate reserved for the people and their representatives."[91] In Nebraska, the people have spoken.

[26] The U.S. Supreme Court has not found the death penalty to be unconstitutional in all cases. As the Fifth Circuit determined, "We are bound by Supreme Court precedent which forecloses any argument that the death penalty violates the Constitution under all circumstance[s]."[92] Similarly, we do not find the death penalty to be a violation of the Nebraska Constitution.[93]

8. Sentence of Death—Facts From Plea

Jenkins assigns that the sentencing panel erred in sentencing him to death based on facts alleged during the proceeding on his no contest plea. We disagree.

(a) Standard of Review

[27] In a capital sentencing proceeding, this court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.[94]

(b) Additional Background

During the death penalty sentencing phase, the State offered exhibit 81, the transcript from the plea hearing. Jenkins' counsel objected to the use of the transcript of the plea for any purpose and stated that the statements of the prosecutor were unsworn and were hearsay. The State represented that the purpose of the exhibit was to show that Jenkins was convicted

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[91] *Bucklew v. Precythe, supra* note 80, 587 U.S. at 129-30.

[92] *U.S. v. Jones*, 132 F.3d 232, 242 (5th Cir. 1998). See, also, *U.S. v. Quinones*, 313 F.3d 49 (2d Cir. 2002) (noting that argument relying upon Eighth Amendment is foreclosed by Supreme Court's decision).

[93] See *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[94] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

of those particular crimes. The sentencing panel received the exhibit for any statements made by Jenkins against interests and for findings of the court. The panel stated that it would receive the statements by the prosecutor, but not for the truth of the matter asserted.

The sentencing panel's order specifically states that the "factual descriptions come from [the] factual basis given by the State at the time of [Jenkins'] pleas of no contest to all counts on April 16, 2014, Exhibit 81." The order then set forth the same facts from the plea hearing regarding each murder that we included in the portion of our analysis addressing the acceptance of Jenkins' pleas.

(c) Discussion

Jenkins' argument is premised upon a rule of evidence. He points to the rule stating:

> Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers when offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.[95]

We have stated that this evidentiary rule does not apply to the sentencing stage.[96]

For practical purposes, a plea of no contest has the same effect as a plea of guilty with regard to the case in which it is entered.[97] The difference between a plea of no contest and

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[95] Neb. Evid. R. 410, Neb. Rev. Stat. § 27-410 (Reissue 2016).

[96] See *State v. Klappal*, 218 Neb. 374, 355 N.W.2d 221 (1984).

[97] See *State v. Wiemer*, 15 Neb. App. 260, 725 N.W.2d 416 (2006).

a plea of guilty appears simply to be that while the latter is a confession or admission of guilt binding the accused in other proceedings, the former has no effect beyond the particular case.[98] But the facts admitted via a no contest plea can be used in the proceeding involving the no contest plea.[99]

We have recognized that strict rules of evidence do not apply at the sentencing phase. The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.[100] A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.[101]

[28,29] But there is a caveat to this general rule, which Jenkins recognizes. A capital sentencing statute dictates: "The Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances."[102] And there is authority for the proposition that a no contest plea constitutes an admission of all the elements of the offenses, but not an admission to any aggravating circumstance for sentencing purposes.[103] So while the sentencing panel could consider Jenkins' no contest plea and the factual basis underlying it, it could not use it as an admission to aggravating circumstances.

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[98] See *id.*

[99] See *State v. Simnick*, 17 Neb. App. 766, 771 N.W.2d 196 (2009), *reversed in part on other grounds* 279 Neb. 499, 779 N.W.2d 335 (2010).

[100] *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata, supra* note 93.

[101] *Id.*

[102] Neb. Rev. Stat. § 29-2521(2) (Cum. Supp. 2018).

[103] See *People v. French*, 43 Cal. 4th 36, 178 P.3d 1100, 73 Cal. Rptr. 3d 605 (2008). See, also, 21 Am. Jur. 2d, *supra* note 13; 22 C.J.S. *Criminal Procedure and Rights of Accused* § 238 (2016).

Upon our independent review, we conclude that the sentencing panel's "Finding as to Aggravators" is supported by evidence adduced during the death penalty sentencing phase. Testimony of a police officer who investigated the homicide scenes of all the murder victims and who interviewed Jenkins in connection with the murders established that Jenkins murdered Uribe-Pena and Cajiga-Ruiz at the same time and that based on those murders, Jenkins had a substantial prior history of serious assaultive or terrorizing criminal activity by the time of the murders of Bradford and Kruger. Additionally, based on certified copies of convictions and the testimony of two armed robbery victims of Jenkins, the sentencing panel found that Jenkins, at the time of all the murders, had previously been convicted of crimes involving the use of threats of violence. Although the sentencing panel stated that it used the factual basis from the no contest plea hearing, the panel's findings as to aggravating circumstances were supported by evidence adduced during the sentencing hearing. This assignment of error lacks merit.

9. Sentence of Death—Mitigating Factors

Jenkins assigns error to the sentencing panel's failure "to give meaningful consideration to his lifelong serious mental illness, his unfulfilled request for commitment before the crime, and the debilitating impact of solitary confinement in violation of Fifth, Eighth, and Fourteenth amendments to the U.S. Constitution and Article I Sections 3 and 9 of the Nebraska Constitution." We constrain our analysis to the three areas assigned by Jenkins.

(a) Standard of Review

[30] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[104]

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[104] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[31] In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.[105]

(b) Additional Background

(i) Lifelong Mental Illness

Jenkins' records show a history of behavioral issues. His first interaction with mental health professionals was in 1995, at age 8, when he was evaluated at a hospital. A letter in 1998 noted that "the majority of his difficulties seem to be behavioral rather than mental health in nature." In 1999, a psychiatric assessment stated that Jenkins "appeared very manipulative . . . and would appear to take on a victim role" and the diagnosis contained therein showed "Conduct Disorder" under "Axis I: Clinical Disorders." In 2001, a report stated: "Personality assessment suggests a Conduct Disorder, adolescent onset type, an Oppositional Defiant Disorder, and a Developing Antisocial Personality Disorder. No other problems of anxiety, depression, or psychosis were indicated."

The panel received the deposition of a chaplain at the Douglas County Youth Detention Center while Jenkins "was kind of a regular" there. The chaplain testified that he and Jenkins "hung out all the time" when Jenkins was 15 to 16 years old. Although not a mental health specialist, the chaplain did not observe any indications of mental illness in Jenkins. He did not recall Jenkins ever talking about Egyptian gods.

Baker testified that she had always thought Jenkins was mentally ill, but that she was not sure if his behaviors were due to mental illness or malingering. Weilage informed Jenkins in 2012 that a mental illness review team believed "'there was not an Axis I severe mental illness present'" to justify transferring Jenkins to an inpatient mental health unit at the Lincoln

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[105] *Id.*

Correctional Center. And we have already detailed the conflicting evidence concerning whether Jenkins suffered from a serious mental illness or was malingering.

(ii) Requests for Commitment

In February 2013—months before Jenkins' scheduled release from prison—he sent an informal grievance to the warden requesting emergency protective custody and psychiatric hospitalization. In a grievance to the warden sent the next day, Jenkins advised that his mother was seeking an emergency protective custody order for psychiatric hospitalization. In a March letter to a member of the Nebraska Board of Parole, Jenkins stated that he had filed an emergency protective custody petition in Johnson County, Nebraska, to be submitted to the county's mental health board. The Johnson County Attorney's office acknowledged receipt of letters regarding Jenkins' mental health.

(iii) Effect of Solitary Confinement

Jenkins spent extensive time on room restriction and in disciplinary segregation. According to an ombudsman report, as much as 60 percent of Jenkins' time with the Department of Correctional Services was in segregation. On at least nine occasions between January 2009 and January 2012, Jenkins spent periods of at least 45 days in disciplinary segregation, five of those being 60 days in length.

The Douglas County Youth Detention Center chaplain testified that he kept in communication with Jenkins over the years. In 2009 or 2010, Jenkins told the chaplain that Jenkins had been in solitary confinement for 2 years. According to the chaplain, Jenkins was "different": "Angry, saying he wants to hurt people, wants to hurt himself. He was going crazy, said he's just sitting in his cell."

Kirk Newring, Ph.D., testified that extended periods of time in solitary confinement or segregation typically exacerbates any existing mental health diagnoses or condition.

He testified that "[i]f somebody is in segregation and can't come up with other solutions, recurrent self-injury would not be unexpected as a problem-solving approach." Cimpl Bohn acknowledged that solitary confinement is generally not something that helps people become psychologically healthier, especially for individuals with a mental illness. Hartmann testified that an extended period of time in solitary confinement is "an extremely stressful experience" and that it could be detrimental to a person's mental health.

The ombudsman's report recognized that a board-certified psychiatrist who evaluated more than 200 prisoners to determine the psychiatric effects of solitary confinement concluded that "'such confinement may result in prolonged or permanent psychiatric disability, including impairments which may seriously reduce the inmate's capacity to reintegrate into the broader community upon release from prison.'" (Emphasis omitted.) The report also acknowledged the research of a professor of psychology who had studied the psychological effects of solitary confinement for more than 30 years: "'The psychological consequences of incarceration may represent significant impediments to post-prison adjustment.'"

(c) Discussion

[32,33] A sentencer may consider as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[106] As noted, we review de novo the sentencing panel's determination of the existence or nonexistence of a mitigating circumstance.[107] We look to whether the sentencer "fairly considered the defendant's proposed mitigating circumstances prior to rendering its decision."[108] The

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[106] See *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

[107] *State v. Torres, supra* note 104.

[108] See *State v. Ryan*, 233 Neb. 74, 147, 444 N.W.2d 610, 654 (1989).

risk of nonproduction and nonpersuasion as to mitigating circumstances is on the defendant.[109]

Jenkins assigns that the sentencing panel failed to give "meaningful consideration" to his lifelong history of mental illness. The sentencing panel recognized "significant divergence of opinion offered by mental health professionals as to whether Jenkins suffers from a mental illness, or if he is feigning mental illness." It accepted the opinions of Cimpl Bohn and her team and found that no statutory mitigating circumstance was proved. Nonetheless, the sentencing panel found that Jenkins' bad childhood was a nonstatutory mitigator to be considered in the weighing process as was his mental health. The panel's seven-page analysis of the bad childhood circumstance included discussion of mental health records from Jenkins' childhood and adolescent years. The panel adequately considered Jenkins' mental health issues, and we agree with its conclusion.

Jenkins also contends that the sentencing panel erred by failing to consider that the killings would have been prevented if his request to be committed had been fulfilled. But we do not find anywhere on the record where Jenkins advised the panel that he wished for such requests to be considered as a nonstatutory mitigating factor. The absence of such request likely explains why the panel's order did not discuss such requests. While there was evidence that Jenkins requested to be committed, we will not fault the panel for failing to discuss a nonstatutory mitigating circumstance that it was not specifically asked to consider. And although we review the sentencing panel's determination of the existence or nonexistence of mitigating circumstances de novo, we do so only on the record. To the extent the record contains evidence of Jenkins' requests for commitment, his argument now relies only on speculation and conjecture. We have considered it and find it to be without merit.

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[109] See *State v. Torres, supra* note 104.

Finally, Jenkins asserts that his extensive time in solitary confinement should have been considered a mitigating circumstance. Our review of the record shows that contrary to Jenkins' assertion, the sentencing panel considered the impact of solitary confinement. The sentencing panel recognized Jenkins' "extensive history of misconduct in the State Penitentiary"; however, it found insufficient evidence to support solitary confinement as a nonstatutory mitigator. We see no error.

Unfortunately, solitary confinement can be a "necessary evil." Justice Kennedy stated:

> Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.[110]

Here, Jenkins' own actions led to his disciplinary segregation. The Department of Correctional Services must have some recourse to deal with an inmate who does such things as manufacture a weapon from a toilet brush, threaten to assault staff, assault staff, attempt to escape, and interfere with or refuse to submit to a search. The sentencing panel acted reasonably in not rewarding such behavior by considering the resulting confinement as a mitigating factor. Upon our de novo review, we reach the same conclusion.

We affirm Jenkins' death sentences.

V. CONCLUSION

Many of the issues in this death penalty appeal turn on Jenkins' competency and mental health. Evidence touching on these matters was abundant and highly conflicting. The trial court and the sentencing panel, like the members of this court,

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[110] *Davis v. Ayala*, 576 U.S. 257, 289, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (Kennedy, J., concurring).

are not medical experts. In light of the conflicting evidence, they gave weight to the expert evidence reflecting that Jenkins suffered from a personality disorder and was feigning mental illness. We find no error in that regard.

We cannot say that the district court abused its discretion in finding Jenkins to be competent to waive counsel, to enter no contest pleas, to proceed to sentencing, and to be sentenced to death. We reject Jenkins' constitutional challenges to the death penalty and affirm his convictions and sentences.

Affirmed.

Papik 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, appellant, v. Shannon D. Bigelow, appellee.

931 N.W.2d 842

Filed July 19, 2019. No. S-18-006.

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. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
3. **Insanity: Proof.** The insanity defense requires proof that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.
4. **Jury Instructions.** Jury instructions are not prejudicial if, when taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence.

Petition for further review from the Court of Appeals, Riedmann, Bishop, and Welch, Judges, on appeal thereto from the District Court for Lancaster County, Kevin R. McManaman, Judge. Judgment of Court of Appeals affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, Melissa R. Vincent, and Derek T. Bral, Senior Certified Law Student, for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

After ingesting methamphetamine, Shannon D. Bigelow was in a hospital emergency room, where hospital personnel administered medications which, instead of relaxing him caused him to become agitated, whereupon he assaulted an officer. We granted Bigelow's petition for further review of the decision of the Nebraska Court of Appeals which affirmed his conviction in the district court for Lancaster County for third degree assault on an officer. On further review, Bigelow raises issues regarding jury instructions refused and given on the defenses of insanity and intoxication.

We agree with the Court of Appeals that the district court did not err when it refused Bigelow's proposed insanity defense instruction and instead gave an instruction regarding both voluntary and involuntary intoxication. We affirm.

STATEMENT OF FACTS

The charge against Bigelow arose from an incident which occurred in July 2016 when he was admitted to a hospital after he ingested methamphetamine and exhibited bizarre behavior. Bigelow became agitated and restless at the hospital, so nurses injected him with three medications—Haldol, Ativan, and Benadryl—which were intended to relax him. However, Bigelow became more agitated, left his room, and began pacing around the emergency room. After personnel called for security, an off-duty police officer working for hospital security arrived and told Bigelow that he needed to leave the emergency room. Bigelow punched the officer in the face, "took him to the ground," and punched the officer several more times while reaching for the officer's gun. He then fled the emergency room, pursued by the security officer.

A sheriff's deputy responding to an emergency dispatch saw Bigelow running out the doors of the emergency room

followed by the security officer. The deputy pointed his Taser at Bigelow and told him to stop and get on the ground. Bigelow immediately stopped running and complied with the deputy's command to get on the ground. Bigelow also immediately complied with subsequent orders to roll over and put his hands behind his back. The deputy testified at trial that Bigelow was "completely compliant," that he did not resist and was not aggressive but instead was "[t]he opposite," and that he was compliant with other police officers who arrived and helped complete the capture.

Bigelow was arrested, and the State charged him with third degree assault on an officer in violation of Neb. Rev. Stat. § 28-931 (Reissue 2016). The State later amended the information to allege that Bigelow was a habitual criminal.

Prior to trial, Bigelow filed a notice of intent to rely on an insanity defense. After a competency evaluation, the court determined that Bigelow was competent to stand trial.

In his defense at trial, Bigelow called Dr. Klaus Hartmann as a witness. Hartmann had conducted an evaluation in January 2017 to determine whether Bigelow was insane at the time of the incident in July 2016. Although Hartmann noted that at times prior to the incident, Bigelow had been diagnosed with various mental disorders, including schizophrenia, the general thrust of Hartmann's testimony was that he attributed Bigelow's behavior in the emergency room to the effects of the three drugs given to him at the hospital. Hartmann also testified that the methamphetamine Bigelow had ingested prior to being admitted to the hospital would have made him "more energized," but Hartmann disagreed with an evaluation by another doctor who concluded that the assault was "precipitated by the voluntary use of amphetamine." When asked to opine on whether Bigelow knew what he was doing when the assault took place, Hartmann opined that "he was sufficiently impaired by the effects of these medicines that he did not know what he was doing." When asked whether the effect of the three drugs could be described as "some sort of either

a mental disease or defect or disorder," Hartmann declined to use one of those terms and instead described the effect as "a temporary drug-induced impairment." Hartmann had also described the effect of the three drugs as being "almost like [Bigelow] had been drinking alcohol excessively and he was not in a position to control his actions and be in full possession of his faculties."

During his cross-examination by the State, Hartmann testified that it was "the three drugs [Bigelow] was given at the hospital" and "[n]ot the methamphetamine" that had "caused his problems" at the time of the assault. At the end of the cross-examination, the State specifically asked Hartmann, "And your opinion is not that he was suffering from the mental disease to the extent that he did not know the difference between right and wrong with respect to what he was doing, it was the impairment due to the three drugs, correct?" Hartman replied, "Yes."

After Bigelow rested his case, the State moved the court for an order that Bigelow would not be entitled to submit an insanity defense to the jury. The State noted Hartman's testimony that it was not mental disease that caused Bigelow's behavior and that instead, he was impaired due to the drugs he had been given. Bigelow argued in response that "the mental disorder was essentially an involuntary intoxication . . . caused by the three drugs." The court found that Bigelow's evidence did not present a prima facie case for the insanity defense and granted the State's motion. In connection with the ruling, the court commented that it thought Bigelow's evidence showed both voluntary and involuntary intoxication but not the mental disease, defect, or disorder necessary for an insanity defense. The court also stated its understanding that insanity required a permanent "diagnosed mental condition, not a temporary intoxication" caused by "externally applied chemical" agents.

At the jury instruction conference, Bigelow objected to the court's draft instruction regarding the elements of the crime

charged; he instead proposed an instruction that incorporated the insanity defense. The language of the proposed instruction regarding the insanity defense followed NJI2d Crim. 7.0 and set forth the elements of the defense as being that Bigelow "had a mental disease, defect or disorder" that "impaired his mental capacity" such that he either "did not understand the nature and consequences of what he was doing" or "did not know the difference between right and wrong with respect to what he was doing." The court overruled Bigelow's objection to its draft instruction, and it refused Bigelow's proposed insanity instruction on the basis that the evidence did not justify it.

The court gave an intoxication instruction, including both voluntary and involuntary intoxication, to which neither the State nor Bigelow objected. The intoxication instruction is set forth in full in our analysis below.

The jury found Bigelow guilty of third degree assault on an officer. The court entered judgment based on the verdict, and it later found Bigelow to be a habitual criminal. The court sentenced Bigelow to imprisonment for a mandatory minimum of 10 years and a maximum of 12 years.

Bigelow appealed his conviction to the Court of Appeals. He claimed that the district court erred when it (1) refused his proposed insanity defense instruction and (2) gave the intoxication instruction. Bigelow also set forth certain claims of ineffective assistance of counsel, each of which the Court of Appeals found to be either refuted by the record or not capable of review on direct appeal; Bigelow does not seek further review of the ineffective assistance claims, and they are not further discussed herein.

The Court of Appeals rejected Bigelow's assignments of error regarding the instructions and affirmed Bigelow's conviction. *State v. Bigelow*, No. A-18-006, 2019 WL 286641 (Neb. App. Jan. 22, 2019) (selected for posting to court website). Regarding the proposed insanity instruction, the Court of Appeals agreed with the district court's determination that

the evidence did not support an insanity defense. The Court of Appeals noted Hartmann's testimony that it was not a mental disease, defect, or disorder that caused Bigelow to act the way he did but instead that he was suffering impairment from the three drugs he had been given at the hospital.

Regarding the intoxication instruction, the Court of Appeals noted that Bigelow had not objected to the instruction and it therefore reviewed the instruction only for plain error. The Court of Appeals cited Neb. Rev. Stat. § 29-122 (Reissue 2016) and determined that the instruction given by the district court "was an accurate statement of the involuntary intoxication defense in Nebraska," because the instruction tracked the provisions of § 29-122. *State v. Bigelow*, 2019 WL 286641 at *4. The Court of Appeals further determined that the evidence supported the intoxication instruction, because there was evidence that Bigelow was injected with three drugs and Hartmann testified that those drugs had an intoxicating effect on Bigelow and impaired his judgment.

We granted Bigelow's petition for further review.

ASSIGNMENT OF ERROR

Bigelow claims that the Court of Appeals erred when it concluded that the evidence did not support an insanity instruction.

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. *State v. Mann*, 302 Neb. 804, 925 N.W.2d 324 (2019).

ANALYSIS

Bigelow claims on further review that the Court of Appeals erred when it determined that the evidence did not support an insanity instruction and concluded that the district court had correctly refused his proposed instruction. He generally contends that under Nebraska law, involuntary intoxication can

support an insanity defense. He specifically contends that the evidence he presented regarding the effect of the three drugs given to him at the hospital caused him to be involuntarily intoxicated which, in turn, resulted in legal insanity, thus supporting an insanity defense instruction.

[2] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Mann, supra*. In the present case, the Court of Appeals determined that there was no reversible error because Bigelow's tendered insanity instruction was not warranted by the evidence; the Court of Appeals therefore did not need to determine whether the tendered instruction correctly stated the law.

As noted, Bigelow contends that evidence of his involuntary intoxication supported an insanity defense. He argues that although case law such as *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011), and statutes such as § 29-122 and Neb. Rev. Stat. § 29-2203(4) (Reissue 2016) establish that the insanity defense is not available in cases involving a temporary condition resulting from voluntary intoxication, we have not addressed whether the insanity defense is available when the defendant's mental state is altered by involuntary intoxication.

In order to address Bigelow's argument, we first review Nebraska law relating to the insanity defense, the intoxication defense, and the interplay of the two. We then consider whether, based on such law, an insanity instruction was warranted based on the evidence in this case. Thereafter, we consider whether an intoxication instruction was warranted instead of an insanity instruction and, if so, whether the intoxication instruction given by the district court in this case was appropriate.

Insanity Defense and Intoxication Defense Developed in Nebraska Common Law and Are Controlled to Some Extent by Statute.

Bigelow's arguments raise issues regarding the insanity defense, the intoxication defense, and the interplay of the two. The two defenses have developed in Nebraska as separate defenses which operate distinctly, and each defense applies to a different circumstance. However, our case law has recognized a degree of intersection between the two concepts.

[3] In Nebraska, as a general matter, the insanity defense and the intoxication defense were each developed by case law. The two developed to address different issues, and they operate in distinct ways. Generally, under Nebraska's common-law definition, the insanity defense requires proof that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong. See *State v. Williams*, 295 Neb. 575, 889 N.W.2d 99 (2017). As it developed under common law in Nebraska, the intoxication defense required that "the defendant must not have become intoxicated to commit the crime and, because of the intoxication, must have been rendered wholly deprived of reason. The excessive intoxication must support a conclusion that the defendant lacked the specific intent to commit the charged crime." *State v. Dubray*, 289 Neb. 208, 239, 854 N.W.2d 584, 611-12 (2014).

The two defenses operate in different ways. Although a successful insanity defense operates as a complete defense to the offense, the intoxication defense does not and instead is treated as a factor the jury may consider when determining whether the defendant had the requisite mental state. We stated in *State v. Hotz*, 281 Neb. 260, 270, 795 N.W.2d 645, 653 (2011), "[i]n Nebraska, the intoxication defense has been available to a defendant under common law almost as long as the insanity

defense." However, we described the intoxication defense as not being a "justification or excuse for a crime," but as a factor that could be "considered to negate specific intent." *Id*. As we noted in *State v. Hood*, 301 Neb. 207, 217, 917 N.W.2d 880, 889 (2018), with regard to an intoxication defense:

> In *State v. Vosler*, [216 Neb. 461, 345 N.W.2d 806 (1984),] we noted that "although there is but one type of insanity which will support a finding of not guilty or not responsible by reason of insanity, there are a variety of mental conditions which bear upon the ability to form a specific intent."

We stated in *State v. Dubray*, 289 Neb. at 239, 854 N.W.2d at 611-12, that "[u]nder Nebraska common law, intoxication is not a justification or excuse for a crime, but it may be considered to negate specific intent."

In past cases, most notably in *State v. Hotz, supra*, we have recognized some interplay between intoxication and insanity. Bigelow notes case law such as *Hotz* and the Legislature's amendment of § 29-2203, which amendment became effective after we filed our decision in *Hotz*, to include subsection (4) which provides, "For purposes of this section, insanity does not include any temporary condition that was proximately caused by the voluntary ingestion, inhalation, injection, or absorption of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof." See 2011 Neb. Laws, L.B. 100, § 2. Bigelow relies on such case law and the specific references in § 29-2203(4) to a "temporary" condition caused by "voluntary" intoxication to argue that Nebraska law recognizes an insanity defense based on either a temporary condition caused by involuntary intoxication or a permanent condition caused by long-term alcohol or drug use. However, as discussed further below, we need not examine this precedent or determine the effect of § 29-2203(4) on such precedent in the present case. The evidence presented by Bigelow does not establish that his condition at the time of the incident was "insanity" as defined in our case law, regardless of whether the

condition was temporary or permanent or whether the condition was caused by voluntary or involuntary intoxication.

Having reviewed the current state of Nebraska law on the insanity defense and the intoxication defense, we apply the law to the specifics of the present case.

District Court and Court of Appeals Correctly Concluded That Evidence in This Case Did Not Support Insanity Defense Instruction Proposed by Bigelow.

Applying the law just discussed, we note that in order to support an insanity defense, regardless of the cause of the insanity, a mental disease or defect must be shown. The evidence presented by Bigelow did not show that Bigelow suffered from such disorders.

Contrary to Bigelow's arguments, Hartmann's testimony did not support a finding of insanity caused by involuntary intoxication. Hartmann testified that Bigelow's behavior in the emergency room was caused by the "effect" of the three drugs given to him at the hospital. However, Hartmann did not characterize such "effect" as "insanity," because he did not testify that the intoxication caused a mental disease or defect. Hartmann did not accept that description when defense counsel posed a question using the language of "mental disease, defect or disorder," and he instead referred to the "effects" of the drugs. On cross-examination, when the State posited that it was not mental disease that caused Bigelow's behavior but instead "impairment due to the three drugs," Hartman agreed. Neither "effects" of drugs nor "impairment" caused by drugs establishes the mental disease or defect required in the law to support an insanity defense. Without evidence linking intoxication to a mental disease or defect or disorder, there is no evidence to support an insanity defense. Although Hartmann's testimony attributing Bigelow's behavior to the effects of the three drugs or impairment caused by the three drugs was sufficient to support an involuntary intoxication defense, it did not support an

insanity defense. We therefore agree with the Court of Appeals that the district court did not err when it refused Bigelow's proposed insanity instruction, because it was not supported by the evidence.

Evidence Supported Intoxication Instruction.

As the district court noted, there was evidence in this case of both voluntary intoxication, caused by Bigelow's use of methamphetamine, and involuntary intoxication, caused by the three drugs given to him at the hospital. The court therefore gave an intoxication instruction that addressed both voluntary and involuntary intoxication. We agree with the district court and Court of Appeals that an intoxication instruction was warranted by the evidence.

Regarding the district court's determination that there was evidence of involuntary intoxication in this case, we do not appear to have addressed whether use of prescribed medication or drugs given by medical personnel can be considered involuntary intoxication. We note that other jurisdictions have determined that one type of "involuntary intoxication is when the substance was taken pursuant to medical advice." 2 Wayne R. LaFave, Substantive Criminal Law § 9.5(g) at 69-70, n.65 (3d ed. 2018) (citing cases). But see *People v. McMillen*, 2011 IL App (1st) 100366, 961 N.E.2d 400, 356 Ill. Dec. 304 (2011) (stating that defendant's intoxication due to unexpected interaction between prescription medicine and voluntarily ingested cocaine did not render defendant involuntarily intoxicated). We believe that under § 29-122, use of medically advised drugs could be involuntary intoxication if the defendant did not know the intoxicating effect of the drug or did not voluntarily take the drug.

From the evidence in this case, the jury could have found Bigelow's behavior in the emergency room was caused by his voluntary ingestion of methamphetamine before he was brought to the hospital or by an interaction of the drugs given at the hospital with the methamphetamine he had voluntarily

ingested. In contrast, based on Hartmann's testimony, the jury could have found that his behavior was caused solely by the effect of the three drugs given to him at the hospital, in which case, Bigelow was involuntarily intoxicated. Finally, based on evidence such as the deputy sheriff's testimony that shortly after assaulting the security officer, Bigelow was "completely compliant" with the deputy sheriff's show of force, the jury could have determined that neither the methamphetamine nor the three drugs given at the hospital had affected Bigelow to the point that he did not have the mental ability to consciously form the requisite intent when he assaulted the security officer minutes earlier.

Because each of these findings was cognizable under Nebraska law and because each finding could be supported by the evidence, it was proper for the court to instruct the jury on these options. It is appropriate for a court to instruct on alternate theories if each is supported by the evidence. By its verdict of guilty, the jury determined that either Bigelow's behavior was caused by his voluntary use of methamphetamine or, if his behavior was caused by involuntary intoxication, his mental state was not affected by any of the substances to the point that he could not form the requisite intent.

In sum, we conclude that based on the evidence in this case, the district court did not err when it refused Bigelow's proposed insanity instruction and did not err when it instead gave an instruction on intoxication.

Intoxication Instruction Given by District Court Correctly Stated Law, Was Not Misleading, and Adequately Covered Intoxication Issues Supported by Evidence in This Case.

Because it does not appear that since the enactment of § 29-122 in 2011 we have considered an appeal in a case in which there was evidence that supported giving an involuntary intoxication instruction, we take this opportunity to review the intoxication instruction given in this case to consider how

issues of intoxication should be presented to a jury in light of § 29-122.

In cases we have decided since the enactment of § 29-122 in which the defendant had sought an intoxication instruction, we have determined that the case involved only evidence of voluntary intoxication and that therefore, the court below correctly refused to instruct on an intoxication defense. See, *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018); *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016). In addition, we have not had the opportunity to consider the propriety of a court's instruction in light of § 29-122 when there is evidence of involuntary intoxication and, as in this case, evidence of both voluntary and involuntary intoxication.

The district court in this case gave the following instruction regarding intoxication:

> There has been evidence that [Bigelow] was intoxicated at the time that the crime with which he is charged was committed.
>
> Voluntary intoxication is not a defense to the crime charged. You may not consider his voluntary intoxication in determining whether he had the required intent to commit the crime charged.
>
> Evidence that . . . Bigelow was involuntarily intoxicated may be taken into consideration if he proves by clear and convincing evidence that he did not:
>
> (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication; or
>
> (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.
>
> Such involuntary intoxication is a defense only when a person's mental abilities were so far overcome by the involuntary intoxication that he could not have had the required intent.
>
> In this case . . . Bigelow has the burden of proving involuntary intoxication by clear and convincing evidence.

> Clear and convincing evidence means evidence that produces a firm belief or conviction about the fact to be proved. Clear and convincing evidence means more than the greater weight of the evidence and less than proof beyond a reasonable doubt.

[4] We have stated that jury instructions are not prejudicial if, when taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence. *State v. Mann*, 302 Neb. 804, 925 N.W.2d 324 (2019). Under these standards, we conclude the intoxication instruction given by the court in this case correctly stated the law as set forth in § 29-122, by stating that voluntary intoxication is not a defense; that intoxication could be considered in connection with the required mental state if such intoxication is shown to be involuntary, consistent with § 29-122; and that Bigelow had the burden to show by clear and convincing evidence that he was involuntarily intoxicated. We further determine that the instruction was not misleading and that it adequately covered the issues relating to intoxication that were supported by the pleadings and evidence in this case.

CONCLUSION

We conclude that the Court of Appeals was correct when it concluded that the district court did not err when it refused Bigelow's proposed insanity defense instruction. We further conclude that the evidence in this case did support an instruction regarding both voluntary and involuntary intoxication and that the intoxication instruction given by the district court in this case correctly stated the law, was not misleading, and adequately covered the issues relating to intoxication that were supported by the pleadings and evidence. We therefore affirm the decision of the Court of Appeals which affirmed Bigelow's conviction for third degree assault on an officer.

Affirmed.

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

Toffie Maloley, appellant and cross-appellee, v. Central Nebraska Public Power and Irrigation District et al., appellees and cross-appellants.

931 N.W.2d 139

Filed July 19, 2019. No. S-18-656.

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 wrong.
2. ____: ____. After 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.
3. **Judgments.** In a bench trial, the trial court's entry of judgment in favor of a certain party warrants the conclusion that the trial court found in the party's favor on all issuable facts.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
5. **Summary Judgment: Moot Question: Appeal and Error.** The denial of a summary judgment motion generally becomes a moot issue on appeal after a final trial on the merits.
6. **Actions: Civil Rights: Convictions: Proof.** A plaintiff seeking relief under 42 U.S.C. § 1983 (2012) based on a criminal conviction must first show favorable termination of his or her underlying conviction if success in the civil action would necessarily undermine the validity of the previous conviction.

Appeal from the District Court for Dawson County: James E. Doyle IV, Judge. Affirmed.

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

Daniel M. Placzek and Jared J. Krejci, of Smith, Johnson, Baack, Placzek, Allen, Connick & Hansen, for appellees.

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

Miller-Lerman, J.

NATURE OF CASE

The appellant, Toffie Maloley (Maloley), brought this 42 U.S.C. § 1983 (2012) action against the appellees, Central Nebraska Public Power and Irrigation District, a political subdivision (Central), its general manager, and the members of Central's board (collectively the appellees). Central owns real estate in Dawson and Gosper Counties, including Johnson Lake.

After harassment protection orders were issued against Maloley and he moved out of the Johnson Lake area through an exit plan negotiated by his counsel, he was given a "ban notice" on August 13, 2013, but repeatedly trespassed thereafter, leading to two convictions for trespass which have not been overturned or otherwise reversed. In his amended complaint, Maloley generally alleged that he was unconstitutionally excluded from the Johnson Lake area such that he could not reside or travel there or engage in recreation and his occupation. After trial, the district court filed a 22-page order and opinion finding in favor of the appellees and dismissing Maloley's action. Judgment was entered accordingly. We determine that Maloley's convictions for trespassing are fundamentally inconsistent with his various civil claims alleged in his amended complaint. Under the *Heck* doctrine, Maloley's claims are not cognizable under 42 U.S.C. § 1983. See *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Although our reasoning differs from that of the district court, we affirm.

STATEMENT OF FACTS

Maloley alleged that he resided in a Johnson Lake residence leased by his mother for the 2 years prior to August 13, 2013, and had personal property and a business at Johnson Lake. Maloley alleged that on August 13, Central's attorney had Maloley served with a notice prohibiting Maloley from entering onto Central's real estate. Maloley alleged that after he received the notice, he was repeatedly arrested and prosecuted for trespassing on Central's real estate. It is undisputed that he was convicted of criminal trespass in two separate incidents and that the convictions have not been reversed, declared invalid, or expunged in any way.

Maloley alleged that when Central's attorney issued the notice, the appellees violated his procedural due process rights and various property and civil rights. All of Maloley's claims were brought under 42 U.S.C. § 1983. The appellees admitted the obvious facts but denied others. Throughout these proceedings, the appellees asserted, inter alia, that under the *Heck* doctrine, Maloley's claims were not cognizable under § 1983, because Maloley was a convicted trespasser and the court could not find in Maloley's favor without invalidating his convictions.

Cross-motions for summary judgment were denied. A bench trial on liability took place on August 8 and 9, 2017. The district court denied the appellees' midtrial motions. After trial, in a 22-page opinion, the district court found in favor of the appellees on all claims, and the entirety of Maloley's amended complaint was dismissed with prejudice and judgment entered accordingly. Maloley filed a motion for new trial which generally asserted that he was denied a fair trial. The motion was denied.

In its order following trial, the district court found that Maloley's mother, Lorraine Maloley, signed a residential lease agreement with Central allowing her to lease a lot at Johnson Lake, referred to as "Bass Bay, Lot 25." In 2011, Maloley began living in Lorraine's residence at Johnson Lake.

In July 2012, Lorraine's neighbor obtained a harassment protection order against Maloley. In August, Central's attorney sent Lorraine a letter advising that Maloley was interfering with the neighboring leaseholders' peaceful enjoyment. The letter gave Lorraine 60 days to remedy the breach by Maloley's leaving Central's real estate. On October 2, Maloley's attorney responded to the August letter, stating that Maloley agreed to leave Bass Bay, Lot 25, on or before October 5. On October 19, Central's attorney sent Maloley's attorney another letter stating that Maloley had vacated the premises, but advising that if Maloley returned, Central would consider his presence a resumption of the breach. These discussions between counsel caused Maloley to leave Central's real estate with the knowledge that he was not permitted to return. The district court found that Maloley left Central's property knowing he was not to return or "he would be treated as a trespasser."

In February 2013, Maloley returned to reside at Bass Bay, Lot 25. In July, the complaining neighbor's husband sent Central a letter explaining that Maloley was at Bass Bay, Lot 25, on a daily basis and disturbing the neighborhood. The district court found that Maloley's disturbing conduct resulted in users of Central's real estate making complaints to Central and that Maloley interfered with the peaceful enjoyment of Central's facilities.

Consistent with the October 2012 communication between counsel, on August 12, 2013, Central prepared a notice advising Maloley he was not to enter any of Central's real estate in Dawson County or Gosper County or else he would be referred to law enforcement authorities. This "ban notice" was personally served on Maloley.

Between August 28 and December 6, 2013, Maloley was charged with four counts of second degree trespass in three cases in the county court for Dawson County. All of the trespass charges occurred on Central's real estate. One of the cases was dismissed by the State, and Maloley was

convicted of criminally trespassing on Central's real estate in two cases.

On November 24, 2014, Central's attorney sent Maloley's attorney a letter advising that Maloley was allowed to enter Johnson Lake to remove his personal property from Bass Bay, Lot 25, provided Maloley had Lorraine's permission and Maloley was accompanied by law enforcement.

The district court found that Maloley was a mere occupier at Bass Bay, Lot 25, and had no interest in the leasehold at that location. The district court found that Maloley's interests as an occupier of Bass Bay, Lot 25, and user of Central's facilities terminated when Maloley left Central's real estate and acceded to the terms discussed and agreed to between counsel in the 2012 communication process. The district court found that the 2012 communication process gave Maloley notice of the requirement that he leave and the reasons therefor. The district court found that the 2012 communication process gave Maloley the opportunity to challenge Central's position, but Maloley waived his rights to remain on Central's real estate after he left in the fall of 2012. Once Maloley returned, the district court recognized that Maloley was a trespasser.

The district court reasoned that because Maloley waived his right to remain on Central's real estate after he left, Maloley had no property or liberty interest in residing at Bass Bay, Lot 25. Further, because Maloley was a trespasser, he had no liberty interest or other right to associate with those at Johnson Lake or engage in an occupation at Johnson Lake. The district court found that the 2012 communication process gave Maloley what process he was due when he was temporarily deprived of his personal property.

The district court found that before the 2012 communication process, Maloley had a right to use Central's real estate which was generally made available to the public. However, the district court found that the 2012 communication process was fundamentally fair and afforded Maloley the process he was due under the circumstances.

Applying the *Mathews v. Eldridge* considerations to determine what process was due, the district court found that Maloley's interest in his personal property was not substantially impaired, because Maloley had ample time to remove his personal property during the August to October 2012 communication process. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed 18 (1976). Maloley knowingly left his personal property behind when he left Johnson Lake. Further, it found that Maloley's evidence regarding the extent and nature of Maloley's personal property was not convincing. With regard to Maloley's interest in providing lawn care and handyman services, the district court found that Maloley's evidence on this issue had little probative value. The district court found that Maloley's interest in using Central's real estate as a member of the public was not substantial, because Maloley forfeited his interest by disturbing the peace.

Continuing its *Mathews* analysis, the district court found that Central's interest in its duty to the public weighed in favor of the adequacy of the 2012 communication process. Central had a duty to protect the quiet, peaceful, and safe use of its real estate by its tenants and the public. The district court noted that Maloley's conduct interfered with the peace and risked safety due to possible escalations of confrontations and altercations. The 2012 communication process minimized the risk of the public's disturbance and promoted safety.

Finally, the district court concluded its *Mathews* analysis by finding that the 2012 communication process carried a "very low" risk of error compared to other procedures. The court found that Central had received bona fide and verified complaints about Maloley's conduct. Due to the existence of the neighbor's harassment protection order, Central knew of a previous judicial determination that Maloley was interfering with the users of Johnson Lake.

In summary, the district court determined that the 2012 communication process was fundamentally fair and afforded Maloley the process he was due.

The district court determined that Maloley had no substantive due process rights to live precisely where he chose, to engage in handyman services at Johnson Lake, to intrastate travel through Central's real estate, or to use Central's recreational facilities. The district court determined that Maloley had no First Amendment right to associate with customers at Johnson Lake. The district court found that Central's actions were rationally related to legitimate government interests in protecting the peace and quiet of Johnson Lake. Finally, the district court determined that Central did not violate Maloley's equal protection rights, because there was a rational basis for Central to classify Maloley as it did.

The district court found in favor of the appellees on all claims and dismissed Maloley's complaint with prejudice. Posttrial motions were denied. Maloley appeals.

ASSIGNMENTS OF ERROR

Maloley claims, summarized and restated, that the district court erred when it denied his motion for summary judgment, determined after a trial that Maloley was a trespasser and that he received due process of law during the 2012 communication process, and denied his motion for new trial.

In their cross-appeal, the appellees claim that although they agree with the judgment as entered, because Maloley was convicted for trespass and these convictions have not been reversed, declared invalid, or expunged, his claims under 42 U.S.C. § 1983 arising as a consequence of these convictions are not cognizable under the rule articulated in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), and the district court erred when it failed to dismiss the amended complaint on this basis.

STANDARDS 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 wrong. *Cullinane v. Beverly*

Enters. - Neb., 300 Neb. 210, 912 N.W.2d 774 (2018). After 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. See *id*.

[3] In a bench trial, the trial court's entry of judgment in favor of a certain party warrants the conclusion that the trial court found in the party's favor on all issuable facts. *Blue Creek Farm v. Aurora Co-op Elev. Co.*, 259 Neb. 1032, 614 N.W.2d 310 (2000).

[4] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions. *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

ANALYSIS

Appeal.

[5] Maloley claims that the district court erred when it denied his motion for summary judgment. However, "denial of a summary judgment motion generally becomes a moot issue on appeal after a final trial on the merits." *First Express Servs. Group v. Easter*, 286 Neb. 912, 920, 840 N.W.2d 465, 471 (2013). Under the circumstances of this case, this assignment is without merit. Maloley also claims that the district court erred when it ruled against him after trial and thereafter denied his motion for new trial. As explained below, because we agree with the appellees' contention in their cross-appeal that the district court did not err when it dismissed Maloley's amended complaint and entered judgment in favor of the appellees, we reject these assignments of error.

Cross-Appeal.

In their cross-appeal, the appellees claim that the district court did not err when it dismissed Maloley's amended complaint after trial, but they contend that their assertion that Maloley's 42 U.S.C. § 1983 action was not cognizable under

the *Heck* doctrine provides the better rationale. We agree with the appellees, and the resolution of this contention in favor of the appellees is dispositive of the appeal.

Maloley's 42 U.S.C. § 1983 claims tried below arise from the assertion that he was denied due process of law when he was excluded from Central's real estate and convicted of trespassing. He claims the circumstances of his eviction and subsequent convictions for criminal trespass were unlawful and are all folded into and serve as the basis for his § 1983 claims. Maloley did not prove at trial that the convictions for trespassing have been reversed on direct appeal, expunged by executive order, or otherwise declared invalid. Thus, as explained below, under the *Heck* doctrine, the claims in Maloley's amended complaint are not cognizable under § 1983 and therefore the dismissal of his amended complaint was not error. See *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

In *Heck*, the U.S. Supreme Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . .

512 U.S. at 486-87. The Court in *Heck* explained that § 1983 does not allow a convicted defendant to mount a collateral attack on his or her conviction under the guise of a civil suit; generally, tort lawsuits "are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486.

Although the *Heck* principle began in a habeas corpus setting, subsequent cases confirmed that the *Heck* doctrine applies regardless of the type of relief sought if success in a

42 U.S.C. § 1983 action would necessarily demonstrate the invalidity of a conviction or sentence. See *Wilkinson v. Dotson*, 544 U.S. 74, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005). We have applied *Heck* to a prisoner's § 1983 case. See *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000).

Courts have extended the *Heck* doctrine to other contexts, and as relevant here, the *Heck* doctrine has been applied to claims in which the plaintiff had been convicted of criminal trespass and sought relief for circumstances surrounding those convictions. See, generally, *Harris v. Wal-Mart Stores, Inc.*, 48 F. Supp. 3d 1025 (W.D. Tenn. 2014); *Salvagio v. Doe*, No. Civ. 13-5182, 2015 WL 460907 (E.D. La. Feb. 3, 2015) (unpublished opinion); *Rector v. Baca*, No. CV 13-3116 VBF (SS), 2014 WL 4244345 (C.D. Cal. Aug. 25, 2014) (unpublished opinion); *Snyder v. Decker*, No. 2:06cv1528, 2007 WL 2616993 (W.D. Pa. Sept. 6, 2007) (unpublished opinion).

To determine whether a 42 U.S.C. § 1983 claim is improper under the *Heck* doctrine, a district court must analyze the relationship between the plaintiff's § 1983 claim and the charge on which he was convicted. See *Hardrick v. City of Bolingbrook*, 522 F.3d 758 (7th Cir. 2008). The Ninth Circuit has explained that the critical element in this analysis is "whether the plaintiff's action, if successful, will 'demonstrate the invalidity of any outstanding criminal judgment.'" *Beets v. County of Los Angeles*, 669 F.3d 1038, 1043 (9th Cir. 2012) (quoting *Heck v. Humphrey, supra*). Put another way, "'if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed.'" *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (quoting *Heck v. Humphrey, supra*). Claims which would not necessarily imply the invalidity of the conviction should be allowed to proceed. *Heck v. Humphrey, supra*.

In this case, the appellees urge that Maloley had no property rights, so Maloley could not be deprived of property without due process. They further urge that Maloley was not

deprived of his constitutional rights, but if his rights were circumscribed, that is a permissible result of the fact that he has been found by a court to be a criminal trespasser at the Johnson Lake area. The appellees assert that the correctness of a limitation on Maloley's rights, if any, would not be cognizable in a 42 U.S.C. § 1983 action while the convictions for trespassing stand. We agree.

The record shows that Lorraine received notice pertaining to Maloley's conduct and that Maloley, represented by counsel, negotiated an exit plan for Maloley from Lorraine's property. Lorraine received a notice banning Maloley from the property and threatening eviction if Maloley returned. The threat of eviction was based, inter alia, on a term in Lorraine's lease protecting the neighboring leaseholders' peaceful enjoyment of their property. Subsequently, Maloley was arrested four times for trespassing on Central's real estate. From those arrests, Maloley was ultimately convicted of two counts of second degree trespass, because he could not show he had a right to remain on the property.

There is a direct relationship between Maloley's trespassing and his 42 U.S.C. § 1983 claims. Each claim in Maloley's amended complaint is rooted in the propriety of his trespass convictions. Had Maloley been successful on his § 1983 claims, the validity of his convictions for trespass would be called into question. Maloley concedes that his convictions stand, but argues that *Heck* does not bar his constitutional claims, because they attack the process of issuing the ban notice against him, and not the resulting convictions themselves. While there may be a distinction, the forum challenging the ban notice is in the criminal cases, not this civil matter. Maloley cannot claim he had a right to remain on the property in the civil case after having been convicted for having no such right in his criminal cases. His criminal convictions are "'fundamentally inconsistent with the unlawful behavior'" alleged against the appellees for which he claims damages. See *Smith v. City of Hemet*, 394 F.3d at 695. Accordingly, Maloley's civil rights action under

§ 1983 was not cognizable and the district court did not err when it dismissed his amended complaint and entered judgment for the appellees.

CONCLUSION

[6] Under the rule articulated in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), a plaintiff seeking relief under 42 U.S.C. § 1983 based on a criminal conviction must first show favorable termination of his or her conviction if success in the civil action would necessarily undermine the validity of the previous conviction. The gravamen of Maloley's constitutional claims in his amended complaint directly call into question his trespass convictions. Thus, Maloley's § 1983 claims were not cognizable under the *Heck* doctrine. Although our reasoning differs from that of the district court, we affirm the judgment of the district court which found in favor of the appellees and which dismissed Maloley's amended complaint.

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. Kathleen M. Schmidt, respondent.

930 N.W.2d 577

Filed July 19, 2019. No. S-19-226.

Original action. Judgment of suspension.

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

Per Curiam.

INTRODUCTION

This case is before the court on the conditional admission filed by Kathleen M. Schmidt, respondent, on May 24, 2018. The court accepts respondent's conditional admission and enters an order of suspension for a period of 1 year, with 2 years of monitored probation following reinstatement.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 18, 1987. At all relevant times, she was engaged in the practice of law in Omaha, Nebraska.

On March 4, 2019, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent. The formal charges consisted of six counts against respondent. On May 22, the Counsel for Discipline dismissed, without prejudice, count VI of the formal charges. Pursuant to Neb. Ct. R. § 3-302, respondent is under the jurisdiction of the Committee on Inquiry of the Second Judicial District.

The matters alleged in the formal charges were reviewed by the Committee on Inquiry pursuant to Neb. Ct. R. § 3-309(H) (rev. 2011). The committee determined that there are reasonable grounds for discipline of respondent and that a public interest would be served by filing formal charges.

Count I.

Count I of the formal charges states that while representing S.L. in a dissolution of marriage case, respondent failed to follow the discovery rules, which caused the district court to continue a hearing.

The formal charges allege that by her actions, respondent violated her oath of office as an attorney licensed to practice law in the State of Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 2012) and Neb. Ct. R. of Prof. Cond. §§ 3-503.4(c) (fairness to opposing party), 3-504.4(a) (respect for rights of third persons), and 3-508.4(a) and (d) (rev. 2016) (misconduct).

Count II.

Count II of the formal charges states that while representing L.P., the plaintiff in a dissolution of marriage case, respondent prepared a parenting plan which she submitted to the Douglas County District Court Conciliation and Mediation Services. Respondent did not submit the proposed parenting plan to opposing counsel for her review; rather, she attached the last page of the stipulated order as the last page of the parenting plan, thereby making it appear that the document had been prepared by opposing counsel and approved by the parties and their counsel.

The formal charges allege that by her actions, respondent violated her oath of office as an attorney licensed to practice law in the State of Nebraska as provided by § 7-104 and Neb. Ct. R. of Prof. Cond. § 3-503.3(a)(1) (rev. 2016) (candor toward tribunal) and § 3-508.4(a), (c), and (d) (misconduct).

Count III.

Count III of the formal charges states that while representing A.K. in a family law matter, respondent misappropriated client funds. On May 11 and 30, 2017, A.K. gave respondent's law firm checks for $1,000 and $650 as advance fee payments, which were deposited into respondent's business account rather than into respondent's client trust account. In June and July, respondent's law firm issued a billing statement to A.K. showing fees and expenses. When A.K.'s case was completed and A.K. was owed a refund of $315 from the initial advance fee payment, respondent issued a refund out of her trust account in that amount. The formal charges allege that respondent used funds belonging to other clients to pay A.K.'s refund. Respondent later deposited $315 of her funds into her trust account to cover the improper withdrawal of funds.

The formal charges allege that by her actions, respondent violated her oath of office as an attorney licensed to practice law in the State of Nebraska as provided by § 7-104 and Neb. Ct. R. of Prof. Cond. § 3-501.15 (safekeeping property) and § 3-508.4(a) (misconduct).

Count IV.

Count IV of the formal charges states that respondent received an advance fee payment of $2,500 from her client, D.R., and deposited this fee payment into respondent's husband's business account rather than her client trust account. After respondent's law firm issued billing statements to D.R., respondent transferred money from her trust account to her business account and, in doing so, misappropriated D.R.'s funds and used funds belonging to other clients to pay D.R.'s bill. Respondent's husband later reimbursed respondent's client trust account to return D.R.'s misappropriated payment.

The formal charges allege that by her actions, respondent violated her oath of office as an attorney licensed to practice law in the State of Nebraska as provided by § 7-104 and §§ 3-501.15 (safekeeping property) and 3-508.4(a) (misconduct).

Count V.

Count V of the formal charges states that while respondent served as a conservator to R.B., she was responsible for making monthly rental payments to pay for R.B.'s self-storage unit. Respondent failed to make timely rental payments four times, and each time, R.B. was charged a late fee of $15, which respondent paid from R.B.'s funds. After an ethics grievance was filed against respondent regarding her untimely payment of R.B.'s rent for the storage unit, respondent reimbursed R.B.'s conservatorship account the sum of $60.

The formal charges allege that by her actions, respondent violated her oath of office as an attorney licensed to practice law in the State of Nebraska as provided by § 7-104 and Neb. Ct. R. of Prof. Cond. § 3-501.3 (diligence) and § 3-508.4(a) (misconduct).

On May 24, 2019, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313(B) of the disciplinary rules, in which she conditionally admitted that she violated her oath of office as an attorney and certain professional conduct rules. In the conditional admission, respondent states she did not knowingly or intentionally violate the rules of professional conduct, but acknowledges and admits that her conduct violated certain rules of professional conduct. Respondent knowingly does not challenge or contest the truth of the matters conditionally asserted and waived all proceedings against her in exchange for agreed-upon discipline.

By way of mitigation, respondent stated that in December 2017, she was diagnosed with an illness which required surgery and extended treatment ending in August 2018. During that time, respondent received mental health treatment, including therapy and medication to help her with the emotional and cognitive aspects of her diagnosis and treatment. During the relevant time period, she failed to properly monitor tasks she delegated to new employees, including the operation of her office account, trust account, and a conservatorship. She

expresses a willingness to cooperate with the Council for Discipline, claims to accept full responsibility for her mistakes, and has taken necessary steps to ensure the same mistakes will not recur. Respondent states that none of her clients suffered legal detriment or financial loss as a result of the acts alleged in the formal charges.

Respondent agreed to a 1-year suspension of her license to practice law in Nebraska, to begin in 30 days. Upon reinstatement of her license, respondent shall serve a term of monitored probation for a period of 2 years. The terms of the probation shall be as follows:

(1) During the first 6 months of the probation, respondent will meet with and provide the monitor a weekly list of cases for which she is entirely responsible, including:

(a) the date the attorney-client relationship began;

(b) the general type of case;

(c) the date of the last contact with the client;

(d) the last type and date of work completed on the case;

(e) the next type of work and date that work should be completed on the case;

(f) any applicable statute of limitations and its dates; and

(g) the financial terms of the attorney-client relationship.

(2) After the first 6 months through the end of probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information set forth above.

(3) Respondent shall reconcile her trust account within 10 days of the receipt of the monthly statement and provide the monitor with a copy within 5 days.

(4) Respondent shall submit a quarterly compliance report with the Counsel for Discipline, demonstrating that she is adhering to the terms of probation. The quarterly report will include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of the probation.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's proposed discipline is appropriate and consistent with sanctions imposed in other disciplinary cases with similar acts of misconduct and will protect the public.

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by her conduct, respondent violated certain rules of conduct and her oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against her in connection herewith. Upon

due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is suspended for a period of 1 year. Should respondent apply for reinstatement, if accepted, her reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years, including monitoring, following reinstatement, subject to the terms agreed to by respondent in the conditional admission and outlined above. Acceptance of an application for reinstatement is conditioned on the application's being accompanied by a proposed monitored probation plan, the terms of which are consistent with this opinion. Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, she shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323(B) of the disciplinary rules within 60 days after the order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

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. Bilal Ahmed Khaleeq, respondent.

931 N.W.2d 146

Filed July 26, 2019. No. S-18-640.

Original action. Judgment of disbarment.

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

Per Curiam.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Bilal Ahmed Khaleeq, on June 14, 2019. The court accepts respondent's voluntary surrender of his license and enters a judgment of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 20, 2007. He has also practiced law in Dallas, Texas. On October 9, 2018, relator filed formal charges against respondent. The formal charges state that respondent entered a guilty plea to violating 18 U.S.C. § 371 and 8 U.S.C. § 1325(c) (2012) (conspiracy to commit marriage fraud) in case No. 3:17-CR-00359-N in the U.S. District Court for the Northern District of Texas, Dallas Division. He was sentenced to 6 months' incarceration and ordered to pay a fine of $10,000. The formal charges allege that respondent violated his oath of office as an attorney licensed to practice law in

the State of Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 2012) and Neb. R. of Prof. Cond. § 3-508.4(a) through (c) (rev. 2016) (misconduct).

On June 14, 2019, respondent filed a voluntary surrender of license to practice law, in which he stated that he knowingly does not contest the truth of the allegations set forth in the formal charges. Respondent stated that he freely and voluntarily surrenders his privilege to practice law in the State of Nebraska; waives his right to notice, appearance, or hearing prior to the entry of an order of disbarment; and consents to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations that were made against him in connection with his federal conviction. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly,

and voluntarily admits that he does not contest the allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

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

Ian B. McPherson, appellant, v. City of Scottsbluff, in the County of Scotts Bluff, in the State of Nebraska, appellee.

931 N.W.2d 451

Filed July 26, 2019. No. S-18-834.

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. **Fair Employment Practices: Discrimination: Proof.** To show a business necessity for requiring an employee (as distinguished from an applicant) to submit to a medical examination under Neb. Rev. Stat. § 48-1107.02(1)(j) (Cum. Supp. 2018), an employer has the burden to show that (1) the business necessity is vital to the business; (2) it has a legitimate, nondiscriminatory reason to doubt the employee's ability to perform the essential functions of his or her duties; and (3) the examination is no broader than necessary. There must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his or her job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions.
4. **Fair Employment Practices: Proof.** A plaintiff must establish a prima facie case of retaliation under Neb. Rev. Stat. § 48-1114 (Reissue 2010) by showing (1) he or she engaged in protected conduct, (2) he or she was subjected to an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse action.

Appeal from the District Court for Scotts Bluff County: Leo P. Dobrovolny, Judge. Affirmed.

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

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

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

Papik, J.

Ian B. McPherson was a police officer for the City of Scottsbluff, Nebraska (City). After the police chief became concerned that McPherson was exhibiting irrational, paranoid, and hostile behavior, he asked McPherson to undergo a fitness-for-duty examination (FFDE). McPherson refused, and the City terminated his employment. McPherson sued, alleging discrimination and retaliation under the Nebraska Fair Employment Practice Act (NFEPA). The district court granted the City's motion for summary judgment. McPherson now appeals.

As to McPherson's discrimination claim, we find that based on the undisputed evidence in the summary judgment record, the City could lawfully require McPherson to undergo an FFDE under Neb. Rev. Stat. § 48-1107.02(1)(j) (Cum. Supp. 2018). And because McPherson alleged that the City retaliated against him for expressing disapproval of the actions of his fellow employees, as opposed to his employer, there is no genuine issue of material fact as to whether he engaged in protected activity pursuant to Neb. Rev. Stat. § 48-1114(3) (Reissue 2010). Accordingly, we affirm.

BACKGROUND

McPherson worked for the City as a patrol officer from January 19, 2010, to February 3, 2016, when the City terminated his employment. The City had no records that McPherson, whose job performance met standards, had any disability.

McPherson filed a complaint alleging disability discrimination and retaliation under NFEPA. He claimed that the City fired him after he reported his belief that members of the police department were involved in a break-in on police property. He asserted that the City violated NFEPA by requiring him to take a FFDE that was not job related and consistent with business necessity and by retaliating against him because he opposed unlawful practices.

The City's answer contended that the FFDE was job related and consistent with business necessity and that it fired McPherson for insubordination in not submitting to the FFDE when ordered. The City moved for summary judgment, and McPherson moved for partial summary judgment on liability. The district court conducted a hearing on the motions. The evidence received at the hearing demonstrated that McPherson's termination came about as described below.

McPherson Raises Concerns Regarding Break-In.

On or about November 3, 2015, the evidence lockers for the Scottsbluff Police Department were burglarized. After learning about the break-in, McPherson became suspicious that two of his colleagues, Officers William Howton and Matthew Herbel, were responsible.

On December 2, 2015, McPherson contacted Brandi Brunz, one of the police department's investigators, and reported that he believed Howton and Herbel were involved with the burglary. Brunz encouraged McPherson to discuss the matter with Capt. Brian Wasson.

That evening, McPherson contacted Wasson, stating that he needed to talk to Wasson immediately and needed to "get something off of his chest." At that time, McPherson was driving around in Scottsbluff, but he told Wasson he would be more comfortable meeting in Gering, Nebraska. Wasson agreed to meet in Gering, where McPherson told him that what he was about to say would make Wasson think McPherson was "crazy" and that it had been bothering him for days, so

much so that he had not been eating. McPherson informed Wasson that he suspected the burglary of the evidence lockers was a staged event to compromise a particular homicide investigation.

McPherson explained to Wasson that on the night of the burglary, the Scottsbluff chief of police, Kevin Spencer (Chief Spencer), had given a speech to a group of nurses and that Chief Spencer might have discussed some confidential information about a homicide. McPherson believed that the speech referring to the homicide and the burglary of the evidence lockers the same night were not coincidental. He further said he believed that someone had made a "statement" at the burglary site by leaving rubbed patterns on a car that was related to the homicide investigation.

McPherson also recalled that the day before the burglary, Herbel had asked him to go hunting the next morning, which McPherson thought was strange, because Herbel had never asked McPherson to go hunting before. McPherson told Wasson he believed this was to establish an alibi for the burglary. McPherson also stated that shortly before the burglary was discovered, Howton asked McPherson, "'Has anything big happened yet?'" McPherson considered this suspicious, because he did not recall Howton ever asking him something like that before.

McPherson reported to Wasson that soon after the burglary, he was driving off duty when he noticed Howton driving nearby. Howton pulled over to talk to McPherson. McPherson said that when Howton approached him to talk, McPherson immediately got the "'Heebie Jeebies.'" McPherson stated that Howton discussed the burglary with him and that McPherson felt Howton kept looking over his shoulder "as if he was paranoid." In an affidavit prepared for trial, McPherson asserted that Howton appeared tense, was scanning the area, and had his hand on his gun during his conversation with McPherson, but it is not clear from the affidavit whether McPherson reported these details to Wasson.

McPherson further described to Wasson an incident earlier in the day on December 2, 2015. McPherson stated during a conversation about the burglary, Howton asked what was going on with the burglary case. McPherson claimed this was of significant concern, because it was inconceivable that Howton had not already looked at the case file. Howton also asked McPherson what the report number was for the burglary and what was depicted in a particular crime scene photograph. According to McPherson, this was concerning, because he claimed that Howton had to have already known this information and was only asking in an attempt to conceal the fact that he was involved in the burglary.

When Wasson asked what motive Howton or Herbel would have to burglarize the evidence lockers, McPherson theorized that Howton may want to compromise the homicide investigation because his brother might have been involved in the homicide. McPherson's explanation for suspecting Howton's brother was based on his understanding that the homicide involved a homosexual relationship and his suspicion that Howton's brother is gay. McPherson based his suspicion that Howton's brother was gay on his observation that Howton had never formally introduced his brother to McPherson. In addition, McPherson said Howton's wife made remarks to McPherson's wife that made McPhersons' wife suspect Howton's brother is gay. McPherson also pointed out that like an individual in the homicide case, Howton and Howton's brother had previously worked in construction.

McPherson also presented the theory that Howton and Herbel were motivated by money. McPherson said that Howton makes multiple drug arrests, but that Howton seems to seize less money than other officers. McPherson stated that based on his knowledge of Howton's possessions and debts owed by Howton's wife, it does not appear Howton "lives within his means."

Last, McPherson said perhaps Howton and Herbel wanted to make the department look bad, claiming that Howton and

Herbel do not like the current police administration. McPherson supported this theory by stating he heard the two officers discussing the homicide case and that Herbel agreed when Howton said, "'They won't be able to keep this out of the media.'"

The next morning, on December 3, 2015, McPherson sent an email to other patrol officers asking for extra patrol around his house. The email included photographs of shoeprints and of circles drawn in the snow. Brunz spoke to McPherson about the email, and McPherson told her that he believed the circles in the snow were "'glasses or eyes'" that someone had drawn. McPherson also told Brunz that he noticed a patrol car driving slowly near his house the night he first reported his suspicions about the burglary and that he had trouble sleeping afterward.

Wasson drafted a report of his conversations with Brunz and McPherson and provided it to Chief Spencer. The report did not include any statement by McPherson that Howton had his hand on his weapon during the conversation that gave McPherson the "Heebie Jeebies." Wasson's report caused Chief Spencer to be concerned because, according to Wasson's account, McPherson said he had not been eating, the allegations McPherson made struck Chief Spencer as bizarre, and the allegations were made against McPherson's self-described friends.

By this time, investigators had identified a burglary suspect through several pieces of evidence. (This suspect eventually pleaded guilty to theft charges.) Nevertheless, Chief Spencer referred McPherson's allegations to the Nebraska State Patrol via an assistant attorney general for investigation, as he did not believe it was appropriate for the department to conduct its own investigation. Chief Spencer explained to the assistant attorney general that he was "concerned about Officer McPherson's wellbeing knowing that he is a war veteran and this behavior seemed very out of character."

Based on McPherson's reports to Wasson, the assistant attorney general agreed that there was no basis to believe any officers had been involved in the burglary. Even so, Chief Spencer

and the assistant attorney general arranged for McPherson to report the allegations to Sgt. Monte Lovelace of the Nebraska State Patrol.

On December 4, 2015, Chief Spencer contacted Dr. Matthew Hutt, a psychologist. Dr. Hutt told him these statements raised concerns about McPherson's fitness for duty and referred Chief Spencer to a colleague in Omaha, Nebraska, who specialized in law enforcement and had conducted FFDE's.

On December 7, 2015, when Chief Spencer told McPherson about the arrangements for him to speak to Lovelace, McPherson again talked about the shoeprints in the snow and the circles that he thought represented eyes or glasses. McPherson said he thought it was a "sign" from Howton that he was watching McPherson.

State Patrol Interviews McPherson.

On December 7, 2015, Lovelace interviewed McPherson about his allegations. Prior to the interview, Lovelace had never met McPherson nor did he have any information regarding McPherson's mental health or any information that it was a concern. At a deposition, Lovelace described McPherson's demeanor during the interview as very nervous, troubled, standoffish, closed off, always frowning, and almost beside himself. Lovelace stated that the information McPherson gave was erratic and irrational and that it led him to be concerned about McPherson.

In the interview, McPherson related to Lovelace many of the same incidents he had described to Wasson, including his roadside interaction with Howton. McPherson told Lovelace, as he had told Wasson, that as soon as Howton began to approach McPherson's vehicle, McPherson got the "Heebie Jeebies." McPherson also told Lovelace that he was not sure why he felt that way and that in response to this feeling, McPherson put his gun under his arm and put his vehicle in reverse. McPherson said he was extremely scared while talking to Howton, that he did not know how he was going to get himself out of the situation, and that he realized he had made a mistake in talking

to Howton about the burglary. McPherson's description of this interaction made Lovelace concerned about the safety of McPherson and other officers.

McPherson also told Lovelace about his concern that Howton, who McPherson considered his best friend, made many drug arrests but never had large amounts of cash, and he wondered how Howton could afford all that he had. McPherson told Lovelace that he asked his wife, who works at a bank, to look into Howton's loan records.

McPherson expressed a firm conviction that his colleagues were involved in the break-in at the department. McPherson said that because he suspected his good friends, he had initially questioned whether he was "losing [his] mind" or whether he was "going crazy" and stated that "this is absolutely insane." He stated that prior to his discussion with Wasson, his suspicions had been "eating [him] up." McPherson implied that after he spoke to Wasson, the tracks in the snow at his residence confirmed what he suspected.

Following the interview, Lovelace and the assistant attorney general concluded that McPherson's information lacked any factual basis upon which to open an investigation and that there was no basis to investigate further.

On December 14, 2015, Lovelace informed Chief Spencer of his concerns and findings. He also told Chief Spencer that he wondered if McPherson was experiencing some sort of paranoia. Chief Spencer listened to the recorded version of Lovelace's interview with McPherson, and several comments made by McPherson, summarized above, caused Chief Spencer concern that McPherson might be irrational and displaying signs of paranoia and hostility. Like Lovelace, Chief Spencer was particularly concerned that McPherson felt the need to arm himself during a conversation with Howton, because it implicated the safety of other officers.

City Follows Up With McPherson.

McPherson again met with Wasson on December 14, 2015. Wasson said that McPherson was "difficult to follow" during

the conversation, that he could not articulate his suspicions in any order, and that he appeared to be paranoid in most of his interactions with Howton and Herbel.

McPherson began the conversation by confirming that Wasson had received the information about the shoeprints and "eyeballs" drawn in the snow around his house. McPherson told Wasson that he believed Howton had very slowly driven by his home, was involved with the markings in the snow, and was watching McPherson's home. McPherson also said that Howton appeared to be watching him closely during a recent briefing when McPherson took a photograph of another officer's boots. He further stated that he thought he was also "'getting the eyeball from Officer Herbel.'"

McPherson then brought up events that occurred on December 12, 2015, when he took a "short day" and came in late. McPherson thought it odd that Howton asked where he was at shift change. McPherson went on to tell about his observations of several other officers that day and described their behavior as strange. McPherson then told Wasson he had convinced himself that the officers assisted with the burglary to anger the administration and that all the details seemed to fit together.

McPherson described to Wasson in detail how easy it would be for them to burglarize the evidence lockers while on duty. McPherson recounted that he told Herbel that if McPherson were a serial killer, it would be easy for him to "log body parts into evidence." McPherson noted that this statement appeared to make Herbel uncomfortable. He also said that Howton's wife had come over in the past to chat and that he believed she was attempting to get information from McPherson and his wife by asking open-ended questions. He informed Wasson that he felt Howton knew McPherson was "onto something" and was "trying to figure out what it is."

McPherson told Wasson that he was angry with Howton and Herbel. He was confident that they were involved in the burglary and that they were "throwing it in his face." McPherson

indicated that he could not think of any other explanation for their behavior.

Wasson reported the conversation to Chief Spencer. It caused Chief Spencer to be more concerned about McPherson and his statements. Chief Spencer felt it was his duty to take all action necessary to ensure the officers and the public were safe, especially because McPherson's job duties as a patrol officer included carrying a firearm and being involved in high risk and high pressure situations. Chief Spencer questioned whether McPherson could perform his duties without posing a threat to himself and others.

City Arranges FFDE, and McPherson Refuses to Participate.

Chief Spencer contacted Dr. Shari Conner, a psychologist. Chief Spencer informed Dr. Conner of McPherson's statements and sent her written reports. Like Dr. Hutt, she advised Chief Spencer that McPherson's behavior raised concerns about his fitness for duty. Chief Spencer arranged an FFDE for McPherson.

When Chief Spencer informed McPherson that he had arranged an FFDE, McPherson stated he was expecting this, agreed to go to Omaha for the FFDE, and told Chief Spencer that if something was wrong, he needed to know too. According to Chief Spencer, at that time, McPherson pointed to his head, stating that he had been "wondering himself."

The City placed McPherson on administrative leave with pay. McPherson subsequently retained counsel and canceled the FFDE appointment. Counsel for McPherson then corresponded with the City about scheduling another FFDE, but McPherson again opted not to attend. In response, Chief Spencer ordered McPherson to attend the FFDE. Chief Spencer informed McPherson that if he refused to attend, he would consider preparing an accusation for termination for insubordination. McPherson refused to participate in the FFDE.

Chief Spencer and McPherson then met, with McPherson's counsel present. Chief Spencer asked McPherson why he

should not be recommended for termination. McPherson gave no response. Chief Spencer filed an accusation recommending termination of McPherson's employment and sent it to the Scottsbluff city manager for further action.

The city manager met with McPherson and his counsel and advised McPherson that he was considering terminating McPherson's employment and asked if McPherson had any reason why he should not take that action. McPherson gave no response.

On February 1, 2016, the city manager asked McPherson and his counsel to discuss the matter further and to respond by 2 p.m. on February 2. McPherson did not respond by the deadline. On February 3, the city manager delivered a letter to McPherson informing him that his employment had been terminated for his refusal to follow Chief Spencer's order to attend the FFDE.

District Court's Rulings.

The district court overruled McPherson's motion for summary judgment and sustained the City's motion for summary judgment. In its written order, the district court stated that it found no dispute as to the following facts: There was no factual basis for McPherson's allegations concerning the burglary, McPherson was concerned about his own mental health, behavior by other officers that McPherson considered suspicious had reasonable explanations, McPherson thought he was being watched by other officers, McPherson suddenly felt threatened during a conversation with Howton on the street and secretly held his gun, and McPherson had his wife secretly look into Howton's bank records.

Regarding McPherson's discrimination cause of action, the district court found that McPherson was fired for refusing to submit to the FFDE and not because he was regarded as having a disability. It determined that the requested FFDE was job related and of business necessity, considering McPherson's undisputed behavior. According to the court, the City was reasonable in requiring the FFDE.

As to McPherson's claims of retaliation, the district court found no evidence to support a finding that the City was retaliating against McPherson for reporting his belief that other officers were involved in the burglary. It observed that the City had thoroughly followed up on his concerns.

ASSIGNMENTS OF ERROR

McPherson assigns, condensed and rephrased, that the district court erred in (1) finding that the City was entitled to summary judgment on his claim that it had violated NFEPA by unlawfully requiring him to submit to an FFDE and (2) finding that the City was entitled to summary judgment on his claim that the City had retaliated against him for opposing unlawful activity.

McPherson's summary of his argument also asserts that the district court judge erred in not recusing himself, but this alleged error is neither assigned nor argued, and we will not consider it. See *State v. Munoz, ante* p. 69, 927 N.W.2d 25 (2019).

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. *Larsen v. 401 Main St.*, 302 Neb. 454, 923 N.W.2d 710 (2019). 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

FFDE Claim.

We begin with McPherson's assertion that there are genuine issues of material fact that precluded the district court from

granting the City summary judgment on his claim that the City discriminated against him by unlawfully requiring him to submit to an FFDE. McPherson is correct that under NFEPA, requiring a disabled employee to undergo an examination can, under certain circumstances, constitute employment discrimination. See § 48-1107.02(1)(j). The parties dispute whether McPherson was a "qualified individual with a disability" eligible for the protections of NFEPA in the first place. See, § 48-1107.02(1); Neb. Rev. Stat. § 48-1102(9) (Cum. Supp. 2018) (defining "[d]isability" as "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (b) a record of such an impairment, or (c) being regarded as having such an impairment"). But even assuming without deciding that he was, we disagree with McPherson's contention that there was a genuine issue of fact as to whether the City committed discrimination in requiring an FFDE. We conclude that the record contains undisputed evidence that the City's actions fell under NFEPA's business necessity exception.

[3] NFEPA provides that it is an act of discrimination for an employer to require a "qualified individual with a disability," § 48-1107.02(1), to submit to a medical examination "unless the examination or inquiry is shown to be job-related and consistent with business necessity," § 48-1107.02(1)(j). We have held that to show a business necessity for requiring an employee to submit to a medical examination under § 48-1107.02, an employer has the burden to show that (1) the business necessity is vital to the business; (2) it has a legitimate, nondiscriminatory reason to doubt the employee's ability to perform the essential functions of his or her duties; and (3) the examination is no broader than necessary. *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015). In this case, we understand McPherson to be contending that there were genuine issues of material fact regarding the second element of the business necessity exception: whether the City had a legitimate reason to doubt his ability to do his job. With respect to this

second element, we have held that there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his or her job. See *id*. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions. *Id.*

In order to determine whether there is reason to doubt that an employee is capable of performing his or her job, a court must also take account of what the job entails. See *Conroy v. New York Dept. of Correctional*, 333 F.3d 88, 99 (2d Cir. 2003) ("what constitutes a business necessity will undoubtedly vary in different workplaces"). In applying a provision of the federal Americans with Disabilities Act that is nearly identical to the provision of NFEPA at issue, see 42 U.S.C. § 12112(d)(4)(A) (2012), a number of federal courts have held that the unique nature of public safety work must be considered in determining whether a business necessity exists to support a request for an FFDE. We have previously held that it is appropriate to look to federal court decisions construing legislation similar to NFEPA. See *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016).

In *Watson v. City of Miami Beach*, 177 F.3d 932 (11th Cir. 1999), the court held that a municipality was entitled to summary judgment on a police officer's claim that the municipality discriminated against him by requiring him to undergo an unnecessary FFDE. The court explained that where a police officer's fitness for duty is at issue, an employer may require an FFDE when it "reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional." *Id.* at 935. As the court explained:

> Police departments place armed officers in positions where they can do tremendous harm if they act irrationally. . . . [T]he [Americans with Disabilities Act] does not, indeed cannot, require a police department to forgo a fitness for duty examination to wait until a perceived

> threat becomes real or questionable behavior results in injuries.

Watson, 177 F.3d at 935.

Similarly, in *Coffman v. Indianapolis Fire Dept.*, 578 F.3d 559 (7th Cir. 2009), the court held that behavior that might not justify a fitness for duty inquiry for some jobs will be sufficient to demonstrate a business necessity in a public safety position. In *Coffman*, a municipality had requested a firefighter to undergo an FFDE. In the course of its opinion affirming the entry of summary judgment in favor of the municipality, the court stated:

> Although a psychological evaluation in response to "withdrawn" and "defensive" behavior might not be job-related in many vocations, we do not second-guess the propriety of such an evaluation for a firefighter. The [fire] Department has an obligation to the public to ensure that its workforce is both mentally and physically capable of performing what is doubtless mentally and physically demanding work. This special work environment convinces us that the Department's decision to refer [the plaintiff] for the [FFDE's] was job-related and consistent with business necessity.

Id. at 566.

Brownfield v. City of Yakima, 612 F.3d 1140 (9th Cir. 2010), is yet another case in which a federal court of appeals held that a claim that a police officer was unlawfully forced to undergo an FFDE must be reviewed with the nature of the job in mind. In that case, the court explained that because police officers are likely to encounter stressful and dangerous situations, a police department can require its officers to undergo an FFDE if they have "good reason to doubt an officer's ability to respond to these situations in an appropriate manner." *Id.* at 1147.

Many other cases are to the same effect. See, e.g., *Wisbey v. City of Lincoln, Neb.*, 612 F.3d 667 (8th Cir. 2010) (nature of employee's position as emergency dispatcher involved lives

at risk, supporting business necessity exception), *abrogated on other grounds, Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011); *Dengel v. Waukesha County*, 16 F. Supp. 3d 983 (E.D. Wis. 2014) (business necessity exception applied where employee who maintained radios used in emergency services and therefore vital to public safety displayed behavior that was obsessive, intense, and detached from reality); *Davis-Durnil v. Village of Carpentersville, Ill.*, 128 F. Supp. 2d 575 (N.D. Ill. 2001) (observing that police officers encounter stressful situations and that employers are entitled to inquire into their employees' mental health where it has legitimate concerns about employee and public safety).

In this case, as in many of the cases discussed above, there is much undisputed evidence demonstrating that the City had reason to doubt whether McPherson could perform the job-related duties of a police officer. This included the evidence that McPherson was aware of and had expressed to the City that his break-in theories were unlikely to be true to the point that they could cause uncertainty about his mental health. When he first reported his concerns about the break-in to Wasson, he prefaced his statements by saying Wasson was going to think he was "crazy," but that the issue had been bothering him for days, to the extent that he had not been eating. In his interview with Lovelace, McPherson acknowledged that his theories made him question whether he was "losing [his] mind" or "going crazy" and called the situation "absolutely insane," but he held to the firm conviction that his theories were true. And later, when McPherson initially agreed to Chief Spencer's request that he undergo an FFDE, McPherson pointed to his head and said that he had been "wondering himself." He told Chief Spencer that he had been expecting an FFDE and wanted to be the first to know if something was wrong.

Indeed, when Chief Spencer shared McPherson's statements and behavior with two psychologists, they suggested that something could, in fact, be wrong; they both told

Chief Spencer that the information raised red flags about McPherson's fitness for duty. Lovelace, who was not informed of concerns regarding McPherson's mental health prior to interviewing him, also expressed concerns about McPherson's well-being after the interview.

Also casting doubt on McPherson's fitness for duty as a police officer was McPherson's statement to Lovelace that based only on an unexplainable feeling of unease, McPherson prepared himself to use his firearm against Howton, his friend and fellow officer. Although the incident occurred while McPherson was off duty, it was reasonable for the City to consider it in evaluating McPherson's fitness for duty as a police officer, a job that placed him "in positions where [he could] do tremendous harm if [he were to] act irrationally." See *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999). As Chief Spencer described, McPherson's duties as a patrol officer included carrying a firearm and being involved in high risk and high pressure situations with the public and other officers.

We recognize that in his summary judgment affidavit, McPherson stated that Howton had his hand on his gun during the same conversation. McPherson did not tell Lovelace that he was concerned about Howton's having his hand on his gun, and it is not clear that McPherson ever told anyone at the City that Howton also had his hand on his gun. Even assuming he did, however, we find that McPherson's reaction, in view of all of the other evidence of concerning behavior by McPherson, could contribute to doubts about McPherson's ability to safely do his job.

In sum, the undisputed evidence establishes that the City had genuine reason to doubt whether McPherson could perform his duties as a police officer. His acknowledgment that his theories could call his mental health into question, the opinions of psychologists and other law enforcement professionals that his behavior raised concerns about his fitness for duty, and the incident in which he armed himself against Howton all support

the business necessity exception. Therefore, the district court did not err in granting summary judgment in favor of the City on McPherson's discrimination claim.

Retaliation.

[4] We turn now to McPherson's retaliation claim. A claim of retaliation under NFEPA is based on § 48-1114, which provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his or her employees . . . because he or she . . . (3) has opposed any practice or refused to carry out any action unlawful under federal law or the laws of this state." A plaintiff must establish a prima facie case of retaliation under § 48-1114 by showing (1) he or she engaged in protected conduct, (2) he or she was subjected to an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse action. *Knapp v. Ruser*, 297 Neb. 639, 901 N.W.2d 31 (2017).

McPherson contends that reporting his suspicions about his fellow employees was protected conduct for which he was ultimately terminated, in violation of § 48-1114(3). But he overlooks this court's application of § 48-1114(3). In *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003), we rejected the "whistleblower" and retaliation claims of an employee who experienced adverse employment actions after reporting his belief that fellow employees were using illegal drugs. We expressly addressed whether § 48-1114(3) protects an employee's opposition to the illegal actions of fellow employees, and concluded that it does not. Considering the context of NFEPA and the purposes it was meant to serve, we held that "the 'practice' in § 48-1114(3) refers to an unlawful practice of the *employer*" and not "any manner of unlawful activity." *Wolfe*, 266 Neb. at 57, 662 N.W.2d at 603 (emphasis supplied). See, also, *Bonn v. City of Omaha*, 19 Neb. App. 874, 814 N.W.2d 114 (2012) (applying *Wolfe, supra*).

At oral argument, McPherson acknowledged that *Wolfe* requires an unlawful act of the employer and argued for the

first time that the City retaliated against him because he was critical of the department's investigation of the burglary. While McPherson is undoubtedly now critical of the department's investigation of the burglary, there is no evidence that those who made the decisions to ask McPherson to undergo an FFDE and, subsequently, to terminate his employment were made aware that McPherson felt the investigation was unlawfully inadequate.

In the absence of any knowledge that McPherson opposed the department's investigation, City officials could not have taken adverse action against McPherson based on that opposition. See *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 493 (3d Cir. 2002) ("[i]t is only intuitive that for protected conduct to be a substantial or motiv[at]ing factor in a decision, the decisionmakers must be aware of the protected conduct"). The City was entitled to summary judgment on McPherson's retaliation claim.

CONCLUSION

For the foregoing reasons, we affirm the entry of summary judgment in favor of the City.

Affirmed.

Freudenberg, J., not participating.

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

Ray Siedlik and Terri Siedlik, appellants, v. Daniel Nissen and Deb Nissen, appellees.

931 N.W.2d 439

Filed July 26, 2019. No. S-18-899.

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. **Equity: Evidence: Appeal and Error.** In an appeal of an equity action, where credible evidence is in conflict on a material question of fact, an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and their manner of testifying, and accepted one version of the facts rather than another.
4. **Adverse Possession: Appeal and Error.** In an action to establish title by adverse possession, an appellate court may give consideration to the fact that the trial court personally viewed the premises involved therein.
5. **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 a statutory period of 10 years.
6. **Adverse Possession: Notice.** The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in the adverse possession of another.
7. ____: ____. 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.

8. ____: ____. Something more than a neighbor's watering and mowing over the property line is needed to alert a reasonable owner that his or her title is in danger and he or she must take steps to protect his or her interest.
9. **Adverse Possession: Boundaries.** Proof of the adverse nature of the possession of land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
10. **Adverse Possession: Proof.** A claimant of title by adverse possession must show the extent of his or her possession, the exact property which was the subject of the claim of ownership, that his or her entry covered the land up to the line of his or her claim, and that he or she occupied adversely a definite area sufficiently described to found a verdict upon the description.
11. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the District Court for Cass County: Michael A. Smith, Judge. Affirmed.

Douglas W. Ruge for appellants.

Joel M. Carney and William J. Hale, of Goosmann Law Firm, P.L.C., for appellees.

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

Funke, J.

This is an action brought by Ray Siedlik and Terri Siedlik to quiet title to a tract of land located in Cass County, Nebraska. The Siedliks claimed title by adverse possession to a 6-foot tract owned by abutting landowners Daniel Nissen and Deb Nissen. The district court found in favor of the Nissens, and the Siedliks appealed. We affirm.

I. BACKGROUND

In December 2004, the Siedliks moved into a newly constructed home located on "Lot 3, Block 7, Buccaneer Bay" (Lot 3), in Cass County, Nebraska. Lot 3 is bordered on the

west by "Lot 4, Block 7, Buccaneer Bay" (Lot 4). Lot 4 is a vacant lot owned by the Nissens, who have occupied a residence on the lot directly west of Lot 4 since 2001. Daniel testified that after the Siedliks moved in, Ray offered to purchase Lot 4 or a portion thereof, but Daniel had no plans to sell.

In April 2005, the Siedliks installed improvements over the property line, which included two sprinkler heads, a sprinkler control box, landscaping, and a wooden fence. The front sprinkler head was placed 5½ feet into Lot 4, which marked the furthest encroachment. The sprinkler heads were intended to line up with a stake located in the rear west corner of the Siedliks' property, but were mistakenly placed beyond the boundary line due to the curvature of Buccaneer Boulevard. The Siedliks placed the front sprinkler head in their front yard about 5 feet south of Buccaneer Boulevard, which they thought was the northwest corner of their property. The second sprinkler head was placed about halfway down the yard, 3 feet into Lot 4. The Siedliks graded and laid sod and erected a wooden fence down the same line, known as the sprinkler line. The disputed area is pie shaped with the widest point at the front of the lot and the end point located at the rear stake traveling along the sprinkler line.

The Nissens took photographs while the Siedliks installed these improvements, were aware of the grading and laying of sod, and witnessed the sprinklers water the sodded area. Daniel testified that when Terri was working in the yard in 2006 or 2007, she represented that the Siedliks would never encroach. Both the Siedliks and the Nissens believed that the improvements were built on the Siedliks' property, but a 2016 survey conducted by the Nissens revealed the true property line and the Siedliks' encroachments. Around this same time, the Siedliks voluntarily moved their fence and sprinkler heads closer to their house.

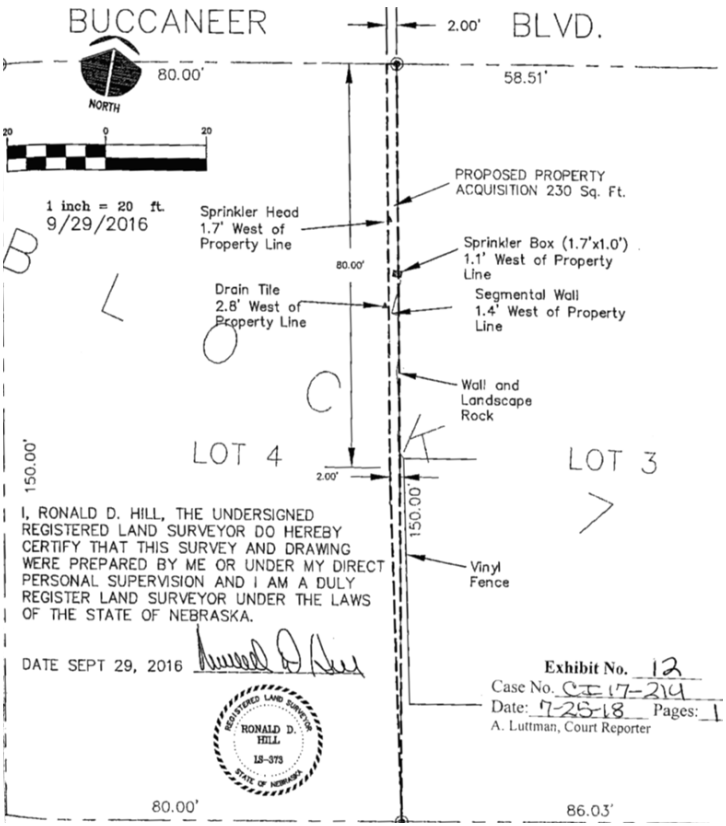
The parties began negotiating an agreement to extend the Siedliks' land 2 feet into Lot 4 for nearly the full length of the property line. The potential land sale was for a total of 230

square feet. The Siedliks conducted a survey which confirmed the true property line and included the following legal description for the proposed property acquisition:

> PART OF LOT 4, BLOCK 7, BUCCANEER BAY, CASS COUNTY, NEBRASKA[,] BEGINNING AT THE NORTHEAST CORNER OF LOT 4, BLOCK 7, BUCCANEER BAY; THENCE N 89°53′35″ E (ASSUMED BEARING), 2.00 FEET ALONG THE NORTH LINE OF SAID LOT 4, BLOCK 7, BUCCANEER BAY; THENCE S 00°06′25″ E, 80.00 FEET; THENCE S 01°44′36″ E, 70.03 FEET TO THE SOUTHEAST CORNER OF SAID LOT 4, BLOCK 7, BUCCANEER BAY; THENCE N 00°06′25″ W, 150.00 FEET TO THE POINT OF BEGINNING. DESCRIBED TRACT CONTAINS 230 SQUARE FEET.

On December 29, 2016, the Siedliks filed an amended complaint seeking to quiet title in a 6-foot tract of land in Lot 4. The Siedliks alleged that for a period of approximately 12 years, their fence, retaining wall, and rock area encroached onto the Nissens' property. The Siedliks alleged that during this time period, they continuously and exclusively maintained, mowed, and utilized an area of land 6 feet beyond the boundary line. The Siedliks attached to the amended complaint "Exhibit 'A,'" which contained the same survey property depiction as exhibit 12, shown on page 788. In their prayer for relief, they requested an "[o]rder quieting legal title in the 230 square feet of property referenced in 'Exhibit A.'" In addition, the Siedliks requested that the court quiet title in "an area up to six feet into the [Nissens'] property."

The Nissens filed an answer denying the allegations and affirmatively alleging that the Siedliks' possession of the property was not under a claim of ownership. The Siedliks moved for summary judgment, which the court overruled. The court inspected the property in the presence of the parties' attorneys and held a trial on July 25, 2018.



At trial, Ray testified that he exclusively used and maintained the land inside the sprinkler line. He testified that he mowed and replaced sod in this area and that the opposite side of the sprinkler line was overgrown with longer grass and tall weeds, which meant that the sprinkler line was also referred to as the "weed line." The Siedliks offered overhead photographs taken in August 2005 and October 2006 which demonstrated the weed line.

Daniel testified that the Siedliks' use of the disputed area within the relevant time period was not always exclusive. He

testified that he also mowed the area, up to about 6 inches from the fence, until 2008 when the parties had a dispute. Thereafter, the parties recognized an "imaginary line" and Daniel then mowed up to the sprinkler line. Ray disputed this testimony by stating that Daniel mowed up to the sprinkler line until 2008 and let the weeds grow thereafter. He stated that he and Daniel mowed at different heights and that when Daniel mowed he mowed the grass down to the dirt.

Ray testified at length about his desire to maintain control over the disputed area in order to prevent flooding issues to his home. In 2012 or 2013, the Siedliks experienced flooding in their basement because Lot 3 sat lower than Lot 4. As a result, the Siedliks installed in the disputed area portions of a lower retaining wall and a drainage system.

In 2016, around the time of the Nissens' survey, the Siedliks replaced their wooden fence with a vinyl fence that did not encroach. There was conflicting evidence as to whether one or both of the sprinkler heads still encroached after they were moved back. The sprinkler control box, grading and sod, and lower retaining wall remained over the property line.

At the close of the evidence, the Siedliks moved to conform the pleadings to the evidence adduced at trial. Their counsel stated that the motion was intended to address a potential discrepancy between the amount of land claimed in paragraphs 6 and 7 in the amended complaint and the evidence at trial. Counsel for the Siedliks specifically asked that the court reform paragraph 7 to be consistent with paragraph 6. Both paragraphs claimed a 6-foot tract of land, but paragraph 7 also claimed the "land depicted in 'Exhibit A,'" which claimed only a 2-foot tract, and the most that Ray claimed in his testimony was a 5½-foot tract. The court granted the motion and amended the pleading "to comply with the proof as received."

Following trial, the court entered an order of dismissal. The court relied on *Poullos v. Pine Crest Homes*[1] for the rule

[1] *Poullos v. Pine Crest Homes*, 293 Neb. 115, 876 N.W.2d 356 (2016).

that mere maintenance of land, such as mowing or landscaping, does not constitute sufficiently hostile possession to put a landowner on notice of adverse possession. The court found the evidence showed that the Siedliks had not used the land in a manner different from general maintenance. The court found that the fence and at least one of the sprinkler heads no longer encroached and that the remaining items which had been in place for longer than 10 years, such as the sprinkler control box and landscaping, encroached by less than 2 feet. The court found these intrusions were not sufficiently notorious to sustain a claim to quiet title by adverse possession. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this State.[2]

II. ASSIGNMENTS OF ERROR

The Siedliks assign that the district court erred in finding (1) insufficient notorious use of the disputed land to sustain a claim for adverse possession and (2) insufficient notorious use of the disputed land to sustain a claim for the boundary line by acquiescence.

III. STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity.[3] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[4]

[3,4] In an appeal of an equity action, where credible evidence is in conflict on a material question of fact, an appellate court considers and may give weight to the fact that the trial

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

[3] *Brown v. Jacobsen Land & Cattle Co.*, 302 Neb. 538, 924 N.W.2d 65 (2019); *Poullos, supra* note 1; *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

[4] *Id.*

court heard and observed the witnesses and their manner of testifying, and accepted one version of the facts rather than another.[5] We may also give consideration to the fact the trial court personally viewed the premises involved therein.[6]

IV. ANALYSIS

1. Adverse Possession

[5] The Siedliks sought to quiet title 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 a statutory period of 10 years.[7] The Siedliks argue on appeal that the district court erred in finding their encroachments were not sufficiently notorious. Upon de novo review, we conclude that regardless of the errors assigned by the Siedliks, the district court correctly dismissed the Siedliks' amended complaint due to the Siedliks' failure to prove all of the elements of adverse possession.

[6] The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in the adverse possession of another.[8] If an occupier's physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious.[9] Although the enclosure of land renders

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[5] See, *Steinfeldt v. Klusmire*, 218 Neb. 736, 359 N.W.2d 81 (1984); *Shirk v. Schmunk*, 192 Neb. 25, 218 N.W.2d 433 (1974). See, also, *Fredericks Peebles v. Assam*, 300 Neb. 670, 915 N.W.2d 770 (2018).

[6] *Shirk, supra* note 5. See, *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984); *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982).

[7] *Poullos, supra* note 1.

[8] *Id.*

[9] *Id.*

the possession of land open and notorious, and tends to show that it is exclusive, it is not the only way by which possession may be rendered open and notorious.[10] Nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose, are sufficient.[11]

In this matter, the evidence showed that the amount of land claimed by the Siedliks varied at different places along the boundary line. The angling of the disputed area meant that the amount of land claimed decreased when moving from the front yard toward the backyard.

(a) Front Yard

In the front yard, which runs from the street to the approximate front of the house, the Siedliks claimed 5½ feet of land due to the placement of the front sprinkler head and the maintaining of the grass in the area. The evidence does support the Siedliks' contention that they maintained the lawn in this area. However, the evidence also indicates that other than the sprinkler head, no structures or improvements were located within this 5½ feet.

[7] It is the Siedliks' burden to establish all of the elements of adverse possession by a preponderance of the evidence. With respect to the front lawn, there was a failure of proof regarding the element of adverse possession under a claim of ownership. Claim of ownership means a possession that is hostile, meaning that an occupant holds and is in possession of land as the owner and against all other claimants.[12] 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

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[10] *Id.*

[11] *Id.*

[12] See, *Brown, supra* note 3; *Wanha, supra* note 3.

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.[13]

[8] With respect to the Siedliks' maintenance of the yard, the evidence does not suggest that their possession was hostile in nature, or something more than maintaining the aesthetics of the area. In considering the nature of the possession, we note that Terri announced that the Siedliks would not encroach. The Siedliks did not erect any structures in the area or appropriate the land for some useful purpose. We have previously held that acts of routine yard maintenance, without more, are insufficient to warn the titleholder that another is claiming or using the land for his own purpose.[14] Something more than a neighbor's watering and mowing over the property line is needed to alert a reasonable owner that his or her title is in danger and he or she must take steps to protect his interest.[15] Additionally, courts from other jurisdictions have held that mere maintenance of land, such as mowing the grass, cutting the weeds, planting flowers, and minor landscaping, does not constitute a hostile character of possession sufficient to give notice of an exclusive adverse possession.[16]

Upon de novo review, we find the Siedliks have failed to prove, by a preponderance of the evidence, the necessary elements to support a claim of adverse possession of the land located adjacent to the front yard.

(b) Middle Yard

Near the middle of the yard, which runs from approximately the front of the house to the back of the house, the Siedliks

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[13] *Id.*

[14] *Poullos, supra* note 1.

[15] *Id.*

[16] See, *Shibley v. Hayes*, 214 Ark. 199, 215 S.W.2d 141 (1948); *Bailey v. Moten*, 289 Ga. 897, 717 S.E.2d 205 (2011); *Crown Credit Co., Ltd. v. Bushman*, 170 Ohio App. 3d 807, 869 N.E.2d 83 (2007); *Montieth v. Church*, 68 Ohio App. 2d 219, 428 N.E.2d 870 (1980).

claimed 3 feet of land due to the placement of a second sprinkler head, a sprinkler control box, a lower retaining wall, and landscaping. In light of the district court's findings, as well as our review of the evidence, we find the record indicates that these improvements encroached by less than 1 foot into the disputed area.

Of importance, the evidence concerning a tract of land 2 feet in width referred only to a term used in negotiations and not as a measure of the land under a claim of ownership. The parties included a legal description for the proposed 2-foot tract in a draft purchase agreement, which the Siedliks signed but the Nissens declined to sign. The record does not contain a legal description for the property which the Siedliks claimed to have adversely possessed.

[9,10] We have long recognized that proof of the adverse nature of the possession of land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.[17] A claimant of title by adverse possession must show the extent of his or her possession, the exact property which was the subject of the claim of ownership, that his or her entry covered the land up to the line of his or her claim, and that he or she occupied adversely a definite area sufficiently described to found a verdict upon the description.[18] This standard requires that the claimant provide to the trial court a precise legal description rather than general descriptions based on landmarks.[19]

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[17] *Schellhorn v. Schmieding*, 288 Neb. 647, 851 N.W.2d 67 (2014); *Inserra v. Violi*, 267 Neb. 991, 679 N.W.2d 230 (2004); *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987).

[18] *Inserra, supra* note 17; *Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979).

[19] See, *Inserra, supra* note 17; *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983). See, also, *Royal v. McKee*, 298 Neb. 560, 905 N.W.2d 51 (2017); *Sawtell v. Bel Fury Investments Group*, 19 Neb. App. 574, 810 N.W.2d 320 (2012).

The Siedliks failed to describe the land with enough particularity, because they did not provide a legal description for the land over which they claimed ownership. It is clear based on the evidence adduced at trial and the Siedliks' motion to amend the pleadings that the Siedliks sought to quiet title in a 5½-foot strip of land and that the only legal description in evidence pertained to a proposed acquisition of a tract of land 2 feet in width.

We have consistently rejected adverse possession claims when the burden to provide a specific land description is not met. In *Inserra v. Violi*,[20] we concluded that the claimants did not meet their burden of proving "an exact and definite description of [the] portion of [the lot] to which they claim[ed] title by adverse possession." In *Matzke v. Hackbart*,[21] we rejected a claim where the description provided was "an admitted estimation, with no factual basis expressed in the record." *In Steinfeldt v. Klusmire*,[22] we noted that the claimant's evidence "failed to establish any specific boundaries." The lack of a precise land description for a court to enter a judgment upon can create problems for future transactions involving the land.[23]

As noted, the evidence of encroachments varied along the boundary line. After personally inspecting the land at issue, the district court found that the fence and at least one of the sprinkler heads no longer encroached and that the Siedliks' encroachments were "*less than* two feet over the property line." (Emphasis supplied.) This finding is consistent with Ray's testimony that the sprinkler control box encroached by 6 inches, as well as with photographs in evidence which showed that the lower retaining wall rested directly on the property line. This evidence suggests that the legal description of the 2-foot tract

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[20] *Inserra, supra* note 17, 267 Neb. at 996, 679 N.W.2d at 235.

[21] *Matzke, supra* note 17, 224 Neb. at 541, 399 N.W.2d at 791.

[22] *Steinfeldt, supra* note 5, 218 Neb. at 739, 359 N.W.2d at 83.

[23] See *Sawtell, supra* note 19.

cannot be used to support the Siedliks' quiet title claim. The varied length of the encroachments along the boundary line only reinforces the fact that the Siedliks' possession of the area was not hostile in nature. Moreover, the lower retaining wall and drainage system were located in the disputed area for less than the required 10-year period.

Upon de novo review, and according deference to the district court's findings based on its inspection of the premises, we determine that the Siedliks have failed to prove, by a preponderance of the evidence, the necessary elements to support a claim of adverse possession of the land located adjacent to the middle yard. We conclude that the Siedliks did not meet their burden to provide a specific description for the land which they sought to claim by adverse possession.

(c) Backyard

Toward the back of the yard, which runs from the back portion of the house to the rear of the lot, the Siedliks claimed the disputed land due to the placement of a wooden fence. Where a fence has been constructed as a boundary line between the property of two landowners, one of whom claimed ownership to such fence line for the full statutory period of 10 years, and is not interrupted in his possession or control during that time, he or she will, by adverse possession, gain title to such land as may have been improperly enclosed within his or her own land.[24] However, the evidence is undisputed that the fence was not constructed as a boundary line. This court has held that where neither party considered a fence a boundary, the fence does not constitute evidence of adverse possession.[25]

The evidence indicates that a fence was erected in 2005 commencing at the back of the house and running to the southern

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[24] *McGowan v. Neimann*, 144 Neb. 652, 14 N.W.2d 326 (1944).

[25] See *Wanha, supra* note 3, citing *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993).

end of the property line. There was testimony that the corner of the fence nearest to the house encroached about 3 feet into the Nissens' land. However, there was no evidence to establish how much the remaining portions of fence encroached upon the disputed area. Further, the evidence shows that prior to filing suit, the Siedliks removed the wooden fence and replaced it with a vinyl fence located inside their property line. As a result, the only survey received into evidence does not depict the location of the old fence, and no legal description was provided to indicate the amount of encroachment.

Additionally, the Siedliks claimed possession of the land beyond the fence up to the sprinkler line. There was evidence that until 2008, Daniel mowed beyond the sprinkler line and into the disputed area about every other week. Possession must be exclusive, and if the occupier shared possession with the title owner, the occupier may not obtain title by adverse possession.[26] Where the record establishes that both parties have used the property in dispute, there can be no exclusive possession on the part of one party for the purpose of establishing adverse possession.[27]

Upon de novo review, we find the Siedliks have failed to prove, by a preponderance of the evidence, the necessary elements to support a claim of adverse possession of the land located adjacent to the backyard.

2. Boundary Acquiescence

[11] With respect to the Siedliks' second assignment of error, the record shows that the district court did not pass upon a claim for quiet title based on the theory of boundary acquiescence and that the Siedliks are advancing this theory for the first time on appeal. Because an appellate court will not consider an issue on appeal that was not passed upon by the

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[26] *Wanha, supra* note 3.

[27] *Nye v. Fire Group Partnership*, 265 Neb. 438, 657 N.W.2d 220 (2003); *Wanha, supra* note 3.

trial court,[28] we do not address the Siedliks' contention that the court erred in failing to sustain a claim for the boundary line by acquiescence.

V. CONCLUSION

Based upon the foregoing, we affirm the judgment of the district court.

Affirmed.

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[28] *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Steven C. Kruse, appellant.

931 N.W.2d 148

Filed July 26, 2019. No. S-18-1011.

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. **Search and Seizure: Judgments: Appeal and Error.** Application of the good faith exception to the exclusionary rule is a question of law. On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Search Warrants: Police Officers and Sheriffs.** When a search warrant has been issued, the applicability of the good faith exception turns on whether the officers acted in objectively reasonable good faith in reliance on the warrant.
4. **Search Warrants: Affidavits: Police Officers and Sheriffs: Appeal and Error.** In assessing an officer's good faith in conducting a search under the warrant, a reviewing court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.
5. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence.** Under the good faith exception to the exclusionary rule, evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on

an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

6. **Appeal and Error.** As a general rule, a Nebraska appellate court does not consider an argument or theory raised for the first time on appeal.
7. **Judgments: Records: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that articulated by the trial court, an appellate court will affirm.
8. **Constitutional Law: Search and Seizure: Proof.** The State has the burden of showing the good faith exception applies to an otherwise unconstitutional search.
9. **Search and Seizure: Police Officers and Sheriffs.** The good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.
10. **Police Officers and Sheriffs: Presumptions.** Officers are assumed to have a reasonable knowledge of what the law prohibits.
11. **Search and Seizure: Probable Cause: Proof: Records: Appeal and Error.** The inquiry into whether the good faith exception applies normally involves an examination of the same facts as the probable cause inquiry, and thus in the vast majority of cases, an appellate court will be able to determine whether the State has met its burden on the existing record.
12. **Search Warrants: Affidavits: Police Officers and Sheriffs: Probable Cause: Appeal and Error.** When evaluating whether a warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court should address whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.

Appeal from the District Court for Seward County, James C. Stecker, Judge, on appeal thereto from the County Court for Seward County, C. Jo Petersen, Judge. Judgment of District Court affirmed.

Gregory C. Damman, of Blevens & Damman, 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.

Stacy, J.

After a stipulated bench trial before the county court, Steven C. Kruse was convicted of driving under the influence with a blood alcohol concentration of .15 or higher, first offense. Kruse appealed to the district court, assigning the county court erred in overruling his motion to suppress the blood test and arguing the affidavit supporting the warrant for the blood draw was insufficient to support a finding of probable cause. The district court affirmed the conviction, and Kruse now appeals to this court. We affirm.

I. BACKGROUND

On August 31, 2017, at 5:39 p.m., Seward police officers Chase Parmer and Bryce Johnson were dispatched to the scene of an injury accident in Seward, Nebraska. They arrived at the scene about 2 minutes later and observed two severely damaged vehicles: a 2002 Hyundai Sonata and a 1999 Mercedes Benz. Parmer observed a man, later identified as Kruse, slumped over in the driver's seat of the Mercedes Benz. The officer's body camera depicts this as well. Kruse was subsequently taken via ambulance to receive medical attention and was not able to submit to either standardized field sobriety testing or a preliminary breath test at the scene.

Based on information learned from the accident scene, Parmer executed an affidavit seeking a search warrant to obtain a sample of Kruse's blood. Parmer was identified as the affiant only by his signature. Parmer averred that a search warrant was being requested for Kruse's blood because Kruse had been involved in an "injury vehicle accident" and was suspected of committing the crime of driving under the influence. Parmer averred that the alcoholic content of blood will drop, on average, at a rate of "0.015 per hour" and for that reason, blood samples are best taken at or near the time of arrest. In support of the warrant, the affidavit recited the following facts:

> On August 31, 2017, your affiant was on duty for the Seward Police Department, working the 1100-2100 hour shift. At approximately 1741 hours, your affiant was dispatched to the area of 8th and Jackson Street in Seward, Seward County, Nebraska, in response to an injury vehicle accident that was reported. Law Enforcement approached the vehicle and got an odor of an alcoholic beverage emitting from his person and inside the vehicle. Rescue personnel who were tending to Kruse also informed Law Enforcement that they detected an odor of alcohol emitting from his person.
>
> Upon contact with Kruse, your affiant observed Kruse to be incoherent and unable to submit to standardized field sobriety tests or a preliminary breath test since he was currently being treated by medical personnel on scene and was subsequently transported to the hospital for further evaluation.

The county court issued the search warrant, after which Parmer and Johnson went to the hospital where Kruse was still being treated for his injuries. Kruse was asked to submit to a preliminary breath test, and he agreed. That test returned a result greater than .15 grams of alcohol per 210 milliliters of breath. Parmer and Johnson then served the search warrant on Kruse, and two vials of his blood were drawn at 8 p.m. Testing showed Kruse's blood alcohol level was .168, over twice the legal limit. Once Kruse was medically released, he was arrested for driving under the influence.

1. County Court Proceedings

Subsequently, a complaint was filed charging Kruse with one count of driving under the influence, .15 or over, a Class W misdemeanor. Kruse pled not guilty and moved to suppress all evidence seized as a result of the search warrant. His motion to suppress challenged the validity of the warrant, alleging it was "issued on the basis of an affidavit that failed to establish probable cause that [Kruse] was engaged in criminal activity." At the suppression hearing, the search warrant

and attached affidavit were received into evidence, but no testimony was offered.

In overruling the motion to suppress, the county court noted the affidavit was "poorly written in many aspects," but found that when "reviewed as a whole," the affidavit was nevertheless sufficient to establish probable cause that Kruse was operating a motor vehicle while under the influence of alcohol. The county court expressly rejected Kruse's arguments that the affidavit was insufficient because: (1) It did not sufficiently identify the affiant; (2) it did not sufficiently identify the person to be searched; (3) it did not sufficiently identify the vehicle as a motor vehicle; (4) it did not sufficiently identify the time or location of any motor vehicle accident; and (5) it did not sufficiently identify Kruse as the driver of a motor vehicle.

The county court's order did not reference the good faith exception recognized by the U.S. Supreme Court in *United States v. Leon*.[1] *Leon* held that even if the affidavit supporting the warrant is insufficient, evidence seized pursuant to the warrant need not be suppressed if officers acted in objectively reasonable good faith in reliance upon the warrant.[2]

Thereafter, the parties held a trial on stipulated facts. Exhibits were received pursuant to the stipulation, and Kruse renewed his motion to suppress. In an order entered April 17, 2018, the county court overruled the renewed motion to suppress and found Kruse guilty of driving under the influence with a blood alcohol concentration of .15 or higher, first offense. Kruse was sentenced to 9 months' probation and his operator's license was revoked for 1 year.

2. Appeal to District Court

Kruse appealed to the district court, assigning only that the county court erred in overruling his motion to suppress.

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[1] *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

[2] *Id.*

Before the district court, Kruse argued the affidavit was insufficient to support a finding of probable cause because it lacked (1) information regarding the identity of the affiant, (2) information regarding the affiant's training and experience, (3) information that the referenced accident occurred on a highway or private property open to public access, (4) specificity as to the nature of the injury accident, (5) the identity of the officer who approached and smelled the odor of alcohol, (6) the identity of the person who smelled of alcohol, (7) facts showing that anyone was driving a motor vehicle, (8) facts showing the time of the contact, and (9) facts showing that Kruse was driving.

The court addressed each of these grounds individually, and found none had merit. The court acknowledged the affidavit was "thin on detail," but it concluded, applying a totality of the circumstances test,[3] that the affidavit supported a finding of probable cause. Alternatively, the district court held the *Leon* good faith exception applied, because the officers acted reasonably in relying on the warrant.

Kruse timely appealed the district court's affirmance, and we moved the case to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

Kruse assigns, renumbered and restated, that the district court erred in (1) finding the affidavit was sufficient to support probable cause and (2) applying the *Leon* good faith exception to the search warrant requirement.

III. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[4] Regarding historical facts, an appellate court reviews the trial

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[3] See *State v. Hildago*, 296 Neb. 912, 896 N.W.2d 148 (2017).

[4] *Id.*

court's findings for clear error.[5] 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.[6]

[2] Application of the good faith exception to the exclusionary rule is a question of law.[7] On a question of law, an appellate court reaches a conclusion independent of the court below.[8]

IV. ANALYSIS

Kruse argues that several deficiencies in Parmer's affidavit rendered it insufficient to support a finding of probable cause. These are the same deficiencies he argued to both the county and district courts. When reviewing the affidavit, the county court remarked that it was "poorly written in many aspects," and the district court agreed that it was "thin on detail." We agree with those characterizations. But we do not engage in a detailed discussion of whether the affidavit was sufficient to support a finding of probable cause,[9] because we conclude that, even if the affidavit was deficient, the district court properly applied the *Leon* good faith exception.[10]

1. Good Faith Exception

Kruse argues the evidence should be suppressed because it was obtained in violation of the Fourth Amendment. But the Fourth Amendment does not expressly preclude the use

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[5] *Id.*

[6] *Id.*

[7] *State v. Hatfield*, 300 Neb. 152, 912 N.W.2d 731 (2018).

[8] *Id.*

[9] See *Carey v. City of Hastings*, 287 Neb. 1, 11, 840 N.W.2d 868, 876 (2013) ("[a]n appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it").

[10] See *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014) (recognizing court can analyze good faith exception before analyzing whether Fourth Amendment violated).

of evidence obtained in violation of its commands.[11] Thus, the exclusion of evidence obtained in violation of the Fourth Amendment is "'not a personal constitutional right.'"[12] Rather, the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.[13]

Because of the deterrent purpose of the exclusionary rule, the U.S. Supreme Court has recognized a number of circumstances in which the rule does not apply. In *Leon*, the Court reasoned the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of judges and magistrates, and thus concluded a good faith exception to the exclusionary rule should apply when police officers act in objectively reasonable good faith in reliance upon a search warrant.[14] The Court has subsequently held the good faith exception also applies when police conduct a search in reasonable reliance on a subsequently invalidated statute,[15] when police conduct a search in reasonable reliance on binding appellate precedent,[16] and when police reasonably rely on erroneous information in a database maintained by judicial employees.[17]

[3-5] In a case such as this where a warrant was issued, the applicability of the good faith exception turns on whether the officers acted in objectively reasonable good faith in reliance on the warrant. In assessing an officer's good faith in

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[11] *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017).

[12] *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).

[13] *Hoerle, supra* note 11.

[14] *Leon, supra* note 1; *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006), *modified on denial of rehearing* 272 Neb. 865, 727 N.W.2d 423 (2007).

[15] *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987).

[16] *Davis, supra* note 12.

[17] *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).

conducting a search under the warrant, a reviewing court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.[18] Evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.[19]

Kruse argues that the good faith exception should not apply in this case for two reasons. First, he contends the State did not raise the good faith exception before the county court and it was error for the district court to consider the exception for the first time on appeal.[20] Second, he contends the good faith exception does not apply to the facts of this case, because the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Notably, Kruse does not argue that any issues of fact exist as to whether the exception applies, but instead limits his arguments to the stipulated evidence in the record.

2. Raising Good Faith on Appeal

We first address Kruse's argument that the district court erred in considering the good faith exception for the first time

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[18] See *Tompkins, supra* note 14.

[19] *Id.*

[20] See, *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018); *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015) (appellate courts generally do not consider arguments and theories raised for first time on appeal).

on appeal. As noted, the county court was the trial court in this proceeding, and the district court was acting as an intermediary appellate court. As a general rule, an appellate court will not consider an argument or theory that is raised for the first time on appeal.[21]

Our record does not allow us to conclusively determine whether Kruse is correct that the good faith exception was not argued before the county court. The parties presented their arguments to the county court in briefs, and those briefs are not in our record. However, Kruse conceded during oral argument before this court that the issue of good faith was raised by the State before the district court sitting as an appellate court.

We thus assume the first time the *Leon* good faith exception was raised in this case was while it was pending before the district court on appeal. And we consider the question presented to be whether it was proper for the district court, under those circumstances, to consider and apply the exception.

(a) *State v. Tompkins*

Kruse argues the district court erred in considering the good faith argument when it was not raised to the trial court. He relies on *State v. Tompkins*,[22] in which we considered whether it was appropriate for the Nebraska Court of Appeals to consider, sua sponte, whether the good faith exception applied. In *Tompkins*, the defendant argued the affidavit used to obtain a search warrant lacked sufficient probable cause. The State disagreed, but did not raise the good faith exception to the district court. The district court found the affidavit was sufficient, and the defendant appealed. The Court of Appeals found the affidavit was insufficient, but then, on its own, considered and applied the good faith exception even though the State had not raised it on appeal. On further review, we held this was error. We framed the question as "whether an appellate court can

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[21] *Id.*

[22] *Tompkins, supra* note 14.

reach the *Leon* good faith exception without the State's having raised the issue," and we held, for "policy reasons," that when the State fails to assert the good faith exception on appeal, it waives it.[23]

We reasoned in *Tompkins* that when the State fails to raise the *Leon* good faith exception on appeal, the defendant is denied an opportunity to argue against its application. In asserting this rationale, we generally acknowledged that "requiring the State to raise the good faith issue at the appellate level does not place an onerous burden on the State," because "the inquiry into good faith normally involves an examination of the same facts as the probable cause inquiry," and thus the State needs to "do little more than assert good faith to have it considered by the appellate court."[24] But we nevertheless found the defendant should have an opportunity to argue against the application of the exception, and he or she is prevented from doing so if the court raises the issue sua sponte.[25]

Our subsequent cases have recognized that the holding in *Tompkins* was narrow and only prevents an appellate court from raising the good faith exception on its own motion. In *State v. Nielsen*,[26] the defendant relied on *Tompkins* and argued the State could not argue the good faith exception on appeal, because it had not raised the argument to the trial court. We rejected this argument by noting that the record showed the State had raised the exception to the trial court. We then explained in dicta:

> Although we do not reach the State's argument that raising good faith for the first time on appeal is sufficient, [the defendant's] contrary premise seems unconvincing. Our decision in *State v. Tompkins* declined to answer the precise question. We recognize that the State has the

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[23] *Id*. at 548-49, 723 N.W.2d at 346.

[24] *Id*. at 553, 723 N.W.23d 349.

[25] See *id*.

[26] *State v. Nielsen*, 301 Neb. 88, 917 N.W.2d 159 (2018).

> burden of showing that the good faith exception applies. In *Tompkins*, we stressed that an appellate court *on its own motion* cannot consider the good faith exception. . . . But we also said that "at the appellate level, the State has ample opportunity to raise the *Leon* good faith exception." This would suggest that in order for an appellate court to consider the good faith exception, the State can raise it either at the trial court or on appeal.[27]

In *State v. Henderson*,[28] we again emphasized the narrow holding in *Tompkins*. In *Henderson*, the defendant argued his appellate counsel was ineffective for not arguing that *Tompkins* prevented the State from arguing the good faith exception for the first time on his direct appeal. We found the record did not factually support the defendant's assertion, because his own counsel had argued against the applicability of the good faith exception at trial. And although we did not reach the issue argued by the defendant, we again noted that *Tompkins* "does not answer the question of whether the State may raise the good faith exception for the first time on appeal."[29]

Because the record before us does not show whether the good faith argument was raised to the trial court, but does show it was raised to the appellate court, we must determine whether, in this case, it was proper for the appellate court to consider the State's argument that the good faith exception applies. In doing so, we necessarily address issues not considered by *Tompkins*.

(b) Existing Record Is Sufficient to Determine Good Faith

[6,7] We also do so in light of well-recognized propositions of law. As a general rule, a Nebraska appellate court does not consider an argument or theory raised for the first time

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[27] *Id.* at 93, 917 N.W.2d at 163, quoting *Tompkins, supra* note 14.

[28] *State v. Henderson*, 301 Neb. 633, 920 N.W.2d 246 (2018).

[29] *Id.* at 659, 920 N.W.2d at 267.

on appeal.[30] This is primarily so because a trial court cannot commit error regarding an issue that was never presented to it or submitted for its disposition.[31] At the same time, however, where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that articulated by the trial court, an appellate court will affirm.[32]

[8-10] The State has the burden of showing the good faith exception applies to an otherwise unconstitutional search.[33] We have said that the good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.[34] Officers are assumed to have a reasonable knowledge of what the law prohibits.[35] In assessing the good faith of an officer conducting a search warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.[36]

[11] As we explained in *Tompkins*, the inquiry into whether the good faith exception applies "normally involves an examination of the same facts as the probable cause inquiry,"[37] and thus in the vast majority of cases, an appellate court will be able to determine whether the State has met its burden on the existing record. This is one of those cases. As noted, although Kruse argues the good faith exception does not apply to this case, he does not argue that any issues of fact exist as to

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[30] See *Ortega, supra* note 20.

[31] See *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

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

[33] See *Nielsen, supra* note 26.

[34] *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

[35] *Id.*

[36] *Id.*

[37] *Tompkins, supra* note 14, 272 Neb. at 553, 723 N.W.2d at 349.

whether the exception applies, but instead limits his arguments to the proved or admitted facts in the record.

Under similar circumstances, other jurisdictions have found that the applicability of the good faith exception recognized in *Leon* and its progeny may be raised for the first time on direct appeal. In *United States v. Sager*,[38] a federal district court reversed the convictions of two defendants, reasoning the evidence used against them was seized pursuant to a warrant based on an insufficient affidavit, and remanded the matter for a new trial. Shortly thereafter, the U.S. Supreme Court decided *Leon*, and the government petitioned for rehearing. Upon granting rehearing, the Eighth Circuit found *Leon* was the applicable law, and reasoned it could determine whether the good faith exception announced in *Leon* applied without conducting further proceedings. In doing so, the Eighth Circuit expressly reasoned that *Leon* involves issues of objective reasonableness, not subjective good faith, and further found that all the facts necessary to such a determination had been "fully ventilated."[39] It also emphasized that the defendants did not "suggest any new fact relevant to [the analysis] that is not already in the record."[40]

In *U.S. v. Gomez*[41] a defendant contended evidence seized as a result of a traffic stop should have been suppressed. The district court denied his motion, relying on *U.S. v. Harrison*.[42] On appeal, the Second Circuit found the U.S. Supreme Court had abrogated *Harrison* in *Rodriguez v. U.S.*[43] and that the district court should have applied *Rodriguez* and found the stop was unconstitutional. But it allowed the government to raise the

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[38] *United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984).

[39] *Id*. at 1265.

[40] *Id.*

[41] *U.S. v. Gomez*, 877 F.3d 76 (2d Cir. 2017).

[42] *U.S. v. Harrison*, 606 F.3d 42 (2d Cir. 2010).

[43] *Rodriguez v. U.S.*, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015).

good faith exception on appeal, in part because "'the argument presents a question of law and there is no need for additional fact-finding.'"[44]

In *State v. Schmidt*,[45] the defendant moved to suppress the results of a warrantless blood test and the trial court denied his motion. While the case was pending on appeal, the U.S. Supreme Court held in *Birchfield v. North Dakota*[46] that the Fourth Amendment does not permit warrantless blood tests. The State then sought to assert the applicability of the good faith exception for the first time on appeal. The Kansas Court of Appeals noted the defendant had not pointed to any disputed facts or made any argument why the good faith exception could not be addressed on direct appeal. The court thus held the State's good faith argument could be invoked for the first time on appeal, because although it was a newly asserted theory, it involved only a question of law that was based on proved or admitted facts and was determinative of the case.[47]

Although this court did not confront the issue as directly as the court in *Schmidt*, we have also considered the good faith exception in a post-*Birchfield* case, and it was also raised by the State for the first time on appeal. In *State v. Hatfield*,[48] the defendant was convicted in county court of driving under the influence based in part on a warrantless blood draw. He appealed to the district court. After appellate briefing in the district court was concluded, the U.S. Supreme Court decided *Birchfield*, and the defendant then asked the district court to apply that decision. It did so, finding that

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[44] *Gomez, supra* note 41, 877 F.3d at 95, quoting *Bogle-Assegai v. Connecticut*, 470 F.3d 498 (2d Cir. 2006).

[45] *State v. Schmidt*, 53 Kan. App. 2d 225, 385 P.3d 936 (2016).

[46] *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

[47] *Schmidt, supra* note 45.

[48] *Hatfield, supra* note 7.

Birchfield rendered the blood draw unlawful and inadmissible, and reversed, and remanded for a new trial. The State filed an exception proceeding, arguing the district court sitting as an appellate court had erred in reversing the conviction without considering whether the good faith exception applied. We agreed. We noted that application of the good faith exception to the exclusionary rule is a question of law on which an appellate court reaches a conclusion independent of the court below.[49] We then concluded, citing our decision in *State v. Hoerle*,[50] that the good faith exception applied to a warrantless pre-*Birchfield* blood draw, and we applied that exception to conclude the blood evidence in *Hatfield* was admissible. We thus sustained the State's exception, reversed the district court's order, and remanded the matter for further proceedings.

These cases illustrate that when the applicability of the good faith exception involves examination of the same basic facts as the probable cause inquiry, an appellate court generally is able, as part of its de novo review, to determine the legal question of good faith on the existing record. Because we conclude this is such a case, we find no merit to Kruse's argument that the *Leon* good faith exception could not be considered on appeal because it was not first raised before the trial court. We emphasize, however, that the record may not always be sufficient to allow an appellate court to determine the applicability of the good faith exception when it is raised for the first time on appeal. For that reason, it is advisable to raise the exception to the trial court whenever it is considered applicable.

We turn now to Kruse's argument that the good faith exception does not apply here because the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

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[49] *Id.*

[50] *Hoerle, supra* note 11.

3. Good Faith Exception Applies

[12] When evaluating whether the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court should address whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.[51] The "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[52] Officers are assumed to "have a reasonable knowledge of what the law prohibits."[53] In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.[54]

Here, the record shows Officers Parmer and Johnson responded to the scene of a motor vehicle accident and found Kruse unresponsive behind the wheel of one of two cars at the scene. Johnson smelled alcohol on Kruse's breath and noticed that Kruse's eyes appeared bloodshot and watery. Emergency medical personnel treating Kruse at the scene told the officers that Kruse had the odor of alcohol on his breath, and Parmer observed Kruse to be incoherent. Based on this information, the officers believed there was probable cause to conclude Kruse had been operating a motor vehicle under the influence of alcohol, and they applied for a search warrant to obtain a sample of Kruse's blood to test his blood alcohol content. The affidavit submitted in support of the warrant did not expressly state that Kruse was the driver of one of the

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[51] *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

[52] *Leon, supra* note 1, 468 U.S. at 922 n.23.

[53] *Id.*, 468 U.S. at 920 n.20.

[54] *Tompkins, supra* note 14.

vehicles involved in the accident, but the officers reasonably believed him to be so, and reasonably believed he had been drinking alcohol prior to the accident. A county court judge issued the search warrant, and officers proceeded to the hospital where they promptly executed the warrant.

Under the totality of the circumstances in this case, we find the officers acted in objectively reasonable good faith in reliance upon the search warrant. We conclude that the *Leon* good faith exception applies and that there was no need to exclude the blood evidence seized pursuant to the warrant. The district court did not err in affirming the judgment of the county court.

V. CONCLUSION

We do not decide whether the affidavit in this case was sufficient to support a finding of probable cause, because we conclude that, even assuming the warrant was invalid, the *Leon* good faith exception applied and that exclusion of the blood evidence was not required. Accordingly, 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

In re Estate of Joan Jane Barger, deceased. Elizabeth Siegfried and Brendon Barger, appellants and cross-appellees, v. Steven Barger and Shane Barger, appellees and cross-appellants.

931 N.W.2d 660

Filed August 2, 2019. No. S-18-711.

1. **Decedents' Estates: Judgments: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Decedents' Estates: Wills: Trusts: Judgments: Appeal and Error.** The interpretation of the words in a will or a trust presents a question of law. When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
4. **Decedents' Estates: Wills.** A proceeding to contest a will under a no contest clause includes actions asserting grounds leading to the invalidity of the will or any of its provisions.
5. ____: ____. Generally, courts have held the following types of claims constitute will contests: lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or a subsequent revocation of the will by a later document.
6. ____: ____. A no contest clause in a will may be violated, not only by a direct contest or challenge instituted by the beneficiary, but also by voluntary conduct of the beneficiary that amounts to an indirect contest or challenge.

7. ____: ____. A no contest clause may be violated when the person restrained by the clause voluntarily instigates or aids another person in his or her attempt to contest the will.
8. **Decedents' Estates: Wills: Probable Cause.** A no contest clause in a will is unenforceable if probable cause exists for instituting proceedings.
9. **Decedents' Estates: Wills: Probable Cause: Evidence.** Probable cause exists if, at the time of instituting the will contest proceeding, there is evidence that would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the challenge would be successful.
10. **Actions: Probable Cause: Words and Phrases.** Probable cause in the context of a civil action for malicious prosecution is whether a person in the defendant's position had reasonable grounds to suspect, based on the facts known or reasonably believed by the defendant at the time, that the crime prosecuted had been committed.
11. **Probable Cause.** Probable cause does not depend upon mere belief, however sincerely entertained, and must have basis in fact.
12. **Wills: Probable Cause: Attorney and Client.** While a petitioner's reliance on the advice of independent legal counsel sought in good faith after a full disclosure of the facts is a factor that bears on the existence of probable cause, the mere fact that a person mounting a challenge to a will was represented by counsel is not controlling.
13. **Wills: Undue Influence: Proof.** To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
14. **Undue Influence: Proof.** Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor: his or her life, character, and mental condition.
15. ____: ____. Suspicious circumstances, when coupled with proof of a confidential or fiduciary relationship, that have indicated an instance of undue influence include (1) a vigorous campaign by a principal beneficiary's family to maintain intimate relations with the testator, (2) a lack of advice to the testator from an independent attorney, (3) an elderly testator in weakened physical or mental condition, (4) lack of consideration for the bequest, (5) a disposition that is unnatural or unjust, (6) the beneficiary's participation in procuring the will, and (7) domination of the testator by the beneficiary.

16. **Trusts.** A trust terminates at the time at which it becomes the duty of the trustee to wind up administration of the trust, and not at the time when that winding up period is actually accomplished.
17. ____. After a trust has been terminated, a trustee must expeditiously exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.
18. **Wills: Death.** The provisions of a will take effect and become operative at the time of the death of the testator.
19. ____: ____. A will always speaks from the date of the testator's death, because the testator could always modify the distributions prior to his or her death.
20. ____: ____. A will is, according to law, of an ambulatory character, and no person can have any rights in it until the testator is dead.
21. **Wills: Intent.** The cardinal rule in construing a will is to ascertain and effectuate the testator's intent if such intent is not contrary to the law.
22. ____: ____. A court must examine a will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the testator understood the words used in the will.
23. **Wills: Words and Phrases.** Ambiguity exists in a will when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
24. **Parol Evidence: Wills: Intent.** Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain.
25. **Decedents' Estates: Wills.** A latent ambiguity exists when the testator's words are susceptible of more than one meaning, and the uncertainty arises not upon the words of the will as looked at in themselves, but upon those words when applied to the object or subject which they describe.
26. **Wills: Evidence.** Extrinsic evidence is admissible both to disclose and to remove latent ambiguity of a will.

Appeal from the County Court for Red Willow County: Anne M. Paine, Judge. Affirmed.

Cody E. Siegfried, of Goodwin Siegfried, L.L.P., for appellants.

Allen L. Fugate and Patrick J. Nelson for appellees.

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

Funke, J.

Elizabeth Siegfried and Brendon Barger (Appellants) appeal the Red Willow County Court's order on Elizabeth's petition for construction of Joan Jane Barger's will and challenge the court's finding that Joan's intent was to distribute her property designated as property held by a trust even though the trust had been terminated.

Steven Barger and Shane Barger (Appellees) cross-appeal the court's order on their petitions for a determination that William Barger, Elizabeth, Brendon, and Joseph Barger are not entitled to take under Joan's will due to their violation of a no contest clause contained therein. Appellees also challenge on cross-appeal the court's determination that the trust was terminated prior to Joan's death. For the reasons stated herein, we affirm.

I. BACKGROUND

Joan died testate in Red Willow County in January 2012, leaving a "Last Will and Testament" dated March 13, 2006. Her 2006 will set forth Joan's intent "to dispose of all the property which I own or in which I have an interest at the time of my death."

Related to the distribution of property, article I of the will provided that Joan was a widow with five children including: William, Elizabeth, Joseph, Brendon, and Steven. Under article I, the will described William was not a beneficiary under the will because, in part, "serious unhappy differences" had arisen in recent years between him, Joan, and the rest of the family which "caused a total break in relations" leading to William and his family "no longer recogniz[ing] any family connection" with Joan. Article I also noted Steven was given additional value in the will explaining:

> (1) he has been the one working closely with [Joan] for many years now to save the farm from loss to creditors

> and taxes, and has contributed a great deal of value in labor, management, equipment, and supplies, for which he has not been compensated; and (2) [Joan] believe[d] he is the only one of [her] children who is likely to expend every effort to keep the farm in [her] family, rather than selling it.

Likewise, article I explained Joan was also giving her

> grandson, Shane . . . , alone among [her] grandchildren, a tract of ground, also because he has always been so cooperative in doing things [Joan] asked of him, and working hard without pay to save the farm from loss to creditors, and also because [Joan] believe[d] he can be especially trusted to keep the ground in the family, rather than sell it.

Article III was titled "Disposition of Property" and provided specific bequests to specific children. Article III also contained a residual clause which stated:

> 3.04 I give, devise, and bequeath all my property which I own or in which I have an interest at the time of my death, which is not disposed of in the preceding Paragraphs 3.01 through 3.03, and which is not property of the Barger Family Irrevocable Trust, to four of my five children, as follows, to-wit: Brendon . . . , Jo[seph] . . . , Steve[n] . . . , and [Elizab]eth . . . , in shares which are equal in value to each other, considering only the property given under this paragraph 3.04.

Article IV, titled "Exercise of Power of Appointment," explained the distribution of trust property under the "Trust Agreement of the Barger Family Irrevocable Trust." Specifically, article IV provided:

> 4.01 I hereby exercise the power of appointment granted to me in section 20.04 of the Trust Agreement of the Barger Family Irrevocable Trust, dated January 10, 1991, by giving the TW35 Ford tractor with duals, four hydraulics, and MFWA and performance monitor, to my son Steve[n] . . . , who originally owned the tractor, and

allowed it to be conveyed to the Barger Family Irrevocable Trust without receipt of consideration to him.

4.02 I hereby exercise the power of appointment granted to me in section 20.04 of the Trust Agreement of the Barger Family Irrevocable Trust, dated January 10, 1991, by directing that all stock owned by the Trust in R & J Barger Farms, Inc., and Five B Farms, Inc., be given to Steve[n] . . . , in trust, however, under the following direction and instruction: Steve[n] . . . shall transfer all assets in the corporations, and all other assets in the Trust, as set forth below in the following provisions of this Article IV, and shall then dissolve the said corporations. In the event Steve[n] . . . has predeceased me, or is not able or willing to serve as trustee, I appoint the following successors, in the following order of priority, to receive all said stock, in trust, under the same direction: (1) [Elizab]eth . . . , (2) Jo[seph] . . . , (3) Shane . . . , and (4) Brendon . . . .

A) All the real estate to the following persons, subject to any encumbrances against such lands:

. . . .

i) To Steve[n] . . . , all of the land owned by Five B Farms, Inc., in the East Half (E1/2) of Section Six (6); the E1/2 and SW1/4 of Section 7, and the N1/2NE1/4 of Section 18; all in T4N, R30W, Red Willow County, Nebraska;

ii) To Steve[n] . . . , the Northeast Quarter (NE1/4) of Section 27, T4N, R31W, in Hitchcock County, Nebraska, owned by R & J Barger Farms, Inc.

iii) To Shane . . . , the Northeast Quarter (NE1/4) of Section 26, T4N, R31W, in Hitchcock County, Nebraska, owned, half by R & J Barger Farms, Inc., and half by the Trust. If Shane predeceases me, this gift shall go to Steve[n] . . . .

iv) To Jo[seph] . . . , a one-third share, to [Elizab]eth . . . , a one-third share, and to Brendon . . . a one-third

share, as tenants in common, of what is called "The Ponderosa", (legally described as the N1/2 of Section 24, T4N, R30W, in Red Willow County, Nebraska). However, this gift is subject to an option to purchase by Steve[n] . . . , exercisable within sixty (60) days after the date of my death, by written notice from Steve[n] to any one of the said beneficiaries of this provision, and on the following terms: $300,000.00 purchase price, 8% interest, amortized over 20 years, with each annual payment due on or before December 20 of each year of the payment period. Each annual payment shall be paid, first to annual payments due on any liens existing against this land as of the date the purchase option is exercised, and the balance in equał shares to Jo[seph], [Elizab]eth, and Brendon.

v) If any of my children: Steve[n], Brendon, Jo[seph], or [Elizab]eth, predeceases me, his or her share of my estate shall go to his or her issue, by representation.

vi) There is currently a mortgage and rent assignment against ground given in the foregoing provisions to Steve[n] . . . and Shane . . . , which may result in income from ground given to Steve[n] or Shane being paid to a Farm Service Agency lien on "The Ponderosa", described above in paragraph iv. If this happens after my death, the beneficiaries of the gift of "The Ponderosa" shall promptly repay such amount to Steve[n] or Shane, as the case may be, and such reimbursement shall constitute a lien against the title of Brendon, Jo[seph], and [Elizab]eth to "The Ponderosa" in favor of Steve[n] or Shane, as the case may be.

B) A 1993 Grand Prix Pontiac automobile to be transferred to Peter Barger, son of Jo[seph] and Kathy Barger.

C) All farm and irrigation equipment, and all cattle or interest in cattle, shall go to Steve[n] . . . .

D) All the remainder of property to four of my five children, as follows, to-wit: Brendon . . . , Jo[seph] . . . , Steve[n] . . . , and [Elizab]eth . . . , in shares which are

> equal in value to each other, considering only the shares given under this particular paragraph. To the extent necessary to avoid disputes or facilitate distribution in shares of equal value of such property, the trustee shall auction such property to the beneficiaries named in this [p]aragraph, and shall then distribute the net funds as directed herein.

Article V contained a will contest provision stating:

> I hereby direct that, in the event any of the beneficiaries of this Will files any proceeding to contest this Will or any provision herein (not including a proceeding to construe or interpret the Will), such beneficiary shall thereafter take nothing from my estate, and any provision favoring such beneficiary shall utterly lapse.

1. Petition to Contest Will

In February 2012, Steven filed an application for informal probate of the 2006 will and for his appointment as personal representative of the estate. In March 2012, William filed a petition to contest the will, alleging a lack of testamentary capacity and undue influence. William also asked the court to remove Steven as personal representative and appoint Elizabeth in Steven's place. Steven and his son, Shane, filed answers denying William's allegations and asking the court to dismiss the petition. During the pendency of that action, Steven was removed as personal representative due to failure to provide legal documents, provide an accounting, provide corporate books, pay taxes, and comply with court orders compelling discovery. After his removal, a successor personal representative was appointed by stipulation of the parties, which was accepted by the court.

Following a trial, the court determined Joan had testamentary capacity to execute the 2006 will insofar as there was no evidence to suggest she did not understand her act in making the will, the extent or character of her property, the proposed distribution of that property, or the natural objects of her

bounty. The court noted that there was some evidence produced to support a finding of a confidential relationship between Steven and Joan, but that given Joan's mental clarity and her specifically stated reasons for making the will provisions, any presumption of undue influence was negated. The court concluded that given all of the evidence, the court could not find any influence exerted in the case "rose to the level of overcoming the free agency of [Joan] or substituting another person's will for that of Joan[]." Thereafter, the court ordered the 2006 will admitted to probate.

Elizabeth filed a motion for new trial which was overruled, and thereafter, William, Elizabeth, and Brendon filed a notice of appeal. The Nebraska Court of Appeals affirmed the county court's judgment in a memorandum opinion filed on May 24, 2016, in case No. A-15-518.

2. Petition for Construction of Will

On August 26, 2016, Elizabeth filed a petition for construction of the 2006 will. The petition alleged that the trust under article IV was terminated prior to Joan's death and that any trust property was transferred to Joan individually. As such, the petition alleged, this property must be distributed under the residual clause of article III to Elizabeth, Joseph, Brendon, and Steven in equal shares. Appellees, in turn, denied the allegations of Elizabeth's petition and filed petitions to exclude Elizabeth, Joseph, and Brendon from taking due to their participation in the will contest proceeding. A hearing was held on Elizabeth, Shane, and Steven's petition.

(a) Termination of Trust

Evidence adduced at the hearing established that the trust was created in 1991 by Joan and her husband, Robert Barger. The trust appointed William, Joseph, and Steven as trustees and provided that upon the death of the survivor of Robert and Joan, the trust property was to be distributed pursuant to the last will of the survivor. Robert died in 1999, and Joan continued to reside on the farm.

In July 2006, during an earlier action involving a challenge to the trust, Joan filed a motion to dismiss, explaining that Joseph and Steven, as a majority of the trustees, made a determination to terminate the trust and distribute the trust property to the sole income beneficiary, Joan. In the motion, Joan specifically stated that she was "therefore the sole and exclusive beneficiary entitled to distribution of the entire trust estate, there are no other beneficiaries, including contingent beneficiaries, and [that she] consented to the determination of said trustees to terminate the trust and make distribution." Attached to the motion was a document titled "Barger Family Irrevocable Trust Resolution of Trustees to Terminate Trust" that was signed by Joseph and Steven. Also attached was a document titled "Release Agreement" signed by Joan ratifying and approving the actions taken by the trustees and releasing them from any liability in their capacity as trustees. Furthermore, Joan stated in this Release Agreement: "I affirm that I have already exercised my power of appointment in my Last Will and Testament, and that William Barger shall retain no beneficial interest in my estate."

Arlan Wine, Joan's attorney who drafted the March 2006 will and represented her during this action, testified that Joan sought to terminate the trust because she was satisfied that there was no malfeasance by Joseph and Steven as trustees and that terminating the trust would allow the farming business to move forward free from litigation and family disputes. In August, the court granted the motion finding the trust had been "effectively terminated," and this finding was summarily affirmed December 27, 2007, on appeal in case No. A-06-1280.

Wine testified he believed the only property held by the trust at the time of its termination was the stock certificates of two corporations used by Joan for the family farming operation. Wine explained that after the trust's termination, it was up to the trustees to convey the property out of the trust. Steven testified that the stock certificates were never transferred to Joan

and that the corporate books were unavailable because they had disappeared from Joan's safe at the house. Joseph also testified that he never took any action to transfer the stock certificates in his role as a trustee. However, an original inventory which Steven filed before being removed as personal representative listed the stock as having been transferred to Joan. Steven explained that while at that time, he thought the stock had been transferred, he presently believes no such transfer occurred.

(b) Participation in Will Contest

While evidence was received that William was the sole party who signed and filed the petition, Elizabeth, Joseph, and Brendon all paid or caused to be paid the lawyer representing William in the contest, Larry Baumann, or his law firm. The parties admitted that in March 2012, Joseph paid $2,500, William paid $2,500, a restaurant owned by Elizabeth's son paid $2,500 at her request, and a corporation owned by Brendon paid $2,500 at Brendon's direction. Further payments were made from these parties to Baumann as well. Elizabeth, Joseph, and Brendon all testified that they paid or caused such payments to Baumann to support William's case. There was also evidence presented that William, Elizabeth, Joseph, and Brendon met with Baumann prior to William's filing of the petition, and the parties admitted to testifying in opposition to the will at the trial.

(c) Probable Cause to File Will Contest

After Joan's death, the parties attended a reading of the 2006 will. William and Brendon testified that after the reading, they met with Wine, who informed them that he had written four additional wills for Joan, including two in 2000, one in 2001, and one in 2003. William and Brendon provided these additional wills to Elizabeth and Joseph. Testimony was also received that there was an earlier sixth will written at the same time as the trust.

Wine testified that at the time he drafted the 2006 will, he was also representing Steven in an ongoing bankruptcy action

and had previously represented other members of the Barger family. Wine further explained that Joan came to his office without an appointment to discuss the new will and that Steven was present with her. Wine testified they discussed, drafted, and signed the will that day. Wine opined that Joan's primary consideration was keeping the farm in the family and that she was fearful someone would outbid Steven if the land had to be sold. Joan consulted with Steven about what it would take to make sure the farm was operable and that the provisions of her will would allow it to be operated successfully and kept in the family. Wine testified that he drafted the will according to Joan's instructions and that he brought up the possibility of using the will contest clause because he anticipated the will was likely to be challenged.

Wine testified that he was uncomfortable writing the 2006 will and that he tried to get Joan to have someone else draft it. He explained that he was reluctant to write this last will because

> I knew that there had been a lot of stress in the family. I had been involved, you know, with different members of the family. And I thought that it was likely to be contested. I really thought that they should have a completely independent outside counsel that had no connection with anybody.

Wine testified he observed Joan to be a little more tired, weaker, and less vivacious than she had been at the drafting of the previous wills. He also testified that he thought it was unusual Joan had drafted four wills in such a short amount of time. William and Brendon testified that Wine talked to them about these concerns when they met with him after Joan's death. Brendon also testified that Wine told them Steven was present at every meeting where Joan changed her will.

Evidence was received that Joan relied heavily on Steven, particularly on matters relating to the operation of the farm, and that Steven was at the farm frequently. Elizabeth testified that between Robert's and Joan's deaths, Steven had no

employment other than helping Joan at the farm. Elizabeth opined that Joan would always look to Steven to see what he thought and never make an independent decision. Elizabeth explained Steven "was basically managing everything on her day-to-day." Brendon testified that he observed Steven controlling and bossing Joan by cussing and swearing at her about things with which he disagreed. Brendon's son testified that he had observed Steven keeping close tabs on Joan and appeared to not want anyone else at the farm.

Joan had a history of calling Elizabeth, Joseph, and Brendon to assist with farm and money issues for herself and for Steven. Joseph testified that on one such occasion, Joan called him repeatedly to give Steven a loan for some land, which loan Steven had not paid back. Brendon testified that he would "drill wheat," plant beans and corn, and help with labor for the farm because Joan asked. Brendon also sold some iron from Joan's property to get her some money. On one specific occasion, Brendon moved "pivots" at Joan's request with other men and not Steven, but Joan paid Steven $3,500 for doing it while not paying Brendon or the others performing the work.

Elizabeth testified that she and Steven held Joan's medical power of attorney. However, Elizabeth testified that she was the one who took Joan to medical appointments and that Steven only came along to one appointment in 2009 to test Joan for dementia because, Elizabeth opined, Steven was nervous. Elizabeth testified that Joan had multiple health issues between Robert's and Joan's deaths, including back surgery, osteoporosis, a total mastectomy, breast cancer, oncology, radiation, memory issues, congestive heart failure, osteoarthritis, cataracts, hearing aids, chest pains, and problems swallowing. Prior to the 2009 dementia-related medical appointment, Elizabeth observed that Joan would repeat herself, forget whom she told what, write everything down, forget how to get home, have issues driving, and forget where Elizabeth lived. Joseph also testified that Joan would get confused, particularly in her understanding of her financial situation.

Elizabeth, Joseph, and Brendon testified that Joan's living conditions were poor, including that, at various times, her telephone service was shut off, her electricity was shut off, there was little or spoiled food in the house, she was driving a damaged vehicle, wildlife got into her house, and various appliances and household items were damaged. Elizabeth testified she would provide Joan food at various times but recalled one occasion where she dropped off peaches and Joan gave them all to Steven because she said he needed them. Joseph also provided food, helped clean, and helped to fix some of the other household issues. Brendon testified that he, at times, provided Joan a car, money, and food.

In 2010, Joan's children met with her to discuss the poor living conditions and determine why she did not have more income given the substantial farming property. At this meeting, Steven read the parties the 2006 will, which was the first time Elizabeth and Joseph had heard about it. The meeting resulted in Steven's threatening William and warning that he would leave Joan and never come back. Joseph testified that he had several of these family meetings with Joan after Robert's death and prior to the 2010 meeting.

Elizabeth testified that she had discussed various family heirlooms with Joan which Joan indicated Elizabeth could have after her death. However, Elizabeth testified that Steven took these items prior to Joan's death.

William, Elizabeth, Joseph, and Brendon explained their reasons for supporting the undue influence claim. All of them testified that they had been unaware there had been six different wills and that the wills showed an increasing partiality to Steven. Elizabeth believed the wills were a product of Steven's undue influence over Joan because each will was successively more favorable to Steven, Wine had been uncomfortable writing the will, a no contest clause was included, Elizabeth observed that Joan's life in her later years revolved around pleasing Steven, and the will disfavored William even though Elizabeth observed that Joan and William got along

well as long as they were not discussing farm business or Steven. Joseph testified that he believed Steven had written the will, and, similarly, William testified that the will looked like something Steven had written. William also testified that the changes in the will seemed to correlate with incidents involving him and Steven. Brendon testified that he supported the petition because he thought William was unfairly left out of the will. Brendon explained that he believed the will was unduly influenced by Steven because it was unfairly weighted toward Steven given his and his siblings' contributions on the farm and house, the $300,000 option price for the land was less than the price of $1,000,000 that Joan had previously been offered, and William was disinherited. William, Elizabeth, Joseph, and Brendon testified they had talked about these observations and concerns prior to William's filing of the petition to contest the will.

(d) Disposition

The county court issued an order on the petitions. First, the court found the trust was terminated. However, the court declined to determine whether the trust was "'wound up'" and could still contain property. The court instead determined that Joan's intent was to distribute the property listed in the will's article IV according to that provision regardless of whether the property had been transferred to Joan.

As to Appellees' petitions, the court first found that even though William was the sole named party to the will contest, Elizabeth, Joseph, and Brendon also supported the filing of the petition to contest the will. However, the court determined that William, Elizabeth, Joseph, and Brendon had probable cause to bring the petition and were therefore not prohibited from taking under article V of the will.

II. ASSIGNMENTS OF ERROR

Appellants assign, restated and consolidated, that the county court erred by (1) considering extrinsic evidence after failing to determine whether the will was ambiguous and

(2) determining the listed trust property should be distributed as outlined in article IV of the will after finding the trust was terminated prior to Joan's death regardless of whether the property had reverted back to Joan personally.

Appellees assign on cross-appeal, restated, that the county court erred by (1) determining the trust was terminated prior to Joan's death and (2) failing to find Elizabeth, Joseph, and Brendon are prohibited from taking under article V of the will due to the earlier will contest.

III. STANDARD OF REVIEW

[1] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.[1] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

[2] The interpretation of the words in a will or a trust presents a question of law.[3] When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.[4]

[3] The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.[5]

IV. ANALYSIS

1. Application of Article V's No Contest Provision

We first address Appellees' assignment that Elizabeth, Joseph, and Brendon are prohibited from taking under Joan's

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[1] *In re Estate of Etmund*, 297 Neb. 455, 900 N.W.2d 536 (2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

will due to the application of article V. Appellees argue article V applies because, even though these parties were not listed in the petition, they were active parties contesting the will in that action.

Article V provides, in relevant part, "[I]n the event any of the beneficiaries of this Will files any proceeding to contest this Will or any provision herein . . . , such beneficiary shall thereafter take nothing from [Joan's] estate."

[4,5] A proceeding to contest a will under a no contest clause includes actions asserting grounds leading to the invalidity of the will or any of its provisions.[6] Generally, courts have held the following types of claims constitute will contests: "'lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or a subsequent revocation of the will by a later document.'"[7] As such, the 2012 action was a proceeding under article V due to its claims alleging Joan's will was invalid because of Steven's undue influence and Joan's lacking testamentary capacity.

[6,7] A no contest clause may be violated, not only by a direct contest or challenge instituted by the beneficiary, but also by voluntary conduct of the beneficiary that amounts to an indirect contest or challenge.[8] Stated another way, a no contest clause may be violated when the person restrained by the clause voluntarily instigates or aids another person in his or her attempt to contest the will.[9]

Elizabeth, Joseph, and Brendon aided and participated in the initiation and litigation of the will contest. They testified they had meetings with William and Baumann prior to the filing,

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[6] See *Martin v. Ullsperger*, 284 Neb. 526, 822 N.W.2d 382 (2012). See, also, 2 Restatement (Third) of Property: Wills and Other Donative Transfers § 8.5, comment *a.* (2003).

[7] *Martin, supra* note 6, 284 Neb. at 530, 822 N.W.2d at 385. See, also, 2 Restatement (Third) of Property, *supra* note 6.

[8] See 2 Restatement (Third) of Property, *supra* note 6, § 8.5, comment *e*.

[9] See *id*.

paid Baumann to initiate and execute the challenge, testified in opposition to the 2006 will at the will contest proceeding, and participated in investigating the grounds for filing the petition. Furthermore, Elizabeth filed a motion for a new trial and Appellants filed an appeal of the trial court's judgment on the 2012 petition. As a result, the county court concluded that Elizabeth, Joseph, and Brendon also supported the filing of the petition to contest the will. Assuming without deciding this conclusion was correct, we must decide whether there was sufficient probable cause to instigate the proceeding.

[8-10] A no contest clause is unenforceable if probable cause exists for instituting proceedings.[10] The Restatement (Third) of Property[11] explains that such probable cause exists if, at the time of instituting the will contest proceeding, there is evidence that would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the challenge would be successful. Similarly, we have defined the question of probable cause in the context of a civil action for malicious prosecution as whether a person in the defendant's position had reasonable grounds to suspect, based on the facts known or reasonably believed by the defendant at the time, that the crime prosecuted had been committed.[12]

[11,12] Probable cause does not depend upon mere belief, however sincerely entertained, and must have basis in fact.[13] Additionally, while a petitioner's reliance on the advice of independent legal counsel sought in good faith after a full disclosure of the facts is a factor that bears on the existence of probable cause, the mere fact that the person mounting the challenge was represented by counsel is not controlling.[14]

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[10] Neb. Rev. Stat. § 30-24,103 (Reissue 2016).

[11] 2 Restatement (Third) of Property, *supra* note 6, § 8.5, comment *c*.

[12] *McKinney v. Okoye*, 287 Neb. 261, 842 N.W.2d 581 (2014).

[13] See, *id.*; 2 Restatement (Third) of Property, *supra* note 6, § 8.5, comment *c*.

[14] See 2 Restatement (Third) of Property, *supra* note 6, § 8.5, comment *c*.

[13-15] Here, there was a sufficient factual basis to support the county court's finding of probable cause. To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.[15] Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor: his or her life, character, and mental condition.[16] Suspicious circumstances, when coupled with proof of a confidential or fiduciary relationship, that have indicated an instance of undue influence include (1) a vigorous campaign by a principal beneficiary's family to maintain intimate relations with the testator, (2) a lack of advice to the testator from an independent attorney, (3) an elderly testator in weakened physical or mental condition, (4) lack of consideration for the bequest, (5) a disposition that is unnatural or unjust, (6) the beneficiary's participation in procuring the will, and (7) domination of the testator by the beneficiary.[17]

Prior to instigating the will contest in the instant case, Elizabeth, Joseph, and Brendon believed and were aware of corroborating evidence that Steven was in a position of influence over Joan in her daily life and farming operations; Steven attended the execution of the 2006 will; Joan was in a deteriorating physical and mental condition; Joan had executed six wills in a relatively short amount of time; Wine represented Steven when he wrote Joan's will; Joan's living conditions were poor despite her land holdings; and the language of the will was inconsistent with their interactions with Joan.

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[15] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

[16] *Id.*

[17] See *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

Specifically, the parties testified, and Wine confirmed, that they had been provided Joan's five other wills after Joan's death and prior to the filing of the will contest. The parties explained that each will got progressively more weighted in Steven's favor and against William. Such changes were in contrast to an earlier will executed at the time of the trust which purportedly divided the estate in equal shares among the children. William, Elizabeth, Joseph, and Brendon testified that they believed the 2006 will was inaccurate because of the lopsided division, the language of the will, the no contest clause, and a purchase option for Steven for specific land which was priced at well under what Joan had previously been offered.

Testimony was received that the siblings were first made aware of the multiple wills when Wine met with William and Brendon shortly after Joan's death. William and Brendon testified that Wine talked to them about various aspects of the execution of the 2006 will. It was discovered that Steven was with Joan when she came to meet Wine without an appointment to execute the 2006 will and that they discussed, drafted, and signed the will that day. Wine explained that Joan relied on answers Steven provided on farming operations and opined that Joan seemed a little more tired, weaker, and less vivacious than she had been at the drafting of the previous wills. Wine expressed that he was uncomfortable and reluctant to write the last will and that he thought it was unusual Joan had drafted four wills in such a short amount of time. Wine had also been representing Steven in a bankruptcy at the time of the execution of the 2006 will.

The siblings testified Joan relied heavily on Steven for her daily life and particularly on matters relating to the farm operation. Steven was at the farm frequently, and Elizabeth testified that he had no other employment between Robert's and Joan's deaths and that Joan made no independent decision without Steven. The parties observed Steven controlling and bossing Joan, and Brendon's son testified he discussed his observations of Steven's behavior with Brendon.

Elizabeth testified that Joan had multiple health issues between Robert's and Joan's deaths. These health issues had Joan in a deteriorating physical state and included observed memory issues.

Testimony was received that Joan's living condition was poor, which surprised the parties due to Joan's substantial holdings. Joan called Elizabeth, Joseph, and Brendon for financial and farming assistance for herself, and Steven and the parties would supply her food, money, transportation, and labor. On one occasion, Brendon performed some farmwork with some other men at Joan's request, but Joan paid only Steven for it even though he did not help. The parties had family meetings to discuss Joan's poor conditions, including one meeting in 2010 where Steven produced the 2006 will to show the other siblings for the first time, got upset at his siblings' questions as to Joan's finances, and threatened to leave Joan alone.

Taken together, this evidence, which the parties testified they discussed prior to the filing of the will contest and regarding which they were advised by counsel as to the probability of success, provided a sufficient basis for the county court to find probable cause for contesting Joan's will. As such, Elizabeth, Joseph, and Brendon are not prohibited from taking under the will through operation of article V.

2. Distribution of Trust Property

Both Appellants and Appellees make assignments concerning the trust property distributed under article IV of the will. Appellees argue the trust was not terminated, because the trustees did not transfer the property to Joan's name prior to her death. As such, Appellees contend the power of appointment was validly exercised by article IV and the property should be distributed as listed in that section.

Appellants, in contrast, argue the trust was terminated in July 2006 by agreement between Joseph and Steven, as two of the three trustees, and Joan. This termination, Appellants assert, was confirmed by the trial court in August 2006 in its

dismissal of the challenge to the trust. Because the trust was terminated and because article IV is for the distribution of trust property, Appellants contend the listed property should be distributed according to the residual clause of article III in equal shares to Elizabeth, Joseph, Brendon, and Steven.

It is clear that Joan, as the testator and sole beneficiary, and Joseph and Steven, as the majority of trustees to the trust, sought to terminate the trust in July 2006. In Joan's motion to dismiss the challenge to the trust, Joan explained that Joseph and Steven, as a majority of the trustees, made a determination to terminate the trust and distribute the trust property to her as the sole income beneficiary. The motion additionally noted that Joan, as settlor and sole beneficiary, consented to such termination. Attached to this motion was a document titled "Barger Family Irrevocable Trust Resolution of Trustees to Terminate Trust," signed by Joseph and Steven, which purported to terminate the trust at their direction. Also attached was a document titled "Release Agreement," signed by Joan, ratifying and approving the actions taken by the trustees and releasing them from any liability in their capacity as trustees.

It is also evident that the court confirmed the trust was terminated by Joan, Joseph, and Steven in its order granting Joan's motion and dismissing the action. The court noted that the terms of the trust allowed for termination at the direction of a majority of the trustees and that Joseph and Steven directed that the trust be terminated. Accordingly, the court found the trust effectively terminated.

[16,17] A trust terminates at the time at which it becomes the duty of the trustee to wind up administration of the trust, and not at the time when that winding up period is actually accomplished.[18] After a trust has been terminated, a trustee must expeditiously exercise the powers appropriate to wind up the administration of the trust and distribute the trust property

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[18] See, *In re Estate of Hedke, supra* note 17; 3 Restatement (Third) of Trusts § 89 (2007).

to the persons entitled to it.[19] Thus, after the trust terminated, William, Joseph, and Steven, as trustees, continued to have a nonbeneficial interest in the trust for timely winding up the trust and distributing its assets.[20] But, after the trust terminated, their powers were limited to those that are reasonable and appropriate to the expeditious distribution of the trust property and preserving the trust property pending the winding up and distribution of that property.[21]

Under the trust as outlined in Joan's motion to dismiss and the court's order granting the motion, the trustees' duties in winding up the trust were limited to the distribution of the trust assets to its sole beneficiary, Joan. Regardless of whether William, Joseph, or Steven actually transferred the corporate shares to Joan, the trust was terminated. Because of this termination, Joan no longer possessed the power of appointment under the trust. The only authority remaining under the trust was for the trustees to transfer its property to Joan. Therefore, Appellants' argument that the trust was not terminated because its property had not been distributed and that Joan exercised the power of appointment at the date of her death fails.

[18-20] Appellants also contend Joan made the appointment at the time of the will's execution, which predated the termination of the will and requires distribution in accordance with that appointment. However, it is an elementary rule that the provisions of a will take effect and become operative at the time of the death of the testator.[22] The will always speaks from the date of the testator's death, because the testator could always modify the distributions prior to her death.[23] A will is,

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[19] Neb. Rev. Stat. §§ 30-3881(a)(26) and 30-3882(b) (Reissue 2016).

[20] Neb. Rev. Stat. § 30-3837(d) (Reissue 2016); §§ 30-3881(a)(26) and 30-3882(b). See, also, *In re Estate of Hedke, supra* note 17.

[21] §§ 30-3881(a)(26) and 30-3882(b); *In re Estate of Hedke, supra* note 17.

[22] *In re Estate of Odenreider*, 286 Neb. 480, 837 N.W.2d 756 (2013).

[23] *Id.*; *In re Estate of Florey*, 212 Neb. 665, 325 N.W.2d 643 (1982).

according to law, of an ambulatory character, and no person can have any rights in it until the testator is dead.[24] Thus, the appointment made in the 2006 will was not effective until after Joan's death, at which point, as described above, the trust was already terminated and Joan no longer held the power of appointment under the trust. Appellants' argument that the appointment was made in the execution of the 2006 will is without merit.

Having determined the trust terminated and the property held therein reverted back to Joan, individually, we must determine whether this property should be distributed according to the specific bequests of article IV or the residual clause of article III.

[21,22] The cardinal rule in construing a will is to ascertain and effectuate the testator's intent if such intent is not contrary to the law.[25] A court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the testator understood the words used in the will.[26]

Article III is titled "Disposition of Property" and provides, in relevant part, "I give, devise, and bequeath all my property which I own or in which I have an interest at the time of my death . . . , and which is not property of the Barger Family Irrevocable Trust," in equal shares to Elizabeth, Joseph, Brendon, and Steven. Article IV, in turn, is titled "Exercise of Power of Appointment" and provides specific instructions for property that was contained within the trust property. Under each section of article IV, Joan stated she was "exercis[ing] the power of appointment granted to [her in the trust]" by giving the listed property to specific children and directing

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[24] *In re Estate of Odenreider, supra* note 22.

[25] *Burnett v. Maddocks*, 294 Neb. 152, 881 N.W.2d 185 (2016). See Neb. Rev. Stat. § 30-2341 (Reissue 2016).

[26] *Burnett, supra* note 25.

the specific distribution of property held by corporations owned by the trust. In determining Joan intended the property listed in article IV to be distributed according to its directions regardless of its status as trust property or her individual property, the county court considered extrinsic evidence to determine whether there was latent ambiguity in the bequests under these sections.

[23-26] Ambiguity exists in a will when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.[27] Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain.[28] A latent ambiguity exists when the testator's words are susceptible of more than one meaning, and the uncertainty arises not upon the words of the will as looked at in themselves, but upon those words when applied to the object or subject which they describe.[29] Extrinsic evidence is admissible both to disclose and to remove latent ambiguity of a will.[30]

Article IV lists specific property in Joan's estate and makes specific bequests of that property, and article III specifically exempts from its directed distribution the property described in article IV as trust property. While article IV provided that Joan made the bequests pursuant to her authority under the trust, which had already terminated, she still retained the authority to distribute this property as the individual owner. Due to the termination of the trust, the issue became that this property is now misidentified as trust property under the will and, looking at Joan's intent in executing the will,

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[27] See *In re Estate of Mousel*, 271 Neb. 628, 715 N.W.2d 490 (2006).

[28] *Id.*

[29] *Id.*

[30] See, *id.*; *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006); *In re Estate of Bernstrauch*, 210 Neb. 135, 313 N.W.2d 264 (1981).

whether she intended the specific distributions only if the property remained trust property.

At trial, Wine testified that Joan made the specific bequests in her will in an effort to keep the farm and its operation in the Barger family, and this intention would have applied whether the property was under the trust or her own name. Furthermore, the evidence surrounding the termination of the trust showed that Joan sought such termination in an effort to protect the farming operation and prevent costly litigation that would tie up the operating corporations. There was no evidence that Joan terminated the trust in an effort to amend her estate plan, and, in fact, in the release agreement attached to the motion to dismiss, Joan reiterated that she had already exercised her power of appointment in the 2006 will. While we determined above that this appointment did not occur until her death, which was after the trust already terminated, it is indicative that Joan believed the trust property would be distributed according to the instructions contained within the 2006 will. This evidence indicated that there was a latent ambiguity as to Joan's intention of the distribution of the property listed in article IV. Thus, the court did not err in considering the extrinsic evidence in determining Joan's intent.

We conclude, taking into account the specific directions for individual items of property under article IV, the evidence of Joan's intentions in directing the specific distributions under article IV, and the evidence of Joan's continued actions consistent with the understanding that the distributions would be made as detailed, Joan intended to make the distributions according to article IV regardless of whether she had authority to direct distribution under the trust or whether she owned the property individually at the time of her death. Accordingly, the county court did not err in determining that the 2006 will directed distribution according to article IV regardless of whether the property described was, at the time of Joan's death, held by the trust or Joan individually.

V. CONCLUSION

Because there was probable cause of undue influence in the drafting of the 2006 will, article V does not prohibit Elizabeth, Joseph, and Brendon from taking under the will due to the 2012 will contest. Additionally, the trust described in the 2006 will was terminated prior to Joan's death, Joan did not exercise the power of appointment under the trust through the will until her death, and Joan did not have the power of appointment at the time of her death, due to the trust's termination. However, the county court appropriately considered extrinsic evidence in determining that there was a latent ambiguity in the terms of the will and that distribution of the property described in article IV was intended to be made according to its directives regardless of whether Joan owned the property individually or under the trust at the time of her death.

Affirmed.

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

State of Nebraska, appellee, v. Daniel J. Lovvorn, appellant.

932 N.W.2d 64

Filed August 2, 2019. No. S-18-1104.

1. **Judgments: Speedy Trial: Appeal and Error.** Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Speedy Trial.** The statutory right to a speedy trial is set forth in Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2016).
4. ____. If a defendant is not brought to trial before the running of the time for trial as provided for in Neb. Rev. Stat. § 29-1207 (Reissue 2016), as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.
5. ____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016).
6. ____. For speedy trial purposes, the calculation of excludable time for a continuance begins the day after the continuance is granted and includes the day on which the continuance ends.
7. **Speedy Trial: Waiver: Appeal and Error.** A defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 2016) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed; (2) discharge is denied; and (3) that denial is affirmed on appeal.

8. **Constitutional Law: Speedy Trial.** The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11.

Appeal from the District Court for Sarpy County: Nathan B. Cox, Judge. Affirmed.

Carolyn Wilson, Assistant Sarpy County Public Defender, and Mitchell Sells, Senior Certified Law Student, for appellant.

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

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

Papik, J.

Daniel J. Lovvorn filed a motion for discharge on statutory and constitutional speedy trial grounds. The district court overruled the motion, and Lovvorn appeals that ruling. For reasons we will explain, we affirm.

BACKGROUND

On January 19, 2018, the State filed an information against Lovvorn in the district court for Sarpy County. The State charged Lovvorn with theft by receiving stolen property, $5,000 or more; possession of a deadly weapon by a prohibited person; possession of a firearm by a prohibited person; driving under revocation/court order; carrying a concealed weapon; reckless driving; obstructing a peace officer; possession of marijuana, 1 ounce or less, or synthetically produced cannabinoids; and possession of drug paraphernalia. On January 30, the district court set a pretrial hearing for April 9 and scheduled trial to begin on June 14.

On April 9, 2018, the day initially scheduled for the pretrial conference, Lovvorn requested a continuance. The court granted the continuance and set the pretrial hearing for June 11. The scheduled trial date was left unchanged.

On June 4, 2018, the State filed a motion to continue the trial. In its motion, the State asserted that it was seeking a continuance because one of its witnesses would be unable to attend the trial scheduled for June 14. Attached to the State's motion was an affidavit of a witness, a deputy sheriff, stating that he would be out of the state for a planned vacation at that time. At the hearing on this motion, Lovvorn's counsel indicated that she objected to the continuance "[f]or the record," without providing further reasons for the objection. The district court granted the motion to continue in a June 12 journal entry and order which provided that the trial would commence on July 17.

On July 5, 2018, the State filed another motion to continue the trial date. The State asserted that another of its witnesses would be unavailable to testify for a trial beginning July 17. Attached to the State's motion was an affidavit from the prosecutor stating that "a material and necessary witness for the State's case" would be unavailable to testify July 17 as a result of previously scheduled work-related travel. At a July 9 hearing, Lovvorn again objected "for the record" without providing reasons for the objection. In a journal entry and order entered later that day, the district court granted the motion. In the same order, the district court transferred the case to a different judge and ordered that the new trial date would be set by the judge to whom the case was transferred. The order indicated that the case was transferred because the judge to whom the case was transferred "has the lowest open docket."

On July 19, 2018, the judge to whom the case was transferred entered a journal entry and order scheduling a status hearing for July 30. On July 30, the judge entered a journal entry and order scheduling a pretrial hearing for August 20. On August 6, the judge entered an order setting the matter for trial on September 11.

On September 6, 2018, Lovvorn filed a motion for discharge on statutory and constitutional speedy trial grounds. Following a hearing, the district court overruled the motion in a written

order. The district court concluded that all of the time between the first continuance requested by the State through its second continuance and Lovvorn's motion for discharge was excludable under Neb. Rev. Stat. § 29-1207(4)(c) (Reissue 2016) and that therefore, the time to bring Lovvorn to trial under Nebraska's speedy trial statutes had not expired. The district court also found that Lovvorn's constitutional right to a speedy trial had not been violated after applying the four-factor test of *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

Lovvorn appeals.

ASSIGNMENTS OF ERROR

Lovvorn asserts that the district court erred in finding he was not entitled to discharge (1) on statutory speedy trial grounds or (2) on constitutional speedy trial grounds.

STANDARD OF REVIEW

[1] Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Gill*, 297 Neb. 852, 901 N.W.2d 679 (2017).

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *Id.*

ANALYSIS

Statutory Right to Speedy Trial.

[3,4] Lovvorn contends that he was entitled to discharge because the State violated his statutory right to a speedy trial. The statutory right to a speedy trial is set forth in § 29-1207 and Neb. Rev. Stat. § 29-1208 (Reissue 2016). *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014). Section 29-1207(1) provides in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in

this section." If a defendant is not brought to trial before the running of the time for trial as provided for in § 29-1207, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense. *State v. Vela-Montes, supra.*

[5] To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4). *State v. Vela-Montes, supra.* Because the information was filed on January 19, 2018, in this case, the State had until July 19 to bring Lovvorn to trial if there were no excludable days.

[6] The parties agree, however, that there were at least some excludable days. Lovvorn conceded at oral argument that the period of delay resulting from the State's first motion for a continuance fell within § 29-1207(4)(c)(i). The calculation of excludable time for a continuance begins the day after the continuance is granted and includes the day on which the continuance ends. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). The district court granted the State's first motion for a continuance on June 12, 2018, and continued the trial until July 17. There is thus no dispute that 35 calendar days were properly excluded as a result of the first continuance obtained by the State.

The State contends that two other periods of time were also excludable. The State argues that a period of time is excludable under § 29-1207(4)(b) as a result of Lovvorn's successful request for a continuance of the pretrial hearing. The State also argues that the period of delay resulting from its second request for a continuance is excludable under § 29-1207(4)(c). Lovvorn disputes that any excludable time arose out of either his motion to continue or the State's second motion to continue.

With respect to his motion to continue the pretrial hearing, Lovvorn does not dispute that he requested a continuance of the pretrial hearing; that the district court granted his request;

and that as a result of his request, the pretrial hearing originally scheduled for April 9, 2018, was rescheduled for June 11. He also acknowledges prior cases in which this court and the Nebraska Court of Appeals have recognized that the continuance of a pretrial hearing or conference can result in excludable time. See, e.g., *State v. Bridgeford*, 298 Neb. 156, 903 N.W.2d 22 (2017); *State v. Williams, supra*; *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002). Lovvorn argues, however, that the continuance he obtained did not result in excludable time under § 29-1207(4)(b).

Section 29-1207 provides in relevant part: "(4) The following periods shall be excluded in computing the time for trial: . . . (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel."

Lovvorn points to the appearance of the word "trial" in the introductory language of § 29-1207(4) and the appearance of the phrase the "period of delay" in subsection (b) and argues that it is only when a continuance results in the postponement of trial, that time is excluded for speedy trial purposes. He argues that the continuance he requested did not result in a delay of the trial, because when the district court continued the pretrial hearing from April 9 to June 11, 2018, it did not reschedule the trial itself, which had been previously set for June 14.

Lovvorn's argument requires us to interpret § 29-1207(4)(b). Our basic principles of statutory interpretation require us to give statutory language its plain and ordinary meaning. See *State ex rel. Peterson v. Creative Comm. Promotions*, 302 Neb. 606, 924 N.W.2d 664 (2019). Those same principles prohibit us from reading a meaning into a statute that is not there or reading anything direct and plain out of a statute. See *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

We are unpersuaded by Lovvorn's statutory interpretation argument. The introductory phrase of § 29-1207(4) does use

the word "trial," but that is unsurprising, because the statute provides the time by which a defendant must be brought to trial. Neither do we find that the presence of the phrase "period of delay" in § 29-1207(4)(b) supports Lovvorn's argument. While Lovvorn contends that there was no period of delay as a result of his continuance, he is incorrect. The pretrial hearing would have occurred April 9, 2018, but due to his request for a continuance, it did not. And, in any event, we have held that in the context of § 29-1207(4), there is no meaningful distinction between the phrase "'period of delay'" and "'period of time.'" *State v. Feldhacker*, 267 Neb. 145, 154-55, 672 N.W.2d 627, 634 (2004).

Lovvorn is essentially asking us to interpret § 29-1207(4)(b) to say that only when a continuance requested by the defendant results in the postponement of a scheduled trial date does excludable time arise. This would run contrary to our practice to not read meaning into a statute that is not reflected in its text. See *Stewart v. Nebraska Dept. of Rev., supra*. The statutory language provides for excludable time whenever there is a "period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel." § 29-1207(4)(b). The delay caused by Lovvorn's request for a continuance of the pretrial hearing meets this definition regardless of whether the trial date was postponed or remained unchanged.

Having determined that Lovvorn's request for a continuance of the pretrial hearing resulted in excludable days, this leaves only a determination of how many days were excluded. We recognize that *State v. Bridgeford*, 298 Neb. 156, 903 N.W.2d 22 (2017), indicates that excludable time arising as a result of the continuance of a pretrial conference begins at the original date of the pretrial conference. That language, however, is inconsistent with our precedent, noted above, which holds that the calculation of excludable time for a continuance begins the day after the continuance is granted and includes the day on which the continuance ends, and we thus disapprove of

the contrary language in *Bridgeford*. The day after Lovvorn requested the pretrial conference was April 10, 2018. The continuance ended on June 11, the date of the next scheduled pretrial hearing. There were thus 63 excludable days as a result of Lovvorn's requested continuance.

To this point, we have determined that there were 98 excludable days. While the State argues that there were additional excludable days, there is no need for us to determine whether that is the case. Recalling that the State had until July 19, 2018, to try Lovvorn if there were no excludable days, the presence of 98 excludable days means that the State could timely bring Lovvorn to trial by October 25. See *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014). Lovvorn filed his motion for discharge September 6.

[7] Not only is it not necessary for us to determine precisely how many days remained on the speedy trial clock when Lovvorn filed his motion for discharge in order to decide this case, but neither is it necessary for us to make that determination so that the parties know how much time remains to try Lovvorn. In *State v. Mortensen*, 287 Neb. 158, 841 N.W.2d 393 (2014), we held that a defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under § 29-1207(4)(b) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed; (2) discharge is denied; and (3) that denial is affirmed on appeal.

That is the case here. Lovvorn's motion for discharge resulted in the continuance of the trial previously scheduled for September 11, 2018. While the parties disagree about exactly how much time remained on the speedy trial clock on that date, Lovvorn's motion and subsequent appeal have moved any trial many months beyond the time that potentially remained. And we conclude that Lovvorn's motion for discharge was properly denied. Accordingly, Lovvorn has waived his statutory right to a speedy trial and there is no need to calculate the exact

number of days remaining on the speedy trial clock. See *State v. Vela-Montes, supra*.

Constitutional Right to Speedy Trial.

[8] We next consider whether the district court erred by finding that Lovvorn's constitutional right to a speedy trial was not violated. The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11. Determining whether a defendant's constitutional right to a speedy trial has been violated requires application of a balancing test first articulated by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). That test involves consideration of four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. See, *id.*; *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

We have observed that it is "an unusual case" in which the Sixth Amendment has been violated when the time limits under the speedy trial act have been met. *State v. Hettle*, 288 Neb. 288, 301, 848 N.W.2d 582, 594 (2014). Applying the constitutional balancing test, we find this is not such a case.

First, the length of delay does not favor Lovvorn. While the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other, we have recognized that § 29-1207 provides a useful standard for assessing whether the length of a trial delay is unreasonable under the U.S. and Nebraska Constitutions. *State v. Hettle, supra.* Here, as we have explained, Lovvorn filed his motion for discharge when time remained on the statutory speedy trial clock.

We find that the reason for the delay also does not favor Lovvorn. *Barker* itself distinguished between a "deliberate attempt to delay the trial in order to hamper the defense" which "should be weighted heavily against the government" and "a valid reason, such as a missing witness," for which some delay

is justified. *Barker v. Wingo*, 407 U.S. at 531. There is no indication of a deliberate attempt on the part of the State to delay the trial to hinder Lovvorn's defense, and Lovvorn concedes that at least part of the delay in this case arose because of witness unavailability. And while Lovvorn argues that the case was delayed due to the transfer of the case from one judge to another following the State's second request for a continuance, there is no indication in the record that the transfer resulted in delay. After the State's request for a continuance was granted, a new trial date was necessary. Our record provides no indication that the trial would have been scheduled for an earlier date if not for the transfer to a different judge.

Lovvorn fares no better with the third *Barker* factor, defendant's assertion of the right. *Barker* noted that factor requires consideration of the "frequency and force" of the defendant's objection to delay, rather than "attaching significant weight to a purely *pro forma* objection." 407 U.S. at 529. Lovvorn objected to both of the State's requests for a continuance, but speedy trial concerns were not mentioned; his counsel said the objection was "for the record." These objections are, at most, the type of pro forma objections that are entitled to little weight in the *Barker* balancing test.

As for the final *Barker* factor, prejudice to the defendant, Lovvorn argues that he was not responsible for the continuances requested by the State and was therefore prejudiced. In *Barker*, however, the Court explained that the prejudice factor is to be assessed "in the light of the interests of defendants which the speedy trial right was designed to protect." 407 U.S. at 532. The *Barker* Court identified three such interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* Lovvorn makes no argument as to how any delay of trial in this case affected these interests.

After weighing the four *Barker* factors, we conclude that this is not an unusual case in which there was no statutory

speedy trial violation but there was a constitutional speedy trial violation.

CONCLUSION

Neither Lovvorn's statutory nor constitutional right to a speedy trial was violated. We therefore affirm the district court's order denying Lovvorn's motion for discharge.

Affirmed.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

JB & Associates, Inc., a Nebraska corporation, et al., appellants, v. Nebraska Cancer Coalition et al., appellees.

932 N.W.2d 71

Filed August 9, 2019. No. S-18-719.

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. **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.
4. **Libel and Slander: Negligence.** A defamation claim has four elements: (1) a false and defamatory statement concerning the claimant, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.
5. **Libel and Slander.** Under a defamation claim, the element which requires that the statement must be false and defamatory concerning the claimant is more precisely stated as "the statement must be false and defamatory of and concerning the claimant."
6. **Libel and Slander: Words and Phrases.** A communication is defamatory if it tends so to harm the reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.

7. **Libel and Slander: Proof.** In order to meet the "of and concerning" requirement for a group libel claim, a claimant must show either (1) the group or class is so small that the matter can reasonably be understood to refer to the claimant or (2) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.
8. **Libel and Slander.** To determine whether a statement is defamatory and concerning a claimant, a court must consider the circumstances under which the publication of the communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience.
9. ____. In a defamation claim, the recipient of the offending statement must understand it as intended to refer to the claimant, but whether the speaker intended such reference is immaterial.
10. **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.
11. **Statutes: Intent.** 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.
12. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
13. ____. 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.
14. **Libel and Slander.** A product disparagement claim under Neb. Rev. Stat. § 87-302 (Cum. Supp. 2018) requires that the offending statements be "of and concerning" a claimant's goods or services.
15. ____. Determining whether a statement is "of and concerning" a claimant's goods or services in a product disparagement claim requires the consideration of the circumstances surrounding the statement but also requires more than general, industry-wide allegations.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Gene Summerlin, Brent A. Meyer, and Quinn R. Eaton, of Husch Blackwell, L.L.P., for appellants.

John C. Aisenbrey and Robin K. Carlson, of Stinson, L.L.P., and Patrick R. Turner, of Dvorak Law Group, L.L.C., for appellees.

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

Funke, J.

Appellants, JB & Associates, Inc., and several other tanning salons, filed an appeal of the district court's order dismissing their claims of defamation and product disparagement under Nebraska's Uniform Deceptive Trade Practices Act (UDTPA).[1] Appellants challenge the court's determination that the UDTPA requires reference to a specific product of a claimant. Appellants further contend the court failed to consider the facts in the light most favorable to their claims and erred in finding there was no genuine dispute of material fact in determining appellees' statements were not disparaging to appellants' businesses, products, or services and were not defamatorily "of and concerning" appellants. For the reasons set forth herein, we affirm.

BACKGROUND

Appellants are tanning salons that, from 2015 to 2017, allegedly accounted for between 68 to 71 percent of the known tanning salons in the Omaha and Lincoln, Nebraska, markets and approximately 14 to 18 percent of all the entities in Nebraska that provide indoor tanning services.

Appellees engage in activities related to cancer education and prevention. In 2014, appellee Nebraska Cancer Coalition (NCC), led by Drs. Alan G. Thorson and David J. Watts, started a campaign named "The Bed is Dead" to educate the public on the dangers of indoor tanning. NCC maintains for this campaign the website "www.thebedisdead.org." When

[1] See Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 2014 & Cum. Supp. 2018).

the website went live in March 2014, the following statements were included on its "LEARN THE FACTS ABOUT TANNING" page:

> Statement 1: "Tanning Causes More Cancers than Cigarettes[.]"
>
> Statement 2: "Young women are hit hardest. New cases of malignant melanoma have soared 8-FOLD in young women since 1970, TWICE AS FAST as in young men!"
>
> Statement 3: "Tanning before age 35 raises your risk of melanoma by nearly 60%."
>
> Statement 4: "Tanning beds have been proven to cause skin cancer."
>
> Statement 5: "Your skin remembers EACH tanning session. Just one indoor tanning session increases your risk of melanoma by 20% and each additional use during the same year boosts risk by another 2%."
>
> Statement 6: "Malignant melanoma is now the most common cancer in young adults aged 25-29 years, second most common in young women aged 30-34 years and in teenagers."
>
> Statement 7: "Ultraviolet radiation and UV tanning devices are rated by the Food and Drug Administration (FDA) and the World Health Organization (WHO), among other agencies, as carcinogenic to humans (type-1 carcinogens), in the highest risk category alongside arsenic, radon, tobacco, and asbestos."
>
> Statement 8: "One person dies of melanoma every hour in the U.S."
>
> Statement 9: "Malignant melanoma is increasing more rapidly than any other cancer."
>
> Statement 10: "Tanning is addictive. One study produced withdrawal symptoms in frequent tanners with narcotic antagonists such as are used in emergency rooms. Studies find higher rates of alcohol, tobacco, and drug use in females that tan."

> Statement 11: "Of melanoma cases among patients under 30 who had tanned indoors, 76 percent were attributable to tanning bed use in a recent well-designed and conducted study."
>
> Statement 12: "Vitamin D is important, but exposure to UV more than about 10 minutes actually starts to break down the pre-vitamin D in the skin."
>
> Statement 13: "There is no such thing as a 'safe tan.' Any color the skin develops is a direct result of DNA damage to the skin cells."

Additionally, under a page titled "FACTS," the website stated:

> . . . Tanning facilities do not require a license to operate in Nebraska.
>
> . . . In 2010, the U.S. Federal Trade Commission ordered the Indoor Tanning Association to cease false advertising claims: 1) that tanning is safe or healthy, 2) that tanning poses no danger, and 3) that tanning does not increase risk of skin cancer.
>
> . . . Yet, a congressional investigative report two years later found:
>
> . . . Tanning Salons market their product to teenagers.
>
> . . . Nine out of ten salons DENIED KNOWN RISKS of indoor tanning.

Under a "TOOLKIT" page on the website, NCC also encouraged visitors to promote the page "at your organization or school."

NCC promoted the website in publications, social media, and advertisements. NCC also utilized dermatologist partners who visited Omaha schools and encouraged students to go to the website. In the other publications, NCC made the following additional statements to support the campaign:

> Statement 14: "Evidence shows that exposure to artificial UV light before age 30 increases a person's risk of melanoma by 75%."
>
> Statement 15: "In a recent study, 76% of melanomas diagnosed in people aged 18-29 were caused by indoor tanning."

Statement 16: "Artificial sunlight — the kind found in tanning beds — . . . carries a significantly higher risk of skin cancer."

Statement 17: "Indoor tanning is thought to cause 170,000 skin cancers annually."

Statement 18: "Worse, to get a fast tan, many tanning beds emit ultraviolet (UV) radiation that far exceeds UV in natural sunlight. Human evolution has not equipped even tanned skin to withstand such extreme UV exposures without injury."

Statement 19: "You may be thinking that just a few indoor tanning sessions won't hurt — that they can't really be that harmful. But science shows that indoor tanning is much more dangerous than previously assumed, especially for young people. A single indoor UV tanning exposure as a young person is linked to an alarming 34-59 percent increase in the risk of melanoma."

Statement 20: "Not only that, but the skin remembers every single tanning session. Melanoma risk increases almost 2 percent for each additional indoor tanning exposure in a given year."

Statement 21: "Melanoma is now the number one cancer in the U.S. among young adults aged 25-29 years, and is one of the most common cancers of teenagers."

Statement 22: "Young women make up 70 percent of the 1 million people who tan indoors every day in the United States. So it is not surprising that a Mayo Clinic study showed that in recent years melanoma has increased twice as fast in young women as in young men."

According to managing staff and employees of appellants, customers asked questions about appellants' facilities and the dangers of indoor training after visiting appellees' The Bed is Dead website.

In July 2015, based upon the statements from the website and supporting publications quoted above, appellants filed a complaint against appellees. This complaint alleged (1)

violations of the UDTPA for deceptive trade practices and product disparagement and (2) defamation for making statements designed to destroy appellants' businesses, reputations, and livelihood.

Appellees submitted a motion for summary judgment in January 2018 seeking dismissal of these claims. In the motion, appellees argued that there were no genuine issues of material fact and that appellees were entitled to judgment as a matter of law.

Following a hearing, the district court granted appellees' motion and dismissed appellants' claims. In addressing the deceptive trade practices claim, the court noted the UDTPA states that "[a] person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she . . . [d]isparages the goods, services, or business of another by false or misleading representation of fact."[2] The court determined this language requires reference to a "specific product." Because the statements on which appellants' claims are based address the tanning bed industry as a whole instead of appellants' specific products, the court found appellants failed to offer evidence that NCC's statements "'disparaged the goods, services, or business of another,'" given the broad application of the statements and the generality with which the statements discuss the potential dangers of tanning.

On the defamation claim, the court listed the elements to prove defamation as (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. The court held that appellants failed to meet the first element and prove the statements were "'of [and] concerning'" appellants. In so holding, the

[2] § 87-302(a)(9).

court referenced the Restatement (Second) of Torts[3] and its explanation that a group libel claim can meet the "of and concerning" requirement if either the group is so small that the matter can reasonably be understood to refer to the member or the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member. Because the court found appellees' statements did not specifically reference appellants or their salons and instead were directed at tanning beds, tanning devices, and indoor tanning generally, the court determined appellants failed to show either option under the test for a group libel claim to meet the "of and concerning" requirement.

ASSIGNMENTS OF ERROR

Appellants assign, restated and reordered, that the district court erred in dismissing appellants' claims of defamation and product disparagement by (1) finding the evidence did not raise a genuine dispute of material fact on whether appellees' statements were "of and concerning" appellants for purposes of defamation; (2) holding that a UDTPA claim for deceptive trade practices and product disparagement requires a statement to reference a specific product of appellants; and (3) finding the evidence did not raise a genuine dispute of material fact on whether appellees' statements disparaged appellants' businesses, products, or services.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4]

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[3] See Restatement (Second) of Torts § 564A (1977).

[4] *Kaiser v. Union Pacific RR. Co., ante*. p. 193, 927 N.W.2d 808 (2019).

[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.[5]

[3] 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.[6]

ANALYSIS

Defamation

We first address appellants' assignments concerning the dismissal of their defamation claim and the court's finding that there was no genuine dispute of material fact. Specifically, appellants claim the circumstances surrounding the NCC's statements indicate that they were concerning appellants.

[4-6] A defamation claim has four elements: (1) a false and defamatory statement concerning the claimant, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[7] The element which requires that the statement must be false and defamatory concerning the claimant is more precisely stated as "the statement must be false and defamatory of and concerning the claimant."[8] A communication is defamatory if it tends

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[5] *Id.*

[6] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

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

[8] See, *Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Deaver v. Hinel*, 223 Neb. 529, 391 N.W.2d 128 (1986).

so to harm the reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.[9] In the instant case, the district court determined appellees' statements did not meet the "of and concerning" requirement of the first element—that the statements were false and defamatory and concerning the claimant.

[7] Appellants' defamation claim is a group libel claim in that the offending statements concern a large group or class of persons or businesses. Under the Restatement (Second) of Torts, in order to meet the "of and concerning" requirement for a group libel claim, a claimant must show either (1) the group or class is so small that the matter can reasonably be understood to refer to the claimant or (2) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.[10] Appellants allege the statements fall under the second option.

[8,9] To determine whether a statement is defamatory and concerning a claimant, a court must consider the circumstances under which the publication of the communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience.[11] The recipient of the offending statement must understand it as intended to refer to the claimant, but whether the speaker intended such reference is immaterial.[12]

Here, there were insufficient facts to show recipients of NCC's statements understood or should have understood the statements referred or were intended to refer to appellants. The offending statements did not name or mention any

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[9] See *id*.

[10] Restatement, *supra* note 3.

[11] *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991). See, also, *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W.2d 584 (2011).

[12] See Restatement (Second) of Torts § 564, comment *a.* (1977).

of appellants, and in fact, none of the statements addressed "tanning salons" specifically. Instead, these allegedly defamatory statements addressed tanning and indoor tanning generally.

Additionally, nothing in the content surrounding NCC's statements mentioned appellants or implied that the statements were targeted at appellants. The Bed is Dead campaign was statewide and was not limited to the Omaha and Lincoln areas. The website is available to anyone in Nebraska and elsewhere. Additionally, the offending statements could apply to anyone tanning indoors or outdoors irrespective of their state residency. Regardless of what internal documents said, which were unavailable to recipients of NCC's statements, nothing in the surrounding content implied NCC was targeting appellants' tanning salons, specific locations in the state, or appellants' specific customer base.

Appellants contend that affidavits of their managing staff and employees demonstrate that customers understood NCC's statements to refer to appellants. Specifically, these affidavits asserted customers asked questions about appellants' facilities and the dangers of indoor tanning after visiting appellees' The Bed is Dead website. However, the affidavits do not state that the customers told them they believed the statements were about appellants specifically and instead indicate the customers thought the statements were aimed at indoor tanning in general. Additionally, contrary to appellants' argument, NCC's utilizing dermatological partners who visited Omaha schools and encouraged students to go to the website also does not indicate the recipients of the offending statements would have understood the statements to be targeted at appellants.

Based upon all of the above, there were no genuine disputes as to any material facts on appellants' defamation claim and appellees were entitled to judgment as a matter of law. Thus, the district court did not err in granting appellees' motion and dismissing appellants' defamation claim.

Deceptive Trade Practices Under UDTPA

Appellants' other assignments claim the district court erred in requiring the offending statements reference a specific product or service to be actionable under the UDTPA and finding that there was no genuine dispute as to any material facts and that appellees were entitled to judgment as a matter of law.

Section 87-302(a)(9) states that "[a] person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she . . . [d]isparages the goods, services, or business of another by false or misleading representation of fact." Section 87-303(a) describes that a person likely to be damaged by the alleged deceptive trade practice may seek an injunction against the person disparaging the petitioner's goods, services, or business. Section 87-303(a) further explains that "[p]roof of monetary damage, loss of profits, or intent to deceive is not required."

Appellants and appellees offer different interpretations for § 87-302(a)(9). Appellants argue that the plain language of § 87-302(a)(9) only requires the offending statement result in disparagement of the goods, services, or business of a claimant and that there is no requirement regarding a level of specificity to identify the claimant within the statement. Appellees, in turn, argue the use of "of another" requires that any statement must be tied to the specific goods, services, or business of the claimant and go beyond a general proposition applying to all goods, services, or business within an industry.

[10-13] 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.[13] A statute's ordinary and grammatical construction is to be followed, unless an intent appears to the contrary or unless, by following such

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[13] *In re Estate of Fuchs*, 297 Neb. 667, 900 N.W.2d 896 (2017).

construction, the intended effect of the provisions would apparently be impaired.[14] It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.[15] 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.[16]

The word "disparage" is defined by Black's Law Dictionary as "1. To speak slightingly of; to criticize (someone or something) in a way showing that one considers the subject of discussion neither good nor important. 2. To degrade in estimation by disrespectful or sneering treatment."[17] While "of another" is not defined under the statute, the plain language of § 87-302(a)(9) and the definition of "disparage" require that the statement be specific enough to the claimant's goods, services, or business that the statement could actually be understood to concern those items and it could be determined whether the statement represented false or misleading facts.

Under common-law defamation, trade libel, and product disparagement cases, other jurisdictions have similarly required libelous statements to concern a claimant's goods and services.[18] These jurisdictions have held that though the offending statements need not explicitly refer to another's product, the statements must be "of and concerning" a claimant's products

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[14] *Patterson v. Metropolitan Util. Dist.*, 302 Neb. 442, 923 N.W.2d 717 (2019).

[15] *In re Estate of Fuchs, supra* note 13.

[16] *Patterson, supra* note 14.

[17] Black's Law Dictionary 570 (10th ed. 2014).

[18] *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998); *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 256 Conn. 343, 773 A.2d 906 (2001); *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 984 N.E.2d 755 (2013); *Wolfe v. Gooding & Company, Inc.*, No. 14-CV-4728, 2017 WL 3977920 (D.N.J. Sept. 11, 2017) (unpublished opinion).

in that a reasonable person who saw or read the statements and was familiar with the circumstances reasonably believed that the statements referred to the claimant's specific products or services.[19] Such holdings are relevant to our interpretation of product disparagement under § 87-302, because the Legislature's use of the "of another" language indicates an incorporation of the same "of and concerning" element present in common-law actions aimed at unfair and deceptive trade practices. While we reach this conclusion regarding the meaning of the "of another" language independent of legislative history, we note that contrary to appellants' suggestion that such an interpretation conflicts with the reasons motivating the enactment of this provision, legislative history suggests that the enactment of the UDTPA was not intended to vary from existing common-law actions of unfair and deceptive trade practices.[20]

Additionally, the Seventh Circuit Court of Appeals, utilizing Illinois law, applied the "of and concerning" requirement to the Uniform Deceptive Trade Practices Act model, similar to § 87-302. In *Brown & Williamson Tobacco Corp. v. Jacobson*,[21] the Seventh Circuit addressed a product disparagement claim under the Illinois statute brought by a cigarette manufacturer for statements made during a newscast regarding cigarettes. In dismissing the disparagement claim and holding that disparagement under the Illinois statute requires more than general, industry-wide statements, the court reasoned, "The [defendant's] broadcast does not suggest that [the plaintiff's] cigarettes are defective, or any more unhealthful than other brands of cigarettes . . . ."[22] This holding is relevant to our

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[19] See *id.*

[20] Judiciary Committee Hearing, L.B. 641, 80th Leg., 9-11 (Apr. 14, 1969).

[21] *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 (7th Cir. 1983).

[22] *Id.* at 274.

analysis, because the Legislature expressly provided that the UDTPA "shall be construed to effectuate its general purpose to make uniform the law of those states which enact" the Uniform Deceptive Trade Practices Act model.[23]

[14,15] Accordingly, considering the use of "of another" in § 87-302(a)(9), the definition of "disparage," the requirements of product disparagement claims under the common law, and interpretation of disparagement under the Uniform Deceptive Trade Practices Act model, we hold that a product disparagement claim under § 87-302 requires that the offending statements be "of and concerning" a claimant's goods or services. Determining whether a statement is "of and concerning" a claimant's goods or services requires the consideration of the circumstances surrounding the statement but also requires more than general, industry-wide allegations.[24]

Appellants cite to *Auvil v. CBS 60 Minutes*[25] for their proposition that a general reference to goods and services is sufficient to disparage a business' specific goods and services under § 87-302. However, the *Auvil* decision is not at odds with our holding detailed above. The court in *Auvil* found that a statement directed at a chemical used in conjunction with apple farming and accompanying pictures of red apples was sufficient to identify that a television segment was directed at Washington State apple growers to bring a disparagement claim.[26] The court based its decision on the proposition that it was commonly known "throughout the country, if not the world, that Washington is the prime producer of red apples."[27] The court in *Auvil* looked at the circumstances surrounding

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[23] Neb. Rev. Stat. § 87-305 (Reissue 2014).

[24] See, *Brown & Williamson Tobacco Corp., supra* note 21; *Moats, supra* note 11; *Matheson, supra* note 11.

[25] *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928 (E.D. Wash. 1992).

[26] *Id.*

[27] *Id*. at 930.

the broadcast, the fact that red apples were synonymous with Washington apples, and the understanding that disparagement claims concerned the product instead of the individual to determine the statements were made concerning the claimants' products.

In the instant case, NCC's statements were not "of and concerning" appellants or their products. As discussed in the previous section, the statements do not mention appellants or identify products or services of appellants beyond general statements on the risks of indoor tanning and tanning overall. Additionally, nothing in the content surrounding the statements mentioned appellants or indicated the statements were concerning appellants' specific goods and services. Appellants make several arguments involving internal communications within NCC to support their argument that NCC was attempting to target them, but these documents were unavailable to the public and could not lead readers of the website to understand NCC's statements were targeting appellants' services and products.

Furthermore, appellants' argument that they occupy the majority of the indoor tanning facilities in the Omaha and Lincoln areas is without merit. The website and the statements contained therein were available and applicable nationwide, and appellees' The Bed is Dead campaign describes itself as a statewide operation, which is not limited to the Omaha and Lincoln areas. Additionally, the statements were applicable to other indoor tanning options not included in appellants' market share analysis—including health clubs, apartments, and condominiums—and to outdoor tanning, as well.

Based upon all of the above, there were no genuine disputes as to any material facts on appellants' product disparagement claim and appellees were entitled to judgment as a matter of law. Thus, the district court did not err in granting appellees' motion and dismissing appellants' product disparagement claim.

CONCLUSION

The district court did not err in finding that there were no genuine disputes as to any material facts and that appellees were entitled to summary judgment on appellants' defamation claim. Additionally, a product disparagement claim requires that the statement be "of and concerning" a claimant's goods or services, which can be determined from consideration of the circumstances surrounding the statement but also requires more than general, industry-wide allegations. Accordingly, there were no genuine disputes as to any material facts and the district court did not err in dismissing appellants' product disparagement claim.

Affirmed.

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

In re Application No. OP-0003. TransCanada Keystone Pipeline, LP, et al., appellees and cross-appellees, v. Susan and William Dunavan et al., appellants, Yankton Sioux Tribe of South Dakota and Ponca Tribe of Nebraska, appellees and cross-appellants, and Sierra Club, Nebraska Chapter, et al., appellees.

932 N.W.2d 653

Filed August 23, 2019. No. S-17-1331.

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. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions 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. **Constitutional Law: Due Process.** The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law.
4. **Public Service Commission: Appeal and Error.** Under Neb. Rev. Stat. § 75-136(2) (Reissue 2018), an appellate court reviews an order of the Nebraska Public Service Commission de novo on the record.
5. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
6. **Administrative Law: Appeal and Error.** Where the evidence is in conflict, the Supreme Court will consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another.
7. **Constitutional Law: Public Service Commission.** The Nebraska Public Service Commission is an independent regulatory body created by the Nebraska Constitution in article IV, § 20.

8. **Public Service Commission.** The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission.
9. **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.
10. **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.
11. **Evidence.** Unless an exception applies, only a preponderance of evidence is required in civil cases.
12. **Trial: Evidence: Proof.** The burden of proof is satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence.
13. **Administrative Law: Pleadings.** The rules of pleading are not applied in administrative proceedings as strictly as they are in court proceedings.
14. **Administrative Law: Due Process: Notice.** Due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings.
15. **Notice: Waiver.** It is generally held that participation in the hearing waives any defect in the notice.
16. **Administrative Law: Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency.
17. **Interventions: Final Orders: Appeal and Error.** An order denying intervention is a final order for purposes of appeal.
18. **Administrative Law: Statutes.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
19. **Rules of Evidence: Hearsay: Statutes.** The Nebraska Evidence Rules provide that hearsay is admissible when authorized by the statutes of the State of Nebraska.
20. **Legislature: Courts: Evidence.** The legislative branch has the right to prescribe the admissibility of certain categories of evidence, but it is solely a judicial function to determine the weight, if any, to be given such evidence.
21. **Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.

22. **Interventions: Pleadings.** Intervenors can raise only issues that sustain or oppose the respective contentions of the original parties.
23. **Interventions: Parties.** An intervenor who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented therein.
24. **Interventions.** An intervenor cannot widen the scope of the issues, broaden the scope or function of the proceedings, or raise questions which might be the subject of litigation but which are extraneous to the controlling question to be decided in the case.

Appeal from the Public Service Commission. Affirmed.

David A. Domina and Brian E. Jorde, of Domina Law Group, P.C., L.L.O., for appellants.

Douglas J. Peterson, Attorney General, L. Jay Bartel, David A. Lopez, and Lynn A. Melson for appellee Nebraska Public Power Service Commission.

James G. Powers and Patrick D. Pepper, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees TransCanada Keystone Pipeline, LP, et al.

Jennifer S. Baker and Leonika R. Charging, of Fredericks, Peebles & Morgan, L.L.P., for appellee Yankton Sioux Tribe.

Brad S. Jolly, of Brad S. Jolly & Associates, for appellee Ponca Tribe of Nebraska.

Kenneth C. Winston for appellee Sierra Club, Nebraska Chapter.

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

Funke, J.

The Nebraska Public Service Commission (PSC) granted the application filed by TransCanada Keystone Pipeline, LP (TransCanada), pursuant to the Major Oil Pipeline Siting Act (MOPSA), Neb. Rev. Stat. §§ 57-1401 to 57-1413 (Reissue 2010 & Cum. Supp. 2018), for approval of a major oil pipeline

route and eminent domain authority. The PSC approved the "Mainline Alternative Route" (MAR), a 36-inch major oil pipeline and related facilities to be constructed through Nebraska, from the South Dakota border in Keya Paha County, Nebraska, to Steele City, Nebraska. The landowners, two Indian tribes, and the Sierra Club, Nebraska Chapter (Sierra Club), all intervened in the proceedings. The landowners appealed, the Indian tribes cross-appealed, and the Sierra Club attempted to appeal from the PSC's decision.

The intervenors raise numerous arguments on appeal. Each of these arguments raises issues of public concern and represents profound, deeply held beliefs. Upon de novo review of the PSC's decision, we find the matters in controversy are resolved based on the determination of four overarching issues: The first, whether the PSC had jurisdiction to consider TransCanada's application; the second, whether TransCanada met its burden of proof; the third, whether the PSC properly considered the MAR; and the fourth, whether the intervenors were afforded due process. We answer each of these questions in the affirmative.

At the outset, we observe that this appeal comes to us in a completely different legal framework than we confronted in *Thompson v. Heineman*.[1] While both cases involve the statutory process for obtaining route approval of an oil pipeline, the issues in this appeal are distinctly different from those in *Thompson* because here, route approval was sought from the PSC using the MOPSA procedure. In this opinion, we describe the procedures enacted by the Legislature to effectuate proceedings under MOPSA. We discuss the record in detail and show that TransCanada carried its burden of proving that the MAR is in the public interest. We then determine that the errors assigned by the intervenors are without merit. Accordingly, we affirm the PSC's determination that approval of the MAR is in the public interest.

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

I. BACKGROUND

TransCanada is a limited partnership organized in Delaware with its principal place of business in Houston, Texas. In 2008, TransCanada applied for a presidential permit to construct a pipeline across the Canadian border into the United States. The proposed route would have passed through the Nebraska Sandhills at a time when no legal standards existed in Nebraska to constrain an oil pipeline carrier's right to exercise eminent domain authority.[2] In 2011, Gov. Dave Heineman called a special session of the Legislature to enact siting legislation for pipeline routing.

1. Siting Legislation

The Legislature enacted MOPSA, 2011 Neb. Laws, L.B. 1, § 2, 1st Spec. Sess., which gave routing authority to the PSC, an independent regulatory body with duly elected officials.[3] MOPSA applies to a pipeline with an interior diameter larger than 6 inches that is built to transport petroleum products within, through, or across Nebraska.[4] MOPSA requires a major oil pipeline carrier to apply for and obtain routing approval from the PSC before the carrier is authorized to exercise eminent domain power pursuant to § 57-1101.[5]

MOPSA recognized that federal law preempts state regulation of safety issues related to oil pipelines and that Nebraska's laws cannot interfere with the federal government's uniform standards for pipeline safety, operation, and maintenance.[6] Consequently, the Legislature enacted MOPSA to address "choosing the location of the route aside and apart from safety considerations."[7] With MOPSA, the Legislature harnessed

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[2] See Neb. Rev. Stat. § 57-1101 (Reissue 2010).

[3] See, Neb. Rev. Stat. § 32-509 (Reissue 2016); Neb. Rev. Stat. § 75-101(1) (Reissue 2016).

[4] § 57-1404(2).

[5] See §§ 57-1402(1)(c) and 57-1408(1).

[6] § 57-1402(2).

[7] See *id*.

Nebraska's remaining sovereign powers with respect to oil pipeline construction, granted the PSC authority to conduct proceedings and decide applications, and determined that "[t]he construction of major oil pipelines in Nebraska is in the public interest of Nebraska . . . ."[8]

In the same special session, the Legislature enacted 2011 Neb. Laws, L.B. 4, 1st Spec. Sess., which created a separate procedural avenue for a pipeline carrier to obtain route approval. Independent from the MOPSA process, § 3 of L.B. 4 authorized Nebraska's Department of Environmental Quality (DEQ) to collaborate with any federal agency for the preparation of a supplemental environmental impact statement (SEIS) for oil pipelines within, through, or across Nebraska, in accordance with the review process under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (2012).[9] Once completed, the DEQ was to submit the SEIS to the Governor, who then would have 30 days to indicate his or her approval of a route in writing to the relevant federal agencies.[10] Both L.B. 1 and L.B. 4 were passed with an emergency clause and became effective on the same date, November 23, 2011.

On January 18, 2012, the President of the United States denied TransCanada's permit application. On April 17, 2012, the Legislature passed and the Governor approved 2012 Neb. Laws, L.B. 1161, which amended L.B. 1 and L.B. 4. In its original form, MOPSA did not apply to TransCanada, because the legislation contained an exemption for a pipeline carrier which had a pending application for a presidential permit.[11] L.B. 1161 eliminated that exemption, which led TransCanada to seek to obtain route approval from the PSC under MOPSA.[12]

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[8] § 57-1403(3).

[9] L.B. 4, § 3(1).

[10] L.B. 4, § 3(4).

[11] L.B. 1, § 5(2).

[12] L.B. 1161, § 4.

L.B. 1161 amended § 3 of L.B. 4 so that the DEQ could either prepare the SEIS through collaboration with federal agencies, as L.B. 4 originally had provided, or could independently evaluate a route submitted by a pipeline carrier "for the stated purpose of being included in a federal agency's or agencies' National Environmental Policy Act review process."[13] This amendment allowed the DEQ to continue to review possible routes for the Keystone XL pipeline project, which the DEQ had ceased reviewing following the President's denial of TransCanada's application for permit.

In conducting an independent evaluation of a proposed route, L.B. 1161 required the DEQ to hold at least one public hearing, provide opportunities for public review and comment, and analyze "the environmental, economic, social, and other impacts associated with the proposed route and route alternatives in Nebraska."[14] The DEQ would then submit its evaluation of the pipeline route to the Governor, and the pipeline carrier could then seek the Governor's approval of the route.[15] L.B. 1161 provided that a pipeline carrier's authorization to exercise eminent domain power expires "[i]f condemnation procedures have not been commenced within two years after the date the Governor's approval is granted or after the date of receipt of an order approving an application under [MOPSA]."[16]

2. TransCanada Modifies Route

In 2012, TransCanada modified the original route, which would have passed through the Nebraska Sandhills, based on recommendations provided by the DEQ. On September 5, 2012, TransCanada filed a supplemental environmental report with the DEQ regarding the "reroute." The "reroute" avoided

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[13] Neb. Rev. Stat. § 57-1503(1)(a)(i) (Cum. Supp. 2018).

[14] *Id.*

[15] See, § 57-1503(4); § 57-1101 (Cum. Supp. 2018).

[16] § 57-1101 (Cum. Supp. 2018).

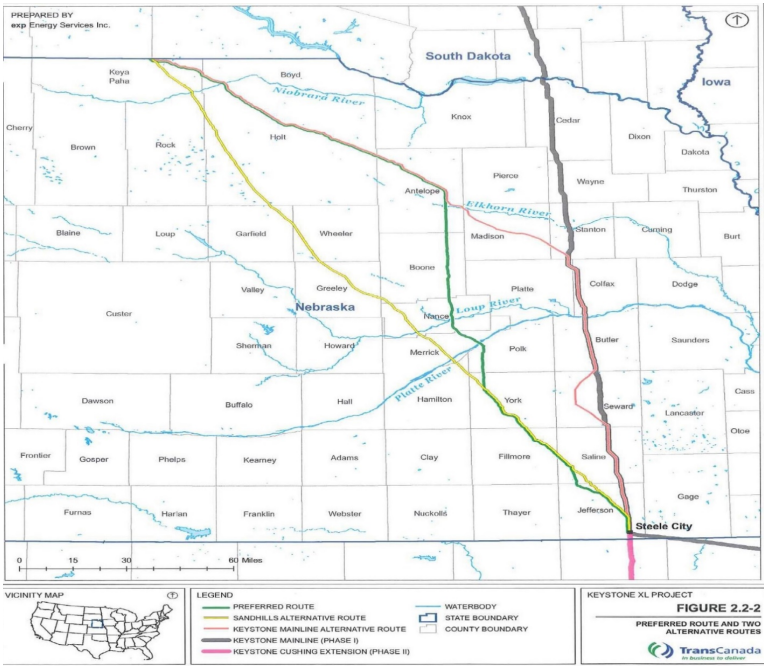
the Sandhills and other areas of fragile soils and shallow groundwater identified by the DEQ. On January 3, 2013, the DEQ submitted a final evaluation report to the Governor in accordance with L.B. 1161. On January 22, the Governor approved the "reroute" in a letter to the President and the U.S. Department of State (the Department), asking that the DEQ's evaluation be included in the federal SEIS report. TransCanada filed condemnation actions, which were later dismissed following litigation challenging the constitutionality of L.B. 1161.

More than 2 years passed after the Governor's approval of the route, and TransCanada no longer proceeded on that approval. On January 24, 2017, the President invited TransCanada to resubmit its permit application, which TransCanada accomplished 2 days later. On February 16, TransCanada filed an application with the PSC for approval of a major oil pipeline route. On March 23, the Department granted TransCanada a presidential permit.

3. TransCanada's Application to PSC

TransCanada's application to the PSC sought approval of a route designated as the "Preferred Route" (PR), which was "refined to reflect the recommendations made by the [DEQ] and the Governor's approval." The "reroute" submitted to the DEQ in 2012 "was used as the basis for developing the [PR]." The PR is 275.2 miles long and begins at the Nebraska-South Dakota border in Keya Paha County and passes through the Nebraska counties of Keya Paha, Boyd, Holt, Antelope, Boone, Nance, Merrick, Polk, York, Fillmore, and Saline before terminating in Steele City.

The application referred to two alternative routes, the MAR and the "Sandhills Alternative Route" (SAR). TransCanada developed each of the three routes with the goal of utilizing the "existing fixed starting point" at the Nebraska-South Dakota border in Keya Paha County, north of Mills, Nebraska, and the "existing fixed ending point" at the pump station in Steele City, which is the end point of the pipeline system already existing in Nebraska, known as Keystone I. Keystone I



runs north and south through the Nebraska counties of Cedar, Wayne, Stanton, Colfax, Butler, Seward, Saline, and Jefferson. The PR and the MAR run southeastward and were designed to avoid passing through the Sandhills, an ecological region as defined by the DEQ.

The PR would run across the southwest corner of Boyd County and then cross the Keya Paha River; enter Holt County crossing the Niobrara River; cross the Elkhorn River in Antelope County, through Boone County; and cross the Loup River in Nance County. The route would then turn and cross the northeastern corner of Merrick County; cross the Platte River; enter Polk County and continue south through York, Fillmore, and Saline Counties; and end in Jefferson County. The PR would parallel Keystone I for 7.3 miles and would require five pump stations.

The SAR is the route TransCanada initially proposed in 2008. TransCanada's application stated: "Compared to the [SAR], the overall footprint of the [PR] represents less environmental impact by avoiding the Sandhills region and minimizing impacts to areas with characteristics similar to the Sandhills, including shallow groundwater and fragile soils."

The MAR would "follow the [PR] for 110 miles to just south of the Elkhorn River in Antelope County, then head in a southeasterly direction across Madison and Stanton counties for approximately 43 miles to intercept [Keystone I]," and head south and parallel Keystone I for 97.6 miles, crossing Shell Creek and the Platte River in Colfax County. Based on the DEQ's recommendation, TransCanada adjusted the route to divert from Keystone I for 29.8 miles to avoid the "Seward County Wellhead Protection Area." The route then rejoins Keystone I and continues through Saline County to Jefferson County. The MAR would be 5 miles longer than the PR and would require a total of six pump stations.

TransCanada stated in the application that it viewed the PR to be superior to the MAR, because the MAR would require a greater total number of acres; increase the crossing of the ranges of federally recognized threatened and endangered species; increase the crossing of highly erodible soils; increase the crossing of unusually sensitive ecological areas; and increase crossings of perennial streams, railroads, and roads. Despite the MAR's advantages due to its co-location with Keystone I, TransCanada considered the PR to be more beneficial than the MAR, because the PR was shorter and required one fewer pump station.

The application included a reclamation and revegetation plan to fully restore lands disturbed by construction along the route to their preconstruction capabilities. Under the Oil Pipeline Reclamation Act, Neb. Rev. Stat. §§ 76-3301 to 76-3308 (Reissue 2018), TransCanada is responsible for all reclamation costs necessary as a result of constructing and operating the pipeline, except to the extent another party is determined

to be responsible.[17] TransCanada intends to revegetate the pipeline right-of-way as near as practicable to preconstruction conditions to ensure equivalent land capability following construction and the establishment of native plant communities along the pipeline. TransCanada represented that it will abide by § 76-3304(3) and keep its reclamation and maintenance obligations until the pipeline is permanently decommissioned or removed.

The application specified that the pipeline would be 36 inches in diameter for the entire length of the route. Construction would occur in a linear segmented fashion within a 110-foot-wide construction right-of-way, consisting of a 60-foot temporary right-of-way and a 50-foot permanent easement. The width of the construction right-of-way may be decreased or increased to address natural resource or engineering concerns. Moreover, TransCanada stated it will adjust the route "to the extent practicable" to avoid culturally significant sites. In addition to the installation of the pipeline, the PR required the construction and operation of permanent aboveground structures, including 5 pump stations and 19 intermediate mainline valves. The pump stations would be built on purchased land ranging from 7 to 17 acres. Each intermediate mainline valve would be constructed within a fenced site, approximately 50 feet by 50 feet, located within the 50-foot-wide easement.

TransCanada concluded its application by stating that the PR had been thoroughly evaluated by federal and state agencies, was designed to mitigate impacts to natural resources, and ensured minimal impacts to the orderly development and growth of the region. In its prayer for relief, TransCanada requested an order from the PSC that the PR is in the public interest.

4. Prehearing Matters

The PSC published notice of TransCanada's application in The Daily Record, a legal newspaper in Omaha, Nebraska, on

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[17] § 76-3304(1).

February 20, 2017, and set the deadline for formal intervention for March 22. TransCanada filed proof of service of its application on the agencies listed in § 57-1407(3), as well as proof of notice to Antelope, Boone, Boyd, Fillmore, Holt, Jefferson, Keya Paha, Merrick, Nance, Polk, Saline, and York Counties. TransCanada later filed proof that notice of the application was filed in newspapers of general circulation in those counties.

Numerous groups and individuals filed petitions to intervene in the proceedings based on property, economic, natural resource, social, cultural, and territorial interests. On March 30, 2017, TransCanada filed objections to certain petitions for intervention, arguing that the asserted legal rights or interests would not be affected due to the narrow scope of the proceedings. TransCanada argued that MOPSA does not provide a forum to litigate whether or not a major oil pipeline should be constructed, but instead is limited to the issue of whether or not to approve a particular pipeline route.

On March 31, 2017, the hearing officer for the PSC issued an "Order on Formal Intervention Petitions." The order explained that, under § 57-1408(2), the applicable statutory deadline for the PSC's decision was "eight months after the issuance of a presidential permit authorizing the construction of the major oil pipeline." The presidential permit for the pipeline was issued on March 23, which meant that the PSC was required to issue its final decision on the application by November 23. The order stated that the decisions on the petitions for intervention were reached by balancing the strict deadline under MOPSA with the need to produce a complete record and afford all interested parties an opportunity to be heard.

The order granted petitions for formal intervention filed by the landowners with no limitations or conditions. The order granted petitions for formal intervention filed by three different unions: the Midwest Regional Office of the Laborers International Union of America (LiUNA); the International Brotherhood of Electrical Workers, Local Union No. 265; and the United Association of Journeymen and Apprentices of the

Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (UA). The order imposed conditions on the unions' participation by ordering them to jointly offer testimony from one witness at the public hearing, participate in limited discovery, collaborate on cross-examination of up to 1 hour per witness, and submit one joint brief.

The order granted petitions for formal intervention filed by the Ponca Tribe of Nebraska (Ponca) and the Yankton Sioux Tribe of South Dakota (Yankton Sioux). Ponca's petition stated it had a direct interest in the proceedings because the routes pass through its traditional, aboriginal, and federally recognized territory, which contains "historic, cultural, sacred and archaeological natural resources." Yankton Sioux's petition stated that the proposed pipeline would "traverse [its] ancestral territory" and that it had an interest in preserving "cultural, spiritual, and historic sites." The hearing officer found that "neither petition cite[d] a legally cognizable current real property interest in land encompassing the route," but noted that § 57-1407(4)(d) requires the PSC "to consider evidence of the social impacts of the project," and found that evaluating social impacts could encompass cultural, anthropological, and historical issues. The order imposed conditions on the tribes' petitions similar to those imposed on the unions.

The order granted petitions for formal intervention, subject to the same or similar conditions, filed by groups and individuals asserting environmental and natural resource interests, including Bold Alliance and the Sierra Club. The order stated that under MOPSA, the PSC is prohibited from evaluating safety considerations such as "the risk or impact of spills or leaks from the major oil pipeline," but found that the PSC could appropriately consider issues such as the proposed route's "environmental impact, soil permeability, distance to groundwater, and impact on plant life and wildlife."

The order on the petitions for intervention concluded with a separate section devoted to addressing the MAR. The order stated that "[MOPSA] requires the [PSC] to consider whether

any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline," and that the MAR "partially parallels [Keystone I]." The order therefore "encourage[d] all parties to provide evidence regarding the feasibility and potential benefits and/or drawbacks of the [MAR]." The order granted each intervenor group permission to call an additional witness and offer accompanying exhibits to provide evidence concerning the MAR. The order noted that the SAR "was previously rejected by Nebraska authorities" and therefore has "already effectively been determined to not be a viable option."

On April 5, 2017, the hearing officer entered a case management order. The order set a prehearing conference for July 31 and announced that a public hearing on TransCanada's application would commence on August 7 in Lincoln, Nebraska. The order stated that the PSC may hold public meetings "for the purpose of receiving input from the public" and that "[a]ny comments received will be made a part of the permanent record of this proceeding." All parties were required to submit written testimony in advance and make witnesses available for cross-examination at the public hearing. The order stated that "any/all Hearing Officer Orders . . . will apply to and bind all parties, will control the course of the proceedings, and may be modified only by order of the Hearing Officer."

The PSC published notice of the public hearing on TransCanada's application in The Daily Record newspaper on April 11, 2017. The notice also announced that the PSC would hold a public meeting in Lincoln on April 18. The PSC published notice of its August 7 public hearing in newspapers in counties along the MAR and the PR, and sent letters to the governing bodies of the cities and counties along both routes notifying them that the pipeline route could pass through their jurisdiction and seeking their views on whether that would be in the public interest. The letters indicated that the application was available on the PSC's website.

On May 3, 2017, the PSC held a public meeting in York, Nebraska. On May 10, "after careful and thoughtful deliberation and reflection of the variety of public comment received by the [PSC] at the [public meeting]," the hearing officer entered an order "[m]odifying [c]ase [m]anagement [p]lan and [i]ntervention [o]rder." The order allowed each intervenor group to present testimony from two witnesses, in addition to a "witness regarding the [MAR] as detailed in the [intervention order]."

On June 7 and 28 and July 26, 2017, the PSC held additional public meetings in York, O'Neill, Norfolk, and Ralston, Nebraska, respectively, and received over 450 oral and written comments from the public.

5. Public Hearing

The PSC held a public hearing on TransCanada's application from August 7 to 10, 2017, in Lincoln. TransCanada submitted prefiled direct examination testimony from 10 witnesses, presented each witness for cross-examination, and filed rebuttal testimony from 6 witnesses. The landowner intervenors prefiled testimony from 61 witnesses and offered live testimony from 10 landowners and 1 expert witness. Ponca and Yankton Sioux each presented testimony from one witness. The natural resource intervenors presented testimony from three witnesses, and the union groups presented testimony from two witnesses.

We provide a summary of the presentation of evidence at the public hearing, along with context added from the thousands of pages of pleadings, exhibits, testimony, and briefs in the record before the PSC.

(a) TransCanada Testimony

(i) Tony Palmer

Tony Palmer is the president of TransCanada Keystone Pipeline GP, LLC, and TransCanada Keystone, LLC, which together own 100 percent of TransCanada, a company organized for the purposes of owning and constructing pipelines which transport crude oil from Canada to the United States.

Palmer is responsible for development and oversight of the pipeline project. He testified in support of the request for approval of the PR as set forth in the application. Palmer stated the PR was designed by drawing the "shortest footprint . . . from Hardisty, Alberta, to Steele City."

Palmer estimated the initial use of the pipeline would be 20 years, which could be extended to 50 years if it was well maintained. Palmer confirmed that TransCanada is responsible for all reclamation costs associated with the project, unless another party is determined to be responsible. Palmer represented that TransCanada and all affiliated parties will not claim any tax deductions, exemptions, credits, refunds, or rebates under the Nebraska Advantage Act, Neb. Rev. Stat. §§ 77-5701 to 77-5735 (Reissue 2009), and testified that "we do not consider selling the route an option." Palmer stated that based on TransCanada's studies and the studies conducted by the DEQ and the Department, he considered the PR to be superior to the MAR.

(ii) Paul Fuhrer

Paul Fuhrer, the project manager for TransCanada USA Services Inc., testified regarding the construction process for the proposed pipeline and pump stations. Fuhrer stated the top of the pipeline will sit a minimum of 4 feet below the surface of land, and a minimum of 25 feet below the surface of a water stream. Each pump station will be placed an average of 55 miles apart and utilize approximately 8 to 10 acres of land, but could utilize up to 17 acres. Shutoff valves will be placed at intervals along the pipeline, based on hydraulics and other factors, and located within a 50-foot-by-50-foot fenced enclosure.

Fuhrer testified about the trenching operations designed to provide sufficient width and depth to support the pipeline. The construction and installation of a new pipeline would require segregating topsoil from subsoil 110 feet across, and digging trenches that are approximately 8 feet wide and 7 feet deep.

(iii) Ernie Goss

Dr. Ernie Goss, a professor of economics at Creighton University and the principal of the "Goss Institute," testified regarding his "socioeconomic" impacts report. Goss concluded that the pipeline project would generate economic activity in Nebraska such as sales, wages, and jobs, and would contribute to the state and local tax bases. He estimated that construction of the pipeline would result in positive state and local tax revenue to exceed $264 million through the year 2034. Goss concluded that during the 2-year construction period, the project would generate a total of over $890 million in Nebraska, with a labor income of $326.6 million supporting an average of 3,397 jobs per year. He estimated that, during the operations period from 2020 through 2034, there would be an economic impact in Nebraska of $1.2 billion in output/sales, with labor income of $415.5 million supporting an average of 371.7 jobs per year. For property tax purposes, Goss considered the pipeline to be a 15-year asset which would depreciate out, except to the extent that facilities are added, replaced, or maintained.

Goss employed an input-output method, a type of applied economics analysis that "tracks the interdependence among various producing and consuming sectors of an economy." For example, Goss asserted that each $1 million TransCanada spends on construction would create a net economic gain of $286,522 in Nebraska and that each $1 million TransCanada spends on operation would create a net gain of $150,000. Goss used "IMPLAN" software in forecasting the economic impact of the pipeline. IMPLAN combines input-output analysis with regional-specific statistics. Goss stated that IMPLAN is a widely used and accepted multiplier system, but agreed that IMPLAN is limited in its ability to determine whether "jobs or output are new or already existing and are simply being reallocated from other uses."

Goss' report did not disclose the scope of his engagement, but he stated that he was engaged to update his report, initially published in 2013, to reflect the most current data. He did not

recall how much he had been paid by TransCanada. He admitted the report was not peer reviewed and stated: "The goal was to do a study that made sense to the woman and man on the street . . . ."

(iv) Sandra Barnett

Sandra Barnett, an environmental specialist for TransCanada Corporation, testified regarding environmental issues. Her testimony reiterated TransCanada's commitment to comply with the Oil Pipeline Reclamation Act and to minimize potential impacts on land areas and natural resources. Barnett admitted that for affected cropland, "[t]here would be temporary yield loss during construction and perhaps for a period of time afterward," but stated that TransCanada will reclaim and revegetate the right-of-way and work with the affected landowners to return it "as close as we can make it" to preconstruction condition.

Barnett stated that if a dispute occurs between TransCanada and a landowner about the postconstruction condition of land, the parties will reach a resolution by consulting the Natural Resources Conservation Service (NRCS), a division of the U.S. Department of Agriculture, or other agencies, and include them in the discussion in order to reach a resolution. Regarding surface water resources, Barnett admitted that during construction, there potentially will be temporary degradation to groundwater quality and aquatic habitat, as well as bank stability.

(v) John Beaver

John Beaver, a project manager, ecologist, and reclamation specialist with an environmental services company, has been the senior reclamation specialist and special-status species biologist for the project since 2009. He stated that TransCanada will monitor the condition of the right-of-way during the pipeline's entire operational life. He admitted that TransCanada's land surveys and "Construction Mitigation and Reclamation Plan" (CMRP) for Nebraska have not been updated since 2012.

(vi) Michael Portnoy

Michael Portnoy, the president and chief executive officer of an environmental consulting and engineering firm, is the lead hydrologist and project manager for soil permeability and distance-to-groundwater surveys. He has academic degrees in geology, geochemistry, hydrology, and business administration. He testified that there is a wide diversification of soil along the PR; he did not separately study the soil along the MAR.

(vii) Dr. Jon Schmidt

Dr. Jon Schmidt, vice president of the management contractor for the pipeline project, helped prepare TransCanada's application. He testified the application compared the different routes based on the number of acres disturbed, federally listed threatened and endangered species, amount of highly erodible soils, ecologically sensitive areas, and number of crossings of perennial streams, railroads, and roads. He did not analyze the route referred to as the "I-90 Route," which would co-locate with the entire length of Keystone I.

On cross-examination, Schmidt agreed that the MAR "ha[d] potential environmental benefits due to its co-location with [Keystone I]." He agreed that the PR crosses five Nebraska rivers and the MAR crosses only two rivers, but stated the MAR crosses more "perennial waterbodies." He agreed that according to a map received in evidence, both the PR and the MAR cross the "Ponca Trail of Tears."

(viii) Meera Kothari

Meera Kothari, a professional engineer and manager for TransCanada, helped prepare the section of the application which addressed the possible routes. She agreed that the MAR could "feasibly" and "beneficially" be used in Nebraska. She testified that the MAR's deviation from Keystone I in Seward County was to "avoid the wellhead protection area based on the feedback from the DEQ" and confirmed that "there are no wellhead protection area issues on either" the PR or the MAR.

(b) Landowner Intervenors Testimony

The PSC heard testimony from the landowners focusing on issues of soil compaction, topsoil loss, wind and water erosion, soil blowouts and slides, adverse impacts to crops based on increased soil temperature, and proximity of pipeline construction to water sources. The landowners also provided expert testimony on the issue of economic impact.

(i) Arthur Tanderup

Arthur Tanderup owns farmland in Antelope County. He and his wife conduct no-till, irrigated farming and raise corn, native corn, soybeans, and rye. He described his land as highly erodible and testified that construction will interfere with the topsoil and the benefits of no-till farming.

(ii) Frank Morrison

Frank Morrison owns farmland in Antelope County, where he and his wife produce popcorn, edible beans, and peanuts. The land farmed by Morrison contains 65 irrigation wells. He testified the proposed route runs approximately 1½ miles from his processing facilities and intersects his property almost in half.

(iii) Robert Krutz

Robert Krutz owns land in Antelope County. He and his wife raise "natural beef," corn, and soybeans. Krutz testified that the construction could put his natural beef certification at risk, which would affect his market sales. He stated his concerns about the continued revegetation of his land which supports his livestock.

(iv) Jeanne Crumly

Jeanne Crumly owns land in Holt County. She and her husband conduct no-till, irrigated farming and raise corn, soybeans, hay, and potatoes. She testified that the pipeline will impact erodible and permeable soils.

(v) Bonny Kilmurry

Bonny Kilmurry owns land in Holt County. She and her husband have a cow-calf operation, and they harvest hay from pastureland. Her land contains subirrigated meadows with water close to the surface, as well as highly erodible soils, which she described as being similar to Sandhills land.

(vi) Diana Steskal

Diana Steskal owns land in Holt County. Steskal owns no-till, irrigated farmland that produces wheat, corn, soybeans, edible beans, and popcorn, and she urged for the protection of the natural resources on her land.

(vii) Andy Grier

Andy Grier is a manager of a ranch in Holt County. He testified about the pipeline's crossing of the Niobrara River, the potential soil erosion from land clearing, and the proximity of the pipeline to his ranch's water supplies.

(viii) Robert Allpress

Robert Allpress owns ranchland on the eastern border of Keya Paha County. He stated the proposed route will cross through fragile soil that is susceptible to blowouts and slides and that many plants and animals will be endangered. He testified he has observed a bald eagle's nest and whooping cranes in areas near his property. In addition, he testified that members of the Ponca and Yankton Sioux have surveyed his property and have identified "culturally significant sites."

(ix) Dr. Michael O'Hara

Dr. Michael O'Hara, an economics professor at the University of Nebraska at Omaha, analyzed the economic impact of the proposed pipeline in Nebraska and reviewed Goss' socioeconomic report. O'Hara opined that the pipeline would decrease the value of property on the route by approximately 15 percent, and he concluded that the pipeline would

"reduce the emotional attitude of property owners towards their property." On cross-examination, he admitted that he did not evaluate the Department's conclusion that the project would not have a negative impact on property values and would have a positive economic impact through job creation and earnings. He opined that the project would create few permanent jobs. He disagreed with Goss' conclusions about the increased property tax revenues generated by the pipeline, but acknowledged that TransCanada will be obligated to pay significant sales and use taxes.

(c) Yankton Sioux Testimony

Jason Cooke, a member of the Yankton Sioux's business and claims committee, the executive body of Yankton Sioux, testified the pipeline would cross the tribe's ancestral territory and would disturb cultural resources. Cooke said he expected that the pipeline would encounter burials, ceremonial areas, historic trails, and food and medicine gathering areas. In addition, he objected to a temporary camp that TransCanada may build for its pipeline workers approximately 40 miles from a Yankton Sioux reservation. Cooke stated that such camps are a source of violence and drugs and that the pipeline workers would be drawn to the tribe's casino in South Dakota.

(d) Ponca Testimony

Shannon Wright, the Ponca's tribal historic preservation officer, stated that the PR and the MAR cross the Ponca Trail of Tears and that construction of either route could damage or destroy historic sites. Wright stated that the MAR would cross near Ponca's service areas in the Nebraska counties of Boyd, Holt, Madison, Stanton, and Platte. Wright agreed that impacts from construction would be alleviated if TransCanada conducted the cultural surveys identified in the "Programmatic Agreement" (PA) and that there will be time before construction for TransCanada to complete these surveys.

(e) Natural Resources Intervenors Testimony

(i) Dr. Paul Johnsgard

Dr. Paul Johnsgard, a University of Nebraska-Lincoln professor emeritus of biological sciences, has extensively researched the biology of whooping cranes. Johnsgard asserted that the pipeline would require placing additional electric transmission lines in the whooping cranes' central migration path. He agreed that the risk posed by the project is "small."

(ii) Dr. Thomas David Hayes

Dr. Thomas David Hayes, the lead scientist and executive director of a nonprofit corporation providing research and technical services on environmental matters, testified the pipeline project would adversely impact natural resources "due to decreased soil permeability and increased soil compaction in both natural areas and croplands." He further stated that construction would "seriously deplete native prairie." Comparing the PR and the MAR, Hayes concluded that "the [MAR's] impact upon federally listed species is significantly less than that of the [PR], primarily due to the [MAR's] impacting 84.6 fewer miles of whooping crane habitat." He stated that the application

> downplays the measurable benefits of co-locating the [MAR]. With 88.3 and 102.2 more miles, respectively, of pipeline and total co-location, compared to the [PR], the [MAR] substantially decreases its overall impact by reworking far more industrially impacted areas and, consequently, reducing impacts to relatively undisturbed land. . . . [I]n this manner, irreparable damage to important natural resources, including native soils and grasslands, is proportionally reduced.

(iii) Joseph Trungale

Joseph Trungale, a consultant specializing in hydrology and instream flows, testified about the physical, chemical, and biological impacts associated with the pipeline's interaction with stream channels. He stated there was insufficient

information about mitigation of stream channel erosion and that shallow aquifers could be affected.

(f) Economic Intervenors Testimony

(i) David Barnett

David Barnett, an international representative assigned to the pipeline and gas distribution department for UA, testified that UA has worked with TransCanada on several recent projects and that the pipeline project would have a positive economic impact on UA. He estimated that UA could expect 564 jobs for the construction phase of the project.

(ii) Bill Gerhard

Bill Gerhard, a special representative of LiUNA, testified that the pipeline project would have a positive economic impact on LiUNA and its members. He stated the project would create several different types of energy-related jobs, including pipeline construction and pump station jobs.

6. Closing Arguments

In their written closing remarks, the landowner intervenors argued that TransCanada's application should be denied for failure of proof. The landowners argued in the alternative that the PSC had the power to approve an alternate route, so long as the route followed Keystone I.

Bold Alliance and the Sierra Club asserted in their written closing argument that "[the] PSC has the authority to approve or disapprove of each route location by considering the benefits and feasibility of each of the proposed routes." They argued that the PR should be denied, because it has more negative impacts than the MAR, and that the PSC should approve the I-90 Route.

Ponca opposed both the PR and the MAR. Yankton Sioux argued about the risks associated with the camps for pipeline workers. The unions urged the PSC's approval of the application, because the project would bring jobs and other tangible

economic benefits to their members and the communities in which they reside and work.

7. PSC's Order Granting TransCanada's Application

On November 20, 2017, the PSC issued an order approving TransCanada's application, by a 3-to-2 vote, and finding the MAR to be in the public interest. The PSC began its findings by stating that MOPSA limits the PSC's authority to "a review of the proposed *route* only. The [PSC] is *not* to determine whether or not the pipeline project, or the pipeline itself, should be built." (Emphasis in original.) The PSC further stated, "[T]he Legislature has given the [PSC] the limited responsibility of determining whether the route of the pipeline is in the public interest." In making its public interest determination, the PSC discussed and analyzed each of the eight factors for consideration under § 57-1407(4), which provides:

> The pipeline carrier shall have the burden to establish that the proposed route of the major oil pipeline would serve the public interest. In determining whether the pipeline carrier has met its burden, the commission shall not evaluate safety considerations, including the risk or impact of spills or leaks from the major oil pipeline, but the commission shall evaluate:
>
> (a) Whether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances;
>
> (b) Evidence of the impact due to intrusion upon natural resources and not due to safety of the proposed route of the major oil pipeline to the natural resources of Nebraska, including evidence regarding the irreversible and irretrievable commitments of land areas and connected natural resources and the depletion of beneficial uses of the natural resources;
>
> (c) Evidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources;

(d) Evidence regarding the economic and social impacts of the major oil pipeline;

(e) Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline;

(f) The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline;

(g) The reports of the agencies filed pursuant to subsection (3) of this section; and

(h) The views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline.

The PSC found that TransCanada had produced sufficient evidence to satisfy the relevant statutory considerations. The PSC gave significant weight to subsection (e), and ultimately approved the MAR rather than the PR based on that subsection. The PSC found that the MAR utilized an existing utility corridor, Keystone I, for approximately 100 miles. The PSC declined to approve the I-90 Route, because TransCanada's construction permit in South Dakota required crossing into Nebraska in Keya Paha County, and the entry point for the I-90 Route is over 100 miles to the east.

The PSC found that "the [PR] fails to take advantage of any opportunity to co-locate with the existing utility corridor represented by Keystone I, and therefore we are unable to conclude that the [PR] is in the public interest." The PSC relied on testimony provided by TransCanada's engineer, Kothari, who stated that the MAR was viable and beneficial. The PSC stated, "We see many benefits to maximizing the co-location of the Keystone XL Pipeline with Keystone I. It is in the public interest for the pipelines to be in closer proximity to each other, so as to maximize monitoring resources and increase the efficiency of response times." The PSC further agreed with the intervenors that the MAR impacts fewer miles of endangered species and has other comparative environmental benefits. The

PSC stated, "[TransCanada] cites the additional [5] miles in length and one . . . additional pumping station as negatives against the [MAR]. However, we feel the benefits of maximizing co-location opportunities and utilizing the existing utility corridor that is . . . Keystone I . . . outweighs these concerns." The PSC found that the MAR "is in the public interest and shall be approved," and granted TransCanada's application.

8. Motions for Reconsideration

Several parties moved for reconsideration. TransCanada's motion requested leave to file an amended application "to make the [MAR] [TransCanada's] [PR]."[18] Following oral argument, the PSC denied the motions. The landowner intervenors filed a notice of appeal. We moved the case to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.[19]

II. ASSIGNMENTS OF ERROR

The landowners assign, restated and consolidated, that (1) the PSC lacked jurisdiction to consider the application, (2) the PSC erred in finding that TransCanada sustained its burden of proof, (3) the PSC erred by approving the MAR, (4) the PSC erred in admitting hearsay evidence under § 57-1407(2) and (3), and (5) the PSC erred in denying the landowners procedural due process. The landowners also assert constitutional challenges to various statutes.

On cross-appeal, Ponca assigns, restated, that (1) the PSC erred in limiting its participation to social and cultural issues and limiting its witnesses and cross-examination time; (2) the PSC erred in approving the MAR because TransCanada never applied for approval of the MAR, the notice requirements related to the MAR were not met, and TransCanada did not meet its burden of proof with respect to the MAR; and (3) the PSC erred in limiting its consideration of historic

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[18] Brief for appellee TransCanada at 11.

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

and cultural resources to those covered by the National Historic Preservation Act, 54 U.S.C. § 300101 et seq. (Supp. III 2015).

On cross-appeal, Yankton Sioux assigns, restated and consolidated, that the PSC erred by (1) approving a route which does not serve the public interest, (2) violating Yankton Sioux's procedural due process and equal protection rights, and (3) applying § 84-912.02 of the Administrative Procedure Act (APA)[20] instead of the PSC's intervention regulations to limit Yankton Sioux's participation. Yankton Sioux also joins in the errors assigned by the landowner appellants.

The Sierra Club filed a brief but did not include any assignments of error.

III. STANDARD OF REVIEW

[1-3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[21] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[22] The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law.[23]

[4-6] Under Neb. Rev. Stat. § 75-136(2) (Reissue 2018), an appellate court reviews an order of the PSC de novo on the record.[24] In a review de novo on the record, an appellate

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[20] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2014 & Cum. Supp. 2016).

[21] *In re Grand Jury of Douglas Cty.*, 302 Neb. 128, 922 N.W.2d 226 (2019).

[22] *In re Petition of Golden Plains Servs. Transp.*, 297 Neb. 105, 898 N.W.2d 670 (2017).

[23] *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 906 N.W.2d 285 (2018).

[24] *In re Application No. B-1829*, 293 Neb 485, 880 N.W.2d 51 (2016); *Telrite Corp. v. Nebraska Pub. Serv. Comm.*, 288 Neb. 866, 852 N.W.2d 910 (2014). See *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.[25] When an appellate court makes a de novo review, it does not mean that the court ignores the findings of fact made by the agency and the fact that the agency saw and heard the witnesses who appeared at its hearing.[26] Where the evidence is in conflict, the Supreme Court will consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another.[27]

Lastly, Neb. Ct. R. App. P. § 2-109(D)(1)(d), (e), and (f) (rev. 2014) requires that the brief of an appellant include a separate section for assignments of error, designated as such by a heading, and also requires that the section be located after a statement of the case and before a list of controlling propositions of law.[28] When a party fails to follow the rules of the Nebraska Supreme Court, an appellate court may proceed as though the party had failed to file a brief or, alternatively, may examine the proceedings for plain error.[29]

The Sierra Club attempted to file an appeal in this case, but failed to set forth any assignment of error in its brief. In addition to considering the assignments of error raised by the landowners, Ponca, and Yankton Sioux, we will consider whether the PSC committed plain error. Plain error is error plainly evident from the record and of such a nature that to leave it

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[25] *Id.*

[26] See, *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *Department of Health v. Lutheran Hosp. & Homes Soc.*, 227 Neb. 116, 416 N.W.2d 222 (1987).

[27] *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988).

[28] *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014); *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[29] *Steffy v. Steffy, supra* note 28. See *In re Interest of Jamyia M., supra* note 28.

uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[30]

IV. ANALYSIS

[7] The PSC is an independent regulatory body created by the Nebraska Constitution in article IV, § 20.[31] The powers and duties of the PSC include the "general control of common carriers as the Legislature may provide by law."[32] The constitutional provision creating the PSC must be liberally construed to effectuate the purpose for which the PSC was created, which is to serve the public interest.[33] In the absence of specific legislation, the powers and duties of the PSC, as enumerated in the constitution, are absolute and unqualified.[34]

[8] We have repeatedly said that the determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the PSC.[35] "'[C]ourts must give substantial deference to [the PSC's] judgment about how best to serve the public interest.'"[36] We have made this statement in recognition of the PSC's status as a constitutional entity, and we have gone as far as to state that the "Supreme Court does not act as an appellate

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[30] *Id.*

[31] *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

[32] Neb. Const. art. IV, § 20.

[33] See *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975).

[34] See *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949).

[35] *Dahlsten v. Harris*, 191 Neb. 714, 217 N.W.2d 813 (1974). See, *Andrews Van Lines, Inc. v. Smith*, 187 Neb. 533, 192 N.W.2d 406 (1971); *Nebraska State Railway Commission v. Chicago & N. W. Ry. Co.*, 187 Neb. 369, 191 N.W.2d 438 (1971); *Ace Gas, Inc. v. Peake, Inc.*, 184 Neb. 448, 168 N.W.2d 373 (1969).

[36] *In re Application No. C-1889*, 264 Neb. 167, 178, 647 N.W.2d 45, 54 (2002).

[PSC]."[37] However, in 2013, the Legislature amended § 75-136(2) to change our standard of review from errors appearing on the record, as provided under the APA, to "de novo on the record."

We first addressed the "de novo on the record" standard of review for PSC cases in *Telrite Corp. v. Nebraska Pub. Serv. Comm*.[38] Prior to the amendment, a party appealed from the PSC under the APA, and the initial appeal was taken to district court, which conducted a de novo review on the record of the agency.[39] Our inquiry in appeals from a district court's decision under the APA is limited to whether the decision conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable.[40] In *Telrite Corp.*, we rejected the PSC's argument that the previous, more deferential standard of review for an appellate court under the APA still applied after the amendment to § 75-136. In so finding, we stated that the PSC was not "due the same degree of deference it enjoyed" before the amendment.[41]

However, the issue of what deference is owed to the PSC regarding its public interest determinations is more nuanced than stated in *Telrite Corp*. Under MOPSA, the PSC views the witnesses and evaluates the strength of their testimony, receives comments from the public, investigates the issues presented in coordination with state agencies and authorized consultants, evaluates the public interest, and makes the initial decision of whether to approve an application and authorize eminent domain power. Under the circumstances, it is appropriate, even under a de novo standard of review, to adhere to the common

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[37] *In re Application of Crusader Coach Lines*, 213 Neb. 53, 58, 327 N.W.2d 98, 101 (1982). Accord *In re Application of McCarty*, 218 Neb. 637, 358 N.W.2d 203 (1984).

[38] *Telrite Corp. v. Nebraska Pub. Serv. Comm., supra* note 24.

[39] See § 84-917(5).

[40] *Telrite Corp. v. Nebraska Pub. Serv. Comm., supra* note 24.

[41] *Id*., 288 Neb. at 874-75, 852 N.W.2d at 916.

practice among appellate courts to afford appropriate deference to the findings of the agency before which the record was created.[42] We articulate this standard in light of the PSC's being constitutionally created to serve the public interest.

1. PSC Had Jurisdiction

The landowners and Yankton Sioux assert that the PSC lacked jurisdiction to approve TransCanada's application because, under the appellants' reading of MOPSA, the PSC cannot consider a route application unless the Governor has already considered and denied the application. We determine that under the plain language of MOPSA, prior gubernatorial denial is not required to initiate application proceedings before the PSC. MOPSA is an independent statutory process under which pipeline carriers may obtain route approval and eminent domain authority. Route approval by the Governor is not at issue in this case.

[9,10] 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.[43] 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.[44]

The appellants' argument is based upon § 57-1405(1), which provides:

> If a pipeline carrier proposes to construct a major oil pipeline . . . and the pipeline carrier has submitted a route for an oil pipeline within, through, or across Nebraska

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[42] See, *Law Offices of Ronald J. Palagi v. Dolan, supra* note 26; *Dieter v. State, supra* note 27; *Department of Health v. Lutheran Hosp. & Homes Soc., supra* note 26.

[43] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

[44] *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

> *but the route is not approved by the Governor* pursuant to section 57-1503, the pipeline carrier shall file an application with the [PSC] and receive approval pursuant to section 57-1408 prior to beginning construction . . . .

(Emphasis supplied.)

Under the appellants' view, "the PSC may consider an application for a route if, *but only if*, the Governor of Nebraska first considered, and declined to grant, the proposed pipeline route within or across the State."[45] According to the appellants, "[d]isapproval is a prerequisite to PSC jurisdiction under § 57-1405(1)"[46] and "[t]he Governor must say 'No' first; then comes the PSC."[47]

It is clear that the appellants' interpretation is not strictly derived from the statutory text, but, rather, is an extrapolation thereof. The language of § 57-1405(1) is not phrased as a jurisdictional prerequisite, but, rather, describes a process for applying for a pipeline route that has "not [been] approved by the Governor." The appellants read the phrase "not approved by" to mean "must have first considered and denied." We do not agree. Logically, one can "not approve" something by taking no action. The phrase "not approved by" does not require the Governor to be the first to consider the application or to consider the application at all. As we explained in the background section of this opinion, the MOPSA application process is one of two options the Legislature has enacted to enable a pipeline carrier to pursue route approval. Though we conduct a textual analysis as to whether § 57-1405(1) or § 57-1101 authorizes the PSC to consider TransCanada's application, we offer no opinion as to the constitutionality of § 57-1101 or other references to the power of the Governor to approve the route.

Sections 57-1405(1) and 57-1101 relate to the same subject matter; they address the procedures available for a

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[45] Brief for appellants at 14 (emphasis in original).

[46] *Id*. at 17.

[47] *Id*. at 15.

pipeline carrier to obtain route approval under Nebraska law. The current versions of these sections were adopted by the Legislature in the same bill, 2012 Neb. Laws, L.B. 1161, and MOPSA makes specific reference to § 57-1101.[48] Therefore, §§ 57-1405(1) and 57-1101 are in pari materia and we must construe them together.

Section 57-1101 provides in relevant part:

> [F]or any major oil pipeline . . . to be placed in operation in the State of Nebraska . . . , any such person, company, corporation, or association shall comply with section 57-1503 and receive the approval of the Governor for the route of the pipeline under such section *or* shall apply for and receive an order approving the application under [MOPSA], prior to having the rights provided under this section.

(Emphasis supplied.)

Section 57-1101 describes the two avenues for route approval, under § 57-1503 and MOPSA, and uses the word "or" to connect them. The word "or," when used properly, is disjunctive.[49] This indicates that a pipeline carrier can pursue either process individually. The processes are independent of each other and should not be understood as the same thing. There are several differences.

As described above, under § 57-1503, a pipeline carrier may not seek the Governor's approval of an application until after the DEQ has utilized State funds to prepare a SEIS and has submitted its evaluation to the Governor. In contrast, under MOPSA, a pipeline carrier initiates the proceedings, is required to prove that the route is in the public interest based on the PSC's evaluation of multifaceted statutory criteria, and must pay for the application process.[50] MOPSA does not require gubernatorial denial prior to initiating an application

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[48] § 57-1408.

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

[50] See §§ 57-1405 and 57-1406.

proceeding. The appellants' assignment of error that the PSC lacked jurisdiction over TransCanada's application is without merit.

2. Evidence Supports PSC's Determination that TransCanada Met Burden of Proof

In their next assignment of error, the appellants argue that the PSC erred in finding that TransCanada sustained its burden of proof. Upon our independent review of the record before the agency, we find that sufficient evidence supports the PSC's decision that TransCanada met its burden of proving that the MAR is in the public interest. While the intervenors reduced the strength of TransCanada's evidence in certain areas, the intervenors' objections are not enough to overcome TransCanada's comprehensive presentation with respect to the relevant public interest factors under MOPSA.

Two possible misconceptions must be addressed. First, in evaluating a route, we are prohibited from considering safety issues. Nebraska cannot interfere with uniform safety standards utilized by the federal government. To do so would undermine MOPSA and jeopardize Nebraska's ability to review and scrutinize a pipeline route in this state under state law. Second, the MOPSA structure enacted by the Legislature concerns only the selection of a particular pipeline route. In this case, TransCanada, as well as some of the appellants, asked the PSC to approve construction of a particular pipeline route. The PSC considered the evidence and determined that the MAR is in the public interest.

[11,12] An application under MOPSA shall be approved if the proposed route of the major oil pipeline is determined by the PSC to be in the public interest.[51] MOPSA places the burden of proof on the applicant.[52] Although MOPSA does not specify a standard of proof, unless an exception applies,

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[51] § 57-1407(4).

[52] *Id.*

only a preponderance of evidence is required in civil cases.[53] The burden of proof is satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence.[54] In concluding that the MAR is in the public interest, the PSC properly relied on all record evidence and carefully weighed the eight factors under § 57-1407(4).

(a) Compliance With Applicable Laws

The first factor for the PSC's consideration is "[w]hether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances."[55] TransCanada stated that it would comply with all applicable state statutes, rules, regulations, and local ordinances, and that it either has obtained or will obtain all permits necessary to comply with state laws, regulations, local ordinances, and zoning requirements. Moreover, TransCanada is required to comply with all applicable laws as a condition of its presidential permit. Palmer, the president of the companies that own TransCanada, reaffirmed these commitments under oath. These commitments apply to the construction, maintenance, and operation of the MAR. The record concerning § 57-1407(4)(a) supports the PSC's finding that TransCanada met its burden of proof.

(b) Impact on Natural Resources

The PSC shall evaluate evidence of

> the impact due to intrusion upon natural resources and not due to safety of the proposed route of the major oil pipeline to the natural resources of Nebraska, including evidence regarding the irreversible and irretrievable

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[53] *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010). See, *Pallas v. Dailey*, 169 Neb. 533, 100 N.W.2d 197 (1960); *Eggleston v. Quinn*, 88 Neb. 775, 130 N.W. 428 (1911).

[54] *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977).

[55] § 57-1407(4)(a).

> commitments of land areas and connected natural resources and the depletion of beneficial uses of the natural resources.[56]

The evidence demonstrated that a large percentage of the land crossed by the pipeline is agricultural in nature and that the impacts of construction will be temporary.

The MAR avoids the Nebraska Sandhills, which provides several advantages as compared to the PR, when considering impacts on natural resources. As the PSC found, compared to the PR, the MAR will involve "one fewer river crossing, fewer wells within 500 feet of the pipeline, fewer acres of pivot irrigated . . . land crossed, fewer crossing of intermittent and perennial streams . . . , fewer miles of pipeline placed in areas with shallow groundwater, and fewer state highways and natural gas facilities to be crossed." The MAR "would impact 84.6 fewer miles of whooping crane migratory path as compared to the [PR]," as well as impact "fewer miles of the ranges" of other "threatened and endangered species." The natural resources intervenors' witness Hayes noted this fact in his conclusion that "the [MAR's] impact upon federally listed species is significantly less than that of the [PR]."

Hayes testified that, compared to the PR, the MAR substantially decreases the overall impact of the pipeline and stated that "irreparable damage to important natural resources, including native soils and grasslands, is proportionally reduced." TransCanada's witness Schmidt agreed that the MAR "ha[d] potential environmental benefits due to its co-location with [Keystone I]." Beaver, the senior reclamation specialist on the project, testified that construction of the pipeline would not significantly increase the impermeability of the soil.

The PSC requested the DEQ to analyze the environmental impact of the MAR. The DEQ responded that based on the mitigation commitments and reclamation procedures within the application, the MAR "would have minimal environmental

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[56] § 57-1407(4)(b).

impacts in Nebraska." The DEQ then followed up with the PSC after further analyzing the relevant soils and sediment, groundwater, surface water, air, hazardous materials, and emissions, and again concluded that the MAR "would have minimal permanent environmental impacts in Nebraska." The record concerning § 57-1407(4)(b) supports the PSC's finding that TransCanada met its burden of proof.

(c) Mitigation of Potential Impacts

The PSC shall evaluate "[e]vidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources."[57] TransCanada provided a CMRP containing "construction, operation, and maintenance measures that are designed to reduce the likelihood and severity of impacts along the pipeline construction corridor and during operations." The CMRP outlines procedures for soil protection, water-crossing methods, vegetation reclamation, and aquatic resources protection. The CMRP was developed in consultation with the NRCS and experts from the University of Nebraska. The CMRP procedures will be used to minimize the environmental impact of the MAR and return the land disturbed by construction as close as possible to its preconstruction condition. The PSC concluded that TransCanada's procedures "conform to industry standards and are reasonable." Project manager Fuhrer testified that TransCanada will be accountable for production losses and other costs resulting from pipeline maintenance and damage to the land throughout the useful life of the pipeline.

The landowners noted that the CMRP has not been updated since 2012. However, the DEQ advised the PSC that the geology has not changed. The landowners emphasized that the CMRP allows TransCanada to deviate from the plan at its discretion. The PSC found that in the event a dispute arises regarding reclamation and mitigation efforts, the parties will consult the NRCS as a resource and follow the NRCS' advice. We agree

[57] § 57-1407(4)(c).

this resolution process is adequate. Because the NRCS helped formulate the CMRP and is familiar with the best reclamation and mitigation practices, the NRCS shall be consulted in any instance in which a dispute arises and TransCanada has deviated from the CMRP. The record concerning § 57-1407(4)(c) supports the PSC's finding that TransCanada met its burden of proof.

(d) Social and Economic Impacts

The PSC shall evaluate "[e]vidence regarding the economic and social impacts of the major oil pipeline."[58]

(i) Economic Impacts

Goss' report found that the pipeline project would constitute an economic benefit to Nebraska and would contribute to the state and local tax bases. He found that the pipeline project would result in positive tax revenue to exceed $264 million through the year 2034. His report assumed that only 10 percent of pipeline work in Nebraska would be conducted by Nebraska residents and that 7.3 percent of related pipeline work in Montana and South Dakota would be conducted by Nebraska residents. The report indicated that Goss' estimates were conservative. The analysis did not include taxes generated from the cost and installation of replacement materials or TransCanada's preconstruction spending. In addition, the dollar figures were not adjusted for inflation, but were discounted to the equivalent of "2015 dollars."

The unions also presented evidence of positive economic impacts. Barnett testified that UA has worked with TransCanada on recent projects and estimated that UA could expect 564 jobs for its members. Gerhard of LiUNA stated the project presents significant opportunity for the creation of several different types of energy-related jobs. O'Hara, the professor who analyzed the economic impact of the proposed pipeline, testified that the project would not provide long-term tax benefits,

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[58] § 57-1407(4)(d).

would create few permanent jobs, and would adversely impact property values. However, O'Hara's analysis predominantly focused on issues of safety. O'Hara admitted that TransCanada will pay significant sales and use taxes. In addition, O'Hara's conclusions regarding tax benefits assume that, contrary to the evidence, TransCanada will seek exemptions under the Nebraska Advantage Act. The PSC found that TransCanada "shall comply with its commitment to not use the Nebraska Advantage Act in any form in connection with the Keystone XL Project."

Nebraska's Department of Revenue found that during construction, TransCanada or its contractors would incur significant sales and use tax liabilities, and that Nebraska would experience an increase in individual income tax revenue. The DEQ and the Department found that the pipeline was not expected to have an impact on residential or agricultural property values and would generate a substantial amount of new economic activity, millions of dollars in annual property tax revenue, and hundreds of jobs for Nebraskans. O'Hara opined that property values would decrease by 15 percent and that property taxes would decrease over the life of the pipeline.

The PSC found that "much of the economic testimony was conflicting," but concluded that the pipeline would accrue an economic benefit in Nebraska, and that Nebraska will "benefit from the investment and activity that is associated with the pipeline construction and operation."

(ii) Social Impacts

The evidence of social impacts primarily concerned impacts on cultural resources and impacts from a temporary camp for pipeline workers that may be built in Holt County. MOPSA does not specifically state that the PSC must evaluate impacts on cultural resources. As noted, § 57-1407(4)(d) states the PSC shall consider "[e]vidence regarding the economic and social impacts of the major oil pipeline." The parties and the PSC understood the cultural resources issue to be a piece of the PSC's obligation to consider evidence of social impacts. The

parties and the PSC generally understood "cultural resources" to mean "physical evidence of culturally and historically valued aspects of the human and natural environment on the landscape," as defined by the DEQ.

The preservation of historic resources is a matter of federal law governed by the National Historic Preservation Act. The Department has been designated the federal agency responsible for the review of TransCanada's permit, which has been determined to be a federal undertaking. Nebraska provides resources in coordination with this effort. Pursuant to Neb. Rev. Stat. § 82-118 (Reissue 2014), the Nebraska State Historical Society, under the direction of the Nebraska State Historic Preservation Officer, is the state agency responsible for carrying out the purposes and objectives of the National Historic Preservation Act.

Pursuant to the National Historic Preservation Act, Pub. L. No. 89-665, § 106, 80 Stat. 917, the Department, the Nebraska State Historic Preservation Officer, TransCanada, and various other state and federal agencies entered into an amended PA in December 2013. According to the Nebraska State Historical Society, a § 106 review identifies "arch[a]eological or historic resources . . . *listed* or *eligible* for listing in the National Register of Historic Places." The PA requires TransCanada to complete cultural resources surveys on all areas that would potentially be impacted by the proposed undertaking and to provide adequate mitigation in consultation with the Department, state and federal agencies, and Indian tribes. The PA requires TransCanada to avoid, when possible, adverse effects on known cultural resources. When unanticipated cultural resources are discovered, all construction within a 100-foot radius must cease and may only resume after the resources are evaluated and protected according to the requirements under the PA. The PA includes a "Tribal Monitoring Plan" that allows "tribal monitors with experience in the identification of cultural resources to monitor construction along the pipeline route." The CMRP also contains a commitment to

comply with any PA in order to minimize the impact on cultural sites along the route.

Ponca's witness Wright stated that construction of the pipeline could damage or destroy historic sites, but he acknowledged this concern would be addressed if TransCanada adhered to the PA. Ponca stated that the Ponca Trail of Tears would not be included within the PA's protections, because the trail is not listed on the National Register of Historic Places. However, the PA applies to any historical site eligible for inclusion on the national register, and furthermore, the PA commits TransCanada to protecting known cultural sites. TransCanada presented evidence that it is prepared to address the issue. TransCanada's application states that it intends to avoid culturally significant sites by rerouting the pipeline "to the extent practicable." Testimony at the hearing reflected that TransCanada has successfully avoided every eligible cultural site it has encountered thus far. TransCanada will have the opportunity to complete further cultural surveys prior to construction and to implement the necessary procedures under the PA.

Ponca assigns error to the PSC's determination that the preservation of cultural issues is a matter of federal law and argues that MOPSA requires an analysis with greater focus on Nebraska's cultural resources. We disagree with Ponca's characterization that the PSC did not evaluate the impact on Nebraska's cultural resources. In its analysis, the PSC articulated features of the federal scheme that are available to address the risks to local cultural resources. The PSC found that TransCanada's record of compliance with the PA and the National Historic Preservation Act showed TransCanada's compliance would likely continue and that the Department will require compliance with federal law. The PSC concluded that these safeguards "help to assure that the route of the pipeline will be in the public interest."

The Nebraska State Historical Society, the state agency responsible for preserving historic resources, informed the PSC that, according to the processes outlined in the PA,

TransCanada is required to "complete cultural resources surveys on all areas that would be potentially impacted," "make recommendations on National Register of Historic Places eligibility," and "provide adequate mitigation in consultation with the Department . . . , state and federal agencies, and Indian tribes." The Nebraska State Historical Society advised that these processes protect cultural resources.

Moreover, existing state laws protect cultural resources. Under Nebraska law, it is a crime to knowingly and willfully appropriate, excavate, injure, or destroy an archaeological resource on public land without written permission from the State Archaeology Office.[59] Neb. Rev. Stat. § 12-1205 (Cum. Supp. 2018) makes it a crime to knowingly fail to report the encounter of an unmarked human burial, and it requires the cessation of any activity that may disturb the burial. Neb. Rev. Stat. § 28-1301 (Reissue 2016) describes the offense of removing, abandoning, or concealing human skeletal remains or burial goods. TransCanada must comply with these laws.

The temporary camps for pipeline workers do not make approving the MAR contrary to the public interest. All such camps must be permitted, constructed, and operated consistent with applicable county, state, and federal regulations. TransCanada must require camp residents to comply with a written code of conduct and potentially expel those found in violation. The camps will be fenced and secured with video surveillance and a guardhouse, staffed at all times. Only authorized personnel will be granted access to the camps; no visitors will be permitted. The record concerning § 57-1407(4)(d) supports the PSC's finding that TransCanada met its burden of proof.

(e) Other Utility Corridors

The PSC must evaluate "[w]hether any other utility corridor exists that could feasibly and beneficially be used for

[59] Neb. Rev. Stat. § 82-507 (Reissue 2014).

the route of the major oil pipeline."[60] The PSC interpreted the phrase "utility corridor" to mean "a passageway for facilities providing public services." The PSC gave significant weight to the fact that the MAR "was developed to maximize the length of co-location with [Keystone I]" and takes advantage of the fixed entry point in Keya Paha County. The PSC found the MAR to be the most beneficial route, because the PR failed to take advantage of an existing utility corridor. The appellants urged approval of the I-90 Route, but the PSC rejected that proposal based on the lack of a feasible entry point. Upon de novo review, we are persuaded that the MAR's co-location with Keystone I maximizes efficiency and reduces impacts to undeveloped land and natural resources.

The PSC evaluated the eight public interest factors under § 57-1407(4) and was persuaded by the evidence in favor of the MAR under § 57-1407(4)(e). The PSC's reasoning is compelling, because the record shows that by satisfying the considerations under § 57-1407(4)(e), the MAR's co-location with Keystone I enhances the overall strength of the route application and serves other public interest factors under § 57-1407(4). There is evidence to support the PSC's reasoning in giving great weight to TransCanada's evidence under § 57-1407(4)(e) in deciding that the MAR, rather than the PR or I-90 Route, is in the public interest. The record concerning § 57-1407(4)(e) supports the PSC's finding that TransCanada met its burden of proof.

(f) Impact on Orderly Development of Area

The PSC must evaluate "[t]he impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline."[61] There was a lack of evidence that significant restrictions on development would occur. The PSC observed that while future developments

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[60] § 57-1407(4)(e).

[61] § 57-1407(4)(f).

would need to avoid the pipeline, "similar restrictions on development occur in areas near other infrastructure, i.e., roads, bridges, dams, power lines, etc." The MAR mitigates interference with orderly development by co-locating with Keystone I. In addition, the CMRP's mitigation procedures address possible impacts of construction. The PSC's consultants concluded that the pipeline would "play an 'insignificant role in residential value, crop production, invasive species, and land development.'" We agree with the PSC that the impact on development of the area seems minimal. The record concerning § 57-1407(4)(f) supports the PSC's finding that TransCanada met its burden of proof.

(g) State Agency Reports

The PSC must evaluate "[t]he reports of the agencies filed pursuant to subsection (3) of this section."[62] The PSC consulted all nine agencies listed within § 57-1407(3) on both the PR and the MAR. The agencies were familiar with the project based on prior efforts and did not express any concerns about the approval, denial, or relocation of either route.

As already noted, Nebraska's Department of Revenue found that the pipeline will generate revenue from sales taxes, use taxes, property taxes, and income taxes. The Nebraska State Historical Society stated that the necessary measures for protecting cultural resources are in place. The Nebraska Game and Parks Commission explained that it would help "avoid and minimize impacts on species and their habitats." And we reiterate the DEQ's finding that the MAR "would have minimal environmental impacts in Nebraska." The record concerning § 57-1407(4)(g) supports the PSC's finding that TransCanada met its burden of proof.

(h) Views of Counties and Municipalities

The PSC must evaluate "[t]he views of the governing bodies of the counties and municipalities in the area around the

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[62] § 57-1407(4)(g).

proposed route of the major oil pipeline."[63] The PSC sent letters soliciting input to 18 counties and 32 cities along both the PR and the MAR. Boone, Nance, Saline, and Seward Counties expressed their approval; Boyd and Holt Counties expressed their opposition. The PSC received no input from Butler, Colfax, Madison, Platte, or Stanton Counties. Seward, Nebraska, and Steele City submitted favorable responses. The record concerning § 57-1407(4)(h) supports the PSC's finding that TransCanada met its burden of proof.

We find that the PSC—after months of investigation reviewing extensive pleadings, exhibits, and reports from consultants; holding public meetings and a public hearing; considering written and oral arguments; deliberating; and issuing its opinion and findings—did not err in concluding that TransCanada proved by a preponderance of the evidence that approval of the MAR is in the public interest.

3. PSC Properly Considered MAR

[13] In the appellants' next assignment of error, they argue that the PSC was not authorized to approve the MAR, because TransCanada applied for approval of only the PR, and that the notice requirements for the MAR were not met. While it is true that TransCanada requested in its application "an order from the PSC that the [PR] is in the public interest," we nevertheless find it indisputable that TransCanada included the MAR in its application and that the parties were on notice that the MAR was at issue. The rules of pleading are not applied in administrative proceedings as strictly as they are in court proceedings.[64] Administrative pleading rules require simply that the parties be sufficiently apprised of the nature of the proceedings so that there is no unfair surprise.[65]

The hearing officer for the PSC devoted a separate section of its intervention order to the MAR and made clear

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[63] § 57-1407(4)(h).

[64] See *In re Appeal of Bonnett*, 216 Neb. 587, 344 N.W.2d 657 (1984).

[65] *Id.*

that the merits of the MAR would be considered. The order stated that the SAR would not be considered and informed the parties that they should be prepared to address the MAR by granting them leave to designate an additional witness and offer exhibits pertaining to the MAR. There was no objection to the MAR section of the order. The case management order stated that "any/all Hearing Officer Orders . . . will apply to and bind all parties, will control the course of the proceedings, and may be modified only by order of the Hearing Officer."

Following a prehearing conference, the hearing officer modified the intervention order by allowing each intervenor group to present testimony from two witnesses, "in addition to the ability to bring an additional witness regarding the [MAR] as detailed in the [intervention order]." The PSC's Rules of Commission Procedure provide that once an order is entered "a reasonable time will be allowed for the parties to present objections . . . . Thereafter, the terms of the order . . . determine the subsequent course of the proceedings . . . ."[66] Generally, the failure to object to the specifications in the pretrial order waives any right to claim error in that regard.[67] The pretrial order is binding upon the parties. The issues set out in a pretrial order supplant those raised in the pleadings.[68]

[14] The appellants also contend that the PSC denied them procedural due process. Due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings.[69] Contrary to the intervenors' assertions,

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[66] 291 Neb. Admin. Code, ch. 1, § 020.04 (1992).

[67] See *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990).

[68] See, *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014), *overruled on other grounds, Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017); *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996). See, *Kustom Kreations v. Duxbury*, 216 Neb. 99, 342 N.W.2d 656 (1983); *Jonas v. Willman*, 27 Neb. App. 251, 930 N.W.2d 60 (2019).

[69] *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998).

the PSC's decision to approve the MAR is a reflection of the evidence and arguments presented. As already discussed, MOPSA "is intended to deal solely with the issue of siting or choosing the location of the route."[70] MOPSA allows Nebraska to exercise its sovereign authority "to protect its land and natural resources . . . by regulation through approval or disapproval of major oil pipeline siting and the location of routes."[71] MOPSA grants the PSC the authority to consult state agencies "regarding the advisability of approving, denying, or modifying the location of the proposed route of the major oil pipeline."[72] As explained, among the factors the PSC must evaluate is "[w]hether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline."[73]

The record contained extensive evidence concerning the MAR. There was significant overlap in the evidence concerning the routes; much of the evidence concerning the PR and Keystone I equally applied to the MAR. The PR and the MAR are the same route for the first 110 miles and approximately 97 of the MAR's remaining 170 miles co-locate with Keystone I. Several witnesses addressed these routes and the differences between them in their testimony.

Hayes testified that compared to the PR, the MAR substantially decreases the overall negative impacts of the pipeline. Kothari testified that the MAR was beneficial and feasible. Schmidt was questioned at length and in detail about the MAR to draw out comparisons between the MAR, the PR, and the I-90 Route. Wright provided testimony concerning the MAR. The consultants advised the PSC that there is little difference in soil characteristics between the PR and the MAR.

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[70] § 57-1402(2).

[71] § 57-1403(1).

[72] § 57-1407(3).

[73] § 57-1407(4)(e).

The DEQ evaluated the MAR and informed the PSC that the MAR would have minimal permanent environmental impacts in Nebraska. The PSC heard evidence that TransCanada modified the MAR to avoid wellhead protection areas based on the DEQ's recommendations. Seward's city council recognized this and approved the MAR on that basis. Thus, the suggestion that the appellants were not afforded notice and an opportunity to be heard on the MAR disregards considerable portions of the record. Fundamental issues before the PSC were whether or not to approve the PR or the MAR.

Ponca argued that "*the PSC could decide it preferred the* [*MAR*] *based on the evidence*, but it was required to deny the [a]pplication for the [PR] and invite TransCanada to file a new application for the [MAR]."[74] Ponca's argument referred to § 57-1408(4), which provides in part that "[i]f the commission *denies* the application, the pipeline carrier may amend the *denied application* in accordance with the findings of the commission and submit the amended application within sixty days after the issuance of the *order denying the application*." (Emphasis supplied.) The record makes clear that the PSC granted the application, approved the MAR, and determined that amendment pursuant to § 57-1408(4) was unnecessary when it overruled TransCanada's motion for reconsideration. The PSC's decision was consistent with the policy under MOPSA to "[e]nsure that a coordinated and efficient method for the authorization of such construction is provided."[75] There was no need to amend the application, because the application was supplanted by the hearing officer's orders concerning the MAR when no party objected to the orders. The parties effectively tried the matter as one seeking approval of the MAR. Moreover, there was no need for the PSC to grant the motion to amend, because in the civil context courts have the power to constructively

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[74] Reply brief for appellee Ponca on cross-appeal at 7 (emphasis supplied).

[75] § 57-1402(1)(e).

amend pleadings in order to render a decision consistent with the trial.[76]

Neither do we find a basis to reverse the PSC's decision due to a failure to satisfy MOPSA's notice requirements. The PSC published notice of the public hearing on TransCanada's application in newspapers in general circulation along both the PR and the MAR. The PSC sent letters to the governing bodies along both routes and advised them that a copy of the application is available online at the PSC's website. The PSC released additional press releases at the time the application was filed and provided notice of several public meetings and the public hearing.

[15,16] Furthermore, these intervenors waived the right to object based on lack of notice. It is generally held that participation in the hearing waives any defect in the notice.[77] If notice is materially lacking, then a timely objection will permit the public body to promptly remedy the defect and defer formal action until the required public notice can be given.[78] The intervenors failed to raise the issue of notice in response to the prehearing orders, at the public hearing, or in their motions for reconsideration. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency.[79] This assignment of error is without merit.

4. Participation Claim Without Merit

Ponca and Yankton Sioux argue that the PSC improperly limited their participation to social and cultural issues. They

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[76] See, *Denali Real Estate v. Denali Custom Builders*, 302 Neb. 984, 926 N.W.2d 610 (2019); *Zelenka v. Pratte*, 300 Neb. 100, 912 N.W.2d 723 (2018); *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[77] See, *Hansen v. City of Norfolk*, 201 Neb. 352, 267 N.W.2d 537 (1978); *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976).

[78] See *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979).

[79] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

argue that their petitions alleged governmental and territorial interests and that the PSC's regulations allow the intervenors to present evidence on any express interest stated in a petition for intervention. They argue that the PSC improperly ordered them to combine their witnesses and cross-examination time. Yankton Sioux argues that the conditions imposed by the PSC violated its equal protection rights. TransCanada argues that this court lacks appellate jurisdiction to consider the intervenors' arguments, because the intervenors did not appeal from the PSC's order on petitions for intervention. The intervenors argue the intervention order was not a final order, because the order did not deny intervention.

(a) Final Order

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[80] The jurisdictional issue before us is whether the intervenors' objections to the scope of their participation may be reviewed after their appeal from the PSC's judgment on the merits or whether the intervenors were required to appeal from the PSC's order on petitions for intervention.

[17] We have consistently held that an order denying intervention is a final order for purposes of appeal.[81] Here, the PSC's intervention order did not deny intervention, but, rather, granted petitions for intervention and imposed conditions on the scope of intervention. Such an order is not final in the traditional sense in that the order is not a final determination of the parties' rights. Moreover, agency orders granting petitions for intervention subject to conditions are interlocutory in

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[80] *In re Grand Jury of Douglas Cty., supra* note 21.

[81] *Streck, Inc. v. Ryan Family*, 297 Neb. 773, 901 N.W.2d 284 (2017); *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985). See, *Wayne L. Ryan Revocable Trust v. Ryan*, 297 Neb. 761, 901 N.W.2d 671 (2017); *Spear T Ranch v. Knaub*, 271 Neb. 578, 713 N.W.2d 489 (2006); *Shold v. Van Treeck*, 82 Neb. 99, 117 N.W. 113 (1908).

nature. Under the APA and Nebraska's Model Rules of Agency Procedure, an agency may modify an order imposing conditions on intervention at any time.[82]

The U.S. Supreme Court held in *Stringfellow v. Concerned Neighbors in Action*[83] that an order granting permissive intervention, subject to conditions, and denying intervention as of right was not an appealable order. The Court explained that an order denying intervention is subject to appellate review by necessity, because the petitioner has no right to appeal from any subsequent order or judgment in the proceeding.[84] Conversely, the imposition of conditions on intervention can be reviewed on appeal from a final judgment. Here, the PSC's intervention order did not deny the petitions for intervention and therefore was not a final order. The intervenors properly appealed from the PSC's judgment on the merits, and we have jurisdiction in such an appeal to consider their objections to the order which placed conditions on their participation.

(b) Merits

[18] Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[85] 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.[86]

Pursuant to its authority under § 57-1410, the PSC adopted rules and regulations to carry out MOPSA. Under 291 Neb. Admin. Code, ch. 9, § 023.06 (2013), "The filing of petitions for intervention . . . and the conduct of the hearing shall be

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[82] § 84-912.02(4); 53 Neb. Admin. Code, ch. 4, § 003.04 (1994).

[83] *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987).

[84] *Id.*

[85] *Tran v. State, ante* p. 1, 926 N.W.2d 641 (2019).

[86] *Id.*

governed by the Rules of Commission Procedure." Under the PSC's Rules of Commission Procedure, any person who has an interest in a proceeding before the PSC, who does not desire to file a formal protest, may file a petition of formal intervention and shall become a party to the proceeding.[87] Generally, one who intervenes becomes a party to the litigation and has all the rights of a party.[88] An intervenor can engage in discovery, file motions, introduce evidence, examine witnesses, and file an appeal.[89]

The PSC's regulations further provide:

> A formal intervenor shall be entitled to participate in the proceeding to the extent of his/her express interest in the matter. Such participation shall include, without limitation, presentation of evidence and argument, cross-examination of witnesses and submission of rebuttal evidence. As a party, a formal intervenor shall have the right of appeal.[90]

The PSC is also an "agency" within the meaning of the APA, and the APA's provisions apply to the PSC.[91] The PSC has authority to take actions affecting parties subject to its jurisdiction if such action is taken pursuant to a statute.[92] The APA grants the PSC the power to impose conditions upon an intervenor's participation, and this action is distinct from granting or denying a petition for intervention.[93] Section 84-912.02(3) of the APA states in pertinent part:

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[87] 291 Neb. Admin. Code, ch. 1, § 015.01 (1992).

[88] See *Brown v. Jacobsen Land & Cattle Co.*, 297 Neb. 541, 900 N.W.2d 765 (2017).

[89] *Id.*

[90] 291 Neb. Admin. Code, ch. 1, § 015.01C (1992).

[91] *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999). See *Yellow Cab Co. v. Nebraska State Railway Commission*, 175 Neb. 150, 120 N.W.2d 922 (1963).

[92] See, Neb. Rev. Stat. § 75-110(1) (Reissue 2018); *In re Application No. C-1889, supra* note 36.

[93] See, § 75-110(2); § 84-912.02.

> If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:
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> . . . .
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> (b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
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> (c) Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

The PSC granted the petitions for formal intervention filed by Ponca and Yankton Sioux in recognition of their interests in the case, then limited the scope of their participation to the issues of impacts on social and cultural resources, as relevant under § 57-1407(4)(d) of MOPSA. The PSC stated it imposed these conditions "in order to balance the statutorily truncated timeframe [and] the need to consider certain statutorily required issues, with the parties' due process interests in being heard, and in the interest of maintaining an orderly proceeding."

The intervenors argue the conditions imposed by the PSC violated the PSC's own regulations. Ponca asserts that "the language [of the regulation] is clear — the evidence, argument, and cross-examination 'shall' be 'without limitation.'"[94] However, Ponca's argument departs from the plain meaning and organization of the language used in the regulation. The language provides that an intervenor's "participation shall include, without limitation, presentation of evidence and argument, cross-examination of witnesses and submission of rebuttal evidence."[95] We interpret this language according to its plain and ordinary meaning. Here, the phrase "without

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[94] Brief for appellee Ponca on cross-appeal at 16.

[95] 291 Neb. Admin. Code, ch. 1, § 015.01C.

limitation" indicates that an intervenor is entitled to engage in each form of participation listed in that sentence, i.e., the intervenor will participate in the "presentation of evidence and argument, cross-examination of witnesses and submission of rebuttal evidence." In this context, "without limitation" does not mean, as Ponca argues, that an intervenor's participation shall be unlimited. Taken to its logical conclusion, the intervenors' position would eliminate basic procedural norms. For example, the intervenors' reading would eliminate a hearing officer's ability to "exclude evidence which is cumulative or repetitious."[96] The intervenors' interpretation of "without limitation" is unreasonable, would yield absurd results, and is contrary to MOPSA.

The PSC advised the parties in numerous orders of its obligation to bring the proceedings to a timely resolution. Working under strict time restraints, the PSC had a managerial responsibility to oversee approximately 100 petitions for intervention; organize a representative presentation of evidence; acquire input from the public, agencies, local governments, and consultants; and issue a written order disposing of the case. The PSC would be unable to carry out these duties if it were required to afford unbounded participation to every intervenor. "[I]ntervention is a useful tool, but [one] which must be used carefully[,] lest the manageable lawsuit become an unmanageable cowlick."[97] Upon de novo review, we find no error in the PSC's interpretation of its own regulations or its actions taken pursuant to the APA.

The intervenors failed to show that the hearing officer's decisions violated their due process or equal protection rights. The intervenors presented evidence and argument, cross-examination, and redirect; had the opportunity for rebuttal; and filed briefs. The hearing officer gave the intervenors

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[96] 291 Neb. Admin. Code, ch. 1, § 016.05 (1992).

[97] *Wilderness Society v. Morton*, 463 F.2d 1261, 1263 (D.C. Cir. 1972) (Tamm, Circuit Judge, concurring).

opportunities to bring out the differences in their positions regarding the pipeline, but they failed to form questions that were not redundant. The hearing officer explained to the intervenors that they had "asked the same questions of virtually every witness." The hearing officer received no substantive offer of proof to justify modifying the conditions and therefore adhered to the prehearing order. The intervenors' cross-examination time was not restricted. The parties never reached their 1-hour time limit for cross-examination. Additionally, they failed to call a witness allotted to address the MAR. The PSC did not act contrary to its own regulations or impose procedural conditions beyond its authority under the APA and Nebraska's Model Rules of Agency Procedure, and its decisions did not injure the intervenors' substantive rights. This assignment of error is without merit.

5. MOPSA Evidence Not Hearsay

[19,20] The intervenors next argue that the PSC erred in receiving into evidence public comments, transcripts of public meetings, and the consultants' reports. The intervenors argue that by including these materials in the record, the PSC violated their due process rights, because the evidence was inadmissible hearsay. It is undisputed that the Nebraska Evidence Rules applied to the proceedings. The Nebraska Evidence Rules provide that hearsay is admissible when authorized by the statutes of the State of Nebraska.[98] The legislative branch has the right to prescribe the admissibility of certain categories of evidence, but it is solely a judicial function to determine the weight, if any, to be given such evidence.[99]

Section 57-1407(2) permits the PSC to hold public meetings for the purpose of receiving public input at locations near the route and requires the PSC to "make the public input part of the record." Section 57-1407(3) allows the PSC to request

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[98] Neb. Rev. Stat. § 27-802 (Reissue 2016).

[99] See *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 894 N.W.2d 788 (2017).

state agencies to file a report "regarding information within the respective agencies' area of expertise relating to the impact of the major oil pipeline." Neb. Rev. Stat. § 57-1412 (Cum. Supp. 2018) enables the PSC to retain consultants "to assist with reviewing applications under [MOPSA]."

[21] The PSC included in the record evidence from public meetings held in York, O'Neill, Norfolk, and Ralston; reports from agencies listed under § 57-1407(3); and reports from consultants. The landowners objected on hearsay grounds and moved for a "mistrial," which the hearing officer overruled. The hearing officer's decision was correct because, assuming that the evidence in question was hearsay, the evidence was admissible by operation of MOPSA and § 27-802. Even if the PSC erred by admitting this evidence, the intervenors made no showing that they were unfairly prejudiced by the admission of the evidence. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.[100] This assignment of error lacks merit.

6. Remaining Arguments Not Properly Raised in MOPSA Proceeding

Lastly, the intervenors raise constitutional challenges to various statutes. We conclude that these arguments are improperly raised in a MOPSA proceeding before the PSC, because the intervenors' arguments do not relate to whether or not the PSC should grant an application for a major oil pipeline route.

[22-24] As stated above, the intervenors have the full rights of original parties in a case. However, our jurisprudence recognizes some practical limitations on the right to intervene. The intervenors can raise only issues that sustain or oppose the respective contentions of the original parties.[101] An intervenor

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[100] *Reiber v. County of Gage, ante* p. 325, 928 N.W.2d 916 (2019).

[101] *Streck, Inc. v. Ryan Family, supra* note 81; *Wayne L. Ryan Revocable Trust v. Ryan, supra* note 81.

who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented therein.[102] "'[I]t is fundamental that an intervenor takes the action as he finds it and cannot secure relief that is foreign or extraneous to the action.'"[103] In other words, an intervenor cannot widen the scope of the issues, broaden the scope or function of the proceedings, or raise questions which might be the subject of litigation but which are extraneous to the controlling question to be decided in the case.[104] Here, the intervenors improperly sought to alter the scope and nature of a MOPSA proceeding by raising challenges to the constitutionality of various statutes, in particular §§ 57-1101, 57-1401, 57-1403, 57-1407(2) and (3), and 57-1408.

The original parties in a MOPSA proceeding are the applicant and the PSC. The PSC is a party in a MOPSA proceeding, because the PSC acts as more than a neutral factfinding body; the PSC is in charge of serving the public interest[105] and has investigative responsibilities.[106] The original parties did not challenge the constitutionality of MOPSA's provisions, but instead conducted the proceedings in recognition of their statutory obligations.

The intervenors' challenge to § 57-1101 miscomprehends condemnation proceedings. A condemnation proceeding is an

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[102] *Gilbert v. First National Bank*, 154 Neb. 404, 48 N.W.2d 401 (1951); *State ex rel. Nelson v. Butler*, 145 Neb. 638, 17 N.W.2d 683 (1945). See, *Chandler Co. v. Brandtjen, Inc.*, 296 U.S. 53, 56 S. Ct. 6, 80 L. Ed. 39 (1935); John P. Lenich, Nebraska Civil Procedure § 16:9 (2019).

[103] *Harleysville Ins. Group v. Omaha Gas Appliance Co.*, 278 Neb. 547, 552, 772 N.W.2d 88, 93 (2009), quoting *Arnold v. Arnold*, 214 Neb. 39, 332 N.W.2d 672 (1983).

[104] *Id.* See, *State ex rel. Nelson v. Butler, supra* note 102; *First Nat. Bank of Neligh v. Lancaster*, 54 Neb. 467, 74 N.W. 858 (1898).

[105] See, § 84-917(2)(a)(i); *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014).

[106] See *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005). See, also, e.g., §§ 57-1407(2) and (3) and 57-1412.

action brought by a condemning authority in the exercise of its power of eminent domain.[107] In other words, eminent domain is the right or power to take private property for a public use and condemnation is the procedure whereby this power is exercised.[108] In a condemnation action, some right in property must be taken or damaged to afford a basis for relief.[109] The determination of compensation to the owner of property condemned for public use, by ascertaining the value of property taken or damaged, is a judicial function.[110] MOPSA proceedings merely concern what route, if any, should be approved, and as such, concern antecedent issues. The intervenors' concerns regarding § 57-1101 are premature and would be more properly raised in subsequent condemnation proceedings. After reviewing the record, we find no plain error and no merit to any assignment of error.

V. CONCLUSION

In summary, the PSC is an elected body created by the Nebraska Constitution to serve the public interest. In § 57-1403 of MOPSA, the Legislature determined that "[t]he construction of major oil pipelines in Nebraska is in the public interest . . . ." The Legislature designated the PSC as the agency responsible for determining which pipeline route is in the public interest. After months of careful consideration, the PSC determined that the evidence showed that the MAR is in the public interest. Upon de novo review, we find there is sufficient evidence to support the PSC's determination that the MAR is in the public interest. The assignments of error are without merit.

Affirmed.

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[107] See *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013).

[108] *Van Patten v. City of Omaha*, 167 Neb. 741, 94 N.W.2d 664 (1959).

[109] *Lockard v. Nebraska Pub. Power Dist.*, 249 Neb. 971, 546 N.W.2d 824 (1996).

[110] See *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951).

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Danny J. McGinn, appellant.
932 N.W.2d 83

Filed August 23, 2019. No. S-18-744.

SUPPLEMENTAL OPINION

Appeal from the District Court for Holt County, Mark D. Kozisek, Judge, on appeal thereto from the County Court for Holt County, Kale B. Burdick, Judge. Former opinion modified. Motion for rehearing overruled.

Forrest F. Peetz, of Peetz Law, 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.

Per Curiam.

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

In the analysis section, we withdraw the last paragraph[2] and substitute the following:

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[1] *State v. McGinn, ante* p. 224, 928 N.W.2d 391 (2019).

[2] *Id.* at 234, 928 N.W.2d at 398.

> In this matter, because we consider all evidence admitted by the trial court, erroneously or not, we consider the breath test in our double jeopardy analysis. Considering the breath test, the evidence was sufficient to sustain a guilty verdict for a violation of § 60-6,196(1)(c) as charged. As such, double jeopardy does not forbid a remand for a new trial. Therefore, in consideration of all of the above, we reverse the district court's decision affirming the county court's conviction and remand the cause to the district court with directions to remand the matter to the county court for a new trial.

In the sole paragraph of the conclusion section, we withdraw the last sentence[3] and substitute the following: "Accordingly, we reverse the district court's decision affirming the county court's conviction, but determine double jeopardy does not require dismissal of this action."

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

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[3] *Id.*

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

State of Nebraska on behalf of Kaaden S., a minor child, appellee, v. Jeffery T., appellant, and Mandy S., appellee.

932 N.W.2d 692

Filed August 30, 2019. No. S-17-1210.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.
2. **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.
3. **Evidence: Appeal and Error.** In a de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Child Custody: Visitation.** The Parenting Act does not require any particular parenting time schedule to accompany an award of either sole or joint physical custody, and there exists a broad continuum of possible parenting time schedules that can be in a child's best interests.
5. **Child Custody: Visitation: Words and Phrases.** An alternating week-on-week-off parenting time schedule requires the child to spend roughly the same amount of time at each parent's residence and allows both parents to exert continuous blocks of parenting time for significant periods of time, and thus meets the statutory definition of joint physical custody.
6. **Child Custody: Visitation.** Where a parenting plan effectively establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.

7. **Divorce: Child Custody.** The Parenting Act authorizes a trial court to award joint custody in dissolution actions if 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.
8. **Courts: Appeal and Error.** The doctrine of stare decisis requires that appellate courts adhere to their previous decisions unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. The doctrine is entitled to great weight, but it does not require courts to blindly perpetuate a prior interpretation of the law if it was clearly incorrect.
9. **Child Custody: Judges.** A blanket rule disfavoring joint physical custody is inconsistent with the Parenting Act and unnecessarily constrains the discretion of trial judges in some of the most important and difficult decisions they are called upon to make.
10. **Child Custody.** Joint physical custody is neither favored nor disfavored under Nebraska law. In fact, no custody or parenting time arrangement is either favored or disfavored as a matter of law.
11. ____. When determining the best interests of the child in deciding custody, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action; (2) the desires and wishes of a sufficiently mature child, if based on sound reasoning; (3) the general health, welfare, and social behavior of the child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse.
12. **Visitation.** The Parenting Act provides that the best interests of a child require a parenting plan that provides for a child's safety, emotional growth, health, stability, physical care, and regular school attendance, and which promotes a child's continued contact with his or her families and parents who have shown the ability to act in the child's best interests.
13. ____. When determining the allocation of parenting time that is in a child's best interests, a trial court should consider the parties' ability to communicate on issues such as transportation, homework, discipline, medical and dental appointments, and extracurricular activities. Other relevant considerations include stability in the child's routine, minimalization of contact and conflict between the parents, and the general nature and health of the individual child. The fact that one parent might interfere with the other's relationship with the child is also a factor to consider, but is not a determinative factor.

14. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines require child support orders to address how the parents will provide for the child's health insurance.
15. ____: ____. Neb. Ct. R. § 4-215(B) of the Nebraska Child Support Guidelines estimates $480 as an ordinary amount of nonreimbursed medical expenses, and that figure is then subsumed within the amount of child support that is ordered. Any nonreimbursed expenses exceeding $480 are prorated between the parties.
16. ____: ____. Child support payments should generally be set according to the child support guidelines.

Petition for further review from the Court of Appeals, Pirtle, Riedmann, and Welch, Judges, on appeal thereto from the District Court for Jefferson County, Ricky A. Schreiner, Judge. Judgment of Court of Appeals affirmed in part as modified, and in part reversed and remanded with directions.

Ronald R. Brackle for appellant.

Angelica W. McClure, of Kotik & McClure Law, for appellee Mandy S.

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

Stacy, J.

In this paternity action, the district court awarded primary legal and physical custody of a minor child to the father and awarded the mother nearly equal parenting time. Child support was calculated using a joint custody worksheet, and the father was ordered to pay monthly support. The father appealed, assigning multiple errors, including that the award of nearly equal parenting time was, in effect, an award of joint physical custody and was an abuse of discretion. The Nebraska Court of Appeals agreed, and it reversed and remanded with directions to modify the mother's parenting time so it was "consistent with an award of primary physical custody" to the father.[1] In

[1] *State on behalf of Kaaden S. v. Jeffery T.*, 26 Neb. App. 421, 430, 920 N.W.2d 39, 48 (2018).

doing so, the Court of Appeals relied on Nebraska precedent holding that joint physical custody is disfavored and should be reserved for rare cases.[2] We granted the mother's petition for further review to reexamine that precedent.[3]

We now hold that a blanket rule disfavoring joint physical custody is inconsistent with the Parenting Act,[4] which requires that all determinations of custody and parenting time be based on factors affecting the best interests of the child. We thus disapprove of our prior rule disfavoring joint physical custody, and we clarify that Nebraska law neither favors nor disfavors any particular custody arrangement and instead requires all such determinations to be based on the best interests of the child.

When the custody and parenting time in the instant case are reviewed under this standard, we find no abuse of discretion. We thus reverse the Court of Appeals' determination to the contrary and remand the matter with directions to affirm the judgment of the district court as it regards custody, parenting time, and child support.

I. FACTS

Kaaden S. was born to Mandy S. and Jeffery T. in June 2014. The parents did not have a dating relationship either before or after conception. Mandy notified Jeffery of her pregnancy, and Jeffery was at the hospital on the day Kaaden was born.

In February 2015, the State filed a paternity action against Jeffery in the district court for Jefferson County, including Mandy as a third-party defendant. Jeffery's answer admitted paternity, and he filed a cross-claim against Mandy seeking

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[2] *State on behalf of Kaaden S., supra* note 1, citing *Erin W. v. Charissa W.*, 297 Neb. 143, 897 N.W.2d 858 (2017).

[3] See, e.g., *Erin W., supra* note 2; *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007); *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984); *Aguilar v. Schulte*, 22 Neb. App. 80, 848 N.W.2d 644 (2014).

[4] Neb. Rev. Stat. §§ 43-2920 to 43-2943 (Reissue 2016 & Cum. Supp. 2018).

joint legal and physical custody of Kaaden and asking that Kaaden's surname be changed. Mandy's responsive pleading admitted Jeffery was Kaaden's father and requested sole legal and physical custody of Kaaden. Genetic testing later confirmed Jeffery was Kaaden's biological father.

In July 2015, the district court entered an order finding Jeffery was Kaaden's father, but reserved the issues of custody, parenting time, and child support pending further hearing. Approximately 1 year later, when Kaaden was nearly 2 years old, the district court entered an order establishing temporary child support and parenting time. The temporary order allowed Jeffery supervised, nonovernight visits for 60 days and then progressed to give Jeffery parenting time every other weekend and on Wednesday evenings.

Mandy did not comply with the temporary order and consistently refused to allow Jeffery overnight parenting time with Kaaden. Jeffery sought to have Mandy held in contempt of court for failing to comply with the temporary order, and the contempt matter was set to be taken up at the time of trial.

Generally, as Jeffery's parenting time with Kaaden increased, the quality of the interaction between Mandy and Jeffery decreased. In November 2016, Jeffery made an audio recording of a particularly contentious interaction with Mandy that occurred during an exchange of Kaaden. In the recording, Mandy can be heard yelling at Jeffery and belittling his attempts to build a relationship with Kaaden. During this interaction, Mandy pepper-sprayed Jeffery in the face and then called police to report she had been assaulted. Jeffery played the recording for the officers, and no arrest was made.

After this incident, it became even more difficult for Mandy and Jeffery to communicate. Exchanges for parenting time occurred at the sheriff's office, but remained contentious. The parties twice attempted to mediate the issues of custody, parenting time, and child support, but both times, Mandy refused to sit in the same room with Jeffery and no agreement was reached.

1. Trial

In May 2017, trial was held on the issues of custody and parenting time, child support, and contempt of the temporary order. Jeffery, whose pleadings originally had requested joint custody, sought primary physical custody of Kaaden at trial. He testified that if awarded primary custody, he would support Mandy and Kaaden's relationship and adhere to any parenting time order imposed. He also asked that Kaaden's surname be changed to his surname.

Mandy testified that she did not think joint custody would work because she and Jeffery did not communicate well, though she thought that would improve once the litigation was concluded. She asked to be awarded sole legal and physical custody of Kaaden and proposed that Jeffery have parenting time every other weekend. She requested continued child support and opposed changing Kaaden's surname. Mandy admitted she had not adhered to the parenting plan under the temporary order, but she testified that Kaaden was scared and did not want to have visits with Jeffery. She said that around the time that Jeffery's parenting time was to increase under the temporary order, Kaaden began exhibiting behavioral problems, so she took him to see a counselor.

Kaaden's counselor testified at trial. She initially diagnosed Kaaden with "separation trauma and extreme anxiety," but testified he showed significant growth over the 5 months she worked with him. The counselor had no concerns about Mandy as a custodial parent, but offered the opinion that it was best for Kaaden that contact between Mandy and Jeffery be limited. According to the counselor, Mandy had "significant unresolved issues" toward Jeffery, and she recommended Mandy participate in treatment to address it. The counselor had no opinion on the feasibility of joint custody, but did have a recommendation regarding future parenting time. She recommended that after a transition period, Jeffery's parenting time should be "week on, week off . . . until [Kaaden] reaches middle school grade age."

Before trial, the court appointed an attorney to serve as the guardian ad litem (GAL) for Kaaden. The GAL attended trial but did not testify. Instead, she was ordered by the court to submit a recommendation and written report, which was received into evidence after trial. No party objected to this procedure before the trial court.

The GAL's report detailed that she had met with both parties and their counsel, visited Kaaden at both parties' homes, observed exchanges of Kaaden during parenting time, and interviewed more than a dozen people including a nationally recognized expert in the area of parental alienation, members of Mandy's family, and friends and acquaintances of Jeffery. The GAL described the case as "one of the most difficult cases [she had] worked on in 20 years of being appointed as a [GAL]." Her report stated she was "completely confident in making the recommendation that Kaaden's primary physical custody be awarded to . . . Jeffery." The GAL believed that Mandy's "loathing" of Jeffery was harmful to Kaaden and that Mandy's pattern of "parental alienation" was unlikely to change. The GAL expressed the opinion that "it would be in Kaaden's best interests to be in a parent's custody [who] is going to make a good faith effort to work with the other parent and not sabotage Kaaden's relationship with that parent."

(a) Custody and Parenting Time

The trial court's order summarized the evidence adduced at trial and generally found that both parents were fit and had formed a good relationship with Kaaden. But the court noted:

> The complicating factor in this matter is the lack of a relationship between the parents, both prior to Kaaden's conception and continuing, and the obvious resentment Mandy has towards Jeff[er]y and the situation in which she now finds herself. Mandy testified that she believes Kaaden needs his father in his life and does not believe that Jeffery abuses Kaaden in any fashion, although she . . . appears to do everything she can to limit or monitor Jeff[er]y and Kaaden's relationship. The record reflects

that she has done everything in her power to prevent Jeff[er]y from being a father to Kaaden by contesting and litigating every attempt he has made to do so. Mandy's testimony at trial indicated that while she wanted to be a mother at some point in her life she did not envision it happening in this fashion nor was this part of her plan. That said, it's obvious she loves Kaaden. Her anger towards Jeff[er]y, unfortunately, clouds her judgment regarding what is in Kaaden's best interests at times, especially when it comes to allowing Jeffery to be involved in his life.

Mandy and Jeff[er]y both provide safe and appropriate homes for Kaaden where he enjoys a healthy diet, has a bed to sleep in, and toys and activities to keep him occupied and engaged.

. . . .

The court has addressed the parties, on the record, during the pendency of this matter. Each time I addressed them I tried to remind them that Kaaden's interests are best served by having both of his parents involved in his life, and tried to encourage Mandy to see past her hurt, fear, and anger and allow Kaaden to have his father in his life. Unfortunately, the report from [the GAL] indicates those words went in one ear and out the other because nothing has changed with her behavior. It appears she is still putting more value on her hate and anger than she is on Kaaden's ability to have a father actively engaged in his life and the benefits of that relationship.

For the reasons stated above, as well as the firm belief that doing so best ensures compliance with the order of custody so that Kaaden can enjoy the full benefits of having both parents involved in his life to the greatest degree possible, the court finds that it is in Kaaden's best interests that primary legal and primary physical custody be awarded to . . . Jeff[er]y . . . subject to liberal parenting time with . . . Mandy . . . .

The decree awarded Jeffery "primary legal and primary physical care, custody and control" of Kaaden, pursuant to a court-created parenting plan. The parenting plan described the custody award as follows:

> The father shall have sole legal and physical custody of the minor child and, as such, shall have the legal responsibility and authority to make final decisions concerning the parenting functions necessary to raising the child.
>
> . . . The principal place of residence (physical custody) of the child shall be with the father, (custodial parent) subject to the terms of this Plan.

The court-created parenting plan provided that after a brief transition period, Mandy and Jeffery would have parenting time in alternating 1-week blocks. Exchanges were to occur each Friday at 6 p.m. at the sheriff's office. The plan addressed holidays and gave each parent 2 uninterrupted weeks of summer parenting time.

(b) Child Support and Nonreimbursed Health Care Costs

The court used worksheet 3 of the Nebraska Child Support Guidelines, the joint custody worksheet, to calculate child support, and the completed worksheet was attached to the decree. In allocating the number of overnights for each parent (line 5 on the worksheet), the court attributed 182 days to Mandy and 183 days to Jeffery. Jeffery was ordered to pay child support of $93 per month and to provide health insurance for Kaaden. He was also ordered to pay the first $480 of Kaaden's nonreimbursed reasonable and necessary health care expenses each year, and Mandy was ordered to pay 50 percent of such expenses in excess of $480.

(c) Name Change, Contempt, and Attorney Fees

Jeffery's request to change Kaaden's surname was denied. The court found Mandy in willful contempt for failing to comply with the terms of the temporary order and imposed a

sanction of $50, but did not impose a purge plan. Finally, the court declined to award attorney fees and ordered the parties to pay their own fees and costs.

2. Court of Appeals

Jeffery appealed, assigning that the district court erred in (1) ordering equal parenting time, (2) calculating child support using the joint custody worksheet, (3) ordering him to pay the first $480 in nonreimbursed health care expenses, (4) refusing to change Kaaden's surname, (5) imposing a nominal fine for Mandy's contempt, and (6) denying his request for attorney fees.

The Court of Appeals found no merit to the arguments regarding the name change or attorney fees. But it agreed with Jeffery that the district court erred in its determinations regarding parenting time, child support, nonreimbursed health care expenses, and contempt. We summarize the court's reasoning below.

(a) Custody and Parenting Time

Before the Court of Appeals, Jeffery claimed the district court's parenting plan was "essentially a Joint Physical Custody Plan,"[5] which he argued was an abuse of discretion. The Court of Appeals agreed. It acknowledged that the district court had awarded primary physical custody to Jeffery, but it concluded that by giving Mandy nearly equal parenting time, the district court effectively imposed "the standard joint physical custody arrangement."[6] In considering whether such an arrangement was an abuse of discretion, the Court of Appeals relied on this court's precedent which holds:

> Joint physical custody should 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

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[5] Brief for appellant at 22.

[6] *State on behalf of Kaaden S., supra* note 1, 26 Neb. App. at 431, 920 N.W.2d at 49.

> 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.[7]

The Court of Appeals found that Mandy and Jeffery had "virtually no ability to communicate with each other regarding Kaaden"[8] and concluded it was an abuse of discretion to establish a parenting time schedule that amounted to joint physical custody. It thus affirmed the award of primary legal and physical custody to Jeffery, but reversed the parenting plan and remanded the matter to the district court to implement a parenting time schedule "consistent with an award of primary physical custody to Jeffery."[9] It did not indicate what the parameters of such a plan must be.

(b) Child Support and Medical Expenses

Because the matter was being remanded to reduce Mandy's parenting time, the Court of Appeals also found the trial court's use of the joint custody worksheet to calculate child support was in error. It therefore reversed the child support award and remanded the matter for recalculation "using the appropriate worksheet."[10] The Court of Appeals also reversed the provision in the decree requiring Jeffery to pay the first $480 of Kaaden's nonreimbursed health care expenses. It reasoned that children's health care expenses are specifically included in the child support guidelines amount of up to $480 per child per year[11] and that consequently, any nonreimbursed health care costs up to $480 were subsumed within the amount of child support ordered.[12] It directed the trial court, upon

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[7] *Id*., citing *Erin W., supra* note 2.

[8] *Id.* at 433, 920 N.W.2d at 50.

[9] *Id*. at 430, 920 N.W.2d at 48.

[10] *Id*. at 433, 920 N.W.2d at 50.

[11] See Neb. Ct. R. § 4-215(B) (rev. 2011).

[12] See, *id*.; *State on behalf of Martinez v. Martinez-Ibarra*, 281 Neb. 547, 797 N.W.2d 222 (2011).

recalculating child support to reflect Mandy's reduced parenting time, to then allocate nonreimbursed health care costs in excess of $480 accordingly.

(c) Name Change, Contempt, and Attorney Fees

Although not directly relevant to this petition for further review, we note that the Court of Appeals affirmed the district court's refusal to change Kaaden's surname, affirmed the district court's denial of Jeffery's request for attorney fees, and found that the district court committed plain error with respect to the unconditional sanction imposed for Mandy's contempt. Our opinion on further review does not affect those findings.

We granted Mandy's petition for further review.

II. ASSIGNMENTS OF ERROR

On further review, Mandy assigns, restated, that the Court of Appeals erred in (1) reversing the parenting plan and remanding the matter with instructions to reduce Mandy's parenting time, (2) finding the record did not support joint physical custody when the district court created a parenting plan that gave Mandy "de facto"[13] joint physical custody, and (3) reversing the child support calculation and the requirement that Jeffery pay the first $480 of Kaaden's nonreimbursed health care expenses.

III. STANDARD OF REVIEW

[1,2] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.[14] A judicial abuse of discretion exists if the reasons or rulings of a trial judge

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[13] Brief for appellee Mandy S. in support of petition for further review at 2.

[14] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[15]

[3] In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[16]

IV. ANALYSIS

In her first two assignments of error, Mandy argues the Court of Appeals erred in reversing the parenting time schedule and remanding the matter with directions to reduce her parenting time. After reexamining our jurisprudence, we agree.

As noted, the district court awarded Jeffery "primary" legal and physical custody of Kaaden and imposed a parenting plan that gave Mandy nearly equal parenting time. The Court of Appeals relied on its own precedent[17] and precedent from this court[18] to conclude that an award of nearly equal parenting time amounted to an award of de facto joint physical custody. It found such a custody arrangement was an abuse of discretion, relying on the legal proposition that joint physical custody is disfavored and should be reserved for rare cases.[19] We granted further review to reexamine that proposition. Before doing so, we set out the legal framework that governs child custody determinations in Nebraska.

1. Legal Custody

Under the Parenting Act adopted by the Nebraska Legislature, the concept of child custody encompasses both "legal custody and physical custody."[20] "Legal custody" focuses entirely on

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[15] *Leners v. Leners*, 302 Neb. 904, 925 N.W.2d 704 (2019).

[16] *Cesar C., supra* note 14.

[17] *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013).

[18] *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999).

[19] See, *Erin W., supra* note 2; *Aguilar, supra* note 3.

[20] § 43-2922(7).

decisionmaking authority and is defined as "the authority and responsibility for making fundamental decisions regarding the child's welfare, including choices regarding education and health."[21]

Here, Jeffery was awarded Kaaden's legal custody, and no party disputes that award. As such, Jeffery has the final say on fundamental decisions regarding Kaaden's welfare, such as where he attends school, his religious upbringing, and how his health and medical needs are met.[22] Because Kaaden's legal custody is not at issue in this appeal, we focus our analysis on the issues of physical custody and parenting time.

2. Physical Custody and Parenting Time

"Physical custody" is defined by the Parenting Act as "authority and responsibility regarding the child's place of residence and the exertion of continuous parenting time for significant periods of time."[23] As such, although the Parenting Act does not speak in terms of "sole" or "primary" physical custody, it contemplates that an award of physical custody will determine the child's primary residence and identify the parent who will exert "significant" and "continuous" parenting time over the child.[24]

"Joint physical custody" as defined by the Parenting Act means "mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time."[25] The Parenting Act does not further define either "significant periods of time" or "continuous blocks," but it does define "parenting time."[26]

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[21] § 43-2922(13).

[22] See *id*.

[23] § 43-2922(20).

[24] See *id.*

[25] § 43-2922(12).

[26] See *id.*

"Parenting time" is defined under the Parenting Act as "communication or time spent between the child and parent."[27] And the Parenting Act makes clear that regardless of the physical custody arrangement, when parents are exercising parenting time, they are performing "[p]arenting functions."[28] Parenting functions are defined to include maintaining a safe, stable, consistent, and nurturing relationship with the child; attending to the child's ongoing developmental needs, including feeding, clothing, grooming, emotional stability, and appropriate conflict resolution skills; attending to adequate education for the child; assisting the child in maintaining a safe, positive, and appropriate relationship with each parent and other family members; minimizing the child's exposure to harmful parental conflict; assisting the child in developing skills to maintain safe, positive, and appropriate interpersonal relationships; and exercising support for social, academic, athletic, or other special interests.[29]

[4] The Parenting Act does not require any particular parenting time schedule to accompany an award of either sole or joint physical custody, and there exists a broad continuum of possible parenting time schedules that can be in a child's best interests. Nebraska has a number of appellate cases in which the parties disagreed over whether a particular custody and parenting time arrangement was properly characterized as sole physical custody with liberal parenting time or as joint physical custody.[30] But in this case, that analysis is not difficult, and both parties concede the court effectively imposed a joint physical custody arrangement. We agree.

[5] The district court awarded the parents nearly equal parenting time in the form of an alternating week-on-week-off

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[27] § 43-2922(19).

[28] § 43-2922(17).

[29] *Id.*

[30] See, e.g., *Dooling v. Dooling, ante* p. 494, 930 N.W.2d 481 (2019); *Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017); *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013); *Hill, supra* note 17.

schedule. Such a schedule requires Kaaden to spend roughly the same amount of time at each parent's residence and allows both parents to exert continuous blocks of parenting time for significant periods of time, and thus meets the statutory definition of joint physical custody.[31]

[6] Where a parenting plan effectively establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.[32] In several cases, we have looked past the labels used by the trial court when describing the physical custody arrangement and have focused instead on the actual terms of the parenting plan adopted by the court.[33] Such cases illustrate that it is the trial court's allocation of parenting time that drives the physical custody label, not the other way around.

We therefore agree with the parties and the Court of Appeals that regardless of the label used in the decree and parenting plan to describe physical custody, the trial court here effectively imposed a joint physical custody arrangement by creating a week-on-week-off parenting time schedule.[34] For the sake of clarity, we modify the language of the decree and parenting plan to reflect this holding.

We turn next to the question whether, by effectively imposing a joint physical custody arrangement, the trial court abused its discretion. The Court of Appeals concluded it did, citing our

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[31] *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018) (parenting plan establishing every-other-week parenting time schedule with equal time over summer break meets statutory definition of joint physical custody regardless of label used by trial court).

[32] See, *id.*; *Elsome, supra* note 18.

[33] See, e.g., *Dooling, supra* note 30, *ante* at 517, 303 N.W.2d at 501 ("the label that a court uses is not controlling and . . . the classification of a custody arrangement is ultimately dictated by parenting time"); *Becher, supra* note 31, 299 Neb. at 225, 908 N.W.2d at 29 ("the labels make little difference" when parenting plan sets forth parent's rights and responsibilities).

[34] See *id.*

cases that generally disfavor joint physical custody arrangements, especially when there is evidence the parents have difficulty communicating.[35] The time has come to reexamine those cases, and we turn to that discussion now.

3. *Trimble v. Trimble*

One of the first times this court addressed the concept of joint physical custody was in *Trimble v. Trimble*,[36] decided in 1984. In that case, the trial court awarded physical custody of two young children to the mother, finding she had "spent a great deal more of her time with the children, has the more predictable work and leisure schedule, and was more concerned with the children's education."[37] On appeal, the father argued it was error not to award joint physical custody.

Trimble noted that "in a given case joint custody might very well act to preserve the parent-child bond for both parents and thus avoid the severance of either of the attachments."[38] But without citation or further explanation, *Trimble* opined:

> We believe, however, that such arrangements must be reserved for the most rare of cases, i.e., 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. A collateral question exists as to why those most ideal of parents, who would satisfactorily cope with the conflicts inherent in a joint child custody arrangement, came to be divorced in the first instance. . . . We are not prepared to reject the concept of joint custody, but are not prepared to state that it should be a regular tool in the remedies of the district courts.[39]

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[35] See, e.g., *Erin W., supra* note 2; *Zahl, supra* note 3; *Trimble, supra* note 3; *Aguilar, supra* note 3.

[36] *Trimble, supra* note 3.

[37] *Id*. at 119, 352 N.W.2d at 600.

[38] *Id*. at 119, 352 N.W.2d at 600-01.

[39] *Id*. at 120, 352 N.W.2d at 601.

Trimble was decided at a time when Nebraska law did not distinguish between legal and physical custody, so many of our opinions applying *Trimble* described a blanket rule that "joint custody" is disfavored and must be reserved for the rarest of cases.[40] More recently, articulation of the *Trimble* rule has focused on joint physical custody; in *Zahl v. Zahl*,[41] we described the rule this way:

> [J]oint 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.

Trimble and *Zahl* use different phrasing but stand for the same blanket proposition—that joint custody arrangements are generally disfavored and should be reserved for rare or special cases.

4. Revisiting *Trimble*

[7] Recently, in *Leners v. Leners*,[42] we cited the rule disfavoring joint custody but cautioned that it should not be viewed as a "hard-and-fast rule." We emphasized that the Parenting Act authorizes a trial court to award joint custody

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[40] See, e.g., *Ensrud v. Ensrud*, 230 Neb. 720, 727, 433 N.W.2d 192, 197 (1988) ("[t]his court has frequently and consistently expressed disapproval of joint custody as a purported solution for the difficulty confronted by a court in determining a question concerning child custody"); *Wilson v. Wilson*, 224 Neb. 589, 590, 399 N.W.2d 802, 803 (1987) ("[w]e have . . . stated explicitly that joint custody is not favored and must be reserved for only the rarest of cases"); *Korf v. Korf*, 221 Neb. 484, 486, 378 N.W.2d 173, 174 (1985) ("[a]n award of joint custody of minor children is not favored. Such an award must be reserved for the most rare of cases").

[41] *Zahl, supra* note 3, 273 Neb. at 1053, 736 N.W.2d at 373. Accord, *Erin W., supra* note 2; *Schmeidler v. Schmeidler*, 25 Neb. App. 802, 912 N.W.2d 278 (2018); *Hill, supra* note 17.

[42] *Leners, supra* note 15, 302 Neb. at 913, 925 N.W.2d at 712.

in dissolution actions "'if 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.'"[43]

In *Leners*, we affirmed an award of joint legal and physical custody, finding it was in the child's best interests, despite evidence the parents had a contentious relationship. In doing so, we analyzed the parents' relationship as one of many factors bearing on the child's best interests. We noted that both parents were fit and that the child had a good relationship with each. We ultimately concluded that by establishing a parenting plan that afforded roughly equal parenting time, the trial court had fashioned a schedule that maximized the child's time with both parents, accommodated the father's unusual work schedule, and minimized the number of transitions and the need for communication and coordination between the parents. We found this plan served the child's best interests. *Leners* did not expressly disapprove of the *Trimble* rule,[44] but our analysis highlighted tension between the best interests analysis required under the Parenting Act and a blanket rule that disfavors joint custody and reserves it only for rare cases.

We are persuaded the time has come to expressly reexamine the proposition that joint custody arrangements are disfavored and "reserved" for rare or special cases.[45] The Wyoming Supreme Court recently engaged in a similar reevaluation of its judicial rule disfavoring joint custody.

In *Bruegman v. Bruegman*,[46] Wyoming acknowledged that its longstanding rule had been to disfavor joint custody "'"absent good reason"'" based on the rationale that "'"stability in a child's environment is of utmost importance to the child's

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[43] *Id.* at 913-14, 925 N.W.2d at 712, quoting Neb. Rev. Stat. § 42-364(3)(b) (Cum. Supp. 2018).

[44] See *Trimble, supra* note 3.

[45] See *id.* at 120, 352 N.W.2d at 601.

[46] *Bruegman v. Bruegman*, 417 P.3d 157 (Wyo. 2018).

well-being"'"'[47] and out of concern that joint custody could be successful only when "'"'"the parents are able to communicate and agree on the matters relevant to the children's welfare."'"'[48] In evaluating whether it should change its rule disfavoring joint custody, the Wyoming court did not analyze the evolving social science on parenting and child development, nor did it discuss arguments advanced for or against joint custody. Instead, it found that its blanket rule disfavoring joint custody was inconsistent with Wyoming statutes that require child custody to be determined based on the best interests of the child. It noted that courts in Iowa[49] and Maryland[50] had previously criticized application of a blanket rule disfavoring joint physical custody, reasoning that the question whether joint physical custody is appropriate should be based on the individual circumstances of each case and not on general presumptions that may or may not be applicable.[51] Wyoming ultimately rejected its precedent disfavoring joint custody and held instead that the fundamental consideration governing all child custody determinations is the best interests of the child. Citing the proposition that "'"'"joint custody, in any of its multiple forms, is but another option available to the trial judge,"'"'"[52] the Wyoming court concluded that "shared custody should be considered on an equal footing with other forms of custody."[53]

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[47] *Id*. at 162.

[48] *Id.*

[49] *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007) (concluding "the joint physical care issue must be examined in each case on the unique facts and not subject to cursory rejection based on a nearly irrebuttable presumption found in our prior cases").

[50] *Taylor v. Taylor*, 306 Md. 290, 302, 508 A.2d 964, 970 (1986) (reexamining rule that joint physical custody is "an arrangement 'to be avoided, whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child'").

[51] *Bruegman, supra* note 46.

[52] *Id*. at 163. Accord *Taylor, supra* note 50.

[53] *Id*. at 164.

5. Joint Custody No Longer Disfavored

[8] The doctrine of stare decisis requires that we adhere to our previous decisions unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.[54] The doctrine is entitled to great weight, but it does not require us to blindly perpetuate a prior interpretation of the law if we conclude it was clearly incorrect.[55]

We can conceive of no principled justification for continuing to apply a blanket rule that disfavors joint legal or physical custody, especially when the rule is based on generalized concerns regarding parental maturity and possible behavioral consequences to a child from spending substantial amounts of time with each parent. Such concerns may well be valid in any given case and in that event should be considered in light of all the other factors and circumstances in arriving at a custody and parenting time arrangement that serves the best interests of the child at issue. But a blanket rule disfavoring joint legal or physical custody is difficult to reconcile with the Parenting Act, under which the best interests of the child are the polestar of all child custody and parenting time determinations.[56]

We see nothing in the Parenting Act that either favors or disfavors any particular custody or parenting time arrangement. The Parenting Act simply requires that all custody and parenting time arrangements be determined based on the best interests of the child.[57] The Parenting Act "presumes the critical importance of the parent-child relationship in the welfare and development of the child and that *the relationship between the child and each parent should be equally considered unless it is contrary to the best interests of the child*."[58] The Parenting

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[54] *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

[55] See *id.*

[56] See §§ 43-2921 to 43-2923. See, also, § 42-364(2) (Reissue 2016).

[57] § 43-2923(6).

[58] § 43-2921 (emphasis supplied).

Act also states that the best interests of the child require, among other things, "appropriate, continuing quality contact" between the child and parents who have shown the ability to act in the child's best interests.[59] The Parenting Act neither expresses nor suggests a default position favoring or disfavoring any particular custody arrangement, even one agreed to by the parents,[60] and instead requires that all such determinations be based on the best interests of the child.[61]

We note that, in dissolution actions where the parents have not agreed to joint custody, § 42-364(3) requires that before joint custody may be ordered, there must be a hearing in open court and an express finding that joint custody is in the child's best interests.[62] But we do not understand the provisions of § 42-364(3) to indicate the Legislature either favors or disfavors joint custody. All cases governed by the Parenting Act[63] require a judicial determination, whether expressly stated or not, that the custody and parenting time arrangement ordered by the court is in the child's best interests.[64] And a hearing on the record is routinely held to facilitate that judicial determination, whether the parents are submitting an agreed-upon parenting plan for approval[65] or have contested the issues of custody and parenting time such that a trial is necessary.

[9] We conclude that a blanket rule disfavoring joint custody is inconsistent with the Parenting Act and unnecessarily

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[59] See § 43-2923(3).

[60] See § 43-2923(4).

[61] §§ 43-2923(6) and 43-2935(1).

[62] See, also, *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 280, 777 N.W.2d 565, 571 (2010) (in paternity case, it is preferable to make express finding that order of joint custody is in best interests of child, but it is "not error under the Parenting Act in a paternity case to fail to make a specific finding of best interests").

[63] See § 43-2924.

[64] See §§ 43-2921, 43-2923(4) and (6), and 43-2935. See, also, *Dooling, supra* note 30.

[65] See §§ 43-2923(4) and 43-2935.

constrains the discretion of trial judges in some of the most important and difficult decisions they are called upon to make. To ensure that custody and parenting time determinations are focused on the best interests of the child, trial judges must be able to base their determinations on actual, not presumed, facts.

[10] Because a blanket rule disfavoring joint custody limits judicial discretion and may constrain the best interests of the child analysis required by the Parenting Act, we now disapprove of the *Trimble* rule and hold that joint custody is neither favored nor disfavored under Nebraska law.[66] In fact, we emphasize that no custody or parenting time arrangement is either favored or disfavored as a matter of law, and we disapprove of prior cases suggesting otherwise.

Our holding today necessarily calls into question some of our reasoning in other cases, to the extent such reasoning was premised on the rule disfavoring joint custody.[67] But today's holding does not alter the fact that whether parents come to court having agreed to a joint custody arrangement, or disputing the issues of custody and parenting time, the court is required to independently determine that any parenting plan being ordered is in the child's best interests and must reject or modify parenting plans that are not in the child's best interests or which do not meet the requirements of the Parenting Act.[68] And today's holding does not change in any respect the various factors courts should consider when deciding what sort of custody and parenting time arrangement is in a child's best interests;[69] it merely eliminates the need to also consider a blanket rule premised on generalized concerns of parental

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[66] See *Trimble, supra* note 3.

[67] See, e.g., *State ex rel. Amanda M., supra* note 62 (noting that factual inquiry for awarding joint physical custody is substantially different from that required for making sole custody determination); *Zahl, supra* note 3. See, also, *Aguilar, supra* note 3; *Hill, supra* note 17.

[68] See §§ 43-2921, 43-2923(4) and (6), and 43-2935.

[69] See §§ 42-364(2), 43-2921, and 43-2923.

maturity, manipulative behavior by the child, and perpetuating turmoil and instability. Of course when such concerns are supported by the evidence, they will still be factors for the court to consider, along with all the other factors bearing on the child's best interests. We discuss those factors next.

6. Equal Parenting Time Was Not Abuse of Discretion

We turn now to the primary question on further review: whether the district court abused its discretion in creating a parenting plan that gave Mandy and Jeffery nearly equal parenting time, effectively imposing a joint physical custody arrangement. We address that question in light of the evidence adduced regarding Kaaden's best interests and disregarding our prior case law to the extent it disfavored joint physical custody.

(a) Best Interests

[11] When determining the best interests of the child in deciding custody, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action; (2) the desires and wishes of a sufficiently mature child, if based on sound reasoning; (3) the general health, welfare, and social behavior of the child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse.[70] In this case, the trial court analyzed the evidence in light of each of these factors.

[12] The Parenting Act also provides that the best interests of a child require a parenting plan that provides for a child's safety, emotional growth, health, stability, physical care, and regular school attendance[71] and which promotes a child's

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[70] § 43-2923(6). See, also, *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006) (reciting rule before amendments to § 43-2923(6)).

[71] § 43-2923(1).

continued contact with his or her families and parents who have shown the ability to act in the child's best interests.[72]

[13] In addition to considering these statutory factors, our case law instructs that when making determinations as to the allocation of parenting time that is in a child's best interests, a trial court should also consider the parties' ability to communicate on issues such as transportation, homework, discipline, medical and dental appointments, and extracurricular activities.[73] Other relevant considerations include stability in the child's routine, minimalization of contact and conflict between the parents, and the general nature and health of the individual child.[74] The fact that one parent might interfere with the other's relationship with the child is also a factor to consider, but is not a determinative factor.[75]

By reciting these factors, we do not suggest that each will be relevant in every case; nor do we imply that a court is prohibited from considering other factors not mentioned. No single factor is determinative, and different factors may weigh more heavily in the court's analysis depending on the evidence presented in each case. The one constant is that "[i]n any proceeding involving a child, the best interests of the child shall be the standard by which the court adjudicates and establishes . . . any custody, parenting time, visitation, or other access determinations as well as resolution of conflicts affecting each child."[76]

(b) Kaaden's Best Interests

Here, the district court, after observing the parties and considering the evidence in light of the factors set out above,

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[72] § 43-2923(3).

[73] See, generally, *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

[74] See *State on behalf of Maddox S. v. Matthew E.*, 23 Neb. App. 500, 873 N.W.2d 208 (2016).

[75] *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009); *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

[76] § 43-2921.

expressly found that an alternating week-on-week-off parenting time schedule was in Kaaden's best interests. This was the parenting time schedule recommended by Kaaden's counselor, and it is consistent with the court's express factual findings that both parents are fit and provide a safe and appropriate home environment for Kaaden. Moreover, nearly equal parenting time furthered the court's stated goal of allowing Kaaden to "enjoy the full benefits of having both parents involved in his life to the greatest degree possible."

In arguing that the award of nearly equal parenting time was an abuse of discretion, Jeffery focuses almost exclusively on evidence of Mandy's animosity toward him and their difficulty communicating. In our de novo review, we neither ignore nor minimize evidence that the parties have difficulty communicating effectively regarding Kaaden's welfare, or that Mandy has significant unresolved anger toward Jeffery and actively interfered with his parenting time while the case was pending before the district court. But when all of the evidence is considered in light of Kaaden's best interests, we cannot find the parenting time awarded here was an abuse of discretion.

The trial court was appropriately concerned about Mandy's interference with Jeffery's parenting time and her unresolved anger toward him, and it addressed those concerns by awarding Jeffery sole legal custody. This minimized the need for the parties to confer regularly because Jeffery has the sole authority and responsibility to make fundamental decisions regarding Kaaden's welfare, including choices regarding his education and health. The trial court also explained that placing primary legal custody with Jeffery was the best way to ensure compliance with the parenting plan.

And despite the tense relationship between Mandy and Jeffery, the record fully supports the trial court's findings that both Mandy and Jeffery are fit and proper parents who love Kaaden and that both provide him safe and stable homes. The evidence shows both parents have developed a nurturing,

positive bond with Kaaden, and it fully supports the trial court's conclusion that it is in Kaaden's best interests to have both parents involved in his life to the greatest degree possible.

The trial court's alternating week-on-week-off parenting schedule served to maximize Kaaden's time with both parents and was directly supported by the testimony of his treating counselor. At the same time, the parenting schedule minimized the need for direct interaction between the parents by limiting exchanges of Kaaden to one time per week at a neutral site.

An abuse of discretion occurs when a trial court bases its decision on reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[77] Here, the trial court made detailed and specific factual findings which were fully supported by the record, and it provided a carefully reasoned explanation for why it considered the custody and parenting time arrangement to be in Kaaden's best interests.

The trial court's goal was not to find a custody and parenting time schedule the parents thought was fair, but to find one that was actually in Kaaden's best interests. That required the court to create a parenting plan for a child who has a positive and nurturing relationship with both his parents, but whose parents do not have a good relationship with each other. On this record, we find no abuse of discretion in developing a parenting plan that gave Jeffery sole legal custody and effectively imposed a joint physical custody arrangement with a week-on-week-off parenting time schedule.

7. Nonreimbursed Medical Expenses

[14] The Nebraska Child Support Guidelines require child support orders to address how the parents will provide for the child's health insurance.[78] Here, Jeffery was ordered to provide health insurance for Kaaden, and no party challenges that on appeal.

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[77] *Randy S. v. Nicolette G.*, 302 Neb. 465, 924 N.W.2d 48 (2019).

[78] § 4-215.

The district court also ordered Jeffery to pay the first $480 of Kaaden's nonreimbursed reasonable and necessary health care expenses per year, and it ordered Mandy to pay 50 percent of such expenses in excess of $480. We understand this language to have effectively allocated responsibility for nonreimbursed health care expenses equally between Mandy and Jeffery. No party contends otherwise, and no party challenges the court's allocation of expenses *in excess of* $480. Instead, the parties focus on whether the trial court erred in ordering Jeffery to pay the first $480 of Kaaden's nonreimbursed health care expenses. We limit our analysis accordingly.

Before the Court of Appeals, Jeffery argued it was error to order him to pay the first $480 of nonreimbursed health care expenses. The Court of Appeals agreed, reasoning that the first $480 of nonreimbursed health care expenses was "subsumed within the amount of child support that is ordered."[79] The Court of Appeals thus reversed that portion of the decree. On further review, Mandy argues the Court of Appeals improperly reversed on this issue. We conclude the Court of Appeals correctly interpreted the child support guidelines.

[15] Nonreimbursed health care expenses are governed by § 4-215(B) of the child support guidelines, which states, in part, "Children's health care expenses are specifically included in the guidelines amount of up to $480 per child per year." As we have explained, "the guidelines estimate $480 as an ordinary amount of such nonreimbursed medical expenses, and that figure is then subsumed within the amount of child support that is ordered. Any nonreimbursed expenses exceeding $480 are [then] prorated between the parties."[80]

The guidelines do not require the trial court to expressly identify any party as being responsible for the first $480 of nonreimbursed health care expenses, but they do require a

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[79] *State on behalf of Kaaden S., supra* note 1, 26 Neb. App. at 434, 920 N.W.2d at 50.

[80] *State on behalf of Martinez, supra* note 12, 281 Neb. at 552, 797 N.W.2d at 222.

court to allocate nonreimbursed health care expenses in excess of $480 per year "to the obligor parent as determined by the court."[81] Such allocation "shall not exceed the proportion of the obligor's parental contribution (worksheet 1, line 6)."[82] The guidelines' reference to an "obligor" refers to the party ordered to pay child support.

We therefore agree with the Court of Appeals that under the child support guidelines, the trial court erred in making Jeffery, who is the obligor under its child support calculation, responsible for paying the first $480 of Kaaden's nonreimbursed health care expenses, when such amounts are already subsumed in the monthly child support payment. The trial court may have had a sound reason for wanting Jeffery to pay such costs, but no explanation was provided in the decree, so we have no basis upon which to review a deviation from the guidelines.[83] We affirm the Court of Appeals' reversal of that portion of the decree requiring Jeffery to pay the first $480 of Kaaden's nonreimbursed health care costs.

8. Child Support

Because the Court of Appeals found the parenting time schedule was an abuse of discretion and remanded the matter to reduce Mandy's parenting time, it also concluded the trial court erred in using worksheet 3, the joint custody worksheet, to calculate child support. It thus reversed the child support award and remanded the matter for recalculation "using the appropriate worksheet."[84]

Mandy assigns this as error. She argues the trial court's use of worksheet 3 to calculate support was appropriate given the

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[81] § 4-215(B).

[82] *Id.*

[83] See, generally, Neb. Ct. R. § 4-203 (rev. 2011) (child support guidelines shall be applied as rebuttable presumption, and deviations should be supported by specific findings).

[84] *State on behalf of Kaaden S., supra* note 1, 26 Neb. App. at 433, 920 N.W.2d at 50.

amount of parenting time she was awarded,[85] and she seeks affirmance of the child support as ordered by the district court. No party challenges any other aspect of the child support award, so we confine our analysis to whether it was error to use worksheet 3.

[16] Child support payments should generally be set according to the child support guidelines.[86] Section 4-212 of the guidelines explains when, and how, worksheet 3 is to be utilized:

> When a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3. When a specific provision for joint physical custody is ordered and one party's parenting time is 109 to 142 days per year, the use of worksheet 3 to calculate support is at the discretion of the court. . . . For purposes of these guidelines, a "day" shall be generally defined as including an overnight period.

Here, the award of nearly equal parenting time effectively created a joint physical custody arrangement, and we have modified the decree and parenting plan to so describe it. Moreover, under the parenting plan, Mandy's parenting time far exceeds the rebuttable presumption of 142 overnights per year referenced in § 4-212, and Jeffery has presented no evidence or argument that would rebut the presumptive use of worksheet 3. As such, we find no abuse of discretion in the trial court's decision to use worksheet 3 to calculate child support. We reverse the Court of Appeals' holding to the contrary, and remand the matter with directions to affirm the district court's child support award.

V. CONCLUSION

For the foregoing reasons, we modify the language of the decree and the parenting plan to reflect an award of joint

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[85] See Neb. Ct. R. § 4-212 (rev. 2011).

[86] See *Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018).

physical custody. We find no abuse of discretion in the custody and parenting time arrangement ordered by the district court, and we reverse the Court of Appeals' decision to the contrary and remand the matter with directions to affirm that award as modified. We find no abuse of discretion in using worksheet 3 to calculate child support, and we reverse that aspect of the Court of Appeals' decision as well and remand the matter with directions to affirm the child support award. In all other respects, we affirm the decision of the Court of Appeals.

Affirmed in part as modified, 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. Nathan M. Thomas, appellant.

932 N.W.2d 713

Filed August 30, 2019. No. S-18-220.

1. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), and the trial court's decision will not be reversed absent an abuse of discretion.
2. **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 the witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).
4. **Rules of Evidence: Other Acts: Proof.** Under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), evidence may be admissible for such purposes as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
5. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that

he or she acted in conformity therewith, (2) probative value is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.

6. **Rules of Evidence: Words and Phrases.** Evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), that is offered for a proper purpose is often referred to as having "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
7. **Rules of Evidence: Other Acts.** The admissibility of other crimes evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), must be determined upon the facts of each case and is within the discretion of the trial court.
8. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.
9. **Criminal Law: Intent: Proof.** Motive, even when not an element of a charged crime, is relevant to the State's proof of the intent element of the crime.
10. **Criminal Law.** Motive qualifies as a legitimate noncharacter theory because although character carries a connotation of an enduring general propensity, a motive is a situationally specific emotion.
11. **Rules of Evidence.** Evidence that is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), may be excluded under Neb. R. Evid. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), if its probative value is substantially outweighed by the danger of unfair prejudice.
12. **Evidence.** The probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case.
13. ____. Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party.
14. **Trial: Evidence.** Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.
15. **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.
16. **Trial: Evidence.** Even if there are inadmissible parts within an exhibit, an objection to an exhibit as a whole is properly overruled where a part of the exhibit is admissible.
17. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

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

Cassel, J.

I. INTRODUCTION

Nathan M. Thomas appeals, challenging one of his two convictions by a jury—for electronically offering to perform oral sex upon a police decoy portraying a 14-year-old girl.[1] He first claims that "[rule] 404 evidence"[2] of a sexually explicit online "chat" with another underage woman was admitted for improper purposes and was unfairly prejudicial. We conclude that both bases, motive and absence of mistake or accident, were proper. We also conclude that the district court did not abuse its discretion in balancing probity and prejudice. Second, Thomas asserts that his solicitation of "eating you out" was not sufficient to support the conviction. He is wrong. We affirm.

II. BACKGROUND

Effectively, only one of Thomas' two convictions is before us, regarding count 1. The district court admitted the rule 404 evidence only for purposes of that count. And Thomas challenges the sufficiency of the evidence only as to that count. Although we note the other charge below in passing, it otherwise has no bearing on this appeal.

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[1] See Neb. Rev. Stat. § 28-833 (Reissue 2016) (enticement by electronic communication device).

[2] Brief for appellant at 18. See Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016).

In the balance of this section, we first summarize the communications with the decoy and the events leading to the arrest and charges. We then recount the proceedings and evidence regarding Thomas' earlier chat with a real 14-year-old girl employing the username "Wolfgirl 458222" (Wolfgirl)—the State's rule 404 evidence. We then briefly summarize the evidence at trial.

1. Decoy

In February 2017, Nicholas Frederick, a Nebraska State Patrol investigator, conducted an online undercover investigation for child enticement. Frederick's online undercover persona was a 14-year-old girl (the decoy). He found an online advertisement stating that a 20-year-old male was seeking to perform oral sex on a non-age-specific female. Thomas later admitted to posting the advertisement, sending messages to the decoy, and arranging to meet her. We disregard spelling and grammatical errors in the communications we summarize next.

The decoy, via email, responded to the advertisement, "Hey just saw ur ad, you up for hanging with someone younger?" Thomas replied, "Possibly." The decoy replied "[O]K," and Thomas asked, "How old are you? Can I see a pic?" The decoy answered, "Im 14 almost 15 so don't want 2 send pic 2 someone I know." At trial, Frederick clarified that he meant to say "don't know." Thomas asked if the decoy had a particular photograph-sharing application. The decoy replied that she did not but stated that Thomas could send a text message. The decoy furnished an undercover cell phone number and informed Thomas of her "name."

Thomas and the decoy continued their conversation via text messages. Thomas continued to ask for pictures, which the decoy declined to send. Thomas asked, "So what do you want from this?" The decoy answered, "Not real sure. Not lots of experience talking to people from [online advertisements]." After each provided a brief self-description, Thomas asked, "If we did meet up what would you like to happen? Me just eating

you out or more?" The decoy replied, "That could start things and see what we want to do after that unless u think something else?" Thomas then asked if he should pick her up and if they could go park somewhere private. The decoy responded that she would need to be picked up. Thomas asked when she would want to do it, and the decoy answered, "So u really want 2? Probably soon cuz need to be home before mom gets home." They then discussed an area for the meeting location, and the decoy stated that she was nervous and wanted to know what he expected. He replied, "The only thing I want to happen for now is maybe some kissing and eating you out that's all." After further discussion of a meeting location, the decoy sent a "pin drop," indicating a particular location for the meeting. Thomas said he drove a "gold Camry" and was on his way. The decoy directed Thomas to a gas station within the pin drop area as the place to meet.

While Frederick was setting up the location with Thomas, Frederick briefed other investigators regarding the situation. Frederick showed them a picture of Thomas, told them that Thomas would be driving a gold Camry, and requested that they go to the gas station for surveillance and take Thomas into custody if he showed up.

Five investigators in plain clothes and unmarked police cars went to the gas station. Very soon after the officers were in position, Thomas pulled into a parking spot and the investigators arrested him. Before returning to the investigative services center, one investigator seized Thomas' cell phone from his car. Later, Thomas consented to a search of his cell phone, waived his *Miranda* rights, and made a statement to the police.

In an amended information, the State charged Thomas with two counts. The first count—the only one relevant on appeal—was for "Enticement by Electronic Communication Device," in violation of § 28-833. The second count charged the offense of "Child Enticement with Electronic Communication Device," in violation of Neb. Rev. Stat. § 28-320.02 (Reissue 2016). Thomas pled not guilty to both counts.

2. Wolfgirl Chat Evidence

The State filed a notice of intent to produce evidence of other crimes, wrongs, or acts pursuant to rule 404. The State's rule 404 motion asserted that the evidence was intended to show motive, opportunity, intent, identity, plan or scheme, absence of mistake or accident, or "some other narrower purpose."

The district court held a hearing on the rule 404 motion where the State presented evidence of sexually explicit conversations with underage women retrieved from Thomas' cell phone. Although only the chat with Wolfgirl is relevant on appeal, the State made a single argument addressing all of the purported rule 404 evidence.

The State argued that Thomas' explicit photographs and requests for pictures of the underage women's genitals would be relevant evidence against an entrapment defense and would show motive, plan or scheme, or absence of mistake or accident. The State then specified its reasoning. As to motive, the conversations would show sexual gratification, and as to plan or scheme, the conversations would show how he connected and engaged in sexually explicit contact with underage women. As to absence of mistake or accident, the conversations would show that Thomas was predisposed to engage in sexually explicit conversations with people who are under the age of 15 years.

Thomas argued that the "prejudicial impact of [the Wolfgirl] evidence outweighs whatever probative value it has." He also asserted that the State did not prove by clear and convincing evidence the true age of the underage women and that the evidence was not sufficiently similar to the charged conduct. These other assertions, however, are not argued on appeal.

The district court found that the conversation between Thomas and Wolfgirl was relevant to the charges. The Wolfgirl conversation would be admissible, the court concluded, to show motive or absence of mistake or accident. However, the court ruled that without clear and convincing evidence that Wolfgirl was under the age of 16, the evidence would not be admitted.

After working with police officers in Pittsburg, California, Nebraska law enforcement confirmed that 14-year-old R.H., with whom Thomas had had sexually explicit conversations, was the owner and creator of Wolfgirl. In separate motions, the State requested the court to reconsider the rule 404 motion and to endorse R.H. as an additional witness.

The State argued that Wolfgirl's testimony would establish ownership of the Wolfgirl account and that the conversation would be relevant evidence. Thomas renewed his relevancy and unfair prejudice arguments to both motions. The court sustained the motion to endorse and overruled the motion to reconsider.

Before opening statements commenced at the jury trial, the State moved to reopen evidence on the rule 404 motion. The State presented as an exhibit a trial stipulation intended to eliminate the necessity of calling R.H. to testify regarding foundation for the Wolfgirl conversation. Again, Thomas asserted that the Wolfgirl conversation was not relevant to either count and that "to the extent it is relevant, it's unduly prejudicial." The court received the trial stipulation into evidence and found the State had proved by clear and convincing evidence that Wolfgirl was a child under 16 years of age and that the evidence was admissible.

The State offered as another exhibit a transcript of the Wolfgirl conversation, with images. The court asked if counsel would raise the same rule 404 objections to that exhibit, and Thomas' counsel answered, "Yes." Further, in front of the jury, the court overruled the objection to the transcript and admitted it for specified limited purposes. Prior to that admission, the court gave a limiting instruction, "This evidence is admitted for the limited purpose of helping you consider matters of motive, or absence of mistake or accident as they relate to the elements of the charges contained in Count 1 in this case."

3. Relevant Evidence at Trial

In addition to the transcript of the Wolfgirl chat, the State's trial evidence included the testimony of five witnesses,

Thomas' recorded statement to the police, his jail cell calls to his brother, his online advertisement, and the conversations between Thomas and the decoy. We have already summarized his conversations with the decoy.

Thomas testified in his defense, emphasizing his disbelief of the decoy's age and existence. He testified that when the decoy told him her age, he did not believe her. He related that he had been in online situations before where women who were older pretended to be younger and where he had acted older. Alternatively, he testified that online, one never knows if the responder is a real person or a "bot" trying "a scam." He explained that he asked for pictures to ascertain whether the person responding was real. He stated that if he had known the decoy was under age 16, he would not have engaged in any sex act with her.

The jury found Thomas guilty on both counts. The court imposed sentences, and Thomas perfected an appeal. We moved the appeal to our docket.[3]

III. ASSIGNMENTS OF ERROR

Thomas assigns that the district court erred in admitting the evidence of the Wolfgirl conversation under rule 404(2) and that the evidence presented at trial was insufficient to support a conviction on count 1.

IV. STANDARD OF REVIEW

[1] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[4]

[2] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence,

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

[4] *State v. Kidder*, 299 Neb. 232, 908 N.W.2d 1 (2018).

pass on the credibility of the 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]

V. ANALYSIS

1. Rule 404 Evidence

Thomas argues that the admission of the Wolfgirl conversation did not inform any element of count 1 and was not within the relevant limited uses under rule 404(2). Further, he contends that the irrelevant sexually explicit language and images in the conversation prejudiced the jury.

[3,4] Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[6] Thus, it may be admissible for such purposes as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[7]

[5-7] We must consider whether the evidence of prior bad acts was admissible for a proper purpose other than propensity to commit the crimes charged. An appellate court's analysis under rule 404(2) considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was

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

[6] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[7] See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

admitted.[8] Evidence that is offered for a proper purpose is often referred to as having "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.[9] The admissibility of other crimes evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court.[10]

(a) Motive

[8-10] We must consider whether the evidence of prior bad acts was relevant to show motive other than Thomas' propensity to commit the crimes charged. Motive is defined as that which leads or tempts the mind to indulge in a criminal act.[11] Motive, even when not an element of the charged crime, is nevertheless relevant to the State's proof of the intent element of the crime.[12] Motive qualifies as a legitimate noncharacter theory because although character carries a connotation of an enduring general propensity, a motive is a situationally specific emotion.[13] Several Nebraska cases inform our analysis of rule 404(2) evidence admitted to show motive.

In *State v. Sanchez*,[14] the trial court admitted rule 404(2) evidence of when the defendant had sexually assaulted his children aged 13 and 5 and of when at 22 years old he sexually assaulted a 14-year-old girl and impregnated her. The State argued that the other crimes evidence proved motive to obtain sexual gratification from underage women, because many adults find it hard to believe that an adult is sexually attracted to a child. We reasoned that the argument only illustrated that

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[8] See *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[9] *Id.*

[10] *Sanchez, supra* note 7.

[11] *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012).

[12] *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[13] *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

[14] *Sanchez, supra* note 7.

under the guise of motive, the State was attempting to prove propensity. We held that although the State's conclusion was logically relevant, it did not articulate a legitimate fact of consequence to the determination of guilt. Therefore, the crimes did not have independent relevance and were inadmissible as to motive.

Importantly, intent was not an element of the crime charged in *Sanchez*. Because intent was not an element of the crime charged, we stated intent was not a fact that was of consequence. Then, in discussing motive, we noted our holding in an earlier case that even if proof of motive is not an element of a crime, any motive for a crime is relevant to the State's proof of the intent element. Because here, intent is an element under § 28-833(1), *Sanchez* leaves open the possibility that motive could have independent relevance because it would be relevant to proof of intent.

In *State v. Trotter*,[15] the court admitted evidence of the defendant's prior abuse of his ex-wives to show a similar motive that the defendant used his superior size and strength to control the behavior of another. We reasoned that the State improperly attempted to show that because the defendant may have been motivated to control his ex-wives through his superior strength, he was likely to use that strength to control someone else. In determining that the evidence was inadmissible to show motive, we reasoned that the focus on the defendant's actions rather than his motive was impermissible propensity evidence. In *Trotter*, we contrasted the situation with that in *State v. Phelps*.[16] In *Phelps*, a defendant was charged with kidnapping a 9-year-old girl who was never found. We determined that evidence of six prior acts of sexual contact by the defendant with young girls showed motive—a sexual motive—which tended to show that the defendant's motive for kidnapping was to achieve sexual gratification.

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[15] *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[16] *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

In *State v. Payne-McCoy*,[17] we stated that intent was not at issue in the case. We reasoned that prior drug sales to the victim did not explain the defendant's motive to sell drugs on the day of the crime, except to show that the defendant sold drugs to the victim before and would do it again. We noted that this type of logic is exactly what is prohibited by rule 404(2). We determined that the rule 404 evidence of prior drug deals was inadmissible to prove motive.

In *Torres*,[18] the district court admitted evidence of a prior kidnapping that showed the defendant's motive was to restrain, rob, and kill the victim to obtain money and transportation to Texas. We stated that intent was not at issue. Turning to motive, we observed that a person's prior actions can help to show motive because of the light they shed on that person's state of mind. We explained that there is a fine line between prior bad acts evidence that goes to propensity and evidence of the actor's motive to commit a later crime. We explained that evidence is not barred just because its relevance could be characterized as propensity: "[S]o long as the evidence is also relevant for reasons not based on the defendant's character, it is admissible under rule 404(2)."[19] We clarified that "'propensity' is meant to refer simply to criminal propensity, i.e., character,"[20] and not to "a specific propensity to do a particular thing."[21] With regard to motive evidence, we reasoned:

> It can easily be framed as relevant because it shows a defendant's "propensity" to commit crimes for a particular reason, i.e., motive. Someone who has a motive to commit a crime could also be described as having a "propensity" to commit the crime. But where the defendant's

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[17] *Payne-McCoy, supra* note 11.

[18] *Torres, supra* note 8.

[19] *Id.* at 158, 812 N.W.2d at 232.

[20] *Id.* at 159, 812 N.W.2d at 233.

[21] *Id.* at 159, 812 N.W.2d at 232.

> motive is particular—in other words, is not based in the defendant's character—evidence of prior acts is nonetheless admissible to show the defendant's motive to commit the charged crime because an inference of a *criminal* propensity is not required to establish independent relevance.[22]

There, we agreed with the district court that the prior kidnapping was independently relevant to show the defendant's motive, to obtain money and transportation to Texas.

We are also persuaded by cases from the Seventh Circuit. In *U.S. v. Zahursky*,[23] the defendant challenged admission of prior chats with others, claiming that they "gave unnecessary, shocking, repulsive and sexually explicit details." The Seventh Circuit quoted an earlier case stating that "'[p]rior instances of sexual misconduct with a child victim may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of children.'"[24] It reasoned that in earlier chats with different individuals, the defendant admitted to having sex with a 14-year-old or having a sexual interest in 14-year-old girls. The court stated that the defendant's "admission to having had sex with a fourteen-year-old and the sexually explicit nature of the [earlier] chats make them probative as to his intent and motive in chatting with [the victim in the instant case] and then meeting her . . . ."[25]

In *U.S. v. Chambers*,[26] the defendant objected to admission of his chat with a special agent posing as a minor, arguing that it merely demonstrated his propensity to entice minors. But the Seventh Circuit determined that the chat was admissible to show motive and intent.

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[22] *Id.* at 159-60, 812 N.W.2d at 233 (emphasis in original).

[23] *U.S. v. Zahursky*, 580 F.3d 515, 524 (7th Cir. 2009).

[24] *Id.*, quoting *U.S. v. Sebolt*, 460 F.3d 910 (7th Cir. 2006).

[25] *Id.*

[26] *U.S. v. Chambers*, 642 F.3d 588 (7th Cir. 2011).

Here, the court admitted the Wolfgirl conversation for the purpose of showing motive to commit the charged offense. As noted above, motive is relevant to the State's proof of the intent element of the crime.[27] And intent was at issue—whether Thomas "knowingly and intentionally utilize[d] an electronic communication device to contact . . . a peace officer who is believed by [Thomas] to be a child under sixteen years of age."[28] Evidence that Thomas carried on a sexually explicit chat with a 13-year-old girl is probative as to his motive in texting with the decoy, purportedly a 14-year-old girl, and arranging to meet her. We conclude the district court did not abuse its discretion in admitting the Wolfgirl conversation to show motive.

(b) Absence of Mistake or Accident

Next, we must consider whether the district court properly admitted the evidence of the prior bad acts to show absence of mistake or accident. In *Trotter*,[29] we discussed when prior bad acts are relevant to show absence of mistake or accident in child abuse cases. Where a defendant does not raise accident or mistake as to how the victim was injured, the evidence is inadmissible for that purpose. We reasoned that the evidence of spousal abuse did not negate the claim of accident in the child abuse case, because the State proffered the evidence to show the propensity of someone who abused people in general. The evidence was inadmissible as to absence of mistake or accident.

Here, the court also admitted the evidence of the Wolfgirl conversation to show absence of mistake or accident. Under § 28-833, a defendant can be found guilty of the crime when he or she communicates with a peace officer whom he or she believed to be a child under the age of 16. Here, the State was

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[27] *Collins, supra* note 12.

[28] See § 28-833(1).

[29] *Trotter, supra* note 15.

required to prove that Thomas believed the decoy was a child under 16 years of age. It could do so by presenting direct evidence of Thomas' belief or, inversely, by presenting evidence that there was an absence of mistake as to his belief of the age of the decoy. Therefore, the belief or absence of mistake of belief as to the decoy's age was a relevant issue in the case.[30]

One of the dissents makes a distinction between the two types of recipients under § 28-833, but we disagree that the distinction is of consequence. The evil that the statute is aimed at is stopping individuals 19 years of age or over from knowingly and intentionally using an electronic communication device to transmit inappropriate material to a child under 16 years of age. Whether the inappropriate material is directed to an actual child or to a person that the transmitter believes to be a child is of little importance. To be guilty, the transmitter must know that the child is under age 16 (for an actual child) or believe the recipient is a child under age 16 (for a decoy). Undoubtedly, a common defense in such prosecutions is that the transmitter did not know (for an actual child) or believe (for a decoy) that the recipient was a child under age 16. In such a situation, the State would want to show that the transmitter was not mistaken (absence of mistake) about the recipient's age, i.e., that the transmitter intended (absence of accident) to transmit inappropriate material to a child under age 16.

Because the belief of the age of the decoy was relevant, we must determine if the Wolfgirl conversation had independent relevance. In order to show that Thomas did not have a mistaken belief as to the age of the decoy, the State presented evidence of other instances of Thomas' belief or absence of mistake. The Wolfgirl chat evidence contained direct statements by the victim that she was 13 years old and showed Thomas' nonchalance to her age. The conversation between Thomas and the decoy was similar, because the decoy expressly stated she was 14 years old and Thomas continued with the conversation

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[30] See *Sanchez, supra* note 7.

unaffected. In both instances, Thomas never questioned the recipient's statement of age or, in any way, was led to believe that she was of a different age.

The Wolfgirl evidence negated the defense that Thomas did not believe the decoy was her claimed age. Such evidence tends to show that Thomas did not mistakenly believe he was chatting with an adult; instead, he targeted minors. Even though the Wolfgirl chat was between Thomas and a child under 16 years of age rather than a peace officer pretending to be a child under 16 years of age, the evidence offered the same probative nature as to Thomas' belief of the recipient's explicitly stated age. The evidence shows not Thomas' general propensity to talk to underage women, but, rather, that there was no mistake regarding Thomas' knowledge of the recipient's age. Similarly, in *Zahursky*,[31] the Seventh Circuit stated that "[t]he revelations of the girls' ages in the chats make the chat evidence probative as to [the defendant's] knowledge and absence of mistake" as to the recipients' ages. The Wolfgirl evidence was independently relevant. Therefore, we find no abuse of discretion by the district court in determining the evidence was relevant to show absence of mistake or accident.

(c) Probative Value Versus Unfair Prejudice

[11] Having found no abuse of discretion by the district court in determining that the Wolfgirl conversation was relevant for the specified limited purposes, we must also review for abuse of discretion the court's balancing of unfair prejudice against probative value. Evidence that is admissible under rule 404(2) may be excluded under Neb. R. Evid. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), if its probative value is substantially outweighed by the danger of unfair prejudice.[32] As the rule plainly states, only when the danger of unfair prejudice

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[31] *Zahursky, supra* note 23, 580 F.3d at 524.

[32] *Payne-McCoy, supra* note 11.

substantially outweighs the evidence's probative value does rule 403 counsel exclusion. And again, we emphasize that we review the decision only for an abuse of discretion.

[12-14] The probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case.[33] Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party.[34] Only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.[35] Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court, whose decision we will not reverse unless there is an abuse of discretion.[36] The district court found that the probative value of the Wolfgirl conversation was not substantially outweighed by the danger of unfair prejudice.

(i) Redaction Not Raised or Preserved

One of the dissenting opinions seems to suggest that the exhibit should have been redacted, but neither of its suggestions is properly before us.

[15] Although that dissent first argues that the images should have been redacted, Thomas did not raise the issue on appeal. Before the district court, Thomas, in a summary fashion, did request redaction of the images. There, he preserved the issue.[37] But on appeal, he simply does not raise redaction of the images. 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.[38] His assignment

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *State v. Oldson, supra* note 13.

[37] See *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[38] *State v. Munoz, ante* p. 69, 927 N.W.2d 25 (2019).

asserted that the district court erred "in admitting evidence of the Wolfgirl chat under Evidence Rule 404." The assignment does not mention either redaction or rule 403. While his argument does discuss rule 403, it does so only in the context of the entire exhibit. He does not argue that the images should have been redacted. Thus, with respect to the images, Thomas has placed the issue before us on an "all or nothing" basis.

That dissent also suggests that several pages of the exhibit "would have accomplished the State's needs." But Thomas never sought redaction of part of the text. And he had the burden of doing so.

[16,17] Even if there are inadmissible parts within an exhibit, an objection to an exhibit as a whole is properly overruled where a part of the exhibit is admissible.[39] A learned treatise explains:

> Suppose that evidence sought to be introduced consists of several statements or items tendered as a unit in a deposition, letter, conversation, or trial transcript. Assume that the opponent objects to the whole of the evidence when some parts are subject to the objection made but other parts are not. In this situation, the judge does not err by overruling the objection. It is not the judge's responsibility to sever the bad parts if some are good. That is the opponent's burden.[40]

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[39] *Huston, supra* note 37. See, also, *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997) (affirming admission of photograph album when 2 of 32 photographs were admissible).

[40] 1 McCormick on Evidence § 52 at 362 (Kenneth S. Broun et al. eds., 7th ed. 2013 & Supp. 2016). See, also, *Foster v. S.C.D.H.P.T.*, 306 S.C. 519, 413 S.E.2d 31 (1992) (defendant's letter was admissible when defendant objected to entirety of letter rather than specific portions that were inadmissible); *State v. Graham*, 641 S.W.2d 102 (Mo. 1982) (business records exception does not make all parts admissible; portions can be excluded if specific objections are made); *Speier v. Webster College*, 616 S.W.2d 617 (Tex. 1981) (summary evidence of witnesses testimony is admissible unless specific objection is made to inadmissible portions).

Thus, to the extent the dissent suggests that redaction of part of the text of the Wolfgirl chat should have occurred (apparently on the district court's own initiative), it would reverse the district court on an issue not raised before that court. But that is not our function. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[41] Because redaction of part of the text was not raised below, we cannot consider it here.

That dissent also discusses the concept of plain error, although it is not clear that it does so with respect to redaction. Neither of the cited cases involved rule 403 balancing or sua sponte redaction of an exhibit. Thus, we read the dissent's plain error discussion as an expression of its level of concern regarding the issue that is properly before us.

In other words, this leaves us where Thomas chose to place us—considering only the exhibit as a whole. We must determine whether the district court abused its discretion in determining that the unfair prejudice of the Wolfgirl chat evidence, in its entirety, did not substantially outweigh its probative value.

(ii) Balancing

The Wolfgirl conversation was highly probative to show motive and absence of mistake or accident as to the decoy's age. That 50-page conversation, containing sexually explicit photographs and language, certainly was prejudicial to Thomas. However, there were striking similarities between the Wolfgirl conversation and the charged offense. In both instances, Thomas asked about the recipient's age; when he learned she was underage, he persisted. In the remaining conversation, he ignored her signals that she was, in fact, underage. He sought pictures of both recipients, and in pursuit of his sexual gratification, he disregarded the respective assertions of age. The probative value of the conversation to show motive and absence of mistake or accident went to the heart of Thomas' defense.

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[41] *Huston, supra* note 37.

Was the content of the Wolfgirl conversation so unfairly prejudicial that it substantially outweighed the high probative value? We conclude that it did not. In *Chambers*, the Seventh Circuit discussed the federal equivalent of the rule 403 balancing test as to several conversations with victims and the defendant and stated, "Sexual abuse of a child or the attempt thereof is a disgusting crime and any evidence of it is no doubt unfavorable to the defendant, but here it was not unfairly prejudicial."[42] Several other circuits have held that admitting several sexually explicit images introduced as rule 404(2) evidence is not unfairly prejudicial.[43] We agree with the federal courts that although the evidence was highly prejudicial in its nature, it was not unfairly prejudicial. And to the extent one of the dissenting opinions seems to suggest that the federal cases on rule 403 balancing are inconsistent with our own precedent, we disagree. We see no meaningful difference between the text of rule 403 and that of the equivalent federal rule. Nor do we see any difference in the standards articulated by courts applying these rules.

Thus, in light of the statutory text, our precedent applying it, and federal cases doing likewise with a nearly identical federal rule, we cannot say that the district court abused its discretion in determining that the probative value of the Wolfgirl evidence outweighed its prejudicial value.

Before moving to the next issue, we note that a casual reader might misinterpret references to the length of the exhibit as 50 "page[s]." We should emphasize that each "page" is a screenshot of the conversation and images displayed on the limited

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[42] *Chambers, supra* note 26, 642 F.3d at 596.

[43] See, also, *U.S. v. Wallace*, 607 Fed. Appx. 25 (2d Cir. 2015) (admitting magazine cover of women dressed as young girls to show sexual interest in young girls and admitting files depicting bestiality and adult pornography account to show identity); *U.S. v. Keith*, 440 Fed. Appx. 503 (7th Cir. 2011) (showing jury 32 uncharged images of child pornography); *U.S. v. Sumner*, 522 Fed. Appx. 806 (11th Cir. 2013) (admitting 85 sexually suggestive photographs to show intent).

space of a cell phone's screen. And three of those pages display only a "Failed to Load" message. So, while the number of words on such a page varies considerably, the other 47 pages of the exhibit total about 2,529 words—or an average of only about 53 words per page.

(d) Limiting Instruction

The court instructed the jury to consider the evidence of the Wolfgirl conversation for the limited purpose of motive and absence of mistake or accident as to the elements of count 1. Before the jury heard any of the evidence concerning the Wolfgirl conversation, the court instructed the jury on the limiting instruction. Thomas did not raise an issue with the limiting instruction on appeal.

2. Sufficiency of Evidence

The crime of enticement by electronic communication device, in relevant part, consists of the following:

> 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 is believed by such person to be a child under sixteen years of age and in so doing:
>
> (a) Uses or transmits any indecent, lewd, lascivious, or obscene language, writing, or sound [or]
>
> . . . .
>
> (c) Offers or solicits any indecent, lewd, or lascivious act.[44]

Thomas argues that "[t]he sole use of the words 'to kiss or eat you out' cannot be . . . lewd, lascivious or obscene . . ." as a matter of law.[45] He contends that these words do not conjure

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[44] § 28-833(1).

[45] Brief for appellant at 20.

up repugnant sexual images. Thomas does not contend that the evidence was insufficient to support a conviction on count 1 for the remaining elements of the crime. Therefore, we address the sufficiency of the evidence only as to whether his writing or solicitation was "indecent, lewd, lascivious, or obscene," in violation of § 28-833.

Case law instructs us that the term of art "indecent, lewd, lascivious, or obscene," when used by the Legislature, is a context-based question of fact. In *State v. Kass*,[46] we analyzed a constitutional challenge to the same language. We identified the rule from *State v. Kipf*[47] as the clear line to apply to narrow the reach of "indecent, lewd, lascivious, or obscene" in § 28-833. We held in *Kipf* that "the phrase in question is the use of language which conjures up repugnant sexual images."[48] We further explained that the context of the language aids to determine whether the language is repugnant or not. There, we reasoned that coitus between two consenting adults as an expression of love is not repugnant and does not conjure up repugnant images. However, we further reasoned that coitus performed as violence is repugnant, as much as it is criminal. Moreover, because of the known or unknown identity of the other actual or would-be participant, an otherwise natural and fulfilling sexual act could be repugnant.[49]

In this case, the context of the sexual language conjured repugnant sexual images when exchanged between an adult and a 14-year-old child. Although Thomas' language, if aimed to a consenting adult, would not conjure up repugnant sexual images, here it was addressed to a person claiming to be 14 years old. As we said in *Kipf*, the known identity of the other would-be participant can turn an otherwise natural sexual act repugnant. Viewing the foregoing in the light most favorable

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[46] *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

[47] *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

[48] *Id*. at 235, 450 N.W.2d at 405.

[49] See *Kipf, supra* note 47.

to the prosecution, any rational trier of fact could have found that the solicitation in writing or otherwise by an adult to perform oral sex on a person whom the adult believed to be a 14-year-old child would conjure up repugnant sexual images. Therefore, there was sufficient evidence for the jury to find that Thomas used or transmitted indecent, lewd, lascivious, or obscene writing or offered or solicited any indecent, lewd, or lascivious act.

VI. CONCLUSION

We conclude that the district court did not abuse its discretion in admitting the rule 404 evidence of the Wolfgirl conversation as to motive and absence of mistake or accident. The evidence was sufficient for a jury to find the writing or solicitation "indecent, lewd, lascivious, or obscene" to support the conviction. We affirm the judgment of the district court.

Affirmed.

Heavican, C.J., dissenting.

I respectfully dissent. In my view, the majority in this case underestimated the danger of unfair prejudice resulting from the admission of the entirety of exhibit 11, otherwise referred to as the "Wolfgirl evidence." The majority suggests that Thomas failed to both specifically assign and argue for redaction of the unfairly prejudicial photographs and failed to assign and argue alternatively that the court should have allowed only the relevant portions of the Wolfgirl evidence. As a result, the majority contends that we cannot review such error. I respectfully disagree and suggest that our analysis of the Wolfgirl evidence involves a review of the district court's decision for plain error.

Where a party fails to comply with the court rules requiring a separate section setting forth the assignments of error, an appellate court may proceed as though the party failed to file a brief entirely or, alternatively, may examine the proceedings

for plain error.[1] The decision to proceed on plain error is at the discretion of the appellate court.[2] Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[3]

In this case, the fairness of the judicial process is called into question by the introduction of unfairly prejudicial material, such as photographs of Thomas' genitalia, that bears little relevance to the instant case. Therefore, a review for plain error is not only appropriate, but necessary. With our judicial role as an appellate court clearly defined, and our standard of review in mind, we turn to the facts of this case.

For purposes of this dissent, only a brief review of the facts is needed. Thomas placed an online advertisement seeking to perform oral sex on a female (no age specified). A law enforcement officer, representing himself electronically as a decoy 14-year-old girl, responded to the advertisement and asked if Thomas would be interested in "hanging with someone younger." After learning the purported age of the decoy, Thomas asked, "If we did meet up what would you like to happen? Me just eating you out or more?" Thomas ultimately pursued a plan to meet the decoy; upon arriving at the planned meeting place, Thomas was instead met by law enforcement officers.

Following Thomas' arrest, he permitted law enforcement to search his cellular telephone. During the course of the search, investigators located another sexually explicit conversation that Thomas had engaged in, with an underage female identified herein by the name "Wolfgirl." At trial, the State sought to produce the Wolfgirl evidence pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016), to show "motive,

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[1] See *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014).

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

[3] *Id*.

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Thomas was charged with two counts. Count 1 alleged a violation of Neb. Rev. Stat. § 28-833 (Reissue 2016) (enticement by electronic communication device), and count 2 alleged a violation of Neb. Rev. Stat. § 28-320.02 (Reissue 2016) (use of electronic communication device to knowingly entice to engage in illegal sex act). The district court rejected Thomas' argument that the text messages with Wolfgirl lacked relevance and were unfairly prejudicial. The court concluded that the Wolfgirl conversation, ultimately entered as exhibit 11, would be admissible to show motive or absence of mistake or accident, but only as to count 1.

I concur with the majority's conclusion that the evidence was admissible under rule 404 to show motive or absence of mistake. But I take issue with the majority's determination that entering the entirety of exhibit 11 could survive scrutiny under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016).

Rule 403 states, "Although 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." In my opinion, most of exhibit 11 was a "needless presentation of cumulative evidence" and its "probative value [was] substantially outweighed by the danger of unfair prejudice [and] confusion of the issues."

CUMULATIVE EVIDENCE

The State presented evidence that Thomas was 19 years of age or older, and it entered two exhibits each consisting of two pages of text messages between Thomas and the decoy. Combined with the testimony of law enforcement officers, that evidence was all that was needed for a reasonable juror to reach the conclusion that Thomas had violated either § 28-833 or § 28-320.02 or both. However, the State sought

and was granted permission to introduce the uncharged Wolfgirl evidence.

In both quantity (compared to the two two-page exhibits) and substance, the 50 pages of exhibit 11 dwarf the State's direct evidence in this case. Exhibit 11 is laced with sexually explicit content, much of which is set out in detail in Justice Miller-Lerman's dissent. It is intermixed with still images of Thomas' genitalia. The images are unmistakably stamped with "play" button icons, indicating the images are merely stills from videos.

The images were not made available to the trial court judge until immediately before trial. The State admitted that the videos behind the images would rise to the level of a danger of unfair prejudice, but argued that the still images themselves did not. But the images with the play button icon affixed thereon left to the imagination of each juror further graphic, indecent, and repugnant behavior. The images were needlessly cumulative and can best be described as overkill (and unfairly prejudicial as noted below).

Further, the text of exhibit 11 in its entirety contains more than one example of Thomas' referencing sexual gratification, as well as a lengthy discussion of Wolfgirl's fantasy life. Wolfgirl's fantasy life is arguably lacking in any relevance to either count and is again needlessly cumulative.

DANGER OF UNFAIR PREJUDICE

In its rule 403 balancing, the majority relies on *U.S. v. Chambers*,[4] a case from the U.S. Court of Appeals for the Seventh Circuit. As the majority notes, in *Chambers*, the Seventh Circuit said, "Sexual abuse of a child or the attempt thereof is a disgusting crime and any evidence of it is no doubt unfavorable to the defendant, but here it was not unfairly prejudicial."[5] I agree with the Seventh Circuit's sentiments as a

[4] *U.S. v. Chambers*, 642 F.3d 588 (7th Cir. 2011).

[5] *Id.* at 596.

general proposition and note that by the court's very language, prejudice is determined on a case-by-case analysis. Beyond that, the majority's reliance on the persuasive authority of the federal circuit courts of appeal is misplaced, as we have binding authority and a clear balancing test.[6]

In *State v. Kirksey*,[7] we discussed the balancing test required when a court is faced with unfairly prejudicial evidence of prior acts. We held that the district court committed prejudicial error during a murder trial when it admitted evidence of a previous homicide for which the defendant had been acquitted. *Kirksey* sets out the following balancing test for a rule 403 review by an appellate court:

> In reviewing trial court rulings which have admitted evidence of other crimes, an appellate court considers "(1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted."[8]

Relevancy.

The State argued that Thomas' conversations with Wolfgirl were "for sexual gratification purposes and that . . . goes to the relevance of it which is the motive, [or] absence of mistake or accident." The State further argued that the Wolfgirl evidence was "relevant both for Counts 1 and 2 in their entirety."

The district court apparently agreed with the State's theory of motive (sexual gratification), but only as to count 1, § 28-833. Justice Miller-Lerman argues, in her dissent as to motive, that the State added an element to § 28-833 that clearly does not exist. She goes on to note, however, that the Wolfgirl

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[6] See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998).

[7] *Id.*

[8] *Id.* at 179, 575 N.W.2d at 390.

evidence could have been relevant to count 2, § 28-320.02. I agree that the relevance of motive for the purpose of § 28-833 is more attenuated than the relevance of motive for the purpose of § 28-320.02.

In any event, motive for either or both § 28-833 and § 28-320.02 could have been demonstrated by introducing an edited version of exhibit 11. Several pages of text (for example, the January 15, 2017, texts exchanged from 9:50 to 10:25 p.m.) demonstrating the real age of Wolfgirl, Thomas' seeking photographs of Wolfgirl, and his interest in sexual gratification would have accomplished the State's needs.

The majority contends that admission of the whole exhibit is proper where one part of the exhibit is admissible. However, I do not believe that *State v. Huston*[9] or *State v. Merrill*[10] stands, or should stand, for the proposition that unfairly prejudicial evidence should be admitted over the protections of rule 403 because some minor interconnected piece of the nonprejudicial evidence is admissible. Such a holding would cut against the protections of rule 403 and render the protection void altogether.

Proper Purpose and Unfair Prejudice.

As Justice Miller-Lerman explains in her dissent, while a demonstration of motive is a proper purpose, the probative value of the entirety of exhibit 11 was outweighed by its danger of unfair prejudice. As discussed above, exhibit 11 overwhelmed the direct evidence in this case. The evidence in exhibit 11 is more indecent, more lewd, more lascivious, and more obscene than the direct evidence of the charged crimes, and it is a communication with an actual 13-year-old girl. In my opinion, exhibit 11 made it highly likely that the jury was really finding Thomas guilty of the uncharged Wolfgirl crimes, as well as the two counts at issue.

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[9] *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[10] *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997).

Jury Instructions.

The fourth element of the *Kirksey* balancing test is "'whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.'"[11] In this case, the trial court did give the jury such an instruction. But, as in *Kirksey*, "[w]here the probative value of evidence is outweighed by its potential for unfair prejudice, its admission is error even if an appropriate limiting instruction is given."[12]

DANGER OF CONFUSION OF ISSUES

Because there were two counts in this case, in its instructions to the jury, the trial court, by necessity, needed to distinguish between count 1 and count 2 by pointing out that the Wolfgirl evidence was to be used only for the limited purpose of showing motive and absence of mistake, and only as to count 1. Our case law is clear that jurors are presumed to have followed instructions: "Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict."[13]

But admitting evidence that is not direct evidence of the charged counts, and is used for the purpose of one count but not another, requires the court to give complicated and elaborate jury instructions that further risk the probative value's being substantially outweighed by the danger of confusion of the issues by the jury. Because there are two counts in this case, the danger of jury confusion is considerably increased when coupled with the danger of unfair prejudice and the cumulative nature of exhibit 11.

That confusion is demonstrated by the questions asked by the jury in this case and the court's responses to those questions:

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[11] See *State v. Kirksey, supra* note 6, 254 Neb. at 179, 575 N.W.2d at 390.

[12] *Id.* at 181, 575 N.W.2d at 391.

[13] *State v. Lester*, 295 Neb. 878, 899, 898 N.W.2d 299, 316 (2017).

> Question #1
> May we request and get transcripts of the interview of . . . Thomas by [law enforcement]?
> Answer to Question #1
> There will be no transcripts provided.
> . . . .
> Question #2
> Does Count 2 hinge on the guilt of Count 1?
> Answer to Question #2
> Please refer to paragraph B of Instruction Number 4.
> Question #3
> What happens if we can't come to a unanimous verdict on Count 1, Count 2 or both?
> Answer to Question #3
> You are instructed to continue your deliberations.

(Emphasis omitted.)

Likewise, the State's closing argument appears to blur the distinction between the direct evidence of the charged crimes (dialogue with law enforcement agent pretending to be juvenile 14 years old or younger) and the uncharged exhibit 11 evidence (dialogue with actual 13-year-old), hence adding to the confusion of issues.

CONCLUSION

Had the Wolfgirl evidence been given to the jury without the images included, or more ideally had only a page or two of the Wolfgirl transcripts been admitted, I would join the majority's opinion. But that is not what happened in this case. In my opinion, the district court did not just abuse its discretion, it committed plain error in admitting exhibit 11 in its entirety.

As admitted, exhibit 11's probative value was substantially outweighed by the danger of unfair prejudice, it was misleading to the jury, and it was needlessly cumulative. Indeed, if a more careful parsing of the rule 404 evidence in this case is not required, rule 403 becomes largely meaningless. I would reverse, and remand.

Miller-Lerman, J., dissenting.

I respectfully dissent.

In my view, exhibit 11 was not admitted into evidence for a proper purpose, and even if it was admissible, it should have been excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016). Exhibit 11 is a textbook example of propensity evidence, which should not have been admitted as to count 1 and resulted in unfair prejudice. Its obvious effect was to poison the jurors against Thomas and distract them from their real task of weighing solely the evidence of the crime charged in count 1 in this case. Although Thomas would remain convicted of count 2, I would reverse, and remand for a new trial on count 1.

Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404(2) (Reissue 2016), provides in part that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith." This is commonly referred to as "propensity evidence." We have previously noted that "propensity evidence may lead a jury to convict, not because the jury is certain the defendant is guilty of the charged crime, but because it has determined the defendant is '"a bad person [who] deserves punishment,"' whether or not the crime was proved beyond a reasonable doubt." *State v. Oldson*, 293 Neb. 718, 744-45, 884 N.W.2d 10, 37 (2016).

We have observed:

> The admission of other acts evidence presents a special danger of confusion of the issues and undue prejudice. Not only might the jury infer action based on the defendant's general lawbreaking character, but the jury might subconsciously penalize the defendant for the proven misdeeds. In other words, such evidence of other acts might encourage a "preventive conviction even if [the defendant] should happen to be innocent momentarily."

Id. at 746-47, 884 N.W.2d at 39.

The hazard of admitting propensity evidence is that it results in unfair prejudice.

> Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. 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. When considering whether evidence of other acts is unfairly prejudicial, we consider whether the evidence tends to make conviction of the defendant more probable for an incorrect reason.

Id. at 751-52, 884 N.W.2d at 41-42.

Count 1 alleges a violation of Neb. Rev. Stat. § 28-833(1) (Reissue 2016), which generally prohibits use of an electronic device to transmit indecent language or visual depictions of sexually explicit conduct or to solicit a lewd act by an individual over 19 years of age addressed to a child under 16 years of age or a police officer believed to be such a child. It is undisputed that the police officer, posing as an underage girl named "Logan," texted Thomas, age 20, "Im 14 almost 15," and Thomas sent messages to "Logan."

The two text messages at issue in count 1 consisted of no graphics and contained these words in their entirety: (1) "If we did meet up what would you like to happen? Me just eating you out or more?" and (2) "The only thing I want to happen for now is maybe some kissing and eating you out that's all."

Perhaps lacking confidence in its case, the State offered and the court received exhibit 11 as to count 1. Exhibit 11 reflects an entirely different uncharged matter consisting of 50 pages of photographs and text messages exchanged in a chat room between Thomas and a 13-year-old girl, who went by the name "Wolfgirl." The court found the "Wolfgirl" evidence inadmissible as to count 2, presumably because count 2 required a finding that Thomas intended to engage in criminal sexual activity with "Logan," and there is no indication in the

"Wolfgirl" evidence that Thomas was trying to actually meet with or engage in sexual activity with "Wolfgirl."

With apologies to the reader, and because the majority merely describes it as a "50-page conversation, containing sexually explicit photographs and language," a sample of exhibit 11 must be briefly described to illustrate how its "probative value" was substantially outweighed by its unfair prejudice and how it confused the issues and, I believe, mislead the jury to convict Thomas of count 1 on an improper basis.

The direct relevant evidence of count 1 consisted of the two "eating you out" statements quoted above, whereas exhibit 11 was voluminous—50 pages of text messages and graphics. The graphics include no less than half a dozen photographs of penises, a scrotum, a man and woman engaged in sexual intercourse, girls in bikini swimsuits, and a cartoon penis telling a joke. A small sample of the text in merely the first dozen pages of the 50 pages of exhibit 11 includes the following:

- "[W]hat turns you on[?]"
- "I'd love to pic [sic] you up and pound deep into your pussy as I kiss you[.]"
- "Would you like to see how excited my cock is for that?"
- "Mmm all seven inches ready to pound into you[.]"
- "Grinds against your ass and smacks it as I lean forward my cock head rubbing up and down your slit as I kiss and nibble on your neck my hands tweaking your nipples[.]"
- "I use you[r] hair as a handle and pound into you rubbing your clit[.]"
- "[A]re you close to cumming for daddy[?]"
- "Mmm slowly working my thumbs into you[r] ass as I pound into you slowly spreading it and then fingering it as I smack and massage your ass[.]"
- "Slowly kiss my way down to your pussy and then slowly start to lick up the juices leaking from your pussy[.]"

The texts after page 12 up to page 50 are similar. However, the later portions of exhibit 11 contain an exchange of texts describing a fantasy in which Thomas and Wolfgirl pretend

to be wolves, mate, and produce offspring and Thomas' wolf character has sex with his young wolf daughter.

Exhibit 11, the unrelated chat room exchange with an actual girl, was obviously intended to inflame the jury and show that Thomas was a "bad person" with a propensity to commit crimes, see rule 404, so he must be guilty in this case. Why else submit 50 pages of graphic sexual material to establish the undisputed fact that Thomas sent two texts to a decoy saying "eating you out"? When it comes to influence, a picture from an unrelated matter is worth a thousand words.

I do not agree with the majority that the exhibit was admissible for a proper purpose. I am puzzled how the majority could reach the conclusion that exhibit 11 was admissible consistent with evidentiary jurisprudence regarding "motive" and "absence of mistake" under rule 404(2), not to mention minimum due process.

I believe the Wolfgirl material was not admissible as to count 1 to show motive. I do not think the Seventh Circuit cases relied on by the majority are persuasive in this case, because those cases involved charges that were more similar to count 2 in this case and required a showing that the defendant communicated with the decoy with the motive of engaging in criminal sexual activity with an underage person. Thus, the fact that the defendant had previously engaged in sex with a 14-year-old girl, *U.S. v. Zahursky*, 580 F.3d 515 (7th Cir. 2009), or had sex with his ex-girlfriend's 14-year-old child, *U.S. Chambers*, 642 F.3d 588 (7th Cir. 2011), could show motive to engage in criminal sexual conduct such as was charged in count 2 herein. But the same type of motive does not apply to count 1, which is the only charge to which the court admitted exhibit 11 in this case.

Also with regard to motive as a proper purpose for admission of the Wolfgirl evidence, I think that relying on motive as a proper purpose in a prosecution based on § 28-833 inadvertently adds an element to the charge that is not required under the statute. As I read § 28-833, it requires a showing that

the defendant knowingly and intentionally communicated with either a person the defendant knew to be an underage person or a decoy the defendant believed to be an underage person and that the content of the communication was of one of the types listed in the statute. As charged in count 1 in the present case, the communication needed to be one that either "use[d] . . . indecent, lewd, lascivious, or obscene language" or "offer[ed] or solicit[ed] any indecent, lewd, or lascivious act." Nothing in the statute requires a determination of the defendant's purpose or motive in making such a communication. This is in contrast to other statutes defining sex offenses, such as offenses requiring a finding of "[s]exual contact," which is defined in Neb. Rev. Stat. § 28-318(5) (Reissue 2016) to "include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." There is nothing in § 28-833 requiring that the communication be for the purpose of sexual arousal or gratification or any other specific purpose, and I therefore do not think a defendant's motive in sending a prohibited communication is relevant under § 28-833.

As relevant to the charges in this case, I think motive could be relevant to a prosecution under Neb. Rev. Stat. § 28-320.02 (Reissue 2016) as charged in count 2, which requires a showing that the communication was intended to solicit, coax, entice, or lure the other person to actually engage in an act that would constitute one of the specified sex offenses. Motive therefore could be relevant under § 28-320.02 to show that the defendant's purpose was to engage in such activity for the purpose of sexual arousal or gratification. However, the district court did not admit the Wolfgirl evidence for the charge under § 28-320.02, as charged in count 2, and instead instructed the jury to consider it only with respect to the charge under § 28-833 as charged in count 1.

While the Wolfgirl evidence is more attenuated as to the charge against Thomas under § 28-320.02 than as to the charge under § 28-833, it is not because "motive" is more relevant

under § 28-833 than it is under § 28-320.02; instead, as discussed above, the opposite is true and motive is not relevant under § 28-833 but may be relevant under § 28-320.02. The reason I think the Wolfgirl evidence is more attenuated as to the charge under § 28-320.02, and the reason I think the district court determined that the Wolfgirl evidence was not admissible as to the charge under § 28-320.02, is because in the Wolfgirl conversations, there is no indication that Thomas was attempting to arrange a meeting with Wolfgirl or to actually engage with Wolfgirl in an act that would constitute one of the specified sex offenses. Therefore, the Wolfgirl evidence was not relevant to Thomas' motive in his communications with "Logan" in connection with the charge under § 28-320.02. Because the district court admitted the Wolfgirl evidence only as to the charge under § 28-833, count 1, and because motive is not relevant to a charge under § 28-833, I do not think that motive was a proper purpose for admission under rule 404 in this case.

I believe the Wolfgirl evidence was not admissible to show absence of mistake. What is the relevance of the Wolfgirl evidence, which involved an actual girl under 16 years of age, to the issue of whether Thomas believed the officer, pretending to be the underage "Logan," was an actual child? It is not a mistake to disbelieve a falsehood. Under § 28-833, there is an important distinction between cases where a defendant knows the recipient to be a child under 16 years of age and cases where a defendant mistakenly believes that the recipient, who is actually an adult peace officer, is a child under 16 years of age. That distinction is particularly important when evidence involving one type of recipient, i.e., Wolfgirl—an actual girl—is offered to prove mens rea in a case involving the other type of recipient, i.e., a police decoy. Compare *U.S. v. Zahursky*, 580 F.3d 515 (7th Cir. 2009), in which the "other acts" evidence included the defendant's statement to a different girl that the victim of the charged conduct was 14 years old and in which said "other acts" evidence was hence

relevant to show that the defendant was not mistaken as to the victim's age.

Even if the 50-page exhibit 11 were admissible, its probative value was far outweighed by the prejudice which occurred by admitting it. See rule 403. Given the nature of exhibit 11, in my view, exhibit 11 tended to make "conviction of [Thomas] more probable for an incorrect reason." See *State v. Oldson*, 293 Neb. 718, 752, 884 N.W.2d 10, 42 (2016). In his separate dissent, Chief Justice Heavican articulately sets forth the reasons why admission of the Wolfgirl evidence presents a danger of unfair prejudice that substantially outweighs the probative value of the evidence. I think that because of the extreme nature of the Wolfgirl evidence relative to the facts related to "Logan" that are the basis for the charges herein, there was an unacceptable risk that jurors would focus more on the Wolfgirl evidence than the evidence related to "Logan," therefore posing a high danger of conviction on an improper basis, that is, a conviction based on Thomas' communications with Wolfgirl rather than on his communications with "Logan." I believe that it was an abuse of discretion to admit exhibit 11 and that such ruling constituted reversible error.

Although it was unfair to convict Thomas of count 1 based on propensity evidence and unkind to unnecessarily expose the jurors to the contents of the graphic sexually explicit 50-page exhibit 11, following reversal of Thomas' conviction on count 1, he would remain convicted of count 2, and double jeopardy does not prevent a retrial of Thomas on count 1 based on admissible evidence. See *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). Our job is to adhere to the rules of evidence and to guard due process even when it may temporarily benefit a defendant.

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