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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 6, 2019 and FEBRUARY 13, 2020

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCCIV

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
Bryan C. Meismer	Hartington

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*
Elizabeth G. Crnkovich	Omaha
Christopher E. Kelly	Omaha
Vernon Daniels	Omaha
Matthew R. Kahler	Omaha
Chad M. Brown	Omaha
Mary M. Z. Stevens	Omaha
Amy N. Schuchman	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

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Zoie H., In re Interest of 868

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No. S-18-369: **State v. Swanson**. Affirmed. Papik, J.

No. S-18-1131: **Faulder v. Faulder**. Reversed and remanded for further proceedings. Miller-Lerman, J. Stacy, J., not participating. Cassel, J., concurs in the result.

No. S-19-164: **In re Interest of Kaylin A. & Kayla A**. Affirmed. Freudenberg, J.

No. S-19-325: **O'Daniel Flight Service v. Edquist**. Affirmed. Papik, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-05-1035: **State ex rel. Counsel for Dis. v. Reilly**. Application for reinstatement granted. Respondent reinstated as an active member of the Nebraska State Bar Association.

No. S-17-1123: **State ex rel. Counsel for Dis. v. Hoffman**. Voluntary surrender of license accepted. Judgment of disbarment.

No. S-18-721: **Harrington v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-19-076: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, Neb. Rev. Stat. § 29-3001(4) (Reissue 2016).

Nos. S-19-084, S-19-087: **Rayhill v. Schmitt**. Stipulations allowed; appeals dismissed.

No. S-19-316: **State v. Molina**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-19-458: **State v. Patton**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. S-19-621: **In re Interest of Isaiah D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-19-774: **State v. Pullens**. Motion of appellant pro se to dismiss appeal sustained; appeal dismissed.

No. S-19-816: **State v. McCurry**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. §§ 25-1329 and 25-1902 (Reissue 2016); *Green v. Seiffert*, 304 Neb. 212, 933 N.W.2d 590 (2019); *Bryson L. v. Izabella L.*, 302 Neb. 145, 921 N.W.2d 829 (2019).

No. S-19-953: **State v. Lessley**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2018).

No. S-19-1009: **State v. Dortch**. Appeal dismissed. See § 2-107(A)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-17-1044: **Troester v. Troester**. Petition of appellant for further review denied on August 30, 2019.

No. A-17-1248: **In re Estate of Gabel**. Petition of appellants for further review denied on October 25, 2019.

No. A-18-033: **In re Warner Family Trust**. Petition of appellant for further review denied on December 20, 2019.

No. S-18-207: **Picard v. P & C Group 1**, 27 Neb. App. 646 (2019). Petition of appellants for further review sustained on February 4, 2020.

No. S-18-207: **Picard v. P & C Group 1**, 27 Neb. App. 646 (2019). Petition of appellee for further review denied on February 4, 2020.

No. A-18-249: **Travelers Indem. Co. v. Gonzalez Constr**. Petition of appellant for further review denied on November 12, 2019.

No. A-18-252: **State v. Nash**. Petition of appellant for further review denied on October 15, 2019.

No. A-18-258: **Homebuyers Inc. v. Watkins**. Petition of appellants for further review denied on September 16, 2019.

No. A-18-285: **State v. Lienemann**. Petition of appellant for further review denied on September 16, 2019.

No. A-18-338: **Tierney v. Tierney**. Petition of appellee for further review denied on January 3, 2020.

No. S-18-352: **State v. Grutell**. Petition of appellant for further review sustained on November 18, 2019.

No. A-18-403: **Harms v. Harms**. Petition of appellee for further review denied on December 12, 2019.

No. A-18-435: **Anderson v. Anderson**. Petition of appellant for further review denied on September 30, 2019.

No. A-18-454: **In re Interest of Bior M. et al**. Petition of appellant for further review denied on November 5, 2019.

No. A-18-470: **State v. Ewinger**. Petition of appellant for further review denied on December 20, 2019.

No. A-18-542: **State v. Kellogg**. Petition of appellant for further review denied on September 23, 2019.

Nos. A-18-544 through A-18-546: **In re Interest of Giani R. et al**. Petitions of appellant for further review denied on November 6, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-18-595: **In re Guardianship of Kyoko R**. Petition of appellants for further review denied on January 27, 2020.

No. A-18-655: **Kitt v. Kitt**. Petition of appellee for further review denied on November 8, 2019.

No. A-18-680: **Williams v. City of Lincoln**, 27 Neb. App. 414 (2019). Petition of appellant for further review denied on September 11, 2019.

No. A-18-693: **Fo Ge Investments v. First American Title**, 27 Neb. App. 671 (2019). Petition of appellant for further review denied on December 13, 2019.

No. A-18-709: **Applied Underwriters v. O'Connell Landscape Maintenance**. Petition of appellant for further review denied on December 12, 2019.

No. A-18-722: **In re Interest of Antonio J. et al**. Petition of appellant for further review denied on September 4, 2019.

No. A-18-723: **State v. Campbell**. Petition of appellant for further review denied on January 3, 2020.

No. A-18-738: **State v. Schramm**, 27 Neb. App. 450 (2019). Petition of appellee for further review denied on November 14, 2019.

No. A-18-754: **Anderson v. Anderson**, 27 Neb. App. 547 (2019). Petition of appellant for further review denied on December 2, 2019.

No. S-18-785: **In re Guardianship of Suzette G.**, 27 Neb. App. 477 (2019). Petition of appellant for further review sustained on October 16, 2019.

No. A-18-846: **In re Guardianship of Hamdan**. Petition of appellant for further review denied on September 19, 2019.

No. A-18-866: **State v. Burhan**. Petition of appellant for further review denied on January 14, 2020.

No. A-18-874: **Rosenfels v. Rosenfels**. Petition of appellant for further review denied on October 28, 2019, as premature. See § 2-102(F)(1).

No. A-18-874: **Rosenfels v. Rosenfels**. Petition of appellant for further review denied on December 31, 2019.

Nos. A-18-884 through A-18-887: **In re Interest of Becka P. et al.**, 27 Neb. App. 489 (2019). Petitions of appellant for further review denied on September 26, 2019.

No. A-18-888: **In re Interest of Giavonna G**. Petition of appellant for further review denied on January 28, 2020.

No. A-18-902: **State v. Valentine**, 27 Neb. App. 725 (2019). Petition of appellant for further review denied on December 12, 2019.

No. A-18-917: **Fischetto v. Fischetto**. Petition of appellant for further review denied on November 22, 2019.

PETITIONS FOR FURTHER REVIEW

Nos. A-18-996, A-18-997: **In re Interest of Jacey P. & Skyelynn P**. Petitions of appellant for further review denied on November 14, 2019.

No. A-18-1076: **State v. Allen**. Petition of appellant for further review denied on December 13, 2019.

No. A-18-1088: **State v. Dober**. Petition of appellant for further review denied on September 23, 2019.

No. A-18-1150: **State on behalf of Anya S. & Jayda S. v. Xavier D**. Petition of appellee Xavier D. for further review denied on November 22, 2019.

No. A-18-1156: **State v. James**. Petition of appellant for further review denied on January 3, 2020.

No. A-18-1162: **Gray v. Frakes**. Petition of appellant for further review denied on October 9, 2019.

No. A-18-1180: **Young v. Zobrist**. Petition of appellant for further review denied on January 31, 2020. See § 2-102(F)(1).

No. A-18-1188: **State v. Davis**. Petition of appellant for further review denied on October 10, 2019.

No. A-19-067: **Churchich v. Frakes**. Petition of appellant for further review denied on November 4, 2019.

No. A-19-074: **Campbell v. Frakes**. Petition of appellant for further review denied on November 7, 2019.

No. A-19-080: **State v. Regalado-Mendez**. Petition of appellant for further review denied on September 25, 2019.

No. A-19-086: **Mumin v. Hansen**. Petition of appellant for further review denied on September 27, 2019.

No. A-19-091: **Frazier v. Frakes**. Petition of appellant for further review denied on October 21, 2019.

No. A-19-096: **State v. Robertson**. Petition of appellant for further review denied on January 17, 2020.

No. A-19-112: **State v. Davis**. Petition of appellee for further review denied on August 30, 2019.

No. A-19-117: **State v. Staska**. Petition of appellant for further review denied on January 3, 2020.

No. A-19-151: **State v. Kelley**. Petition of appellant for further review denied on January 3, 2020.

No. A-19-159: **In re Interest of Atticus B**. Petition of appellant for further review denied on December 17, 2019.

Nos. A-19-171 through A-19-174: **In re Interest of Alivia B. et al**. Petitions of appellee Timothy B. for further review denied on February 4, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-19-177: **Gray v. Johnson**. Petition of appellant for further review denied on October 25, 2019.

No. A-19-193: **State v. Broussard**. Petition of appellant for further review denied on December 2, 2019.

No. A-19-197: **In re Interest of Jaya M. et al**. Petition of appellant for further review denied on December 2, 2019.

No. A-19-212: **State v. Hulme**. Petition of appellant for further review denied on December 20, 2019.

No. A-19-217: **In re Interest of Latrell K. et al**. Petition of appellant for further review denied on January 3, 2020.

No. A-19-234: **State v. McCray**. Petition of appellant for further review denied on December 20, 2019.

No. A-19-235: **State v. Johnson**. Petition of appellant for further review denied on September 19, 2019.

No. A-19-243: **Gray v. Frakes**. Petition of appellant for further review denied on November 8, 2019.

No. A-19-247: **In re Interest of A.M. & S.K.S**. Petition of appellant for further review denied on December 17, 2019.

No. A-19-253: **Alford v. Hansen**. Petition of appellant pro se for further review denied on September 13, 2019.

No. A-19-261: **State v. Sieckmeyer**. Petition of appellant for further review denied on October 10, 2019.

Nos. A-19-282, A-19-284: **State v. Warren**. Petitions of appellant for further review denied on October 4, 2019.

No. A-19-308: **Applied Underwriters v. Sky Materials Corp**. Petition of appellant for further review denied on January 16, 2020.

No. A-19-322: **State v. Livingston**. Petition of appellant for further review denied on January 29, 2020.

No. A-19-349: **Long v. Warneke**. Petition of appellant for further review denied on January 29, 2020.

No. A-19-401: **Security State Bank v. Bopp**. Petition of appellants for further review denied on October 3, 2019.

No. A-19-426: **State v. Prigge**. Petition of appellant for further review denied on November 22, 2019.

No. A-19-441: **Applied Underwriters v. O'Connell Landscape Maintenance**. Petition of appellant for further review denied on October 3, 2019.

Nos. A-19-456, A-19-457: **State v. Rik**. Petitions of appellant for further review denied on November 22, 2019.

No. A-19-492: **State v. Martinez**. Petition of appellant for further review denied on November 22, 2019.

PETITIONS FOR FURTHER REVIEW

No. A-19-515: **Gray v. Frakes**. Petition of appellant for further review denied on October 1, 2019.

No. A-19-559: **Bonnell v. Eisenmenger**. Petition of appellant for further review denied on September 5, 2019.

No. A-19-576: **Gardner v. International Paper Destr. & Recycl**. Petition of appellant pro se for further review denied on October 31, 2019.

No. A-19-653: **Blueitt v. Frakes**. Petition of appellant for further review denied on December 12, 2019.

No. A-19-676: **Robinson v. State**. Petition of appellant for further review denied on September 11, 2019. See § 2-102(F)(1).

No. A-19-677: **Clayborne v. Hansen**. Petition of appellant for further review denied on November 4, 2019.

No. A-19-698: **Barber v. Rickets**. Petition of appellant for further review denied on December 30, 2019, as untimely filed.

No. A-19-707: **Muhammad v. State**. Petition of appellant for further review denied on November 14, 2019.

No. A-19-759: **Mumin v. Frakes**. Petition of appellant for further review denied on November 4, 2019.

No. A-19-819: **Barber v. Frakes**. Petition of appellant for further review denied on November 8, 2019.

No. A-19-820: **Barber v. Frakes**. Petition of appellant for further review denied on November 13, 2019.

No. A-19-824: **State v. Rogers**. Petition of appellant for further review denied on December 30, 2019.

No. A-19-839: **In re Trust of Hunt**. Petition of appellant for further review denied on January 16, 2020.

No. S-19-913: **Great Northern Ins. Co. v. Transit Auth. of City of Omaha**. Petition of appellant for further review sustained on December 30, 2019.

No. A-19-975: **State v. Ezell**. Petition of appellant for further review denied on January 17, 2020.

No. A-19-1051: **Koch v. Mielak**. Petition of appellant for further review denied on January 27, 2020.

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

In re Guardianship of K.R., a minor child. Heather R., appellant, v. Mark R. and Cynthia R., Guardians, appellees.

932 N.W.2d 737

Filed September 6, 2019. No. S-17-846.

1. **Guardians and Conservators: Judgments: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2016 & Cum. Supp. 2018), are reviewed for error on the record. 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. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings.
3. **Child Custody: Parent and Child: Presumptions.** The parental preference principle establishes a rebuttable presumption that the best interests of the child are served by placing custody of a minor child with his or her parent.
4. **Parent and Child: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.

Petition for further review from the Court of Appeals, Pirtle, Riedmann, and Welch, Judges, on appeal thereto from the County Court for Douglas County, Marcela A. Keim, Judge. Judgment of Court of Appeals affirmed.

Julie A. Frank for appellant.

Patrick A. Campagna, of Campagna Law, P.C., L.L.O., for appellees.

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

Papik, J.

Years after her parents were appointed as coguardians for her daughter, K.R., Heather R. sought to terminate the guardianship or to obtain visitation with K.R. Following a trial, the county court declined to terminate the guardianship or to grant visitation. The Nebraska Court of Appeals affirmed, finding that it was in K.R.'s best interests for the guardianship to remain in place and for there to be no visitation. We granted Heather's petition for further review, in which she contended that the Court of Appeals erred by denying her motions without finding that she either was unfit or had forfeited her parental rights. Upon further review, however, we find that the county court determined that at the time of the trial, Heather was unfit to parent K.R. and that this finding was supported by competent evidence. Accordingly, we affirm, although based on different reasoning than that of the Court of Appeals.

BACKGROUND

Establishment of Guardianship for K.R.

Heather is the biological mother of K.R., born in 2007. Appellees, Mark R. and Cynthia R., are Heather's parents and K.R.'s grandparents.

This case began in June 2014 when Mark and Cynthia filed a petition in Douglas County Court in which they asked the court to appoint them as coguardians for K.R. They also filed an ex parte motion, asking that their appointment as coguardians take effect immediately. After the court granted the motion for immediate appointment, Heather unsuccessfully sought to set it aside.

Heather later reached an agreement with Mark and Cynthia that they would be appointed as coguardians for K.R. The

agreement was adopted by the court in an October 29, 2014, order. The order required Heather to complete certain requirements: a psychological evaluation, a chemical dependency evaluation, and a parenting education course. The order also provided a specific parenting time schedule for Heather. The order further required that during her parenting time, Heather was not to leave K.R. without proper adult supervision and was to allow K.R. unrestricted access to a cell phone to call Mark and Cynthia or her guardian ad litem during her visits with Heather.

Heather Is Convicted of Child Abuse.

On March 17, 2015, Heather filed a motion to dismiss the guardianship. On May 4, just 2 days before the trial on Heather's motion to dismiss the guardianship was set to begin, K.R.'s guardian ad litem filed an ex parte motion to suspend visitation between Heather and K.R. because K.R. had disclosed to her therapist that she had been the victim of sexual abuse while in the care of Heather. The trial court entered an order the next day, suspending visits and canceling the trial on Heather's motion to dismiss the guardianship.

Heather was later charged with Class IIIA felony child abuse for failing to protect K.R. K.R. identified two minor boys as the perpetrators of abuse. The two boys and their family had lived in Heather's home. A trial was held on the criminal charge against Heather, and she was found guilty. She was sentenced on December 29, 2016, to 18 months' probation.

Trial on Motions to Terminate Guardianship and for Visitation.

On April 3, 2017, Heather filed a motion to terminate the guardianship and a motion to reinstate visitation. Trial was held on both motions in May and June 2017. Because the evidence introduced at trial is central to the resolution of this appeal, we summarize it here.

Mark and Cynthia first called Cynthia to testify. Cynthia testified that she did not believe it would be appropriate for

K.R. to have contact with Heather. Cynthia testified that certain things seemed to "trigger [K.R.'s] memories of abuse." Cynthia testified that K.R. was terrified to go to Omaha, Nebraska, where Heather lives. She also testified that after the establishment of the guardianship, K.R. had issues with "wet[ting] her pants" at school and was fearful, had nightmares, sleepwalked, and sometimes woke up screaming.

Cynthia stated that K.R.'s symptoms had "ebb[ed] and flow[ed]" over time, but that her symptoms recently increased when she became aware of Heather's motion to dismiss the guardianship. Cynthia testified that K.R. saw a letter from the court in Mark and Cynthia's mail and that after seeing the letter, she started hurting herself. She would hit herself, pull her own hair, and squeeze her cheeks.

On cross-examination, Cynthia testified that she had not seen Heather for 3 years and did not know anything about her current fitness as a parent. She also admitted that Heather could not have expressed remorse or apologized directly to K.R., because there was a court order prohibiting contact between them.

Next to testify on behalf of Mark and Cynthia was Jeanne Cattau, K.R.'s therapist. Cattau testified that K.R. had been her patient since January 2015. Cattau testified that early on in her therapy, K.R. disclosed that she had been bitten and hit by others while in Heather's care. She testified that K.R. made more significant disclosures in May 2015. At that time, K.R. disclosed that two minor boys, who were residing in Heather's home, physically and sexually abused her on multiple occasions. K.R. identified "Seth" as the primary perpetrator but also made disclosures regarding his older brother.

Cattau testified that K.R. disclosed being bitten, hit, choked, and drowned. K.R. also told Cattau she had been locked in a bathroom; had been left home alone to care for her younger sister, who was 2 or 3 years of age at the time; had seen one of the boys choke her sister; and had also seen one of them sit

on her sister's chest, making it difficult for her to breathe. K.R. also reported "being forced to eat dog poop."

Cattau also testified that K.R. told her that she had told Heather about what Seth had done to her, but that when Seth gave a different account of what had occurred, Heather believed Seth and punished K.R. for sexual activity with Seth. Cattau also testified that K.R. reported that she was left in Seth's care even after her disclosure of abuse to Heather. Cattau testified that K.R. is still working through the resulting guilt and blame.

Cattau also acknowledged that K.R. had recently started to display additional emotional outbursts, such as hitting herself, out of concern for the current proceedings. Cattau testified K.R. had told her that there had been more abuse in addition to what she had already disclosed but that she was not ready to talk about it. K.R. told Cattau that she felt Heather did not love her and did not care about her, because Heather believed Seth instead of her.

Cattau testified that she was not in favor of visitation between Heather and K.R. at the time of trial. She testified to certain steps she would like to see taken before she would recommend visitation. Cattau also testified that she did not support termination of the guardianship.

On cross-examination, Cattau admitted that she had met Heather only one time, had never observed Heather and K.R. together, and had not conducted any therapy with or evaluation of Heather. She also testified that K.R. told her that Heather told K.R. not to talk about what happened with Seth, because it would "tear the family apart."

On redirect, Cattau testified that Heather's statements to K.R. not to talk about the abuse concerned her. She testified that this conduct would increase K.R.'s fears and contribute to a "sense of guilt." Cattau expressed concern that if Heather was successful in terminating the guardianship, it could lead to "re-victimization" of K.R. Cattau identified a lack of parental support as something that would contribute to continued

victimization of K.R. Cattau testified that this could lead to internalization of blame, depression, self-harming behaviors, self-harming comments, and other consequences.

Mark and Cynthia also called Heather to testify. She testified that she had been married since November 2014 and had lived with her husband since June 30, 2014. She also testified that she was employed at the time of trial.

Heather testified that she knew in May 2014 about K.R.'s being physically abused by Seth. She testified that when she learned about the abuse, she asked Seth's family to move out. She testified that the family instead had Seth move to live with an aunt, but that Seth had no additional contact with K.R. after he moved out.

Heather testified that she learned about the sexual abuse in June 2015, when a police officer called to ask her questions. Heather denied that K.R. ever told her about the sexual abuse or that she told K.R. not to talk about it. Heather testified that she thinks K.R.'s claim that Heather told her not to talk about the abuse was influenced by Mark and Cynthia.

Heather testified that while she did not agree with her conviction, she did acknowledge that "something horrible happened to [K.R.], and essentially it was [Heather's] fault" but that it was nothing she did intentionally. She also testified that she would "have to live with [failing to protect K.R.] for the rest of [her] life" and that she would "never forgive [her]self."

Heather testified that in 2014, she underwent a chemical dependency evaluation and a psychological and parental fitness evaluation and took a parenting class. In 2015, she started seeing a therapist and continued until December 2016. At that point, her therapist released her from therapy, and her probation officer said that he would not require additional therapy. In 2017, she took another psychological and parental fitness evaluation, another chemical dependency evaluation, and another parenting course. Heather testified that she had complied with or was working toward complying with every

provision of her probation. Heather testified that there was a no-contact order between K.R. and her and that she had not attempted to contact K.R. since it was entered. Heather denied ever telling K.R. that she should not talk about the abuse.

At the close of Mark and Cynthia's case, Heather moved for a directed verdict, which the court denied. Heather then presented her evidence, beginning with her own testimony.

Heather reiterated that she had taken the steps required by the initial guardianship order. She testified that after a psychological parenting evaluation and chemical dependency evaluation, it was recommended that she see a therapist to address low self-esteem issues. She testified that she had completed therapy and was discharged successfully. She testified that she also completed a parenting class, as required by the order establishing the guardianship, and had additionally obtained a second psychological and parental fitness evaluation and taken another parenting class focusing on parenting children who have gone through trauma.

Heather testified that she recalled occasions during which K.R. was talking about Seth and that she told K.R. that she did not need to worry about him anymore, because he was no longer capable of hurting her. Heather testified that K.R. may have misunderstood these statements as telling her not to talk about the abuse.

Heather was also asked whether she would be willing to wait to have contact with K.R. until Cattau believed K.R. was ready. Heather testified that she would not, because she believed that Cattau obtained information only from Mark and Cynthia and was biased against her.

Heather also called Dr. Stephanie Peterson, a clinical psychologist, to testify on her behalf. She provided testimony regarding psychological evaluations and parenting assessments she performed on Heather. Peterson testified that based on her evaluations and assessments, Heather "had all the qualities of an adequate parent" and that she had matured in positive ways between her first assessment of Heather in November 2014 and

a subsequent assessment in March 2017. Peterson also noted that K.R.'s younger sister lives with Heather and that Peterson was not aware of any issues or problems with Heather's parenting of that child. She testified that if a parent is competently parenting one child, it indicates that the parent should be able to competently parent another child.

County Court Order on Motion to Terminate Guardianship.

Following trial, the county court entered an order denying Heather's motion to terminate the guardianship. In the order, the county court stated that it would apply the parental preference principle. It explained that under the principle, Mark and Cynthia were required to establish by clear and convincing evidence that Heather is unfit or has forfeited her right to custody and that absent such a showing, reunification with Heather was required by law.

The trial court then praised many of Heather's actions after the establishment of the guardianship as "commendable." But it also noted that Heather had failed to take responsibility for what happened to K.R. It also stated that Heather "seeks reunification because that is what she wants; not because it is in the best interest of [K.R.]." The county court denied Heather's motions.

Heather appealed the county court's decision.

Court of Appeals.

On appeal, Heather argued that the county court erred by declining to terminate the guardianship or order any visitation. She also argued that the county court improperly delegated to Cattau the authority to make decisions regarding visitation and termination of the guardianship.

The Court of Appeals affirmed. In its opinion, the Court of Appeals stated that "there are two competing principles in the area of child custody jurisprudence: the parental preference principle and the best interests of the child principle." *In re Guardianship of K.R.*, 26 Neb. App. 713, 722, 923 N.W.2d

435, 443 (2018). With respect to the parental preference principle, the Court of Appeals noted that this court has previously said that to deny a parent the custody of his or her minor child, "it must be affirmatively shown that such parent is unfit to perform parental duties or that he or she has forfeited that right." *Id.* at 723, 923 N.W.2d at 443. But the Court of Appeals also pointed to the following language in our opinion in *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016):

> "We continue to adhere to the view that the parental preference doctrine, by definition, is a preference, and it will be applied to a child custody determination unless it is shown that the lawful parent is unfit or has forfeited his or her superior right or the preference is negated by a demonstration that the best interests of the child lie elsewhere."

In re Guardianship of K.R., 26 Neb. App. at 724, 923 N.W.2d at 443.

The Court of Appeals relied on this language to hold that there are rare cases in which the parental preference principle can be rebutted by a showing that the child's best interests will be served by custody being awarded to a nonparent rather than a parent. Based on the evidence in the record, particularly Cattau's testimony about how K.R. was still dealing with the abuse, the Court of Appeals found that this was such a case. The Court of Appeals also found that the county court did not err in not ordering visitation and did not improperly delegate to Cattau decisions regarding termination of the guardianship and visitation.

We granted Heather's petition for further review.

ASSIGNMENTS OF ERROR

Heather's primary contention on further review is that the Court of Appeals erred by affirming the county court's denial of Heather's motions to terminate the guardianship and for visitation on the grounds that the relief Heather sought would be contrary to K.R.'s best interests.

She also claims that the Court of Appeals erred when it found that the county court did not improperly delegate to Cattau decisions regarding termination of the guardianship and visitation. We find no error in the Court of Appeals' disposition of this issue, and we see no need to comment on it further. Accordingly, our analysis below is limited to whether the Court of Appeals erred by affirming the county court's order denying Heather's motions to terminate the guardianship and for visitation.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2016 & Cum. Supp. 2018), are reviewed for error on the record. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). 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. *Id.* An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings. *McManus Enters. v. Nebraska Liquor Control Comm.*, 303 Neb. 56, 926 N.W.2d 660 (2019).

ANALYSIS

[3] All the parties to this case and every court to have considered it agree that because Heather is K.R.'s parent, this case is governed by what this court has dubbed the "parental preference principle." See, e.g., *In re Guardianship of D.J., supra*. That principle establishes a rebuttable presumption that the best interests of the child are served by placing custody of a minor child with his or her parent. See *id.*

Heather's objection to the Court of Appeals' decision is not that it applied the parental preference principle. Instead, she contends that the Court of Appeals erred by finding that the parental preference principle was rebutted by a demonstration

that K.R's best interests would be served by keeping the guardianship in place and not allowing visitation. Heather argues that allowing the parental preference principle to be rebutted by a best interests showing dilutes the doctrine and violates her right to due process under the 14th Amendment to the U.S. Constitution. She argues that under this court's precedent as well as cases of the U.S. Supreme Court interpreting the 14th Amendment, the parental preference principle can be overcome only if the nonparent who seeks custody proves by clear and convincing evidence that the parent is either unfit or has forfeited his or her right to custody.

Heather correctly points out that on many occasions, this court has said that under the parental preference principle, absent proof that a parent is unfit or has forfeited the right to custody, a parent may not be deprived of the custody of a minor child. See, e.g., *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011); *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008); *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007); *In re Guardianship of D.J., supra*; *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). She asks that to the extent our opinion in *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016), held that the presumption can be overcome by anything other than a showing of unfitness or forfeiture, we overrule it.

Before reaching these arguments, however, we note that while the Court of Appeals clearly found the parental preference principle was negated by a best interests demonstration, it is not so clear that the county court did the same. In fact, before proceeding to analyze the issues raised by Heather's motions, the county court articulated the parental preference principle precisely, as Heather contends the law requires. It stated:

> The parental preference principle applies in guardianship proceedings that affect child custody and creates a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her

> biological parent. The current guardians must establish by clear and convincing evidence that the biological parent is unfit and/or has forfeited her right to custody. Absent such a showing, the law requires reunification.

The county court went on to discuss evidence introduced at trial that would bear on Heather's fitness as a parent before ultimately denying Heather's motions.

In our view, the county court decision is best read as making an implicit determination that Heather was not fit to have custody of or visitation with K.R. The county court said that absent a showing of unfitness or forfeiture, "the law requires reunification," and after discussing facts pertaining to Heather's fitness, it denied reunification. The county court's order does also contain some language referring to K.R.'s "best interests," but we do not think the order can logically be read as turning on a best interests determination when the order states that a finding of unfitness or forfeiture was the only basis upon which Heather could be denied reunification with K.R.

Because we understand the county court to have denied Heather's motions on the ground that she was unfit to parent K.R., we begin our analysis by reviewing that determination.

Did County Court Err by Finding Heather Unfit?

[4] We have defined parental unfitness as "a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being." *Farnsworth*, 276 Neb. at 657, 756 N.W.2d at 526. Mark and Cynthia primarily argue that Heather's unfitness was demonstrated by the conduct that led to her child abuse conviction. We begin our consideration of whether there was competent evidence to support a finding of unfitness with that evidence.

Many witnesses testified to the facts that led to Heather's conviction. This testimony indicated that Heather left K.R. and her younger sister alone for long periods of time with minor

boys who were members of a family temporarily staying at Heather's home. During that time, K.R. was abused by the minor boys. There was evidence that this abuse was of both a physical and sexual nature. K.R. reported to Cattau that the physical abuse included biting, hitting, choking, and drowning, as well as locking K.R. in a bathroom and forcing her to eat dog feces. Heather does not dispute that K.R. was subjected to physical and sexual abuse and that her child abuse conviction was based on the theory that Heather failed to protect her from that abuse.

This evidence unquestionably reflects poorly on Heather's parenting, but we must also consider when the conduct occurred. There is some dispute between the parties as to when Heather failed to protect K.R. from abuse. Heather contends the abuse predated the establishment of the guardianship in June 2014. Mark and Cynthia, pointing only to the charging documents in the criminal case, contend that the abuse continued through May 2015. In either case, however, Heather's failure to protect K.R. from abuse concluded *over 2 years prior* to the trial on Heather's motions to terminate the guardianship and for visitation.

The passage of time following the facts forming the basis of Heather's conviction affects the weight those facts can be given in an unfitness analysis. In *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011), we stated that evidence of unfitness must be focused upon a parent's *present* ability to care for a child. We added that evidence of a parent's past misdeeds may be pertinent, "insofar as [they] suggest[] present or future faults" and that "in some instances, [they] may be *very* pertinent." *Id.* at 594, 804 N.W.2d at 182 (emphasis in original).

We do not view Heather's failure to protect K.R. from abuse as entirely irrelevant to the fitness analysis. At the same time, however, we question whether this evidence from at least 2 years in the past would, standing on its own, support a determination that Heather was unfit at the time of trial. That,

however, is a question we need not confront, because there was other evidence in the record pertaining to Heather's fitness. We will discuss that evidence now.

While the basic facts underlying Heather's child abuse conviction are not disputed, the evidence introduced at trial relating to Heather's fitness as a parent conflicted on many other points. Cattau testified that K.R. disclosed to her that when K.R. told Heather about the physical and sexual abuse, Heather not only did not believe K.R., she blamed and punished K.R. for engaging in sexual conduct and told K.R. not to talk about it. At trial, Heather denied that K.R. informed her of the sexual abuse or that she blamed K.R. for it. Heather also testified that K.R.'s statements that Heather told her not to talk about the abuse were the result of Mark and Cynthia's influence on K.R.

Testimony from Cattau also indicated that K.R. was left with Seth after telling Heather about the abuse. Heather denied this as well, contending that Seth left her home after she demanded that his family leave.

There was also conflict in the testimony as to whether Heather could effectively meet K.R.'s needs. Peterson testified that based on her evaluations of Heather, there was no reason to believe she would be an abusive or unfit parent. Cattau, however, opposed termination of the guardianship or visitation and outlined many concerns regarding contact between Heather and K.R. In particular, Cattau expressed concerns about the harm K.R. suffered as a result of Heather's telling K.R. not to talk about the abuse. Cattau testified to K.R.'s need for "parental support" and the negative consequences that were likely to follow in the absence of such support. While Heather testified to her belief that Cattau was biased and that the only information she received was through Mark and Cynthia, Cattau testified to steps she took to ensure that K.R. independently disclosed information to her.

As the foregoing discussion illustrates, two very different accounts of Heather's fitness as a parent were presented at

trial. If Heather's side of the story were believed, one would find that after being informed that K.R. was being physically abused, Heather supported K.R., promptly took steps to remove the abuser, recognized some of her faults as a parent, took steps to address those deficiencies, and then at trial accepted responsibility for her initial failure to protect K.R. Under this view, Heather resisted Cattau's opinion that contact with Heather would be detrimental to K.R. only because Cattau is a biased therapist who accepts everything Mark and Cynthia tell her.

Other evidence, however, portrayed a different story. There was evidence that K.R. told Heather she was being physically and sexually abused and that Heather responded by not only blaming K.R. for engaging in sexual activities but also telling her not to talk about the subject and allowing the principal perpetrator of the abuse to remain in her home. Heather denied all of this at trial and even went so far as to assert that K.R. said she told Heather about the abuse only because Mark and Cynthia influenced her to do so.

While we are presented with conflicting evidence, our standard of review in this matter does not allow us to reweigh this evidence or make our own factual findings. Rather, our task is limited to determining whether there is competent evidence to support a finding of unfitness by clear and convincing evidence. As we will explain, we find there is competent evidence to support such a finding.

As we have described above, evidence was introduced at trial showing that K.R. informed Heather of the physical and sexual abuse and that Heather disregarded K.R.'s complaints, blamed her for the abuse, told her not to talk about it, and allowed the perpetrator of the abuse to remain in her home. Heather failed to accept responsibility for these actions and, instead, denied them at trial and suggested that a portion of K.R.'s account was not based in fact. We also note that at trial, while Heather purported to accept responsibility for at least allowing some abuse of K.R., she described her particular

failure as "trying to help some people out" and "allow[ing] them into [her] home" and "because of that, [her] daughter was hurt." This description seems to minimize Heather's culpability for actions that ultimately resulted in a felony child abuse conviction for knowingly and intentionally placing K.R. in an abusive situation.

Many courts have recognized that the failure to accept responsibility for past misconduct can indicate present unfitness. See, e.g., *K.D. v. People*, 139 P.3d 695 (Colo. 2006); *In re C.N.*, 196 Ill. 2d 181, 752 N.E.2d 1030, 256 Ill. Dec. 788 (2001); *In re Emma S.*, 177 A.3d 632 (Me. 2018); *In re Kelly S.*, 715 A.2d 1283 (R.I. 1998). We believe that is the case here. In fact, we find that Heather's failure to accept responsibility is particularly relevant to the fitness determination, given testimony regarding K.R.'s emotional needs.

Cattau testified that K.R. was emotionally harmed as a result of Heather's telling her not to talk about the abuse and was dealing with a sense of guilt for "believing that she is responsible for tearing her family apart." Cattau testified that a lack of parental support would contribute to "continued victimization" and outlined various negative consequences thereof. Cattau's testimony suggests that given the abuse she suffered and her emotional state, K.R. is in particular need of support and validation from those who care for her.

Courts in other jurisdictions have recognized that when a child develops special needs as a result of past misconduct by a parent, a parent's inability to meet those needs bears on parental fitness. For example, in *Matter of Welfare of M.A.*, 408 N.W.2d 227 (Minn. App. 1987), a Minnesota appellate court affirmed a finding of unfitness based in part on the parent's inability to meet the emotional needs of a child arising as a result of past physical abuse committed by the parent. Similarly, in *Matter of K.M.M.*, 186 Wash. 2d 466, 379 P.3d 75 (2016), the Washington Supreme Court affirmed a trial court's finding that a father was unfit based on the determination that the father, who had not had substantial contact with his child

after the child was removed from the home due to neglect, was unable to parent the child because of a lack of attachment. The court emphasized that "in order to determine whether a parent is a fit parent *to a particular child*, the court must determine that the parent is able to meet that child's basic needs." *Id.* at 494, 379 P.3d 90 (emphasis in original). See, also, *In re Scott S.*, 775 A.2d 1144, 1151 n.14 (Me. 2001) ("[t]his does not mean that the facts relating to the children's needs should not be considered in determining the parents' capacity to care for them. To the contrary, the parents' actions and abilities must be understood and judged in the context of the health, ages, and needs of the children").

We find these cases instructive because there is competent evidence here that K.R. has needs arising from Heather's past misconduct and that Heather, at the time of the trial, was unable to meet those needs. As noted above, Cattau's testimony suggests that K.R.'s needs include support and validation from parental figures. At trial, however, Heather continued to deny K.R.'s account and to blame Mark and Cynthia for influencing K.R. to fabricate details. Put in terms of our unfitness standard, there was competent evidence that Heather has a deficiency or incapacity that will probably prevent her from performing reasonable obligations to K.R., which will probably result in detriment to K.R.'s well-being. See *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008).

Heather's inability to meet K.R.'s unique needs also distinguishes this case from *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007). In that case, the State sought termination of a mother's parental rights as to one of her three children. We held that the evidence was insufficient to establish that termination was in the child's best interests. We pointed out that the State had admitted that the mother was an adequate parent to her other two children, but had failed to show any reason why the mother would not be an adequate parent to the third child as well. In this case, while there is evidence that Heather has custody of K.R.'s younger sister and

no evidence that she is unfit to parent that child, the evidence described above supports a finding that Heather is not fit to parent K.R.

For these reasons, we find that there was competent evidence supporting the county court's finding that Heather was unfit at the time of trial. Because guardianships are temporary and depend upon the circumstances existing at the time, our findings would not foreclose Heather from seeking visitation or termination of the guardianship in the future. See *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996).

Role of Best Interests in Parental Preference Principle Analysis.

Because we find that there was competent evidence to support the county court's finding that Heather was unfit to parent K.R., there is no reason for us to consider Heather's argument that the Court of Appeals erred by finding that the parental preference principle was rebutted by a showing that it was in K.R.'s best interests for the guardianship to remain in place. For the same reason, there is no need to consider Heather's request that we overrule *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016), to the extent it holds that the parental preference principle can be negated by a showing that it is in the child's best interests for a nonparent to have custody rather than a parent. We do, however, take this opportunity to make some observations regarding the interaction of the parental preference principle and the best interests of the child standard.

With a citation to *Windham*, the Court of Appeals found that this is "one of those rare cases where the best interests of the child defeats the parental preference principle." *In re Guardianship of K.R.*, 26 Neb. App. 713, 724, 923 N.W.2d 435, 444 (2018). The Court of Appeals noted various pieces of evidence it considered relevant to its best interests analysis, but it did not otherwise explain why it believed this was such a case. We note that the Court of Appeals followed a similar

approach in a case issued shortly after its opinion in this case. See *State on behalf of Lilliana L. v. Hugo C.*, 26 Neb. App. 923, 924 N.W.2d 743 (2019). While it is not necessary for us to determine whether the Court of Appeals erred in these cases, we believe caution is warranted in this area for reasons we will briefly explain.

First, *Windham* cannot be read to stand for the proposition that the parental preference principle will be rebutted in every case in which the nonparent might prevail in a pure best interests comparison. In *Windham*, we rejected the nonparent's invitation to "examine the merits as though [the parent and nonparent] were standing on equal footing and the outcome would be determined only by reference to best interests." 295 Neb. at 290, 887 N.W.2d at 718. Instead, we emphasized that the parental preference principle could *not* be rebutted by a showing that the nonparent can "provide more amenities and a better life" or "'"'merely because on financial or other grounds a stranger might better provide.'"'" *Id.* at 291, 292, 887 N.W.2d at 719.

Second, while *Windham* makes clear that there will be cases in which a best interests showing will be insufficient to overcome the parental preference principle, we did not have the occasion in *Windham* to explore the circumstances in which a best interests showing *could* negate the presumption. Our opinion in *Windham* did cite a case from a Florida intermediate appellate court in which the court affirmed a trial court's award of custody to an ex-stepmother rather than the child's natural father based on the child's best interests rather than a finding of unfitness, but we did so only in the course of noting that it was distinguishable from the facts before us. We also note that courts in other states have not taken a uniform approach to the question of when, if ever, a court may deny a parent custody of a child based on a determination that the child's best interests lie elsewhere. See, e.g., *Watkins v. Nelson*, 163 N.J. 235, 748 A.2d 558 (2000) (collecting cases).

For reasons we have noted, this case does not present the opportunity to exhaustively explore the interplay of the best interests standard and the parental preference principle. We urge courts, however, to be mindful of the above considerations when confronted with an argument that custody of a child should be awarded to a nonparent rather than a parent because doing so would be in the best interests of the child.

CONCLUSION

Because we find that the county court's determination that Heather was unfit to parent K.R. was supported by competent evidence, we affirm the decision of the Court of Appeals, albeit on different grounds.

Affirmed.

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

State of Nebraska, appellee, v. Larry Paulsen, appellant.

932 N.W.2d 849

Filed September 6, 2019. No. S-18-936.

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. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
3. **Jurisdiction: Judgments: Words and Phrases: Appeal and Error.** For purposes of appellate jurisdiction, a judgment is the final determination of the rights of the parties in an action.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2016) include those legal rights that a party is entitled to enforce or defend.
6. **Probation and Parole: Appeal and Error.** Claim-specific standards of review apply to an appeal of an order refusing to modify or eliminate a probation condition.

Appeal from the District Court for Dawson County: James E. Doyle IV, Judge. Affirmed.

Christopher Ferdico and Erik W. Fern, of Berry Law Firm, 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.

Per Curiam.

Over 6 months after the district court for Dawson County sentenced him to probation and imposed various terms thereof, Larry Paulsen filed a motion to modify one of those terms relating to possession of firearms. The district court denied the motion, and Paulsen has appealed. We conclude that the district court did not err in denying Paulsen's motion and therefore affirm.

BACKGROUND

Conviction and Sentence.

Paulsen's conviction in this case arose out of the district court's acceptance of his plea of guilty to driving under the influence, second offense. The district court set forth its sentence in a journal entry filed on January 16, 2018, in which it stated that it was sentencing Paulsen to jail for 30 days and probation for 24 months "under the terms and conditions set by the Court." The district court also revoked Paulsen's driver's license for 18 months and ordered him to pay a $1,000 fine. The district court later entered an order setting forth various conditions to which Paulsen would be subject during his 24 months of probation. One of the conditions states that Paulsen shall not "have nor associate with anyone who has possession of firearms, ammunition, or illegal weapons."

Paulsen did not appeal his conviction or sentence.

Motion to Modify Probation Order.

On August 28, 2018, Paulsen filed a motion to modify the terms of his probation under Neb. Rev. Stat. § 29-2263(3) (Reissue 2016). Paulsen asked the district court to remove the term of probation relating to firearms. In the motion, Paulsen

asserted that he had "always been a collector of different firearms, including mostly hunting rifles or shotguns," that he had "always been in possession of those weapons in his residence," but that he "recently had that room locked up by Dawson County Probation and the keys to the room were delivered to [his] counsel." Paulsen alleged that he had no history of violence, that there was no evidence any of his driving under the influence convictions were caused by firearm ownership, and that there was thus no reasonable connection between his rehabilitation and the firearms restriction in the probation order. Paulsen also stated that he had not been sanctioned since beginning his probation term.

The State did not object to Paulsen's motion, and consequently, the district court considered it without a hearing. In a written order, the district court denied Paulsen's motion. It explained that the firearms restriction is part of the court's usual and customary terms of probation and that it is included to protect the public and probation officers. The district court then noted that in ruling on requests to modify probation conditions, it considers whether there has been a material change in circumstances which arose after the entry of the probation order. The district court found that Paulsen had not identified a material change in circumstances or any other reason that would entitle him to the relief sought. There is no indication in the record that the administration of probation ceased during the pendency of this appeal.

Paulsen appeals the order denying modification.

ASSIGNMENT OF ERROR

Paulsen contends that the district court erred by overruling his motion for modification of his probation order.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

The standard of review governing orders denying a motion to modify probation are discussed further in the analysis section below.

ANALYSIS

Paulsen contends that the district court erred by denying his request to eliminate the condition of his probation relating to firearms. Before we may reach that question, however, we must ensure we have appellate jurisdiction. See *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018). We have an independent obligation to ensure we have appellate jurisdiction, *id.*, and in this case, the State also contends appellate jurisdiction is lacking.

Jurisdiction.

[2,3] For an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken. *Simms v. Friel*, 302 Neb. 1, 921 N.W.2d 369 (2019). For purposes of appellate jurisdiction, a judgment is the final determination of the rights of the parties in an action. *State v. Thalmann*, 302 Neb. 110, 921 N.W.2d 816 (2019). In a criminal case, the judgment from which the appellant may appeal is the sentence. *Id.* Here, the sentencing order was entered on January 16, 2018, and the order setting forth the terms of Paulsen's probation was entered on February 22. Paulsen did not timely appeal from either of those orders and therefore did not timely appeal from a final judgment.

[4] The jurisdictional question before us is thus whether the order denying Paulsen's motion for modification of his probation terms was a final order. Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action

after a judgment is rendered. *State v. Thalmann, supra.* We find that the order from which Paulsen appeals falls into the third category for reasons we will explain.

Starting with the most straightforward aspect of the third category of final orders, the district court's order was made "upon a summary application in an action after judgment." See § 25-1902. We have said that an order made "upon a summary application in an action after judgment" under § 25-1902 is "'an order ruling on a postjudgment motion in an action.'" See *State v. Coble*, 299 Neb. 434, 438, 908 N.W.2d 646, 651 (2018). See, also, John. P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239, 313 (2001) ("only reasonable interpretation of the words of the statute . . . is that an order 'upon a summary application in an action after judgment' is an order ruling on a post-judgment motion in an action"). Paulsen's motion seeking a modification of his probation terms plainly meets that definition.

While a more difficult question, we also find that an order denying a motion to modify or eliminate a probation condition affects a substantial right. We have identified many factors that define when an order affects a substantial right. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue. *State v. Thalmann*, 302 Neb. 110, 921 N.W.2d 816 (2019).

Regarding the importance of the right affected, we often state that a substantial right is an essential legal right, not merely a technical right. See, e.g., *id.* Also relevant to the importance of the right, we have stated that an order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. See *id.* Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter. *Id.* This aspect of affecting a substantial right also depends on whether the right could otherwise be

effectively vindicated. *Id.* An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review. *Id.*

In order to determine whether an order denying a motion to modify a probation condition affects a right that is sufficiently important to be classified as substantial, we must consider the source and nature of the right asserted. Paulsen contends that § 29-2263(3) confers a substantial right that was affected by the district court's order denying his motion to modify. The text of § 29-2263(3) provides: "During the term of probation, the court on application of a probation officer or of the probationer . . . may modify or eliminate any of the conditions imposed on the probationer or add further conditions authorized by [Neb. Rev. Stat. § 29-2262 (Reissue 2016)]."

Section 29-2263(3) gives trial courts the authority to modify or eliminate conditions of probation "[d]uring the term of probation." Because a defendant's term of probation will not begin until after the sentence is pronounced, § 29-2263(3) creates an exception to the general rule that, once a valid criminal sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. See, e.g., *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006). In other words, while other aspects of a criminal sentence are quite static, § 29-2263(3) allows a court to make adjustments to conditions of probation as changing circumstances warrant.

Section 29-2263(3) is not so explicit about the standards trial courts are to apply when considering whether to modify or eliminate probation terms. But § 29-2263(3) is part of a collection of statutes dealing with probation. As we often say, such a collection of statutes pertaining to a single 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." See *State v. McGuire*, 301 Neb. 895, 901, 921

N.W.2d 77, 83 (2018). And another statute in this collection of statutes, Neb. Rev. Stat. § 29-2262 (Reissue 2016), addresses the standards courts are to consider in imposing conditions of probation.

Section 29-2262 provides trial courts with considerable discretion in fashioning conditions of probation, but also provides some guidance as to what courts are to consider in doing so. Section 29-2262(1) directs courts sentencing an offender to probation to "attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life." Section 29-2262(2) sets forth a number of specific conditions that a court may impose and also states that "any other conditions reasonably related to the rehabilitation of the offender" may be imposed. In addition to these limitations on permissible probation conditions, some probation conditions may also be subject to constitutional limitations. See, e.g., *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013).

Mindful of our obligation to read § 29-2263(3) in pari materia with § 29-2262, we believe § 29-2263(3) is best read as giving a probationer the right to initiate a process where the sentencing court may assess whether, in light of new circumstances arising during the course of probation and within the bounds of constitutional limitations, conditions might reasonably be changed to better accomplish the primary goal of probation—"to insure that the offender will lead a law-abiding life." See § 29-2262(1). In some cases, a probationer might demonstrate that because of changed circumstances, a probation condition is no longer appropriate. A probationer might, for example, demonstrate that, in light of new circumstances, a condition that was once "reasonably related to the rehabilitation of the offender" is no longer so. See § 29-2262(2)(r). Of course, the statutory ability to initiate a modification process is not an opportunity to collaterally attack the sentencing judgment or to reassess whether the initial conditions of probation were erroneous. That is the proper subject of an appeal from

the judgment of the initial sentence and must be taken within the time limit established by the Legislature.

[5] With this understanding of the right conferred by § 29-2263(3) established, it becomes clearer that the denial of relief sought thereunder affects a substantial right. Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend. *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016). Appellate courts regularly allow parties to enforce their right to not be subjected to probation conditions that are unauthorized by law at the time of sentencing. See, e.g., *State v. Rieger, supra*. We see no reason why the right to be subjected to only those probation terms authorized by law is any less substantial when sought during the term of probation. Moreover, an order denying modification or elimination of conditions affects the right with finality; there is no later point at which the issue could be effectively reviewed on appeal.

While the reasons set forth above suggest that the district court's order is an order affecting a substantial right made on summary application in an action after judgment is rendered, the State contends that a different conclusion follows from the Nebraska Court of Appeals decision in *State v. Volcek*, 15 Neb. App. 416, 729 N.W.2d 90 (2007). We disagree.

In *Volcek*, a defendant was sentenced to probation with one of the conditions requiring the defendant to serve a term of 45 days' imprisonment "'unless waived by the Court.'" 15 Neb. App. at 418, 729 N.W.2d at 92. The probation order required the term of imprisonment to begin on a specified date and set a hearing on that same date for the court to determine whether the jail term should be waived. The defendant did not appeal the original sentencing and probation order, but attempted to appeal from the trial court's later decision not to waive the jail sentence. The Court of Appeals reasoned that the defendant did not have any substantive right to have the jail term waived, but that the decision was merely within the discretion of the trial court and was thus not appealable.

The State contends that like the request to waive the jail term in *Volcek*, Paulsen did not have any substantive right to have conditions of probation modified or eliminated. Unlike this case, however, the defendant in *Volcek* was not requesting that a term of probation be modified or eliminated. Instead, the trial court was simply presented with the question of whether, under the permissive language of the original probation order, the jail term should be waived.

We recognize that *Volcek* does contain a reference to the language of § 29-2263(3) following its conclusion that the decision to waive the jail term was entirely within the discretion of the trial court. This reference is somewhat cryptic, given that there did not appear to be a motion to modify or eliminate probation conditions in that case. In any event, to the extent *Volcek* suggests that § 29-2263(3) provides no standards by which motions brought thereunder are to be evaluated and leaves them solely to the unfettered and unreviewable discretion of the trial court, we disapprove for the reasons we have set forth above.

For these reasons, we conclude that the order denying Paulsen's motion was a final, appealable order.

Merits.

Before turning to the merits of Paulsen's appeal, we pause to address the standard of review. We do not appear to have previously addressed the standard of review governing an order denying a motion brought under § 29-2263(3).

[6] When probation conditions are challenged on direct appeal, the standard of review depends on the challenge asserted. In *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013), we reviewed a claim that a condition of probation that infringed on a fundamental constitutional right was not sufficiently tailored to an offender's rehabilitative process for an abuse of discretion. In contrast, the question of whether a condition of probation is authorized by statute is a question of law subject to de novo review. See, *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010); *State v. Grimm*, 240 Neb.

863, 484 N.W.2d 830 (1992). We hold that these same claim-specific standards of review apply to an appeal of an order refusing to modify or eliminate a probation condition. With these standards established, we proceed to consider the merits of Paulsen's argument.

Paulsen offers a primary and an alternative argument that the district court erred by refusing to remove the firearms condition. We are not persuaded by either.

Paulsen's primary argument is that because the firearms restriction affects his fundamental right to bear arms under the U.S. and Nebraska Constitutions, any such restriction must be subjected to heightened scrutiny, and that the restriction in this case cannot withstand such review. In support of this argument, Paulsen invokes *Rieger*, where we held that because a probation condition affected a fundamental constitutional right, the condition must be "narrowly tailored and reasonably related to the rehabilitative process." 286 Neb. at 796, 839 N.W.2d at 288.

As Paulsen must acknowledge, however, he did not argue in the district court that the firearms restriction was subject to heightened scrutiny for constitutional reasons. Nor did he argue that because he pled to an offense that was not a felony, the firearms restriction should have included the "written permission by the court" language set forth in § 29-2262(2)(i). We have held that a court cannot err with respect to a matter not submitted to it for disposition and that an issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. See *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013). Because Paulsen did not present these arguments to the district court, they are not properly before us on appeal.

This leaves Paulsen's alternative argument. Here, Paulsen contends that even if the heightened scrutiny we applied in *Rieger* does not apply, the firearms restriction is still improper given the crime for which probation was imposed and Paulsen's lack of a history of violence.

Paulsen articulated the substance of this argument in the district court. In his motion, he alleged that he did not have a propensity for or history of violence, that his criminal convictions for driving under the influence did not involve firearms, that there was no connection between his rehabilitation and his possession of firearms, and that there was no risk to public safety in removing the firearms restriction. But while Paulsen made all of these allegations in support of his motion to modify, none of them arise out of circumstances that developed during the term of probation. Instead, all of these arguments for why the firearms restriction was unreasonable could have been made in a challenge to the firearms restriction on direct appeal.

The district court relied on the absence of a material change in circumstances as a reason for refusing to modify the firearms restriction. We do not believe the district court erred by doing so. As we noted recently in *State v. Dill*, 300 Neb. 344, 352, 913 N.W.2d 470, 475 (2018), although § 29-2263(3) allows for the modification of probation conditions during the term of probation, objections to probation conditions "should be brought to the sentencing court's attention for possible elimination or modification at the outset." Our conclusion in *Dill* is consistent with the "fundamental principle" that "[t]he need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity." *State v. Parnell*, 294 Neb. 551, 578, 883 N.W.2d 652, 672 (2016).

Our conclusion in *Dill* is also consistent with the understanding of § 29-2263(3) set forth in this opinion. As we have explained, we understand § 29-2263(3) to allow trial courts to adjust probation terms during the course of probation as *new* circumstances warrant. We do not, however, understand § 29-2263(3) to allow probationers to challenge terms of probation based on arguments that could have been raised in a direct appeal of their sentence. If § 29-2263(3) was construed to allow such challenges, a party that failed to challenge a probation condition on direct appeal could file a motion to modify

and, if unsuccessful, appeal the denial of the motion to modify. We will not interpret § 29-2263(3) to effectively eliminate the deadline to appeal a criminal sentence set forth in Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018) in the context of challenges to probation conditions.

While nearly all of the allegations Paulsen made in his motion to modify were known to him at the time of sentencing, we acknowledge that Paulsen's motion to modify also alleged that he had not been sanctioned during the term of his probation. We also acknowledge that Paulsen's apparent compliance with his terms of probation for approximately 6 months is not a basis upon which Paulsen could have sought removal of the firearms restriction on direct appeal. Even so, our conclusion that the district court did not err in denying Paulsen's motion to modify remains unchanged. Compliance with the terms of probation is the expectation for all probationers. The mere fact that a probationer has complied with the terms of probation for some period of time is not a sufficient change in circumstances so as to entitle a probationer to a modification of the conditions of probation.

CONCLUSION

Because we find that the district court did not err in denying Paulsen's motion to modify the terms of his probation, 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. Malik M. Stelly, appellant.

932 N.W.2d 857

Filed September 13, 2019. No. S-18-025.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Trial: Photographs: Appeal and Error.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect. An appellate court reviews a trial court's admission of photographs of a victim's body for abuse of discretion.
3. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. An appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.
4. **Search Warrants.** The purpose of the particularity requirement as it relates to warrants is to prevent general searches, and whether a warrant is insufficiently particular depends upon the facts and circumstances of each case.

5. **Search Warrants: Affidavits.** An inadvertent defect in a search warrant may be cured by reference to the affidavit used to obtain the warrant if the affidavit is incorporated in the warrant or referred to in the warrant and the affidavit accompanies the warrant.
6. **Homicide: Photographs.** If the State lays proper foundation, photographs that illustrate or make clear a controverted issue in a homicide case are admissible, even if gruesome.
7. ____: ____. In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
8. **Homicide: Photographs: Juries: Proof.** Photographs can provide visual proof from which a jury could reasonably infer that the homicide was committed with deliberate and premeditated malice.
9. **Rules of Evidence: Photographs: Words and Phrases.** Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), does not require the State to have a separate purpose for every photograph, and it requires a court to prohibit cumulative evidence only if it substantially outweighs the probative value of the evidence.
10. **Trial: Evidence: Appeal and Error.** The decision of the trial court as to whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice or the needless presentation of cumulative evidence will not be disturbed on appeal unless there has been an abuse of discretion.
11. **Effectiveness of Counsel: Proof: Words and Phrases.** 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. 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. 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.
12. **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.
13. **Effectiveness of Counsel: Appeal and Error.** To raise a claim on direct appeal that trial counsel was ineffective, a defendant's brief must

specifically set forth how counsel's performance was deficient, but it need not also allege prejudice.

14. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.
15. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
16. ____: ____: ____. The record on direct appeal is sufficient to review a claim of ineffective assistance 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.
17. ____: ____: ____. When 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.
18. **Criminal Law: Jurors: Proof.** Generally, a victim's qualities and personal attributes are irrelevant to the facts that the State must prove in a criminal prosecution and have the potential to distort the jurors' reasoned consideration of the evidence by evoking their sympathy for the victim and corresponding outrage toward the defendant.
19. **Effectiveness of Counsel: Prosecuting Attorneys: Presumptions: Appeal and Error.** An appellate court gives defense counsel's decision not to object to a prosecutor's conduct or remark a strong presumption of reasonableness.
20. **Effectiveness of Counsel: Claims.** A claim of ineffective assistance that is insufficiently stated is no different than a claim not stated at all.
21. **Postconviction: Effectiveness of Counsel: Claims: Appeal and Error.** When an appellate court finds, on direct appeal, that the record is not sufficient to resolve a claim of ineffective assistance, it should not be misunderstood as a finding that the claim will necessarily require an evidentiary hearing if raised in a motion for postconviction relief, because that determination is governed by an entirely different standard.

22. **Postconviction: Effectiveness of Counsel: Records: Claims: Appeal and Error.** Just because an appellate court finds the record on direct appeal is insufficient to resolve a claim of ineffective assistance, it does not mean that a postconviction court will necessarily be precluded from later finding the existing record affirmatively refutes the same claim.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Stacy, J.

In this direct appeal, Malik M. Stelly challenges his convictions for first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Finding no merit to his assignments of error, we affirm.

I. BACKGROUND

On January 11, 2017, at 2:37 a.m., the "ShotSpotter" system in Omaha, Nebraska, indicated shots were fired in the area of 3615 Laurel Avenue. Officers responded to the alert and arrived on the scene within minutes to find D'Angelo Branch lying in a pool of blood on a residential sidewalk. Paramedics determined Branch had no pulse and declared him dead. An autopsy showed he died of multiple gunshot wounds to the head; in total, he sustained 16 wounds to the head and five additional wounds to his lower body.

1. Investigation

Several people who lived near the crime scene reported hearing multiple gunshots and seeing a silver Chrysler PT Cruiser driving away from the area. One person described

the PT Cruiser as having rust around the wheel wells on the driver's side in both the front and the back. Surveillance video from a nearby residence showed a silver PT Cruiser in the area during the relevant time.

Officers collected 11 spent casings from a 9-mm firearm from around Branch's body. They also recovered two cell phones from the crime scene: an LG cell phone that was found in the street about 10 to 15 feet from Branch's body and a ZTE cell phone that was found in Branch's pocket.

Later that day, officers obtained a search warrant and extracted data from the LG cell phone found in the street. That data indicated the cell phone belonged to Stelly. After learning Stelly's address, officers went to surveil his apartment complex. They found a silver PT Cruiser in the parking lot at the complex. The PT Cruiser was registered to Stelly's friend, Royce White.

While surveilling the apartment complex, officers saw Stelly and White leave in a green Cadillac. The Cadillac was registered to White's girlfriend. Officers followed the Cadillac and ultimately conducted a traffic stop. Stelly and White were transported to the police station and interviewed. After authorities obtained buccal swabs from each, Stelly and White were released.

A search warrant was then obtained for Stelly's apartment and the PT Cruiser. During the search of the apartment, officers discovered the keys to the PT Cruiser under some couch cushions. They also found and seized a hat they believed Stelly was wearing during the relevant time period based on time-stamped photographs discovered on Stelly's social media profile. The search of the PT Cruiser showed it had damage to the wheel wells on the driver's side. Evidence adduced at trial showed that White had loaned Stelly his silver PT Cruiser before the shooting because Stelly's car had been in an accident. Stelly's fingerprint was recovered from the interior doorframe of White's PT Cruiser.

The LG cell phone found in the street near Branch's body, and the hat seized from Stelly's apartment, were examined

by a forensic technician for blood and DNA testing. A few spots of blood were found on the underside of the hat brim, and the DNA was compared to known samples from Stelly, White, and Branch. Branch was not excluded as the major contributor to the DNA contained in the blood spots, and the probability of that DNA's coming from someone other than Branch was 1 in 47.4 nonillion. Stelly was not excluded as the major contributor to the DNA collected from the inside headband of the hat, and the probability of that DNA's having come from someone other than Stelly was 1 in 1.01 octillion. DNA found on the LG cell phone was tested, Stelly was not excluded as the major contributor, and the probability of that DNA's having come from someone other than Stelly was 1 in 4.12 sextillion.

Stelly was arrested and charged with first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person.

2. Motion to Suppress

Before trial, Stelly moved to suppress certain evidence. As relevant to the issues raised on appeal, he sought to suppress evidence obtained from searching the contents of the LG cell phone found near Branch's body. The LG cell phone was searched pursuant to a warrant which Stelly challenged as insufficient. Specifically, Stelly claimed that the affidavit in support of the warrant, and the warrant itself, both identified the electronic device to be searched as the ZTE cell phone found in Branch's pocket rather than the LG cell phone that was actually searched.

At the suppression hearing, the warrant and attached affidavit were received into evidence. The affidavit recited in pertinent part:

> On Wednesday, January 11th, [2017,] at 0237 hours [t]here was a ShotSpotter activation in the area of 3620 Laurel Avenue, Omaha, Douglas County, Nebraska. Shortly after that a shooting was called in at the same location.

> When [o]fficers arrived on the scene they located a male party down . . . . This party was declared deceased by medic units at the scene. The victim appeared to have been shot multiple times, including at close range. Several spent 9mm casings were located near the victim.
>
> . . . .
>
> An LG model LG-LS755; MEID-D:089806163100 409889 cellular telephone was located in the street about 10 feet to the west of where the victim was located. Another cellular telephone was located in the victim's pocket[.]
>
> It is unknown, at this time, who the LG cellular telephone belongs to, a suspect or a victim. Affiant [o]fficers believe that if [they] were allowed to examine the electronic data located on this telephone it would be a benefit to this investigation.

The affidavit also stated that the electronic device to be searched was in the lawful possession of the Omaha Police Department and was "found in the street at the scene of a homicide and seized as evidence." But elsewhere in the affidavit, the device to be searched was identified as the ZTE cell phone. Likewise, the warrant that was issued identified the ZTE cell phone as the device to be searched. The warrant was issued January 11, 2017, after which the LG cell phone found in the street was searched.

The officer who swore the affidavit testified at the suppression hearing. He noticed, after returning the warrant, that he had "made an error when listing the cell phone itself in the search warrant and the affidavit as far as property being searched." According to the officer, his narrative description correctly referenced the LG cell phone found in the street and explained why law enforcement wanted to search that cell phone, but when identifying the electronic device to be searched, he mistakenly "listed the cell phone that was recovered from the victim himself as opposed to the cell phone that was found in the street." After noticing the

error, the officer applied for and obtained another search warrant, this time referencing only the LG cell phone found in the street.

The district court determined that "[b]ased upon review of the search warrant and the [a]ffidavit attached thereto, it is clear that officers were seeking to search the LG phone that was found lying in the street approximately ten feet from the victim's body." Relying on *State v. Kleinberg*,[1] in which we held that "an inadvertent defect in a search warrant may be cured by reference to the affidavit used to obtain the warrant if the affidavit is incorporated in the warrant or referred to in the warrant and the affidavit accompanies the warrant," the court found the search of the LG cell phone constitutional and overruled the motion to suppress. Stelly renewed his motion to suppress at trial, and again it was overruled.

3. Trial

The case was tried to a jury over a period of 9 days in October 2017. We summarize only the evidence pertinent to the issues raised on appeal.

(a) Murder Timeline

On January 10, 2017, the day before Branch was killed, Stelly and White celebrated Stelly's birthday. Stelly purchased some new clothes, including the hat later found in his apartment. At approximately 8 p.m., Stelly took several photographs with his cell phone and posted them on a social media website. One of these photographs showed Stelly wearing his recently purchased clothes.

Stelly's cell phone records indicate that from approximately 8:15 p.m. until just before 11 p.m. on January 10, 2017, his cell phone was "pinging off" a cell tower at 33d Street and Laurel Avenue, which was near White's house and the crime scene. Around midnight, Stelly's cell phone pinged off a cell tower

[1] *State v. Kleinberg*, 228 Neb. 128, 131, 421 N.W.2d 450, 453 (1988).

at 40th and Grant Streets. And finally, between 1:43 and 1:51 a.m. on January 11, Stelly had a text message conversation with the mother of his son in which he stated he was "bored" and "wanna act bad." The shooting occurred at 2:37 a.m. on January 11.

(b) Exhibits

During trial, the State offered several photographs depicting Branch's body at the crime scene and during the autopsy. Stelly objected to four of the photographs taken at the crime scene on grounds they were "overly graphic" and "redundant." He objected to four of the autopsy photographs on grounds they were "overly gruesome." The court overruled Stelly's objections and admitted all eight photographs.

At another point during trial, the State identified a string of 12 exhibits, marked as exhibits 94 through 106. There was no exhibit 105 included in the string. After the witness was asked about each of the exhibits, the State offered them. But while reciting the string of exhibits, the State omitted reference to exhibit 103. This oversight was apparently not realized by either the parties or the court. When defense counsel was asked whether he had any objection to the offer, he replied: "No objection to 94 through 102. Our objection is to 103 and 104. No objection to 106." The court then ruled: "[E]xhibits 94 through 102 are received. The objections are noted on 103 and 104, those will be received. And 106 is received."

(c) Evidence of Victim's Personal Attributes

During trial, testimony was adduced that Branch had a developmental disability and did not drive. Instead, he primarily walked or rode his bicycle for transportation. Several times during the trial, testimony was introduced by the State regarding Branch's personal attributes and his general good character. Defense counsel did not object to this testimony. Some of this evidence was referenced by the State during closing argument, again without objection.

(d) Verdicts and Sentences

The jury found Stelly guilty on all three counts. The trial court accepted the verdicts and convicted Stelly of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Stelly was sentenced to a term of life imprisonment on the murder conviction and to consecutive terms of 30 to 40 years' imprisonment on the other two convictions. Stelly filed this direct appeal, represented by new counsel.

II. ASSIGNMENTS OF ERROR

Stelly assigns, reordered and restated, that the trial court erred in (1) denying his motion to suppress the search of his cell phone and (2) admitting graphic and duplicative photographs over trial counsel's objections. He also asserts 18 different claims of ineffective assistance of trial counsel, and he argues that the cumulative effect of these alleged deficiencies deprived him of a fair trial.

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.[2] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[3]

[2] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[4] An appellate court reviews a trial

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[2] *State v. Botts*, 299 Neb. 806, 910 N.W.2d 779 (2018).

[3] *Id.*

[4] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

court's admission of photographs of a victim's body for abuse of discretion.[5]

[3] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.[6] An appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.[7]

IV. ANALYSIS

1. Motion to Suppress

Stelly argues that evidence from the search of the LG cell phone found near Branch's body should have been suppressed. He points to the fact that the first search warrant, and portions of the supporting affidavit, identified a different cell phone as the electronic device to be searched. He thus appears to be arguing that the first warrant was not particular enough in its description of the item to be searched.

[4] The purpose of the particularity requirement as it relates to warrants is to prevent general searches, and whether a warrant is insufficiently particular depends upon the facts and circumstances of each case.[8] As a general rule, the description must enable officers to ascertain and identify the items to be seized with reasonable certainty and little chance of confusion or uncertainty.[9]

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[5] *Id.*

[6] *State v. Golyar*, 301 Neb. 488, 919 N.W.2d 133 (2018).

[7] *Id.*

[8] See, *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993); *State v. Walters*, 230 Neb. 539, 432 N.W.2d 528 (1988).

[9] See 79 C.J.S. *Searches* § 243 (2017). See, also, *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991).

Stelly's argument in support of this assignment of error is limited. He contends only that the district court erred in applying the rationale of *Kleinberg*[10] to conclude the affidavit cured any deficiency in the warrant. We limit our analysis accordingly.

[5] *Kleinberg* held that "an inadvertent defect in a search warrant may be cured by reference to the affidavit used to obtain the warrant if the affidavit is incorporated in the warrant or referred to in the warrant and the affidavit accompanies the warrant."[11] In *Kleinberg*, police officers had been informed the defendant had marijuana in his vehicle and they applied for a warrant to search the vehicle. The supporting affidavit sought to search the vehicle, but the warrant authorized a search of the defendant's person. The police served the warrant on the defendant and then searched his vehicle, but did not search his person. Marijuana was found in the vehicle, and the defendant was arrested. The defendant moved to suppress the evidence, arguing the warrant did not authorize a search of his vehicle. The trial court overruled the motion to suppress, and we affirmed. In doing so, we reasoned that the warrant referred to and was accompanied by the affidavit discussing the search of the vehicle and that the information in the affidavit could "be used to cure the defect in the warrant resulting from the error of the scrivener."[12]

Here, as in *Kleinberg*, the warrant referred to and was accompanied by an affidavit. And although both the warrant and the affidavit misidentified the ZTE cell phone as the item to be searched, a review of the information in the supporting affidavit demonstrates the reference to the ZTE cell phone was an inadvertent scrivener's error, as it is clear the officers were seeking a warrant to search the LG cell phone found lying in the street near Branch's body. The affidavit reads, "The

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[10] *Kleinberg, supra* note 1.

[11] *Id.* at 131, 421 N.W.2d at 453.

[12] *Id.* at 134, 421 N.W.2d at 454.

telephone was found in the street at the scene of a homicide and seized as evidence." Additionally, it states:

> An LG model . . . cellular telephone was located in the street about 10 feet to the west of where the victim was located. Another cellular telephone was located in the victim's pocket[.]
>
> It is unknown, at this time, who the LG cellular telephone belongs to, a suspect or a victim. Affiant [o]fficers believe that if [they] were allowed to examine the electronic data located on this telephone it would be a benefit to this investigation.

We conclude that the detailed information in the supporting affidavit cured any defect in the warrant resulting from the scrivener's error in misidentifying the ZTE cell phone as the item to be searched. Moreover, reading the information in the affidavit and the warrant together, the item to be searched was described with sufficient particularity to allow the executing officer to ascertain and identify the item to be searched with reasonable certainty. Stelly's argument to the contrary is without merit, and the district court did not err in overruling the motion to suppress.

2. Photographs of Victim

Stelly argues the trial court improperly admitted eight photographic exhibits over his objections that some were overly graphic and redundant and that others were overly gruesome. Although Stelly did not expressly object to any of the photographs on Neb. Evid. R. 403[13] grounds, his objections were treated as seeking exclusion on grounds the photographs, even if relevant, were gruesome and cumulative and thus were more prejudicial than probative. He makes the same argument on appeal.

In response to Stelly's objections, the district court examined the photographs outside the presence of the jury and asked the State to explain the relevance of each. The court also

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[13] Neb. Rev. Stat. § 27-403 (Reissue 2016).

explored with counsel whether any of the photographs were duplicative and whether other photographs existed showing the same areas of Branch's body after he had been "cleaned up." Summarized, the State explained that more than 200 photographs had been taken and that although some of the 8 being offered were similar, they were taken from different angles and distances to depict different areas of Branch's body at different points during the investigation and to highlight different things of evidentiary significance. The court overruled Stelly's objections and admitted all eight photographs.

"The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect."[14] On appeal, the State does not dispute that the photographs depicting Branch's body after the shooting were gruesome, but it points out that this does not render them inadmissible.

[6,7] We have often observed that gruesome crimes produce gruesome photographs,[15] but if the State lays proper foundation, photographs that illustrate or make clear a controverted issue in a homicide case are admissible, even if gruesome.[16] In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[17]

The photographs taken at the scene of the crime show Branch's body as it was discovered, lying on the sidewalk in a pool of blood. The photographs depict the nature, extent, and location of the multiple bullet wounds, and illustrate the spatial relationship of Branch's body to the spent shell casings discovered near and under his body. The photographs taken

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[14] *Dubray, supra* note 4, 289 Neb. at 218, 854 N.W.2d at 599.

[15] *Dubray, supra* note 4.

[16] *Id.*

[17] *Id.*

during the autopsy show portions of Branch's body not otherwise visible in the photographs taken at the scene, including a photograph of a projectile in his left eye.

[8] We have recognized that photographs can also provide "'visual proof from which a jury could reasonably infer that the homicide was committed with "deliberate and premeditated malice."'"[18] Here, in addition to showing the condition of the body and the nature and extent of the wounds, the photographs tended to establish malice or intent in that they showed multiple shots were fired at Branch's head. We conclude that although the photographs were gruesome, their probative value was not substantially outweighed by the danger of unfair prejudice.

Stelly also objected that some of the four photographs from the crime scene were unnecessarily cumulative, in that they showed some of the same bullet wounds. We pause to note that his brief on appeal argues that some of the autopsy photographs should also have been excluded as cumulative, but because he did not object to the autopsy photographs on that basis at trial, he has not preserved the issue for appellate review.[19] We thus address only Stelly's argument that the four photographs of the crime scene were needlessly cumulative.

In that regard, he argues that some of the same bullet wounds are visible in more than one crime scene photograph. While he is correct, that is due in large part to the sheer number of wounds to Branch's head and body. Moreover, Stelly's argument ignores the different evidentiary significance of the four photographs. Three of the photographs depict entirely different areas of Branch's body and clothing, and although there are two photographs depicting the injuries to the right side of Branch's head, one of the photographs was taken from an angle that shows the proximity of several shell casings not visible in the other photograph.

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[18] *State v. Ryan*, 226 Neb. 59, 87, 409 N.W.2d 579, 596 (1987).

[19] *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003) (objections not presented to and passed upon by trial court will not be considered on appeal).

[9,10] Rule 403 does not require the State to have a separate purpose for every photograph, and it requires a court to prohibit cumulative evidence only if it "'substantially'" outweighs the probative value of the evidence.[20] The decision of the trial court as to whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice or the needless presentation of cumulative evidence will not be disturbed on appeal unless there has been an abuse of discretion.[21]

Here, we find the court admitted the photographs for a proper purpose and did not abuse its discretion in concluding that multiple photographs of the same wounds were not unfairly prejudicial.

3. Ineffective Assistance of Counsel

[11] Stelly asserts a total of 18 different claims of ineffective assistance of trial counsel. Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[22] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[23] 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.[24] 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.[25]

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[20] *Dubray, supra* note 4, 289 Neb. at 219, 854 N.W.2d at 600.

[21] See *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

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

[23] *State v. Munoz*, 303 Neb. 69, 927 N.W.2d 25 (2019).

[24] *Id.*

[25] *Id.*

Summarized, Stelly's brief asserts his trial counsel was ineffective in (1) failing to object when the trial court received exhibit 103, which had never been offered; (2) failing to object to evidence of and argument concerning Branch's personal attributes and good qualities; and (3) failing to adequately investigate or present evidence in 16 different instances. We address each claim in turn, but first we set out the law that governs our analysis of ineffective assistance claims on direct appeal.

[12,13] It is well settled that 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.[26] In *State v. Filholm*,[27] we explained that to raise a claim on direct appeal that trial counsel was ineffective, a defendant's brief must specifically set forth how counsel's performance was deficient. But we clarified that the brief need not also allege prejudice:

> Although our case law makes clear that specific allegations of prejudice are required within the context of postconviction relief, we view such a requirement on direct appeal as a waste of time and resources. As we have noted, the trial record on appeal is devoted to issues of guilt or innocence, not counsel's performance. Thus, to require an appellant to allege prejudice from ineffective assistance on direct appeal would require him or her to allege facts in detail that are likely not within the appellate record or known to the defendant without further inquiry. . . . We therefore see no justification for requiring an appellant to allege prejudice when claiming ineffective assistance of trial counsel on direct appeal. That said, we emphasize that in the context of direct appeal, like the requirement in postconviction

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[26] *Id.*

[27] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

proceedings, mere conclusions of fact or law are not sufficient.[28]

[14] 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.[29]

[15-17] 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.[30] The determining factor is whether the record is sufficient to adequately review the question.[31] We have said 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.[32] We have also said that when 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.[33]

With this framework in mind, we consider Stelly's various claims that his trial counsel performed deficiently.

(a) Exhibit 103

During trial, exhibit 103 was received into evidence over Stelly's objection, despite the fact that the State failed to

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[28] *Id*. at 770-71, 848 N.W.2d at 578-79.

[29] *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

[30] *Id.*; *Munoz, supra* note 23.

[31] *Id.*

[32] *Munoz, supra* note 23.

[33] See *State v. Hibler*, 302 Neb. 325, 923 N.W.2d 398 (2019).

formally offer exhibit 103 into evidence. The exchange at trial occurred as follows:

> [The State]: Judge, we're going to offer Exhibits 94 through 100 and then 101, 102, 104 and 106.
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> [Defense counsel]: No objection to 94 through 102. Our objection is to 103 and 104. No objection to 106.
>
> THE COURT: 94 through 102 are received. The objections are noted on 103 and 104, those will be received. And 106 is received.

Stelly argues that although his trial counsel objected to exhibit 103, his trial counsel performed deficiently by failing to also object to the court's receipt of exhibit 103 on the ground that the State had never offered it. Both Stelly and the State agree that the record is sufficient on appeal to address this claim, and we agree. We therefore turn to the merits.

The State argues that trial counsel was not deficient in failing to object to the court's receipt of exhibit 103 because trial counsel was aware, based on prior discussions outside the presence of the jury, that the State's failure to formally offer exhibit 103 was inadvertent and easily cured. This is supported by the record.

Prior to the formal offer of the string of exhibits identified in the above exchange, counsel for both parties informed the court, outside the presence of the jury, that defense counsel intended to object to exhibits 103 and 104 as cumulative and unfairly prejudicial. After some discussion, the court informed counsel at sidebar that it would "allow 103 and 104 since they are different."

The formal offer of exhibits occurred after this sidebar. The record shows that defense counsel was aware the State intended to offer exhibit 103 and was further aware the court intended to receive the exhibit over trial counsel's objection. Under such circumstances, if trial counsel had objected to the court's receipt of exhibit 103 despite the State's failure to offer it, the State would have easily corrected the oversight. In other words, with or without the objection that Stelly claims his counsel should have made, the exhibit would have been

received. Stelly can show no prejudice, and his first claim of ineffective assistance of trial counsel has no merit.

(b) Evidence of Personal Attributes of Victim

Stelly claims his trial counsel performed deficiently by failing to object to testimony and argument regarding Branch's general good character and his diminished mental capacity. Both Stelly and the State contend the record is sufficient on appeal to resolve this claim of ineffective assistance of counsel. We agree.

At trial, two of the State's witnesses—Branch's brother and Branch's girlfriend—testified about Branch's personal attributes. The following testimony was adduced without objection from Branch's brother:

> [Branch] was very helpful to just about everybody he came in contact with. You know, friends, family. I mean, you couldn't really ask for a better person than [Branch] because — he was mentally challenged. He had — he was born with water on his brain, but he was still just a lovable person, you know. We looked at him as one of God's angels because he wasn't supposed to make it a year after his birth. He was supposed to die. He made it all the way to 29.

Branch's brother also testified that Branch "had the mind of a kid instead of an adult. So he was 29, he was probably 14 in — in his head he was 14. He was still a kid." He explained that Branch attended special education classes while in school.

Branch's girlfriend also testified to Branch's personal attributes without objection. She stated that Branch "got along very well with everybody. He was very helpful, very kind, especially very kind to me." She described him as very loving and caring, but with an IQ that was lower than that of the average person.

During closing arguments, the prosecutor summarized the testimony of Branch's brother and girlfriend, without objection from trial counsel:

> You also heard from . . . Branch's brother . . . .
>
> He described [Branch] as, quote, one of God's angels. He related to you that [Branch] shouldn't have made it past one year of age because he was born with water on the brain. As a result of that condition, he forever — or at the point of his death, had the mentality of a 14-year-old. He told you that [Branch] went to North High School and graduated, but he required special education during his time there.
>
> He described [Branch] as helping everyone and would not drive, but he said he would walk around town, walking as he was on the early morning hours of January 11th, 2017, when he was trying to walk home from [Branch's girlfriend's] house to his family's house. He didn't have a car. He relied on walking.
>
> . . . .
>
> . . . [Branch's girlfriend] told you that [Branch] was very kind. He wasn't of the highest IQ, in her opinion, but they were able to communicate. He treated her well, and she was dating him. . . .
>
> . . . .
>
> . . . It's time to hold [Stelly] accountable. He murdered . . . Branch, who is a stable man simply trying to get home at the end of the night. He was gunned down in the street. His body was left there, and [Stelly] fled because [Stelly] is the one who perpetrated it. He needs to be held accountable.

[18] Generally, a victim's qualities and personal attributes are irrelevant to the facts that the State must prove in a criminal prosecution and have the potential to distort the jurors' reasoned consideration of the evidence by evoking their sympathy for the victim and corresponding outrage toward the defendant.[34] But here, it cannot be said that all the evidence of Branch's personal attributes was irrelevant. Evidence that he did not drive due to his diminished mental capacity tends

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[34] *Dubray, supra* note 4.

to explain why he was out walking at the time he was shot, and it was relevant for that purpose. But the related testimony and argument that Branch was kindhearted and had overcome obstacles in his life were relevant neither to the facts the State had to prove nor to any defense raised by Stelly.

[19] That said, an appellate court gives defense counsel's decision not to object to a prosecutor's conduct or remark a strong presumption of reasonableness.[35] Counsel may have made a sound tactical decision in not objecting, and "'[i]t is not beyond comprehension to envision an instance where a surely winnable objection may still hurt the defense in the eyes of the jury.'"[36]

In this case, defense counsel agreed during his closing argument that this was "a horrible crime" and remarked: "It's senseless. His poor family." These remarks suggest counsel may have made a tactical decision not to object to evidence of Branch's personal attributes because, even if the objections were winnable, he decided it was better for the jury to see Stelly as sympathetic to the loss of an innocent life, while denying that he was the perpetrator.

Even if counsel's failure to object was not a tactical decision, we find this record is sufficient to conclude that Stelly was not prejudiced by counsel's alleged deficient performance.[37] Our analysis in *State v. Iromuanya*[38] and *State v. Dubray*[39] is instructive.

In *Iromuanya*, we considered whether defense counsel was ineffective for failing to object to the prosecutor's improper statements and questions. During opening statements, the prosecutor remarked about one victim's accomplishments in collegiate soccer and the other victim's academic achievements.

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[35] See *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[36] *Id.* at 813, 806 N.W.2d at 423, quoting *Ayers v. State*, 802 A.2d 278 (Del. 2002).

[37] See *Hibler, supra* note 33.

[38] *Iromuanya, supra* note 35.

[39] *Dubray, supra* note 4.

The prosecutor also asked the surviving victim to recall for the jury how he learned of the other victim's death. We disapproved of the prosecutor's improper statements and question, but we found the defendant was not prejudiced by the deficient conduct. We reasoned the trial court had orally instructed jurors before trial that attorney statements and arguments were not evidence. And we noted that the statements represented short moments in a long trial during which many other witnesses testified about the critical issue in the case—whether the defendant had shot at the victims with the intent to kill. Further, we emphasized that the trial court's written instructions informed the jurors that they must not decide the case based on sympathy or prejudice. We therefore concluded that the prosecutor's improper statements and question did not result in prejudicial error.

In *Dubray*, we considered whether defense counsel was deficient for failing to object to improper remarks the prosecutor made, during closing arguments, about the victim's personal qualities and attributes:

> "Now, I don't — never knew [the victims]. These are two beautiful human beings. They had love in their heart, they had goals, they had aspirations, they had children, they had all of those things in life that people could want. Nothing was perfect but is it ever for any of us? And to have their lives taken from them so savagely, so brutally at 22 years old. And [one victim is] never going to his boy's ball games. And [the other victim will] never see her kids again. 'Take care of my baby.' That's what you are supposed to be doing. That's what she's supposed to be doing. They were killed for no reason. He took their lives and the evidence shows that he did so brutally with premeditation.
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> "Find him guilty of two counts of first degree murder and use of a weapon. The law requires it. And justice demands it. Thank you."[40]

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[40] *Id.* at 220, 854 N.W.2d at 600.

We found this argument was improper, but concluded the defendant could not show prejudice from his counsel's failure to object. We found it significant that the trial court had admonished the jury not to let sympathy or passion influence its verdict and also had instructed that the attorneys' statements were not evidence. Moreover, we noted that the evidence against the defendant was "strong" and that, viewing the trial as a whole, we could not find the defendant had been deprived of a fair trial because of the prosecutor's remarks.[41]

We reach a similar conclusion here. Even assuming trial counsel performed deficiently by failing to object to at least some of the testimony and argument about Branch's personal traits, Stelly cannot show he was deprived of a fair trial or demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Here, as in *Iromuanya*[42] and *Dubray*, the testimony and argument regarding the personal attributes of the victim were a small part of an otherwise lengthy trial in which there was strong evidence of the defendant's guilt. Moreover, the trial court admonished the jury not to let sympathy or prejudice influence its decision and also instructed the jury that statements, arguments, and questions of the lawyers for the State and the defendant were not evidence.

We conclude the record affirmatively shows that Stelly cannot demonstrate he was prejudiced by any deficient performance of his trial counsel in failing to object to testimony and argument regarding the personal attributes of Branch. This claim of ineffective assistance of trial counsel is without merit.

(c) Failure to Investigate

Stelly asserts his trial counsel was ineffective in failing to independently investigate certain defenses and failing to interview or question certain witnesses. He argues generally

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[41] *Id.* at 228, 854 N.W.2d at 605.

[42] *Iromuanya, supra* note 35.

that had trial counsel done so, he would have discovered or adduced evidence helpful to Stelly's defense. Stelly's brief sets out 16 such claims, which we summarize and number for ease of reference:

(1) Trial counsel failed to consult with or call as a witness an expert on the ShotSpotter system. Such an expert would have testified that the ShotSpotter equipment recorded two separate shootings in two different locations at approximately 2:37 a.m. on January 11, 2017, rather than one shooting in the area of 3615 Laurel Avenue.

(2) Trial counsel failed to investigate or subpoena Carrie Crook as a witness. Crook would have testified that, contrary to the State's prosecution theory, Stelly did not borrow a PT Cruiser from White during the month of January 2017, but continued to drive his 1985 Chevy Caprice. Crook would have further testified that White loaned the PT Cruiser to many people.

(3) Trial counsel failed to investigate video from a clothing store that would have shown Stelly was not driving a PT Cruiser on January 10, 2017.

(4) Trial counsel failed to consult with or call as a witness an independent expert in the field of ballistics upon learning that the State's ballistics expert could not conclusively determine whether the bullets recovered were fired from the same firearm. An independent ballistics expert would have testified that the bullets were fired from more than one firearm and would support a conclusion that some bullets were planted at the scene.

(5) Trial counsel failed to investigate the source of calls to White's cell phone from two specific telephone numbers which would have revealed that officers called White's cell phone themselves after illegally searching the LG cell phone found near Branch's body without a warrant.

(6) Trial counsel failed to obtain Stelly's clothing "as seen in [a convenience store] video," which clothing was "available" to trial counsel and would have disproved the State's theory

that Stelly either hid or destroyed the clothing he was wearing at the time of the shooting.[43]

(7) Trial counsel failed to obtain the recording of a call to the 911 emergency dispatch service to report the shooting. Stelly claims the recording would have demonstrated that one or more officers testified falsely as to the time they arrived at the crime scene.

(8) Trial counsel failed to investigate the circumstances of a second crime scene that was being processed on January 11, 2017, as testified to by a technician who testified that she was "working that day and responding to another crime scene, but was asked to drop off some scanning equipment to a homicide investigation" in the area of 3615 Laurel Avenue. Further investigation would have revealed that shell casings or bullet fragments allegedly found at the scene of Branch's shooting came from the other crime scene being processed by the technician.

(9) Trial counsel failed to investigate or ask whether the State's witnesses who lived in the area of the shooting, but not directly on Laurel Avenue, believed they heard shots from two different shootings.

(10) Trial counsel failed to consult with and call as a witness an independent DNA expert who, upon comparing the DNA swabs taken from inside the PT Cruiser (which were not submitted for testing) with known samples taken from Stelly, would have testified that Stelly's DNA was not found on any surfaces or objects inside the PT Cruiser.

(11) Trial counsel failed to consult with and call as a witness an independent fingerprint expert who, upon analyzing the latent fingerprint evidence allegedly obtained by the officers and technicians who testified for the State, would have testified that Stelly's fingerprints were not present on the surfaces claimed by the technicians.

(12) Trial counsel failed to consult with and call as a witness an independent cell phone expert who, upon analyzing

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[43] Brief for appellant at 29.

the LG cell phone found near Branch's body, would have testified that the data officers purportedly extracted from the LG cell phone was not in fact present on it and that one or more officers manufactured cell phone evidence. Such expert would also have testified that officers sent and received text messages and voice calls using the LG cell phone, but testified falsely and failed to disclose this fact to trial counsel, the trial court, and the jury.

(13) Trial counsel failed to elicit testimony or obtain and introduce 911 records that would have demonstrated that the times of the 911 calls made by two individuals disprove the officers' testimonies as to the timeline of the shootings on January 11, 2017. Such testimony would have demonstrated that the officers changed Branch's time of death from the actual time, approximately 11 p.m. on January 10, to the time testified to at trial, approximately 2:37 a.m. on January 11.

(14) Trial counsel failed to elicit testimony or obtain and introduce Omaha Fire Department records that would have demonstrated that the arrival times of the fire department paramedics disprove the officers' testimony as to the timeline of the shootings on January 11, 2017.

(15) Trial counsel failed to elicit testimony from all the resident witnesses as to their best estimates of the time of night they heard shots and saw the PT Cruiser. Said testimony would have disproved the officers' testimony as to the timeline of the shootings on January 11, 2017. Such testimony would have demonstrated that officers changed Branch's time of death from the actual time, approximately 11 p.m. on January 10, to the time testified to at trial, approximately 2:37 a.m. on January 11.

(16) Trial counsel failed to ask questions of the State's witnesses that would have revealed a break in the chain of custody of the shell casings and bullet fragment evidence allegedly recovered at the scene of the shooting and supported a defense theory that officers planted evidence from the other crime scene being processed on January 11, 2017, by a technician.

Stelly suggests the record is insufficient to resolve any of these 16 claims on direct appeal. The State agrees and addresses all 16 claims collectively in a single sentence, suggesting they are "better left for postconviction review."[44] But on direct appeal, our appellate review of ineffective assistance claims requires more than just noting the claims and postponing consideration for another day.

An appellate court is required to consider whether the defendant has adequately alleged a claim of ineffective assistance,[45] and if so, must then consider whether the record on appeal is 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.[46] In the future, we encourage all parties to address these considerations in their appellate briefing.

We have considered Stelly's claims in light of the record on appeal. As we explain below, we conclude that some of his claims were insufficiently pled. Of those claims that were sufficiently pled, we conclude some are affirmatively refuted by the record and others cannot be resolved on direct appeal.

(i) Record Affirmatively Refutes Claims 5, 6, 9, and 15

a. White's Cell Phone, Claim 5

Stelly claims that if an investigation had been undertaken, counsel would have discovered that police officers called White's cell phone after "illegally" searching Stelly's LG cell phone "without a warrant."[47] As noted earlier in our analysis of Stelly's motion to suppress, the search of his LG cell phone was pursuant to a valid warrant. Because there was no illegal search of Stelly's LG cell phone, the entire premise

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[44] Brief for appellee at 19.

[45] See, *Manjikian, supra* note 29; *Filholm, supra* note 27.

[46] See *Hibler, supra* note 33.

[47] Brief for appellant at 29.

of this claim fails. There is no merit to this claim of ineffective assistance.

b. Clothing From Video, Claim 6

Stelly claims the clothes he was wearing could be "seen"[48] in a convenience store video taken the night of the murder, and he alleges trial counsel was deficient in not obtaining that clothing to rebut the State's theory at trial that Stelly either hid or destroyed the clothing he was wearing the night of the murder.

The convenience store video is a part of the record, and we have reviewed it. In the video, the PT Cruiser can be seen as it proceeds down the roadway, but neither the occupants inside, nor their clothing, are plainly visible. Because the video does not show the clothing Stelly was wearing, the record affirmatively refutes this allegation of deficient performance.

c. Questions About Two Shootings, Claim 9

At trial, the State called several witnesses who lived in the area of the shooting, but not on Laurel Avenue. Each testified to hearing multiple gunshots in the early hours of January 11, 2017. They testified that they heard between four and eight shots fired, and each described the gunshots as rapidly occurring, one right after the other.

Stelly alleges his trial counsel was deficient because he failed to inquire whether these lay witnesses believed the shots were from "two different shootings."[49] But he does not suggest any of these witnesses had special training or knowledge in ballistics or were otherwise capable of differentiating the source of bullets based on their sound. As such, any question seeking to elicit an opinion from these witnesses on whether the shots were coming from more than one shooting would have been objectionable. Because counsel cannot be

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[48] *Id.*

[49] *Id.* at 30.

deficient for failing to ask a plainly objectionable question, this claim is without merit.

d. Testimony of Timeline From Neighborhood Witnesses, Claim 15

Stelly claims his trial counsel failed to elicit testimony from witnesses regarding their "best estimates of the time"[50] when they heard shots and saw the PT Cruiser. He claims that if counsel had done so, he would have obtained information that the shooting occurred at 11 p.m. on January 10, 2017, contradicting the State's evidence that the shooting occurred at 2:37 a.m. on January 11.

We conclude the record affirmatively refutes this claim of deficient performance. Each witness testified to having heard gunshots and seen the PT Cruiser in the early hours of January 11, 2017. In light of this testimony, Stelly cannot show prejudice from his trial counsel's failure to question the witnesses about their best estimates of when the shooting occurred. This claim of ineffective assistance is meritless.

(ii) Part of Claim 14 and All of Claim 16 Lack Particularity

a. Omaha Fire Department Records, Claim 14

Stelly's claim 14 is twofold. He claims that his trial counsel failed to elicit testimony about Omaha Fire Department records that would have contradicted the State's evidence as to the timeline of the shooting on January 11, 2017, and he claims that his trial counsel failed to actually obtain and introduce the Omaha Fire Department records. As to the first part of his claim, Stelly does not allege what testimony his counsel should have sought to elicit or from whom, and thus, he has failed to allege deficient performance with sufficient particularity. As we note later in our analysis, the second part of claim 14

[50] *Id.* at 31.

is alleged with sufficient particularity, but the record does not permit us to resolve it on direct appeal.

b. Chain of Custody, Claim 16

Stelly claims his trial counsel failed to ask questions of the State's witnesses that would have revealed a break in the chain of custody of the shell casing and bullet fragment evidence recovered from the scene of the shooting. He suggests such a break would have supported a defense that officers planted evidence from another crime scene being processed on January 11, 2017.

[20] But Stelly does not allege which of the State's many witnesses should have been questioned about the possible break in the chain of custody or how their testimony would reveal such a break. We conclude Stelly has failed to allege this claim of deficient performance with sufficient particularity. A claim of ineffective assistance that is insufficiently stated is no different than a claim not stated at all.[51]

(iii) Record Insufficient to Resolve Claims 1 Through 4, 7, 8, and 10 Through 13 and Part of Claim 14

We conclude Stelly's remaining claims of ineffective assistance cannot be resolved on direct appeal, because the record is not sufficient to conclusively determine whether counsel did or did not perform in a deficient manner or whether Stelly was or was not prejudiced by counsel's alleged deficient performance.[52] We emphasize two important points about our conclusion that the record is insufficient to resolve these claims.

[21] First, when an appellate court finds, on direct appeal, that the record is not sufficient to resolve a claim of ineffective assistance, it should not be misunderstood as a finding that the claim will necessarily require an evidentiary hearing if raised

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[51] See *State v. Hood*, 301 Neb. 207, 917 N.W.2d 880 (2018).

[52] See *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

in a motion for postconviction relief,[53] because that determination is governed by an entirely different standard.[54]

[22] And second, just because an appellate court finds the record on direct appeal is insufficient to resolve a claim of ineffective assistance, it does not mean that a postconviction court will necessarily be precluded from later finding the existing record affirmatively refutes the same claim. Several factors make this so. Sometimes, critical portions of the existing trial record are not included in the appellate record, but are later available to the postconviction court. Additionally, because a defendant on direct appeal is not required to make specific allegations of prejudice,[55] the appellate court often has an incomplete understanding of how a defendant claims to have been prejudiced by certain deficient conduct. Consequently, a finding on direct appeal that the existing record is insufficient to determine a claim of deficient conduct does not speak to whether the existing record will be sufficient to affirmatively refute prejudice once the claim is alleged on postconviction.

4. Cumulative Error

Finally, Stelly argues that the cumulative effect of the trial court's errors, and his trial counsel's deficiencies, deprived him of a fair trial. We have recognized the doctrine of cumulative error in the context of a criminal jury trial,[56] but it is not supported in this case.

We found no merit to any of Stelly's assigned errors. And we concluded that 8 of his 18 claims of ineffective assistance are either without merit or not alleged with sufficient

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[53] *Filholm, supra* note 27.

[54] See, e.g., *State v. Tyler*, 301 Neb. 365, 918 N.W.2d 306 (2018) (to be entitled to evidentiary hearing, prisoner must allege facts in motion for postconviction relief that, if proved, would constitute violation of his or her rights under U.S. or Nebraska Constitution).

[55] *Filholm, supra* note 27.

[56] See *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

particularity. We are unable, on direct appeal, to resolve Stelly's remaining claims of ineffective assistance of trial counsel, and thus, those unresolved claims cannot form the basis for a claim of cumulative error. Stelly's cumulative error argument is without merit.

V. CONCLUSION

For the foregoing reasons, we affirm Stelly's convictions and sentences.

Affirmed.

Heavican, C.J., not participating.

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

State of Nebraska, appellee, v.
Steven J. Hatfield, appellant.
933 N.W.2d 78

Filed September 13, 2019. No. S-18-1107.

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. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
5. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is generally controlled by either a statute or court rule.

Appeal from the District Court for Gage County: Julie D. Smith, Judge. Affirmed.

Steven J. Mercure, of Nestor & Mercure, 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

Steven J. Hatfield was convicted of misdemeanor driving under the influence (DUI). His conviction and sentence were affirmed by the district court, sitting as an intermediate court of appeals. He appeals. We affirm.

BACKGROUND

Hatfield was convicted in the county court for Gage County of DUI and appealed that conviction to the district court for Gage County. The district court reversed the county court's judgment based not on the arguments made by Hatfield, but instead upon the U.S. Supreme Court's decision in *Birchfield v. North Dakota*.[1] This court reviewed that decision and concluded that the good faith exception to the exclusionary rule applied to a pre-*Birchfield* warrantless blood draw and that the results of Hatfield's blood test were therefore admissible.[2] As such, we found that the district court, sitting as an appellate court, erred in reversing Hatfield's conviction and vacating his sentence. We remanded the cause for the district court to consider Hatfield's original errors.

Upon remand, the district court considered Hatfield's assignment of error alleging that the county court erred in failing to exclude evidence that was offered by the State in violation of both the court's June 29, 2015, order of discovery and Neb. Rev. Stat. § 29-1912 (Reissue 2016).

The facts relating to this discovery dispute are as follows: The county court entered an order of discovery on June 29, 2015. That order was in response to an oral motion made at a pretrial hearing. The State had already filed a notice on February 3, 2015, indicating that it had complied with discovery consisting of 51 pages of documents and that other evidence was available for review with law enforcement or at the Gage County Attorney's office.

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[1] *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

[2] *State v. Hatfield*, 300 Neb. 152, 912 N.W.2d 731 (2018).

On November 4, 2015, Hatfield filed a motion entitled "Sixth Motion in Limine." In that motion, Hatfield asserted that the State had failed to provide him with a witness list or with copies of "the Beatrice Community Hospital's Clinical Laboratory Improvement Amendments" (CLIA) certificate. Hatfield also asserted that the State failed to provide him with a copy of title 177 of the Nebraska Administrative Code dealing with the testing of the alcohol content in blood and breath. Hatfield sought an order prohibiting the State from offering testimony of any witnesses and from offering as evidence the CLIA certificate or title 177.

Jury selection was held on November 5, 2015. After the jury was empaneled, the county court took up Hatfield's sixth motion in limine. At the hearing, Hatfield argued that he had not received a list of witnesses the State intended to call, which he claimed was required under § 29-1912, and that he had not received a list of the specific written exhibits the State intended to offer at trial. As was noted in his written motion, Hatfield argued that the witnesses the State apparently intended to call should not be permitted to testify, because those witnesses had not been disclosed.

At no point during the course of this argument did Hatfield ask for a continuance. The State, however, did seek a continuance in the event the court was inclined to grant the sixth motion in limine, because in the State's view, a continuance was the proper cure for delay of notification of witnesses. The county court ultimately denied the motion in limine, and trial began.

At the conclusion of the first day of trial, the county court indicated it wanted to revisit the sixth motion in limine. That issue was again addressed the morning prior to the second day of trial. Following arguments at which the parties offered case law in support of their respective positions, the court noted that it did not want to grant a continuance because the jury had already been empaneled and because in any case, barring the use of evidence was one remedy available but was not the

only remedy available, and that Hatfield had to show he was prejudiced by the failure to disclose. Because Hatfield was aware he was missing the information and could have sought it via a motion to compel rather than by a motion in limine filed just prior to trial (at 4:31 p.m. the day before trial was set to begin), he had not shown prejudice. As such, the county court noted its prior ruling on the sixth motion in limine stood. While the county court observed it was not going to continue the trial at that point, Hatfield did not ask for a continuance at any time during the proceedings or seek any relief besides complete exclusion of the evidence.

Hatfield also contends the State failed to disclose the conviction upon which it was relying to support a second-offense charge against Hatfield. The district court rejected this claim, noting that Hatfield was aware the complaint charged a second offense and that Hatfield had been provided with his driver's abstract identifying by case number the prior DUI case. Hatfield was offered, but declined, a continuance in connection with this objection.

In this second appeal, the district court concluded that the county court had not erred, and it consequently affirmed Hatfield's conviction and sentence. Hatfield now appeals that decision to this court.

ASSIGNMENTS OF ERROR

Hatfield assigns that the district court (1) erred in affirming the county court's admission of evidence offered at trial that was not disclosed to him as was required by the court's June 29, 2015, order and by § 29-1912 and (2) erred when sentencing him, because the prior conviction the court relied upon for a second offense was not disclosed to Hatfield prior to sentencing.

STANDARD OF REVIEW

[1-3] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error

or abuse of discretion.[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]

[4] Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.[6]

ANALYSIS

On appeal, Hatfield argues two separate incidents in which the State failed to disclose evidence. First, Hatfield contends the State failed to file witness and document lists despite being ordered to do so and that as such, its witnesses should not have been permitted to testify and certain documents—specifically the CLIA certificate and title 177 of the Nebraska Administrative Code—should not have been admitted into evidence. Hatfield also argues that the State did not provide a copy of a prior conviction sufficient to support a finding that Hatfield had previously been convicted of DUI.

[5] Discovery in a criminal case is generally controlled by either a statute or court rule.[7] Nebraska's principal discovery statute, § 29-1912, sets forth a list of evidence that may be subject to discovery at the discretion of the trial court. The list includes a defendant's prior criminal record, the names and addresses of witnesses on whose evidence the charge is based, and documents, papers, books, accounts, photographs, objects, or other tangible things of whatsoever kind or nature which

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016).

[7] *Id.*

could be used as evidence by the prosecuting authority.[8] Neb. Rev. Stat. § 29-1919 (Reissue 2016) sets forth various remedies the court may employ when there is a claimed violation of a discovery order: The court may (1) order such party to permit discovery or inspection of materials not previously disclosed, (2) grant a continuance, (3) prohibit a party from calling a witness not disclosed or introducing evidence not disclosed, or (4) enter another order as it deems just under the circumstance. If a continuance would have been a sufficient remedy for a belated disclosure in violation of § 29-1912, a defendant who fails to request a continuance waives any rights he or she may have had pursuant to § 29-1912.[9]

Hatfield's arguments are without merit. The record shows that by the time the county court ordered the parties to engage in discovery, the State had, over 3 months prior, forwarded 51 pages of documents to Hatfield and informed him that still other evidence was available for his review at its offices or with law enforcement. That notice did not include a witness list. By the time the order for discovery was made, discovery had already taken place. There was no indication from a pretrial discussion about discovery, or the State's notice, that the parties anticipated a forthcoming witness list.

Hatfield filed his sixth motion in limine 9 months after discovery first commenced. In that motion, he made specific reference to the witnesses and documentation he believed to be missing. At least as of that date, it was clear Hatfield was aware of what discovery he had not received, yet our record does not indicate that he filed a motion to compel or sought a continuance. Instead, in the late afternoon of the day before trial, Hatfield filed a motion in limine seeking to prevent the State from offering this evidence at trial.

While a court may order that a party not be permitted to offer evidence at trial which it failed to disclose, this court has stated

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[8] § 29-1912.

[9] See *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

a preference for a continuance in such situations.[10] Despite having 9 months to do so, Hatfield failed to seek a motion to compel or a continuance. The same holds true for Hatfield's prior conviction. A copy of Hatfield's driver's abstract was included in the discovery material provided to him, and a certified copy was offered at trial. Hatfield objected and was offered a continuance, but declined and stood on his objection.

The fact that Hatfield's driver's abstract—which listed the challenged prior conviction—was disclosed placed Hatfield on notice of the conviction the State planned to use to enhance his sentence. Hatfield could have investigated the conviction in more detail; he apparently chose not to do so. At the time of sentencing, not only did Hatfield not seek a continuance, but he declined one offered by the county court. In addition, the State noted at the sentencing hearing that a certified copy of the conviction had been available for review at its offices should Hatfield have chosen to review it in person.

We reject Hatfield's claims due to his failure to seek a continuance, and we find no prejudice owing to any belated disclosures on the State's part. Hatfield contends that because the State did not file a witness list, all its witnesses were effectively surprise witnesses. Specifically, Hatfield argues that Deputy Robert Sandersfeld and Investigator John Chavez of the Gage County sheriff's office were surprise witnesses involved in the chain of custody of his blood sample test and that he was unable to prepare for these witnesses. But Hatfield does not show what different preparation he would have made or how that preparation would have changed the examination of Sandersfeld and Chavez, let alone the examination of all of the State's witnesses. Moreover, we observe that the record shows that while a witness list was not provided, the identities of the witnesses the State ultimately called, including Sandersfeld and Chavez, were available in the discovery made or offered to Hatfield. This claim fails.

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[10] See *id.*

We also reject Hatfield's assertion regarding both title 177 of the Nebraska Administrative Code and the CLIA certificate. Hatfield was charged with DUI. Title 177 is a public record routinely applied in such cases, and CLIA certificates are routinely referenced in cases involving laboratory testing. Hatfield exhibited that knowledge by referencing both in his motion in limine. Hatfield has not shown that he was prejudiced by the State's belated disclosure of either.

Finally, we reject the assertion that Hatfield was prejudiced by the State's failure to disclose and provide a copy of his prior DUI conviction for enhancement purposes. Hatfield was charged with second-offense DUI. The information filed against him referenced the same conviction he now complains was not disclosed to him. As noted above, Hatfield was provided with a copy of his driver's abstract which included the now-challenged conviction.

We have consistently held that in discovery disputes where a continuance can cure any prejudice caused by a failure to disclose, it is that remedy that should be utilized. We reject Hatfield's invitation to overrule that authority.

We review the lower court's action for an abuse of discretion. Hatfield declined to ask for a continuance, declined to join in the State's suggestion of a continuance at trial, and at sentencing declined to accept the court's offer of a continuance. Hatfield has also failed to show that he was prejudiced by the State's belated disclosures. Hatfield's arguments on appeal are without merit.

CONCLUSION

We affirm the decision of the district court affirming the judgment and conviction of the county 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. Kelly Schmaltz, appellant.

933 N.W.2d 435

Filed September 20, 2019. No. S-18-925.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **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.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
5. **Statutes.** Basic principles of statutory interpretation require a court to give statutory language its plain and ordinary meaning.
6. ____. Basic principles of statutory interpretation prohibit a court from reading a meaning into a statute that is not there or reading anything direct and plain out of a statute.
7. **Trial: Prosecuting Attorneys: Appeal and Error.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.
8. **Trial: Prosecuting Attorneys: Words and Phrases.** Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various conducts because the conduct will or may undermine a defendant's right to a fair trial.
9. **Trial: Prosecuting Attorneys: Juries.** Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may

have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.

10. ____: ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.

11. **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.

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

Bell Island, of Island Law Office, 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.

Heavican, C.J.

INTRODUCTION

Following a jury trial, Kelly Schmaltz was convicted of leaving the scene of an injury accident. He appeals. We affirm.

FACTUAL BACKGROUND

On January 22, 2018, Schmaltz was charged by information with leaving the scene of an injury accident and driving without proof of financial responsibility. A jury trial was held August 8.

At trial, evidence was adduced that a semi-truck hauling cattle in a trailer and driven by Schmaltz was involved in a collision with a vehicle driven by Monica Gomez. Schmaltz did not challenge that an accident had occurred, that Gomez was injured, or that he left the scene. Schmaltz instead argued that leaving the scene was justified because he had to unload the

cattle he had been hauling in order to avoid loss of or injury to the cattle. Accordingly, Schmaltz sought an instruction on the so-called choice of evils defense as codified at Neb. Rev. Stat. § 28-1407 (Reissue 2016).

The district court declined to instruct the jury as to this defense, concluding that it was inapplicable where the choice made was to mitigate or prevent loss to property and not to a person. The jury found Schmaltz guilty of leaving the scene of an injury accident.

The other charge, driving without proof of financial responsibility, had earlier been dismissed following Schmaltz' motion for a directed verdict at the end of the State's case in chief. Schmaltz sought a mistrial based on prosecutorial misconduct. Schmaltz alleged that by attempting to introduce hearsay evidence that Schmaltz' insurer refused to pay for Gomez' injuries to prove up the elements of that charge, the State committed prosecutorial misconduct that warranted a mistrial. The district court denied the motion for a mistrial.

Schmaltz was convicted by a jury. His subsequent motion for new trial was denied. Schmaltz was sentenced to 12 months' probation, and his operator's license was revoked for 1 year. He was also ordered to pay restitution to Gomez. Schmaltz appeals.

ASSIGNMENTS OF ERROR

Schmaltz assigns that the district court erred in failing to (1) give his requested instruction regarding the choice of evils defense and (2) grant a mistrial on the basis of prosecutorial misconduct.

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.[1]

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[1] *State v. Bigelow*, 303 Neb. 729, 931 N.W.2d 842 (2019).

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[2]

[3] 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.[3]

ANALYSIS

Jury Instruction.

[4] Schmaltz first argues that the district court erred in refusing to give his proposed choice of evils instruction. 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.[4]

Section 28-1407, the choice of evils justification, provides as follows:

> (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable if:
>
> (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
>
> (b) Neither [the Nebraska Criminal Code] nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or

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[2] *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

[3] *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019).

[4] *State v. Bigelow, supra* note 1.

> evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

The district court declined to give the tendered instruction. Specifically, the court noted that Schmaltz' defense was that he left the scene of the accident in order to prevent loss to the 94 head of cattle he was hauling.

Schmaltz directs us to *State v. Wells*[5] to support his assertion that § 28-1407 is applicable to property. In *Wells*, the defendant and others were charged with criminal mischief in connection with the destruction of equipment on a construction site that adjoined the defendant's farm. The defendant contended that the construction work being done was causing soil erosion to his property and that he was justified, via the choice of evils defense, in damaging the equipment in question to prevent the damage to his own property.

In reaching our decision in *Wells* that such defense was not available, we noted that "[i]n property crimes, the defense of justification is available only in limited circumstances."[6] Schmaltz suggests that had the choice of evils defense not been an available justification defense for property crimes, this court would have simply relied upon that fact to reject the argument of the defendant in *Wells*. Instead, this court went further to reason that the choice of evils justification was unavailable because the defendant in *Wells* had a reasonable alternative to the criminal damage—he could have filed for and obtained a temporary restraining order.

Wells does not address § 28-1407. However, by implication, the court suggests that § 28-1407 would not be applicable to property crimes, noting that a different section, Neb. Rev. Stat. § 28-1415 (Reissue 2016), would provide justification for a

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[5] *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

[6] *Id.* at 338, 598 N.W.2d at 35.

property crime under certain circumstances, just not those presented in *Wells*.

[5,6] In addition, the defendant in *Wells* destroyed the property of another through use of force and sought a justification for that act in a way that is not present in this case. Of course, there is no allegation that Schmaltz collided with Gomez intentionally in an attempt to save the cattle in his trailer. For these reasons, *Wells* is distinguishable. Our basic principles of statutory interpretation require us to give statutory language its plain and ordinary meaning.[7] 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.[8]

Section 28-1407(1) provides a justification for "[c]onduct which the actor believes to be necessary to avoid a harm or evil to himself or another . . . ." This justification is available only if the "harm or evil sought to be avoided by such conduct is greater than that sought to be prevented."[9] Neb. Rev. Stat. § 28-1406(4) (Reissue 2016) defines "[a]ctor" as "any person who uses force in such a manner as to attempt to invoke the privileges and immunities afforded him by sections 28-1406 to 28-1416."

The choice of evils justification is generally inapplicable here. The statutes at issue in this appeal were all enacted at the same time and concern "justification" for the use of force.[10]

The only person in this scenario who could be the "actor" contemplated in § 28-1407 is Schmaltz. Even if his conduct in leaving the scene of the accident was done to avoid a harm or evil, the conduct was not done with force. A justification defense under these statutes is unavailable.

There is no merit to Schmaltz' first assignment of error.

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[7] *State v. Lovvorn, supra* note 2.

[8] *Id.*

[9] § 28-1407(1)(a).

[10] See § 28-1407.

Prosecutorial Misconduct.

Schmaltz also argues that the district court erred in not granting his motion for mistrial for the State's act of prosecutorial misconduct. Specifically, Schmaltz argues that the State's attempt to prove the charge of driving without proof of financial responsibility by eliciting testimony by Gomez that Schmaltz' insurer had not paid her claim was both prejudicial and insufficient. We find this argument to be without merit.

[7-10] When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.[11] Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various conducts because the conduct will or may undermine a defendant's right to a fair trial.[12] Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.[13] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[14]

[11] 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.[15] The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.[16] We review the denial of a motion for mistrial for an abuse of discretion.[17]

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[11] *State v. Munoz*, 303 Neb. 69, 927 N.W.2d 25 (2019).

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

[13] *Id.*

[14] See, *State v. Munoz, supra* note 11; *State v. Mrza, supra* note 12.

[15] *State v. Briggs, supra* note 3.

[16] *Id.*

[17] See *id.*

In this case, a review of the record supported the State's assertion that Schmaltz was driving without proof of financial responsibility—a copy of his insurance information obtained prior to trial showed that his insurance was expired. The State did not call the correct witnesses to prove up this charge, and it was accordingly dismissed. The fact that the charge was dismissed shows that even assuming the State's actions amounted to misconduct, Schmaltz did not show that he was prejudiced.

Schmaltz additionally argues that the State's attempt to prove the charge by inadmissible evidence affected his right to a fair trial. But he does not explain how the proffered testimony that his insurance did not pay Gomez' claim, which testimony was not admitted to support a charge that was dismissed, led to his conviction on a separate charge for leaving the scene of an accident.

We find no abuse of discretion in the district court's denial of the motion for mistrial. There is no merit to Schmaltz' final assignment of error.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

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

State of Nebraska, appellee, v. Shalynn R. Hartzell, appellant.

933 N.W.2d 441

Filed September 20, 2019. No. S-18-1105.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
3. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
4. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
5. **Sentences: Probation and Parole.** The practice of entering separate sentencing and probation orders is disapproved. Instead, a sentencing court should enter its entire judgment, including all of the terms and conditions of probation, at one time.
6. **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.
7. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.

8. **Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.
9. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Appeal and Error.** To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), which describes the three levels, or tiers, of police-citizen encounters.
10. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Arrests.** A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection. A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning. A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention. Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.
11. **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.
12. ____: ____. 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.
13. **Police Officers and Sheriffs: Search and Seizure.** A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his or her request is required.

Appeal from the District Court for Adams County: Terri S. Harder and Stephen R. Illingworth, Judges. Affirmed.

John Heieck and Kelsey Helget, Assistant Adams County Public Defenders, 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

In Shalynn R. Hartzell's appeal from her conviction and probationary sentence for possession of a controlled substance, the legality of the evidence turns upon whether the traffic stop concluded and a voluntary police-citizen encounter began before she consented to a search of her vehicle. Because the totality of circumstances here establishes that this was not, as Hartzell contends, an unlawful extended seizure, her appeal fails. Before reaching that conclusion, we note jurisdiction but disapprove of the practice of entering separate sentencing and probation orders, and we direct that a sentencing court should instead enter its entire judgment, including all of the terms and conditions of probation, at one time.

II. BACKGROUND

1. Encounters

Because the crux of Hartzell's argument is based upon police-citizen encounters, we recount those events first. At oral argument, Hartzell conceded that she does not dispute the historical facts determined by the district court. Therefore, we recount the facts accordingly.

In March 2017, Sgt. Raelee VanWinkle of the Hastings, Nebraska, police department conducted a traffic stop of Hartzell's vehicle for expired registration tags. Hartzell was alone in the vehicle. VanWinkle issued a "fix-it" ticket, returned Hartzell's license and registration, and told Hartzell to "'have a good night and to drive careful[ly].'" VanWinkle began to walk back to her patrol vehicle.

After reaching the rear of Hartzell's vehicle, VanWinkle turned around and again approached Hartzell. VanWinkle asked, "'[H]ey, before you go, do you have a minute to talk to

me?'" Hartzell responded, "'[S]ure, what's up?'" VanWinkle asked to search the vehicle and Hartzell "verbally indicated that she didn't have a problem with that."

After a search of Hartzell's vehicle, VanWinkle found a marijuana joint, marijuana stems and leaves, a digital gram scale with a white crystalline substance on it, and a methamphetamine pipe. When confronted about these items, Hartzell stated that she was a marijuana user and used the scale to weigh her marijuana. A field test of the pipe residue resulted in a presumptive positive for methamphetamine. VanWinkle arrested Hartzell and searched her person. VanWinkle found "a baggie of methamphetamine in [Hartzell's] bra." Later, the Nebraska State Patrol Crime Laboratory tested the "baggie" and confirmed it contained methamphetamine with a weight of .94 grams.

While being taken to jail, Hartzell stated that she had tried to "stay clean" and that she had relapsed the prior night. VanWinkle denied conducting an interview in the patrol vehicle.

Once at the jail and after Hartzell waived her *Miranda* rights, VanWinkle interviewed her. Hartzell admitted that she had relapsed and that she came to Hastings to purchase methamphetamine.

Prior to a stipulated bench trial, Hartzell moved to suppress all evidence found during the search of her vehicle or on her person and all statements made to law enforcement. The district court denied the motion and determined that neither the Fourth Amendment nor the Fifth Amendment had been violated. Because Hartzell's argument on appeal relies solely on the Fourth Amendment, in that she claims the seizure of the traffic stop was continuous until her ultimate arrest, we summarize only those findings pertinent to the Fourth Amendment analysis.

Regarding Hartzell's Fourth Amendment claim, the court determined that "a reasonable person would not conclude [she was] not free to leave," because VanWinkle told her to "'drive safe[ly]'" and did not indicate that her compliance

with the request to search was required. It noted that although VanWinkle's patrol vehicle's lights were still activated, Hartzell knew that VanWinkle had not returned to the patrol vehicle. It determined that VanWinkle did not display a weapon, touch Hartzell, or use an authoritative tone. It concluded that Hartzell was not seized and that VanWinkle did not need reasonable, articulable suspicion to reapproach Hartzell and request consent to search. Hartzell later moved to reconsider and vacate the order on the motion to suppress. She contended that the court entered the order on the day that the court had scheduled the parties to submit their reply briefs. The court then reviewed the reply briefs and declined to vacate the motion to suppress order.

At trial, Hartzell renewed her motion to suppress. The district court adhered to its prior ruling. The district court found Hartzell guilty of possession of a controlled substance, methamphetamine, pursuant to Neb. Rev. Stat. § 28-416(3) (Reissue 2016).

2. October Sentencing Order

At a sentencing hearing, the district court sentenced Hartzell to 2 years of probation and pronounced several conditions for probation. A few days after the hearing, on October 29, 2018, the court entered a sentencing order, styled as a journal entry (October sentencing order), which also stated that Hartzell "should be ordered to comply with the terms and conditions set out in the separate Order of Probation."

Within 30 days of the entry of the October sentencing order, Hartzell filed her notice of appeal. We moved the appeal to our docket.[1]

3. Inquiry Regarding Jurisdiction

After reviewing the transcript, this court noted that no "separate Order of Probation" appeared in our record. After we notified the parties of this situation, Hartzell supplemented

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

the record with an order of probation entered on July 17, 2019 (July order of probation). This order was entered after our notification to the parties.

We then ordered the parties to submit simultaneous supplemental briefing on jurisdiction. The parties did so prior to oral argument.

III. ASSIGNMENTS OF ERROR

Hartzell assigns, consolidated and restated, that the district court erred in denying her motion to suppress, motion to reconsider and vacate, and renewed motion to suppress.

IV. STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[2]

[2,3] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[3] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[4]

V. ANALYSIS

1. Jurisdiction

[4] Before reaching Hartzell's assignments of error, we must determine whether this court has jurisdiction. It is the

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[2] *State v. Thalmann*, 302 Neb. 110, 921 N.W.2d 816 (2019).

[3] *State v. Petsch*, 300 Neb. 401, 914 N.W.2d 448 (2018).

[4] *State v. Rivera*, 297 Neb. 709, 901 N.W.2d 272 (2017).

duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[5] Obviously, the question arose because the October sentencing order contemplated a "separate Order of Probation" that was not entered until nearly 8 months after the notice of appeal. However, this appeal does not challenge the content of either the October sentencing order or the July order of probation. Thus, no claim is made that either order conflicted with the pronouncement of sentence. Here, we need only determine whether we have jurisdiction of this appeal, and our statutes provide a clear jurisdictional basis.

Under Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018), which includes appeals from "judgments and sentences upon convictions for felonies and misdemeanors"[6] and which must be read together with other statutes governing appeals in criminal cases,[7] a notice of appeal filed after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed after the entry of the judgment, decree, or final order and on the date of entry.[8] "In other words, to trigger the savings clause for premature notices of appeal under § 25-1912(2), an announcement must pertain to a decision or order that, once entered, would be final and appealable."[9]

Here, the oral announcement of a sentence and the content of the October sentencing order, which stated a "separate Order of Probation" would be forthcoming, triggered the savings clause under § 25-1912(2). Although the notice of appeal was filed almost 8 months before the remainder of the judgment

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[5] See *Thalmann, supra* note 2.

[6] § 25-1912(1).

[7] See Neb. Rev. Stat. §§ 29-2301 and 29-2306 (Reissue 2016).

[8] See § 25-1912(2).

[9] *Lindsay Internat. Sales & Serv. v. Wegener*, 297 Neb. 788, 795, 901 N.W.2d 278, 282 (2017).

was entered, it was filed after the announcement of the October sentencing order, which in turn announced the July order of probation. Taken together, the October sentencing order, which was initially interlocutory, and the July order of probation composed a complete sentencing judgment, from which Hartzell could appeal. Because her notice of appeal was filed after the announcement but before the entry of the judgment, her premature notice of appeal sprang into effect after the entry of the July order of probation.

[5] But we emphasize that this jurisdictional tangle could and should have been avoided. The practice of entering separate sentencing and probation orders is disapproved. Instead, a sentencing court should enter its entire judgment, including all of the terms and conditions of probation, at one time. And we remind trial courts that when imposing a sentence, the court should state with care the precise terms of the sentence which is imposed. This same rule applies to the terms of probation imposed upon a defendant.[10]

2. Motion to Suppress

(a) Seizure

Hartzell argues that the district court erred when it failed to grant her motion to suppress evidence found during a search of her vehicle and person, as well as statements she made to law enforcement. She asserts that because the encounter with VanWinkle never de-escalated to a voluntary encounter, VanWinkle "unlawfully expanded the scope and extended the duration of the investigative stop . . . and thus obtained evidence and statements from [Hartzell] in violation of the Fourth Amendment."[11] The State argues that the traffic stop terminated when VanWinkle told Hartzell, in effect, she was free to leave and that what followed was a separate encounter not subject to the Fourth Amendment. We agree with the State.

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[10] See *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992).

[11] Brief for appellant at 20.

[6] Hartzell's argument depends solely on the Fourth Amendment analysis. She does not argue that her consent was not voluntary or that her statements were procured in violation of her *Miranda* rights and the Fifth Amendment. 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.[12]

[7,8] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[13] Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.[14]

[9,10] To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*,[15] which describes the three levels, or tiers, of police-citizen encounters.[16] A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection. A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning. A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention. Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[17]

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[12] *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

[13] *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

[14] *State v. Gilliam*, 292 Neb. 770, 874 N.W.2d 48 (2016).

[15] *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[16] *Gilliam, supra* note 14.

[17] *Petsch, supra* note 3.

[11-13] 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 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] A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his or her request is required.[20]

We begin by noting that neither party has challenged the original traffic stop. The traffic stop resulted in a tier-two seizure sufficient to invoke the protections of the Fourth Amendment.[21] What we must determine is whether the initial traffic stop terminated and de-escalated to a voluntary encounter.

Hartzell relies upon *State v. Hansen*[22] for a similar factual scenario. The officer conducted a traffic stop of the defendant's vehicle for an improper lane change and uninsured vehicle. When the officer returned to the defendant, a second officer arrived and activated his patrol vehicle's lights. The officer gave the defendant a verbal warning for being uninsured but did not give a warning about the improper lane change. Once the officer returned the defendant's documents, he asked whether there was any contraband in the vehicle. The defendant denied. The officer then asked for consent to search the vehicle, and the defendant consented.

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[18] *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019).

[19] *Id.*

[20] *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[21] See *State v. Barbeau*, 301 Neb. 293, 917 N.W.2d 913 (2018).

[22] *State v. Hansen*, 63 P.3d 650 (Utah 2002).

In *Hansen*, the Utah Supreme Court reasoned that there was no evidence of de-escalation. It considered the factors concerning whether a seizure has occurred. It discussed that because there were no factors demonstrating a coercive show of authority in the initial stop, "a reasonable person would not be able to discern that a seizure had de-escalated to a consensual encounter due to the absence of such factors at the time of additional questioning."[23] It reasoned that when the second officer arrived with his vehicle's lights flashing, a reasonable person may believe that the encounter was escalating rather than de-escalating. It discussed that when the officer returned the defendant's documents and questioned him about contraband, the officer did not address the improper lane change, tell him he did not have to answer, or tell him he was free to leave. Under the totality of the circumstances, the court concluded that the detention did not de-escalate and that therefore, the officer exceeded the scope of the stop without reasonable suspicion.

Here, the facts differ significantly. Based upon the record before us, VanWinkle completed the traffic stop. VanWinkle returned Hartzell's documents and told her to "'have a good night and to drive careful[ly].'" She then walked away from the encounter. After this exchange, a reasonable person would believe that he or she was free to leave. This was a definitive end to the seizure.

At oral argument, Hartzell argued that a reasonable person would not feel free to leave until the officer was inside his or her vehicle for fear of injuring the officer. We disagree. Although roadside safety is a paramount concern for officers and citizens, there is no per se rule extending the length of a traffic stop in this way. Based upon the totality of the circumstances, we conclude that VanWinkle terminated the first encounter before beginning a new one.

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[23] *Id*. at 662.

We must also determine whether the second encounter was a seizure. For three reasons, we conclude that it was only a tier-one encounter.

First, VanWinkle did not show coercive authority. Upon reapproaching Hartzell, VanWinkle did not use an authoritative tone, brandish her weapon, or touch Hartzell. Although these factors were not present in the initial encounter, the second encounter did not begin under the guise of the initial encounter. The termination of the prior encounter signaled the start of a new encounter. Additionally, until Hartzell gave consent to search, there was only one officer present. There was no evidence of coercive authority to escalate the voluntary encounter to a seizure.

Second, VanWinkle did not require compliance with her request. VanWinkle asked, "'[H]ey, before you go, do you have a minute to talk to me?'" The question was casual, not authoritative. The question did not demand compliance[24]; it simply asked for a willingness to consent.

Third, the continued flashing of the patrol vehicle's lights does not dictate a different outcome. Hartzell emphasizes that the lights were not extinguished at the point when VanWinkle began to return to her patrol vehicle. But Hartzell was aware that the patrol vehicle's lights were activated for the initial encounter, and "[Hartzell] knew [VanWinkle] had not been back to her unit to turn [the patrol vehicle's lights] off." VanWinkle's requests contradicted the notion that the flashing lights continued to command Hartzell's presence. And as we reasoned in *State v. Gilliam*,[25] patrol vehicle lights alone would not cause a reasonable person to believe that he or she was not free to leave.

Under the totality of the circumstances, the factors regarding the second encounter do not support that a seizure

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[24] See *Hedgcock, supra* note 20.

[25] See *Gilliam, supra* note 14.

occurred. The evidence failed to show how VanWinkle applied coercive authority or required compliance with her requests. Accordingly, VanWinkle did not seize Hartzell. We conclude that the district court did not err in overruling Hartzell's motion to suppress.

Hartzell further argues that even if the encounter de-escalated, "[her] purported consent to search her vehicle was the product of police exploitation of a prior illegality,"[26] a concept known as the attenuation doctrine. If the consent to search was not sufficiently attenuated, it is invalid as an exploitation of the prior illegal act and a court must exclude both the consent and the evidence found as a result of that consent as fruit of the poisonous tree.[27] Because we determined that VanWinkle did not violate the Fourth Amendment when asking for consent to search, attenuation is inapplicable. This argument lacks merit.

(b) Remaining Arguments

Hartzell's remaining arguments address the district court's denials of her motion to reconsider and vacate and her renewed motion to suppress. Hartzell asserts that because the district court rendered a decision on her motion to suppress before the court received the parties' reply briefs, it was error. Hartzell does not cite to any authority to support her assertion.

Based upon the record, the court did recognize that it had entered the order before the parties' scheduled reply brief date. In its order on the motion to reconsider and vacate, it stated that "[it] ha[d] reviewed the reply briefs submitted by both the State and [Hartzell] and decline[d] to vacate its earlier ORDER." We find no prejudicial error.

Because we have considered the evidence from all the hearings and trial and found that the district court did not err in overruling the motion to suppress, it necessarily follows that

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[26] Brief for appellant at 33.

[27] See *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010).

the court did not err in overruling the motion to reconsider and vacate and the renewed motion to suppress.

VI. CONCLUSION

We determine that we have jurisdiction pursuant to § 25-1912(2). Additionally, because there was no seizure during the second encounter, we conclude that the district court did not err by overruling Hartzell's motion to suppress, motion to reconsider and vacate, and renewed motion to suppress. Thus, we affirm her conviction and sentence.

Affirmed.

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

State of Nebraska, appellee, v. Carla Montoya, appellant.

933 N.W.2d 558

Filed September 27, 2019. No. S-18-342.

1. **Constitutional Law: Motions to Suppress: Confessions: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
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. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of statutes are questions of law, regarding which appellate courts are obligated to reach conclusions independent of those reached by the court below.
4. **Trial: Convictions: Evidence: Appeal and Error.** An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

5. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
6. **Miranda Rights.** The warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are required only when a suspect interrogated by the police is "in custody."
7. ____. The ultimate inquiry for determining whether a person is "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.
8. ____. The test for custody under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is to be determined based on how a reasonable person in the suspect's situation would perceive his or her circumstances. It is an objective inquiry and does not depend on the subjective views harbored by either the interrogating officer or the person being interrogated.
9. ____. The test for determining custody under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), involves two discrete inquiries: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.
10. **Constitutional Law: Confessions.** The 5th Amendment to the U.S. Constitution, along with the Due Process Clause of the 14th Amendment, prevents the use of involuntary confessions in criminal convictions.
11. **Miranda Rights.** The question of whether a custodial interrogation complies with *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is distinct from the question of whether statements made during a custodial interrogation were sufficiently voluntary.
12. **Confessions: Proof.** The State has the burden to prove that a defendant's statement was voluntary and not coerced.
13. **Confessions.** Whether a defendant's statement was voluntarily given depends on the totality of the circumstances. Factors to consider include the interrogator's tactics, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne.
14. **Confessions: Police Officers and Sheriffs.** While the confession of an accused may be involuntary and inadmissible if obtained in exchange for a promise of leniency, mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or promise, does not make a subsequent confession

involuntary. In order to render a statement involuntary, any benefit offered to a defendant must be definite and must overbear his or her free will.

15. **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.
16. **Criminal Law: Minors: Intent.** Neb. Rev. Stat. § 28-707(1)(a) through (f) (Reissue 2016) defines the offense of child abuse. Then, § 28-707(3) through (8) classifies the level of any such offense based on two factors: the actor's state of mind when committing the offense and the degree of harm to the child resulting from the offense.
17. **Criminal Law: Minors: Intent: Proof.** To convict a defendant of the Class IB felony of knowing and intentional child abuse resulting in death under Neb. Rev. Stat. § 28-707 (Reissue 2016), the State must prove the defendant knowingly and intentionally caused or permitted the child to be abused in one or more of the ways defined in § 28-707(1), and also must prove the offense resulted in the child's death, as required by § 28-707(8). It is not necessary, however, to prove the defendant intended the abuse to result in death.
18. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
19. **Plea in Abatement: Evidence: Appeal and Error.** An error in a ruling on a plea in abatement challenging whether there was sufficient evidence to bind a case over for trial is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
20. **Criminal Law: Evidence: Appeal and Error.** When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
21. **Constitutional Law: Statutes: Standing: Proof.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question. To establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
22. **Constitutional Law: Statutes.** Courts will not decide a question concerning the constitutionality of a statute unless such question has been

raised by a litigant whose interests are adversely affected by the questioned statute.

23. **Constitutional Law: Statutes: Presumptions.** Courts will presume a statute to be constitutional and will resolve all reasonable doubts in favor of its constitutionality.
24. **Constitutional Law: Statutes: Proof.** The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality.
25. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.
26. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
27. ____. When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
28. **Constitutional Law: Statutes: Legislature: Intent: Appeal and Error.** Under rational basis review, an appellate court will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose. In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made.
29. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
30. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
31. **Constitutional Law: Statutes: Standing.** The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied. To assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute. Furthermore, a defendant cannot maintain that the statute is vague when applied to the conduct of others, because a court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.

32. **Sentences: Appeal and Error.** Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.
33. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
34. **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.
35. **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.
36. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Ronald E. Temple, of Fitzgerald, Vetter, Temple & Bartell, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Stacy, J.

Carla Montoya was convicted of knowing and intentional child abuse resulting in death, in violation of Neb. Rev. Stat. § 28-707(1) and (8) (Reissue 2016). She was sentenced to prison for a term of 55 to 75 years. Finding no merit to

any of her assignments of error, we affirm her conviction and sentence.

I. FACTS

At approximately 1 a.m. on March 13, 2016, Montoya brought her 4½-year-old daughter, C.H., to the emergency room at Faith Regional Health Services (Faith Regional) in Norfolk, Nebraska. C.H. was unresponsive, tremoring, and posturing, and she had bruising on her body. A CT scan revealed bilateral bleeding between the brain and the skull. C.H. was "life-flighted" to Children's Hospital in Omaha, Nebraska, where she subsequently died from her injuries. The cause of death was blunt force trauma to the head.

1. Police Investigation

Shortly after C.H. was brought to the emergency room, staff there contacted police to report possible child abuse. The police conducted a series of three interviews with Montoya; two of those interviews occurred the same day that C.H. was taken to Faith Regional, and the third interview occurred the next day.

(a) First Interview

When police arrived at Faith Regional, an officer asked to speak with Montoya in a private area. They proceeded to a family waiting room where the officer questioned Montoya about how C.H. had sustained her injuries. This interview, which was recorded on the officer's body microphone, was suppressed by the trial court. That suppression ruling has not been challenged on appeal.

(b) Second Interview

Shortly after the first interview ended, the lead investigator, Josh Bauermeister, arrived at Faith Regional. After C.H. was life-flighted to Children's Hospital in Omaha, Bauermeister was introduced to Montoya and told her he wanted "to find out a little bit about what happened." He asked whether Montoya would allow police to search and photograph her apartment

and whether she would give a recorded interview at the police station. Montoya agreed to both requests. Montoya's boyfriend then took officers to the apartment, and Montoya—who did not have a car available—rode with Bauermeister to the police station in the front seat of his unmarked patrol car.

The recorded interview occurred in an interview room at the police station, and lasted about 1 hour. At the beginning of the interview, Bauermeister told Montoya that she was not under arrest, that she did not have to speak with him, and that she could leave at any time. Bauermeister also explained how to leave the police station from the interview room.

During the interview, Montoya explained that around noon on March 12, 2016, she became frustrated that C.H. would not stay in her bed and would not stop crying, so she squeezed C.H.'s torso hard enough to leave marks and then threw C.H. onto her bed three times. Montoya said that C.H. struck her head on the wall the third time she was thrown. After that, C.H. fell asleep around 1 p.m. and slept until around 4 p.m., when she woke briefly before falling asleep again. Around 9 p.m., C.H. began to vomit. Montoya put C.H. into the bathtub to wash her off, but C.H. would not stand; Montoya described C.H.'s body as "Jell-O." Montoya said that when she turned on the cold water, C.H. became responsive and was able to answer questions. Montoya asked C.H. whether her head hurt, and C.H. answered yes. Montoya also asked whether C.H. wanted ice cream, and C.H. again answered yes.

Montoya and her boyfriend put C.H. in the car to get some ice cream. They proceeded to drive several places with C.H., including to Montoya's mother's house, a grocery store, a discount department store, and a fast-food restaurant. When they returned home, C.H. was unresponsive. Montoya called a friend who convinced her to take C.H. to the hospital.

At the end of the recorded interview, Bauermeister asked Montoya to write a statement summarizing her interview, and she complied. When Montoya finished writing out her three-page statement, she left the police station.

Bauermeister subsequently obtained an arrest warrant, and Montoya was arrested at Children's Hospital in Omaha on March 14, 2016. She was transported to the downtown Omaha police station, where she was interviewed a third time.

(c) Third Interview

Montoya's third interview was conducted by Bauermeister on March 14, 2016, at 1:30 p.m. and lasted 1¼ hours. Before questioning Montoya, Bauermeister spoke about the importance of telling the truth during the interview, saying, "Whatever you do today though, don't lie about it, because if you lie about anything or fail to tell me anything, it's going to look really bad for you when you go to court." Bauermeister also advised Montoya of her rights under *Miranda v. Arizona*[1] before questioning her. Throughout the interview, Bauermeister continued to emphasize the importance of being truthful. His statements in that regard are addressed more fully in our analysis of Montoya's assignment of error relating to the third interview.

During the third interview, Montoya admitted she slammed C.H. into the wall as hard as she could and held her there. Montoya explained that she also pushed C.H. against the wall three or four times to stop her from getting away, all while screaming and yelling at her to "shut up" and to stop crying. Montoya said that C.H.'s head slammed into the wall and that Montoya pressed C.H. so hard against the wall that she worried it would break her ribs. Additionally, Montoya said that when she threw C.H. onto her bed, she did it forcefully and C.H. hit her head on the bedframe both the first and last time she was thrown. Montoya said she did not take C.H. to the hospital sooner, because she was afraid what people might think about the bruises and because she was in denial about hurting C.H. and was hoping she might recover.

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

Toward the end of the third interview, Bauermeister asked Montoya to write out what happened, and she complied. Her written statement tracked generally with her statements to police during the interview.

C.H. died from her injuries on March 20, 2016, after which the State charged Montoya with knowing and intentional child abuse resulting in death, a Class IB felony.[2]

2. Pretrial Proceedings

(a) Motions to Suppress

Montoya moved to suppress all of her oral and written statements to police. She claimed she was in custody during all three interviews and argued her statements should be suppressed, because (1) in the first and second interviews, she was not advised of her *Miranda* rights, and (2) in the second and third interviews, her will was overborne by coercive interrogation tactics.

After a hearing, the trial court sustained in part and denied in part Montoya's motion to suppress. Regarding the first interview, the trial court sustained the motion to suppress, finding Montoya was in custody during police questioning at Faith Regional and should have received the *Miranda* advisement. As stated, the State has not challenged the suppression of the first interview.

Regarding the second interview, the court found that under the totality of the circumstances, Montoya was not in custody and her statements were made freely and voluntarily. Regarding the third interview, the trial court found that the officer's interrogation tactics did not amount to improper threats, inducements, or lies and that Montoya's confession was freely and voluntarily made. The court thus overruled Montoya's motion to suppress as it regarded both the second and third interviews.

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[2] § 28-707(1) and (8).

(b) Plea in Abatement

After the court ruled on Montoya's motion to suppress, Montoya was permitted to withdraw her plea of not guilty in order to file a plea in abatement challenging the sufficiency of the evidence to bind the case over to district court. In support of her plea in abatement, Montoya argued the State had not offered any evidence that she intended to kill C.H., and she suggested that a finding of guilt under § 28-707 requires the State to prove the defendant had specific intent to cause the resulting harm. The trial court rejected Montoya's interpretation of § 28-707, reasoning it was inconsistent with the plain language of the statute and with settled precedent from both this court[3] and the Nebraska Court of Appeals.[4] The trial court found the evidence offered at the preliminary hearing was sufficient to establish probable cause that Montoya committed the crime of intentional child abuse resulting in death under § 28-707, and it overruled the plea in abatement.

(c) Motion to Quash

Once the plea in abatement was overruled, Montoya filed a motion to quash the information. In support of the motion, Montoya argued that unless § 28-707 was construed to require proof that she intended to cause the resulting harm to the child, the statute would be unconstitutional, both facially and as applied. The trial court overruled the motion to quash, rejecting all of Montoya's facial constitutional challenges and reserving ruling on the as-applied challenges.

3. Bench Trial and Sentencing

After Montoya reentered a plea of not guilty, she waived her right to a jury and a bench trial was held. Montoya renewed her motion to suppress and her constitutional challenges to § 28-707, and the court overruled them. In an order entered

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[3] See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[4] See *State v. Parks*, 5 Neb. App. 814, 565 N.W.2d 734 (1997), *reversed on other grounds* 253 Neb. 939, 573 N.W.2d 453 (1998).

February 1, 2018, the district court found beyond a reasonable doubt that

> on March 12, 2016, [Montoya] knowingly and intentionally placed her minor child, [C.H.], in a situation that endangered that child's life, and that [Montoya] did knowingly and intentionally cruelly punish this child, which ultimately caused and resulted in the death of [C.H.] approximately one week later, on March 20, 2016. Additionally, the Court specifically finds that this offense was not committed negligently, nor did [Montoya] act recklessly. Her actions directed against the child . . . were intentional.

Montoya was found guilty of intentional child abuse resulting in death, a Class IB felony. She was sentenced to an indeterminate prison term of 55 to 75 years. Montoya filed this timely appeal, which we moved to our docket.

II. ASSIGNMENTS OF ERROR

Montoya assigns, consolidated and restated, that the trial court erred in (1) overruling her motion to suppress, (2) overruling her plea in abatement, (3) overruling her motion to quash and rejecting her constitutional challenges, (4) finding her guilty of intentional child abuse resulting in death, and (5) imposing an excessive sentence.

III. STANDARD OF REVIEW

[1] In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda*,[5] an appellate court applies a two-part standard of review.[6] Regarding historical facts, an appellate court reviews the trial court's findings for clear error.[7] Whether those facts meet constitutional standards, however, is

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[5] *Miranda, supra* note 1.

[6] *State v. Clifton*, 296 Neb. 135, 892 N.W.2d 112 (2017).

[7] *Id.*

a question of law, which an appellate court reviews independently of the trial court's determination.[8]

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[9]

[3] The constitutionality and construction of statutes are questions of law, regarding which appellate courts are obligated to reach conclusions independent of those reached by the court below.[10]

[4] An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.[11] In making this determination, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.[12] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[13]

[5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[14]

IV. ANALYSIS

1. Motion to Suppress

Montoya argues the trial court erred in overruling her motion to suppress statements made in the second and third

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[8] *Id.*

[9] *State v. Kennedy*, 299 Neb. 362, 908 N.W.2d 69 (2018).

[10] See *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

[11] *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014).

[12] *Id.*

[13] *Id.*

[14] *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

police interviews. Regarding the second interview, Montoya claims her statements should have been suppressed because police questioned her without first giving her the *Miranda* advisement. Regarding both the second and third interviews, Montoya claims her will was overborne by coercive police tactics and argues her statements should have been suppressed as involuntary. We address each argument in turn.

(a) *Miranda* Advisement

[6] In *Miranda*, the U.S. Supreme Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[15] To combat against these pressures and protect the privilege against self-incrimination, *Miranda* announced a set of prophylactic warnings that law enforcement officers must give before interrogating someone who is in custody. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[16] These warnings are considered "prerequisites to the admissibility of any statement made by a defendant" during custodial interrogation.[17] But *Miranda* warnings are required only when a suspect interrogated by the police is "in custody."[18] And the fact that a suspect is questioned by police at

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[15] *Miranda, supra* note 1, 384 U.S. at 467.

[16] *Id.*, 384 U.S. at 444. Accord, *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019); *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014).

[17] *Miranda, supra* note 1, 384 U.S. at 476.

[18] *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).

the station house does not necessarily render the questioning custodial.[19]

[7-9] Both the U.S. Supreme Court and this court have emphasized that the ultimate inquiry for determining whether a person is "in custody" for purposes of *Miranda* "'is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'"[20] The *Miranda* custody test is to "be determined based on how a reasonable person in the suspect's situation would perceive his [or her] circumstances."[21] It is an objective inquiry and does not depend on the subjective views harbored by either the interrogating officer or the person being interrogated.[22] The U.S. Supreme Court has described the *Miranda* custody test as involving two discrete inquiries: "'first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'"[23]

In *State v. Rogers*,[24] we observed that a "large body of case law" had developed to assist courts in identifying which circumstances may be most relevant to the *Miranda* custody inquiry. *Rogers* mentioned eight such circumstances, including: (1) the location of the interrogation and whether it was a place where the defendant would normally feel free to leave;

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[19] See, e.g., *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977).

[20] *Yarborough v. Alvarado*, 541 U.S. 652, 662, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) (quoting *Beheler, supra* note 19). Accord *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008).

[21] *Yarborough, supra* note 20, 541 U.S. at 662. Accord *In re Interest of Tyler F., supra* note 20.

[22] *Yarborough, supra* note 20.

[23] *Id.*, 541 U.S. at 663 (quoting *Thompson, supra* note 18).

[24] *State v. Rogers*, 277 Neb. 37, 57, 760 N.W.2d 35, 54 (2009).

(2) whether the contact with the police was initiated by them or by the person interrogated and, if by the police, whether the defendant voluntarily agreed to the interview; (3) whether the defendant was told he or she was free to terminate the interview and leave at any time; (4) whether there were restrictions on the defendant's freedom of movement during the interrogation; (5) whether neutral parties were present at any time during the interrogation; (6) the duration of the interrogation; (7) whether the police verbally dominated the questioning, were aggressive, were confrontational, were accusatory, threatened the defendant, or used other interrogation techniques to pressure the suspect; and (8) whether the police manifested to the defendant a belief that the defendant was culpable and that they had the evidence to prove it.[25]

In *Rogers* and several other cases analyzing custody under *Miranda*,[26] we also discussed the six "indicia of custody" outlined by the Eighth Circuit Court of Appeals in *U.S. v. Axsom*.[27] The *Axsom* indicia include: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong-arm tactics or deceptive stratagems were used during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was placed under arrest at the termination of the proceeding.[28] The first three *Axsom*

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[25] *Rogers, supra* note 24.

[26] See, *id.*; *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, Rogers, supra* note 24.

[27] *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002).

[28] *Id.*

indicia are factors which, if present, tend to weigh against a finding of custody, and the last three weigh in favor of a finding of custody.[29] However, *Axsom* emphasized that the indicia were intended to be representative and not exclusive; a finding of custody does not require the factual circumstances of a case to present all six indicia.[30]

In the instant case, Montoya was not given the *Miranda* advisement before the second interrogation. In analyzing whether Montoya was in custody during that interrogation, the district court recited the governing principles outlined above, and it expressly analyzed each of the six *Axsom* indicia before concluding, based on a review of all the circumstances surrounding the interrogation, that Montoya was not in custody. On appeal, Montoya argues the district court erred when it analyzed custody using the *Axsom* indicia without also expressly addressing the eight circumstances we identified in *Rogers*. She contends this is grounds for reversal. She is incorrect.

Both *Rogers* and *Axsom* offer guidance to courts when analyzing the circumstances surrounding an interrogation to determine whether a reasonable person in those circumstances would have believed they were in custody, and both cases were decided at a time when the U.S. Supreme Court had not expressly identified relevant factors to consider in making the *Miranda* custody determination. But neither *Rogers* nor *Axsom* purported to develop an exclusive test which must be applied in every case, and we expressly reject Montoya's suggestion to the contrary.

For the sake of completeness, we note that in 2012, the U.S. Supreme Court, in *Howes v. Fields*,[31] also identified several "[r]elevant factors" for courts to consider when examining the objective circumstances to determine whether a reasonable

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[29] *Id.*

[30] *Id.*

[31] *Howes v. Fields*, 565 U.S. 499, 509, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012).

person would have felt he or she was not at liberty to terminate the interrogation and leave. These factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.[32]

While many appellate courts have developed factors to help guide the *Miranda* custody determination,[33] neither the U.S. Supreme Court nor this court has developed a single set of factors that courts are required to apply in every case. So while the factors identified in *Howes*, the circumstances summarized in *Rogers,* and the indicia outlined in *Axsom* all provide guidance, none are meant to be applied mechanically or exclusively to determine whether a suspect is in custody for purposes of *Miranda*. We reject Montoya's argument that the district court erred in not expressly considering each circumstance referenced in *Rogers*.

Here, the district court properly considered the relevant circumstances surrounding Montoya's interrogation and made specific factual findings which we review for clear error.[34] Among others, the court found that Montoya voluntarily agreed to ride with police to the station because she did not have a car available. Once Montoya was in the interview room, she was expressly told that she was not in custody, that she was free to leave at any time, that she was not under arrest, and that she would be walking out of the police station after the interview. Nothing about the officer's subsequent questioning or conduct nullified these statements. In addition, Montoya was instructed by police how to leave the police station from the interview room, and during questioning, police did not

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[32] *Id.*

[33] See, e.g., *U.S. v. Jones*, 523 F.3d 1235 (10th Cir. 2008); *U.S. v. Swanson*, 341 F.3d 524 (6th Cir. 2003); *U.S. v. Hayden*, 260 F.3d 1062 (9th Cir. 2001); *U.S. v. Fike*, 82 F.3d 1315 (5th Cir. 1996), *overruled on other grounds, U.S. v. Brown*, 161 F.3d 256 (5th Cir. 1998).

[34] See *Clifton, supra* note 6.

position themselves in a way to prevent her from leaving if she wished. Montoya was not handcuffed at any point, and her freedom of movement was unrestrained. All of these findings pertain to the circumstances surrounding the interrogation, and all are supported by the record.

Based on these findings, the district court concluded that Montoya voluntarily agreed to an interview at the police station and that a reasonable person in her position would "not have necessarily felt compelled to do so." This is a conclusion of law which an appellate court reviews independently.[35] Having done so, we conclude that a reasonable person in Montoya's position would not have felt he or she was not at liberty to terminate the interrogation and leave.[36] Because Montoya was not "in custody" during the second interview, no *Miranda* advisement was required prior to questioning. The district court properly denied her motion to suppress to the extent it was based on the absence of a *Miranda* advisement.

(b) Voluntariness of Montoya's Statements

With respect to both the second and third interviews, Montoya argues that her statements should have been suppressed, because they were not voluntarily made and her will was overborne by coercive police tactics.

[10,11] The 5th Amendment to the U.S. Constitution, applicable to state governments by incorporation through the 14th Amendment, protects against compelled self-incrimination by providing that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ."[37] This amendment, along with the Due Process Clause of the 14th Amendment, prevents the use of involuntary confessions in

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[35] *Id.*

[36] Accord, *Beheler, supra* note 19; *Mathiason, supra* note 19.

[37] U.S. Const. amend. V; *State v. Hernandez*, 299 Neb. 896, 911 N.W.2d 524 (2018).

criminal convictions.[38] Although the *Miranda* rule and the requirement that confessions be made voluntarily both arise out of the Fifth Amendment, the question of whether a custodial interrogation complies with *Miranda* is distinct from the question of whether statements made during a custodial interrogation were sufficiently voluntary.[39]

[12,13] The State has the burden to prove that a defendant's statement was voluntary and not coerced.[40] Whether a statement was voluntarily given depends on the totality of the circumstances.[41] Factors to consider include the interrogator's tactics, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne.[42] While the circumstances surrounding the statement and the characteristics of the individual defendant at the time of the statement are potentially material considerations, coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.[43] With this in mind, we consider Montoya's contention that her confessions during the second and third interviews were not voluntary.

(i) Second Interview

The district court's order overruling Montoya's motion to suppress made several factual findings that are relevant to the voluntariness inquiry. It found that no "strong-arm tactics" or deceptive stratagems were employed and that Montoya did not react to the questioning with emotional outbreaks. It

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[38] *Hernandez, supra* note 37.

[39] *Id.*

[40] *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

[41] See, *State v. Turner*, 288 Neb. 249, 847 N.W.2d 69 (2014); *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[42] *McClain, supra* note 41.

[43] See *id.*

found that Bauermeister made no threats or promises during the interview and maintained a serious and calm tone throughout. These findings are supported by the record and are not clearly erroneous.

Based on these factual findings and our de novo review of the record, including the video recording of the second interview, we conclude the statements Montoya made during the second interview were voluntary and were not the result of police coercion. There was no error in overruling the motion to suppress as to the second interview.

(ii) Third Interview

Montoya argues her statements in the third interview were not voluntary, because improper inducements were made to her by police in the form of either promises of leniency or threats of harsher punishment. Some additional factual background is necessary to understand her arguments.

Before questioning Montoya, Bauermeister spoke at length about the importance of telling the truth during the interview, saying, "Whatever you do today though, don't lie about it, because if you lie about anything or fail to tell me anything, it's going to look really bad for you when you go to court." Bauermeister went on to say:

> You can choose not to talk to me and that's fine, but the story I got, and the injuries [C.H.] has, I can prove that you had something to do with this. I can prove you are responsible for this at this point. Now, if you go into court, and you will go to court for this at some point . . . . If you go into court, if you stand up there on the stand and you say anything that is a lie and I get up there on the stand and say that this is what she told me and this is a lie and I can prove it because of this, this, and this, that's going to make you look very bad to a judge or a jury. So right now what you need to think about is getting the truth out and explaining what happened. . . . Don't you think that whoever listens to this story, that I'm gonna tell and the prosecutor's gonna tell, and we lay out

> the facts of the case, don't you think they would rather hear, would like to hear and don't you think that they would want to work with the person who says I made a mistake as opposed to the person who just flat out lies or the person who says no I didn't make a mistake, I'm a bad, evil person and I wanted to hurt that child so bad that the child might die. I'll guarantee you that it would sound better if it's just some deal where you just couldn't take it anymore. . . . I would rather have somebody say "I made a horrible mistake" and tell me the entire truth about what happened as opposed to having someone just lie to me, and then later on I will prove that those are lies. Don't you think the person who lies is going to be treated . . . I don't want to say more harshly, but who would you want to work with?

Bauermeister then advised Montoya of her *Miranda* rights and began questioning her. Throughout the interview, Bauermeister continued to emphasize the importance of being truthful. He told Montoya he did not think she was being completely honest, and he commented that judges and juries do not like liars, that it would be better for Montoya to tell the truth, and that prosecutors and police would be more likely to "work" with someone who was truthful.

[14] While the confession of an accused may be involuntary and inadmissible if obtained in exchange for a promise of leniency, mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or promise, does not make a subsequent confession involuntary.[44] In order to render a statement involuntary, any benefit offered to a defendant must be definite and must overbear his or her free will.[45]

The district court found that Bauermeister's statements during the third interview did not rise to the level of promises

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[44] See *id.*

[45] *Id.*

of leniency or threats of harsher punishment. After reviewing the video recording and considering the totality of the circumstances, we agree. Bauermeister used standard interrogation techniques, and nothing about the circumstances of the interrogation or the characteristics and reaction of Montoya suggest her will was overborne. On this record, we agree with the district court's conclusion that Montoya's statements in the third interview, both oral and written, were voluntarily made. The trial court did not err in overruling Montoya's motion to suppress, and her first assignment of error is without merit.

2. Interpreting § 28-707

Several of Montoya's remaining assignments of error rise and fall on the merits of her statutory interpretation argument, so we consider that argument as a threshold matter. Summarized, Montoya argues that to be found guilty of the Class IB felony of intentional child abuse resulting in death under § 28-707(1) and (8), the State was required to prove not only that she knowingly and intentionally committed the crime of child abuse, but also that she intended that abuse to result in the child's death. The trial court rejected Montoya's proposed interpretation of § 28-707, and so do we.

[15] Our analysis begins with the plain language of the statute. 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.[46] Section § 28-707 provides in relevant part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
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> (a) Placed in a situation that endangers his or her life or physical or mental health;
>
> (b) Cruelly confined or cruelly punished;

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[46] *State v. Wal*, 302 Neb. 308, 923 N.W.2d 367 (2019).

> (c) Deprived of necessary food, clothing, shelter, or care;
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> (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 . . . . . .
>
> (3) Child abuse is a Class I misdemeanor if the offense is committed negligently and does not result in serious bodily injury as defined in section 28-109 or death.
>
> (4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109 or death.
>
> (5) Child abuse is a Class IIIA felony if the offense is committed negligently and results in serious bodily injury as defined in section 28-109.
>
> (6) Child abuse is a Class IIA felony if the offense is committed negligently and results in the death of such child.
>
> (7) Child abuse is a Class II felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.
>
> (8) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

In the present case, the district court found that Montoya committed the offense of child abuse by placing C.H. in a situation that endangered her life, in violation of § 28-707(1)(a), and by cruelly punishing C.H., in violation of § 28-707(1)(b). The court expressly found Montoya committed such child abuse knowingly and intentionally, and not negligently or recklessly.[47] And the court found the child abuse resulted in the death of C.H. and thus was a Class IB felony under § 28-707(8).

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[47] See § 28-707(9).

Montoya does not take issue with the trial court's conclusion that she knowingly and intentionally committed the offense of child abuse as defined in § 28-707(1)(a) and (b). Instead, she contends that in order to find her guilty of intentional child abuse resulting in death under § 28-707(1) and (8), the trial court also had to find that she had the "intent to commit the harm"[48] or the "intent to commit the result"[49] of the child abuse. In other words, Montoya contends that to be found guilty of knowing and intentional child abuse resulting in death, the State was required to prove not only that she intentionally committed the offense of child abuse, but also that she intended the abuse to result in death. As we explain below, Montoya's construction is inconsistent with the plain language of the statute and is contrary to this court's case law.

[16] Section 28-707(1) defines the offense of child abuse and states that one commits child abuse "if he or she knowingly, intentionally, or negligently causes or permits a minor child to be" abused in any of the six ways identified in subsections (a) through (f). Then, § 28-707(3) through (8) classify the level of any such offense based on two factors: the actor's state of mind when committing the offense and the degree of harm to the child resulting from the offense.[50] But neither the plain language of § 28-707 nor our cases interpreting it require the State to prove the defendant intended the resulting harm to the child. We said so expressly in *State v. Molina*[51] when we observed that "[c]hild abuse resulting in death requires proof of the defendant's intent to commit child abuse, as defined in the subsections of § 28-707(1), but it does not require proof that the defendant intended to kill the minor child."

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[48] Brief for appellant at 29.

[49] *Id.* at 23.

[50] See *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

[51] *Molina, supra* note 3, 271 Neb. at 505-06, 713 N.W.2d at 432.

In *Molina*, the defendant was convicted of both second degree murder and intentional child abuse resulting in death. He appealed, arguing his conviction for second degree murder should be vacated because it was a lesser-included offense of knowing and intentional child abuse resulting in death. We applied the *Blockburger*[52] test and disagreed. First, we observed that intentional child abuse resulting in death requires proof that the death was that of a minor child, which is not required to prove second degree murder. We then stated:

> [S]econd degree murder also requires proof of an element that child abuse resulting in death does not: an intent to kill. . . . *Child abuse resulting in death requires proof of the defendant's intent to commit child abuse, as defined in the subsections of § 28-707(1), but it does not require proof that the defendant intended to kill the minor child.* Second degree murder, on the other hand, requires proof of an intent to kill.[53]

Molina therefore held that second degree murder was not a lesser-included offense of intentional child abuse resulting in death.

Our opinion in *State v. Muro*[54] is also instructive. In that case, we explained that under the statutory framework of § 28-707, the proscribed conduct is "exactly the same" whether the offense is classified as a felony or a misdemeanor,[55] but that the classification of the offense will vary depending on two factors: the defendant's state of mind in committing the offense and the degree of harm caused by the offense. In *Muro*, the defendant left her infant in the care of another and,

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[52] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (requiring analysis of whether each statute requires proof of fact which other does not).

[53] *Molina, supra* note 3, 271 Neb. at 505-06, 713 N.W.2d at 432 (emphasis supplied).

[54] *Muro, supra* note 50.

[55] *Id.* at 708, 695 N.W.2d at 429.

after returning home, she found the child was unresponsive and "'limp, kind of like a rag doll.'"[56] The defendant waited approximately 4 hours before seeking medical care for the child. By the time the child arrived at a hospital, she was not breathing, her pupils were fixed and dilated, and she was limp and cold. Tests eventually concluded brain death had occurred, and the decision was made to discontinue life support. An autopsy showed the cause of death was a skull fracture that resulted in cerebral edema and ultimately brain death. The defendant was convicted of intentional child abuse resulting in death, a Class IB felony, and sentenced to 20 years' imprisonment.

We confirmed the conviction for child abuse, reasoning the evidence supported a finding that the defendant knowingly and intentionally caused or permitted her child to be deprived of necessary medical care, in violation of § 28-707(1)(c). But for purposes of classifying the crime, we found the medical evidence was insufficient as a matter of law to establish beyond a reasonable doubt that the child's death was proximately caused by the delay in seeking medical care. Notably, we explained that the State's failure to prove that the child's death resulted from the abuse "d[id] not relieve [the defendant] of criminal responsibility"[57] for the offense of child abuse, but affected only the level of the offense under § 28-707. We thus concluded the evidence was "sufficient to sustain a conviction for Class IIIA felony child abuse under § 28-707(4) without any proof of resulting harm to the child."[58] So, we reclassified the offense from a Class IB felony to a Class IIIA felony and remanded the matter for resentencing. *Muro* illustrates that proof of the resulting harm is pertinent to classifying the offense of child abuse, but it does not impact criminal responsibility for the offense.

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[56] *Id.* at 705, 695 N.W.2d at 427.

[57] *Id.* at 713, 695 N.W.2d at 432.

[58] *Id.* at 713-14, 695 N.W.2d at 432.

[17] Given the plain language of § 28-707 and our cases interpreting and applying it, we reject Montoya's contention that the intent to cause the resulting harm is a necessary element of the offense of child abuse. We hold that to convict a defendant of the Class IB felony of knowing and intentional child abuse resulting in death under § 28-707, the State must prove the defendant knowingly and intentionally caused or permitted the child to be abused in one or more of the ways defined in § 28-707(1), and also must prove the offense resulted in the child's death, as required by § 28-707(8). It is not necessary, however, to prove the defendant intended the abuse to result in the child's death.[59]

[18] In arguing for a contrary interpretation, Montoya presents a number of different arguments which invite this court to ignore the statutory requirements established by the Legislature, to conflate the statutory provisions defining the offense of child abuse[60] with the statutory provisions classifying the level of offense for purposes of punishment,[61] and to read provisions into the statutory language which are not there. But it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[62] It would add nothing to our jurisprudence to address all of Montoya's arguments individually. We have considered them all and find, without exception, that they either are premised on a fundamentally flawed reading of the statute or urge a construction which is contrary to the plain and unambiguous language of § 28-707 and this court's opinions construing it.

Having addressed the proper interpretation of § 28-707 as a threshold matter, we apply that interpretation when considering Montoya's remaining assignments of error.

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[59] *Molina, supra* note 3.

[60] See § 28-707(1).

[61] See § 28-707(3) through (8).

[62] *State v. Smith*, 302 Neb. 154, 922 N.W.2d 444 (2019).

3. Plea in Abatement and Sufficiency of Evidence

[19] Montoya's second assignment of error challenges the denial of her plea in abatement and argues the evidence offered at her preliminary hearing was insufficient to bind the case over. Her fourth assignment of error argues that the State's evidence at trial was insufficient to convict her of intentional child abuse resulting in death. We address these assignments together, because we have held that "an error in a ruling on a plea in abatement challenging whether there was sufficient evidence to bind a case over for trial is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence."[63] Consequently, Montoya's second and fourth assignments both turn on whether the evidence at trial was sufficient to convict her of intentional child abuse resulting in death.

[20] When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, 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.[64] The evidence that Montoya knowingly and intentionally committed child abuse was overwhelming.

Montoya admitted that on March 12, 2016, she threw C.H. against the bed multiple times causing her to hit her head on the wall and the bedframe. She admitted slamming C.H.'s head into the wall and pressing C.H. against the wall so hard she thought the child's ribs would break. By the time Montoya took C.H. to the hospital some 13 hours later, C.H. was unresponsive, tremoring, and posturing and had bruising all over her body. Imaging revealed a skull fracture and bleeding in the brain, and medical evidence showed the cause

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[63] *State v. Chauncey*, 295 Neb. 453, 464, 890 N.W.2d 453, 462 (2017).

[64] *State v. Draper*, 295 Neb. 88, 886 N.W.2d 266 (2016).

of C.H.'s death was blunt force trauma to the head. This evidence was sufficient to prove that Montoya knowingly and intentionally caused C.H. to be placed in a situation that endangered her life or physical or mental health, in violation of § 28-707(1)(a), and knowingly and intentionally caused C.H. to be cruelly punished, in violation of § 28-707(1)(b). The evidence was also sufficient to prove that Montoya's offense resulted in C.H.'s death, making it a Class IB felony under § 28-707(8).

Montoya does not challenge any of this evidence, but instead argues the State offered no evidence that she intended to kill C.H. She points specifically to her own statement that she never intended to kill C.H. and to the investigating officer's testimony that he "uncovered no evidence suggesting that . . . Montoya intended to cause the death of [C.H.]." But since intent to cause death is neither an element of the offense of child abuse nor a factor in determining the level of such offense, Montoya's argument in that regard is simply immaterial. The evidence at trial was sufficient to support Montoya's conviction for intentional child abuse resulting in death, and her arguments to the contrary are meritless.

4. Constitutionality of § 28-707

In her third assignment of error, Montoya argues the district court erred in overruling her motion to quash the information and rejecting her constitutional challenges to § 28-707. Montoya's motion to quash alleged that § 28-707(1), (3), (6), and (8) violate equal protection, violate due process, and are unconstitutionally vague and overbroad both facially and as applied.

[21,22] As a preliminary matter, we point out that Montoya was convicted of child abuse under § 28-707(1)(a) and (b) and (8), but her constitutional challenge purports to extend to other portions of the statute as well. Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely

affected by the language in question.[65] To establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.[66] Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute.[67]

Montoya can claim to be adversely affected only by the statutory provisions under which she was charged and convicted, and we conclude she lacks standing to challenge other portions of § 28-707. Furthermore, we limit our analysis to only those constitutional arguments specifically discussed in Montoya's appellate briefing.[68]

Montoya's appellate briefing focuses on just two of the constitutional claims alleged in her motion to quash. Her primary argument is that § 28-707 violates equal protection principles, because it "criminalizes the same conduct [but] imposes substantially different penalties for that conduct"[69] depending on how the crime is classified. She also argues that § 28-707 is unconstitutionally vague.

[23-25] In considering these two constitutional challenges, we presume § 28-707 to be constitutional and resolve all reasonable doubts in favor of its constitutionality.[70] The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality.[71] A

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[65] *State v. Hibler*, 302 Neb. 325, 923 N.W.2d 398 (2019).

[66] *Id.*

[67] *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990).

[68] See *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018) (absent plain error, appellate court considers only those claimed errors specifically assigned and argued).

[69] Brief for appellant at 26.

[70] See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

[71] *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996).

penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.[72] Applying these principles, we address both of Montoya's constitutional arguments in turn.

(a) Equal Protection Claim

Montoya argues that under § 28-707, "[t]he penalties are disparate" but "the same conduct is at issue," and she contends that this violates her "right to equal protection under Article I, Section 3 of the Nebraska Constitution and the 14th Amendment to the U.S. Constitution."[73] We have recognized that the Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges,[74] so we address her claims together.

Montoya's equal protection claim is best understood as a challenge to the different classifications or gradations of offense under § 28-707. She generally argues, through a series of hypotheticals, that her criminal conduct was charged as a Class IB felony, yet someone else committing the same acts of abuse might be charged with and convicted of a lower level felony, or even a misdemeanor. She contends this shows a violation of equal protection. We disagree.

As explained earlier, § 28-707 differentiates between levels of offense based on two factors: the actor's state of mind in committing the proscribed conduct and the degree of harm resulting to the child. Generally speaking, those who commit child abuse knowingly and intentionally are subject to a higher penalty range than those who commit the crime negligently; and, as the degree of harm caused to the child increases, so does the penalty range. As a result, depending on the actor's state of mind in committing the offense and the harm caused to the child, the same criminal conduct can be classified as either

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[72] *Id.*

[73] Brief for appellant at 27.

[74] *Hibler, supra* note 65.

a Class I misdemeanor,[75] a Class IIIA felony,[76] a Class IIA felony,[77] a Class II felony,[78] or a Class IB felony.[79]

Montoya suggests that these classifications offend equal protection principles. She suggests the only way to classify her offense as a Class IB felony without offending equal protection is to read into the statute an "intent to kill" requirement. There are two problems with her argument: We have already rejected her statutory interpretation as unsound, and she has not presented any argument showing how the classification of crimes under § 28-707 violates the Equal Protection Clause.

[26,27] The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.[80] When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.[81] Montoya does not claim that the classification of her crime as a Class IB felony turns on a suspect characterization or affects a fundamental right, and we have been clear that child abuse is not a constitutionally protected activity.[82] Accordingly, Montoya's equal protection claim is subject to rational basis review.

[28,29] Under rational basis review, we will uphold a classification created by the Legislature where it has a rational

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[75] § 28-707(3).

[76] § 28-707(4) and (5).

[77] § 28-707(6).

[78] § 28-707(7).

[79] § 28-707(8).

[80] *Hibler, supra* note 65.

[81] *Id.*

[82] *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985).

means of promoting a legitimate government interest or purpose.[83] In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made.[84] Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.[85] Montoya has failed to meet this burden.

As it regards her equal protection claim, Montoya's briefing does little more than point out that § 28-707 proscribes the same criminal conduct but classifies the level of crime differently depending on certain statutory factors. She does not mention or discuss the rational basis test or attempt to apply any other level of constitutional scrutiny to the classification she challenges. She does not argue, or even imply, that classifying the crime of child abuse as a Class IB felony when it is committed intentionally rather than negligently, and when it results in the death of the child, somehow fails to rationally further a legitimate state interest.

In short, Montoya has failed to present any viable equal protection argument related to the classification of her crime under § 28-707(8). The district court did not err in rejecting her equal protection claim.

(b) Void for Vagueness

Montoya's motion to quash alleged that § 28-707 was both "overbroad and vague" and thus facially invalid. But on appeal, she argues only that the statute should be found "facially unconstitutional as violative of the void-for-vagueness doctrine,"[86] so we confine our analysis accordingly.

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[83] *Rung, supra* note 70.

[84] *Id.*

[85] *Id.* See, also, *Hibler, supra* note 65.

[86] Reply brief for appellant at 3.

[30,31] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[87] The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.[88] Courts consider two things: First, to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute.[89] Furthermore, a defendant cannot maintain that the statute is vague when applied to the conduct of others, because a court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.[90] Montoya fails the test for standing under both considerations.

Montoya engaged in conduct that is clearly proscribed by § 28-707 when she abused C.H., and thus lacks standing to assert a claim of vagueness.[91] She was convicted of violating § 28-707(1)(a) and (b), and this court has previously upheld both those statutory provisions against challenges that the conduct proscribed therein is unconstitutionally vague or overbroad.[92]

Additionally, the real focus of Montoya's vagueness argument is not on her crime at all. Instead, she focuses on the different criminal classifications of the crime under § 28-707 and argues the classifications are potentially vague as applied to the conduct of others:

> Is the situation where a child dies in an accident where the defendant was speeding a Class IB, a Class IIA, or a

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[87] *Scott, supra* note 10; *Rung, supra* note 70.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] See *id.*

[92] See, *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002); *Crowdell, supra* note 67; *Sinica, supra* note 82.

> Class I misdemeanor? Is a shaken-baby case a Class IB Felony or a Class IIA Felony? Is the case where the child is inadvertently scalded in too hot bath water a Class IIA Felony or a Class I misdemeanor? Is a case where very young children are left at home and a fire ensues a Class IIA Felony or a Class I misdemeanor? The examples are endless.[93]

We conclude that Montoya lacks standing to assert a claim that § 28-707 is void for vagueness, because she was engaging in conduct that is clearly proscribed by § 28-707(1)(a) and (b) when she abused C.H. Furthermore, she lacks standing to assert a claim of vagueness on behalf of others. Montoya's third assignment of error has no merit.

5. Excessive Sentence

[32,33] In her final assignment of error, Montoya challenges her sentence as excessive. She was convicted of a Class IB felony, which is punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment.[94] Montoya was sentenced to a term of 55 to 75 years in prison. Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.[95] 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.[96]

[34-36] Where, as here, 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

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[93] Reply brief for appellant at 7-8.

[94] Neb. Rev. Stat. § 28-105 (Supp. 2015).

[95] *Leahy, supra* note 14.

[96] *State v. Hunt*, 299 Neb. 573, 909 N.W.2d 363 (2018).

sentence to be imposed.[97] 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.[98] 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.[99]

The record on appeal demonstrates that the trial court considered all of these factors when imposing sentence in this case. Montoya nevertheless presents two arguments in support of her claim that the sentencing court abused its discretion.

First, she argues that during sentencing, the trial court improperly considered the State's suggestion that a delay in providing medical treatment to C.H. was a factor weighing in favor of a harsher sentence. Montoya contends this was improper because there was no evidence that if she had sought treatment more promptly, C.H.'s injuries would have been reduced. But when imposing sentence, the trial judge expressly told Montoya: "I'm not sentencing you because of the delay. Could [earlier treatment] have helped? Nobody will ever know. The doctors evidently don't seem to think so." The record on appeal affirmatively refutes Montoya's contention that the trial court improperly considered the delay in treatment when imposing sentence.

Next, Montoya argues the sentence imposed was excessive when compared to sentences imposed in other cases which defense counsel brought to the trial court's attention during sentencing. Montoya suggests this was an abuse of

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[97] *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

[98] *Id.*

[99] *Id.*

discretion, but the record affirmatively refutes such a conclusion. Regarding the other cases that defense counsel mentioned during sentencing, the trial judge remarked:

> I am aware of the cases . . . which you spoke of, [defense counsel]. I'm also aware of a lot of other cases that you did not speak of that I researched and looked into and that were sentenced significantly greater than what you indicated.
>
> . . . The law is different in some instances. Injuries are different, circumstances are different.

Montoya's sentence is well within the statutory limits and reflects the serious nature of her crime. The district court properly considered and applied the relevant factors in determining an appropriate sentence, and we find no abuse of discretion in the sentence imposed.

V. CONCLUSION

Having found no merit to any of Montoya's assignments of error, we affirm the judgment of the district court.

Affirmed.

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

State of Nebraska, appellee and cross-appellant, v. Edward D. Koch, appellant and cross-appellee.

933 N.W.2d 585

Filed September 27, 2019. No. S-18-971.

1. **Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.
2. **Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
3. **Postconviction: Final Orders: Appeal and Error.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final, appealable order as to the claims denied without a hearing. It is appealable because an order overruling a motion for postconviction relief as to a claim is a "final judgment" as to such claim under Neb. Rev. Stat. § 29-3002 (Reissue 2016).
4. **Postconviction: Pleadings: Time.** Neb. Rev. Stat. § 29-3001(4) (Reissue 2016) of the Nebraska Postconviction Act contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.
5. **Postconviction: Limitations of Actions: Words and Phrases: Appeal and Error.** The issuance of a mandate by a Nebraska appellate court is a definitive determination of the "conclusion of a direct appeal," and the "date the judgment of conviction became final," for purposes of Neb. Rev. Stat. § 29-3001(4)(a) (Reissue 2016).

Appeal from the District Court for Cass County: Michael A. Smith, Judge. Affirmed.

Cameron Kroeger, of Berry Law Firm, for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and Maureen Larsen, Senior Certified Law Student, for appellee.

Miller-Lerman, Cassel, Stacy, and Papik, JJ., and Bishop, Judge.

Stacy, J.

Edward D. Koch appeals from an order of the Cass County District Court dismissing his motion for postconviction relief after an evidentiary hearing. The State cross-appeals, arguing the district court erred in granting an evidentiary hearing on a postconviction claim that was time barred. We affirm the dismissal of the postconviction motion.

I. BACKGROUND

In 2014, Koch was charged with two counts of manslaughter in violation of Neb. Rev. Stat. § 28-305 (Reissue 2008). He eventually pled no contest to both counts as charged, and he was sentenced to consecutive terms of 15 to 20 years in prison for each conviction.

Koch filed a direct appeal, represented by the same attorney. The Nebraska Court of Appeals affirmed Koch's conviction and sentence in a memorandum opinion filed May 24, 2016.[1] The Court of Appeals issued its mandate to the Cass County District Court on June 28.

The record shows the mandate was filed by the clerk of the district court on July 21, 2016, and a few days later, on July 25, the district court entered judgment in accordance with the mandate. An amended judgment on the mandate was entered July 28 to correct a typographical error.

On July 19, 2017, Koch filed a verified motion for postconviction relief. The motion, which was prepared and filed by newly retained counsel, alleged that Koch's trial counsel had provided ineffective assistance in four respects. The State moved to deny postconviction relief without an evidentiary hearing, arguing, among other things, the motion was time barred. In response, Koch argued that his motion was timely

[1] *State v. Koch*, No. A-15-959, 2016 WL 3083135 (Neb. App. May 24, 2016) (selected for posting to court website).

under Neb. Rev. Stat. § 29-3001(4)(a) (Reissue 2016), because it was filed within 1 year of the date on which the Court of Appeals' mandate had been filed in the district court.

In an order entered November 2, 2017, the district court agreed with Koch on the issue of timeliness. It noted that under § 29-3001(4)(a), a postconviction motion must be filed within 1 year of "'the conclusion of a direct appeal.'" The district court reasoned "the issuance of an appellate opinion is not necessarily the final step in the appellate process, and that issuance and receipt of the mandate is also a part of that process." Applying this reasoning, the district court found Koch's direct appeal concluded on July 21, 2016, the date on which the Court of Appeals' mandate was filed in the district court, and thus concluded Koch's postconviction motion was timely filed within 1 year of that date.

The district court then found Koch was entitled to an evidentiary hearing on one of his four claims of ineffective assistance of counsel. It found the other three claims were either procedurally barred or insufficiently pled, and dismissed them. Neither Koch nor the State appealed the November 2, 2017, order.

An evidentiary hearing was held on the remaining claim, and the district court found Koch had failed to show his trial counsel performed deficiently. In an order entered September 18, 2018, the court therefore dismissed Koch's motion for postconviction relief.

Koch filed a timely appeal, and the State cross-appealed. We moved the appeal to our docket on our own motion.[2]

II. ASSIGNMENTS OF ERROR

Koch assigns, restated, that the district court erred in (1) finding he was not entitled to an evidentiary hearing on three of his four postconviction claims and (2) denying his remaining postconviction claim after an evidentiary hearing.

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

In its cross-appeal, the State assigns, restated, that the district court erred in granting an evidentiary hearing because Koch's postconviction motion was time barred under § 29-3001(4)(a).

III. STANDARD OF REVIEW

[1,2] If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.[3] When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.[4]

IV. ANALYSIS

On cross-appeal, the State argues the district court erred in granting an evidentiary hearing on one of Koch's ineffective assistance claims, rather than dismissing Koch's postconviction motion as untimely. Because we find this issue dispositive, we address it first. Before doing so, however, we pause to address Koch's argument that the State's cross-appeal is not properly before us.

1. State's Cross-Appeal Properly Before Us

Koch argues the State's cross-appeal should not be considered for two reasons. First, he argues the timeliness ruling being challenged on cross-appeal was part of the district court's order of November 2, 2017, and the State did not timely appeal from that order. Second, Koch argues the State did not timely file its appellate brief raising the cross-appeal. We address each argument in turn and reject them both.

(a) Timeliness of State's Cross-Appeal

[3] It is well established that, within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final, appealable

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[3] *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018).

[4] *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), *cert. denied* ___ U.S. ___, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019).

order as to the claims denied without a hearing.[5] Such an order is appealable because as to the denied claim, it is a "final judgment" under Neb. Rev. Stat. § 29-3002 (Reissue 2016).[6]

As noted, the district court's order of November 2, 2017, dismissed three of the four postconviction claims raised by Koch. Neither party appealed, and Koch is thus correct that the November 2 order has become final as it regards the three dismissed claims. But the November 2 order was not a final, appealable order as to the remaining claim on which an evidentiary hearing was ordered. As to that claim, no final order was entered until September 18, 2018, when the district court denied postconviction relief following an evidentiary hearing. Koch timely appealed from the September 18 order, and in its appellate brief, the State presented a cross-appeal[7] limited to the timeliness of the claim on which the evidentiary hearing was held. There is no merit to Koch's argument that the State's cross-appeal is not properly before us because no appeal was taken from the November 2 order.

(b) Timeliness of State's Brief

Next, Koch urges us not to consider the State's cross-appeal because the State "failed to timely file its brief" on appeal.[8] We need not discuss the circumstances under which an appellate court might accept and consider a party's untimely brief, because here, the State's brief and cross-appeal were not untimely.

The State requested, and was granted, an extension of time to file its appellate brief, and it thereafter filed its brief, which asserted a cross-appeal,[9] within the time permitted by the court. The State's cross-appeal is properly before this court, and Koch's arguments to the contrary have no merit.

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[5] *Id.*

[6] See *id.*

[7] See Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014).

[8] Reply brief for appellant at 7.

[9] See Neb. Ct. R. App. P. § 2-101(E) (rev. 2015).

2. Koch's Postconviction Motion Untimely

In its cross-appeal, the State argues it was error for the district court to grant an evidentiary hearing on Koch's claim because his postconviction motion was time barred under § 29-3001(4)(a). We agree.

[4] Section 29-3001(4) of the Nebraska Postconviction Act[10] contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.[11] Here, the applicable triggering event is set out in § 29-3001(4)(a): "The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal." As such, the question of timeliness in this case turns on whether Koch filed his postconviction motion within 1 year of the date his judgment of conviction became final by the conclusion of his direct appeal.

Koch argues his direct appeal was not concluded until the district court entered judgment on the mandate issued by the Court of Appeals. The State argues Koch's direct appeal was concluded once the Court of Appeals issued its mandate. The State is correct.

[5] In *State v. Huggins*,[12] we held "the issuance of a mandate by a Nebraska appellate court is a definitive determination of the 'conclusion of a direct appeal,' and the 'date the judgment of conviction became final,' for purposes of § 29-3001(4)(a)." *State v. Huggins* observed that when a criminal conviction is appealed, this court has often indicated the finality of the judgment is tied to the issuance of a final mandate,[13] and that

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[10] Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016 & Cum. Supp. 2018).

[11] See *State v. Edwards*, 301 Neb. 579, 919 N.W.2d 530 (2018).

[12] *State v. Huggins*, 291 Neb. 443, 450, 866 N.W.2d 80, 85 (2015).

[13] *Huggins, supra* note 12, citing *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003); *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999); and *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

"[u]nder Nebraska law and procedure, the issuance of a mandate by an appellate court is a clear signal that a direct appeal has been concluded."[14] Since our decision in *Huggins*, both this court and the Court of Appeals have applied the rule that for purposes of § 29-3001(4)(a), the conclusion of a direct appeal occurs when a Nebraska appellate court issues the mandate in the direct appeal.[15]

Here, it is undisputed that the Court of Appeals issued its mandate on June 28, 2016, and under our case law, that is the date on which Koch's judgment of conviction became final by the conclusion of his direct appeal for purposes of § 29-3001(4)(a). Koch filed his postconviction motion on July 19, 2017, more than 1 year after the date the mandate was issued by the appellate court. As such, his postconviction motion was time barred under § 29-3001(4)(a).

V. CONCLUSION

We do not reach Koch's assignments of error on appeal because we find merit in the State's cross-appeal. We conclude Koch's postconviction motion was filed outside the 1-year limitations period under § 29-3001(4)(a) and was time barred. We therefore affirm the district court's order of September 18, 2018, dismissing Koch's postconviction motion, albeit on different grounds.

Affirmed.

Heavican, C.J., and Funke and Freudenberg, JJ., not participating.

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[14] *Huggins, supra* note 12, 291 Neb. at 449, 866 N.W.2d at 85.

[15] See, *State v. Shannon*, 293 Neb. 303, 876 N.W.2d 907 (2016); *State v. Liner*, 26 Neb. App. 303, 917 N.W.2d 194 (2018).

Nebraska Supreme Court
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In re The Stueven Charitable Foundation, a Nebraska nonprofit corporation. The Stueven Charitable Foundation and Kristy Cavanaugh, appellees, v. Delbert Stueven, by and through Shelley Stueven Mallory, his Guardian and Conservator, appellant.

933 N.W.2d 554

Filed September 27, 2019. No. S-18-1110.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.

Appeal from the District Court for Hall County: Teresa K. Luther, Judge. Vacated and remanded for further proceedings.

Thomas A. Wagoner for appellant.

John Matson, James Tews, and Matthew Maser, of Koley Jessen, P.C., L.L.O., for appellees.

Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

INTRODUCTION

The district court for Hall County granted the petition of The Stueven Charitable Foundation (Foundation) seeking the appointment of four members to its board of directors. Delbert Stueven (Delbert)—by and through his guardian and conservator, Shelley Stueven Mallory (Shelley)—appeals. We vacate the district court's appointment of directors and remand the matter to the district court for further proceedings.

BACKGROUND

Delbert and his wife incorporated the Foundation in 1990 as a charitable nonprofit corporation. Delbert's wife has since passed away. The current directors of the Foundation are Delbert, president; Kristy Cavanaugh, secretary; and Robert Burkhardt, treasurer (incorrectly referred to as "Bernhardt" in some pleadings). Delbert has since been found incompetent. His daughter, Shelley, was appointed as his guardian and conservator.

The Foundation and Cavanaugh filed a petition on September 18, 2018, seeking the appointment of additional directors. The Foundation's amended petition alleged that the Foundation failed to make the required 2016 calendar year donation to a qualified charity and that another distribution was due before the end of 2018. The Foundation further alleged that Cavanaugh had attempted to contact Burkhardt for the purpose of holding a meeting of the board of directors, but was unable to reach him. The Foundation alleged that because of Delbert's incapacity and Burkhardt's failure to respond, the board lacked a quorum to take any actions. As such, the Foundation sought an order from the district court appointing two new directors.

Delbert, acting through Shelley, filed a motion on October 11, 2018, seeking the dismissal of "the action of . . . Cav[a]naugh." In that motion, Shelley objected to the appointment of further directors, arguing that there was no vacancy on the board.

On October 29, 2018, Cavanaugh, acting in her capacity as a director of the Foundation, retained separate counsel and filed an answer and a cross-complaint that contained allegations similar to those made by the Foundation and sought essentially the same relief as the Foundation, except that Cavanaugh asked for the appointment of four, not two, additional directors.

A hearing on this motion was held on October 30, 2018. There was no testimony at the hearing, and no evidence was offered. The articles of incorporation and certain amendments had been attached to the initial petition filed by the Foundation. And those same articles with some amendments, minutes from

various board meetings, and the Foundation's bylaws were attached to Cavanaugh's answer and cross-complaint.

On November 2, 2018, the district court granted the Foundation's petition in part and Cavanaugh's petition in its entirety, appointing four new directors to the board. Shelley, acting as Delbert's guardian and conservator, appeals.

ASSIGNMENTS OF ERROR

Shelley assigns that the district court erred (1) in appointing members to the board of directors and (2) in failing to find that Shelley could act as Delbert's representative on the board of directors.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[1]

ANALYSIS

The primary issue on appeal is whether the district court erred in naming four new directors to the board of directors for the Foundation. Shelley argues that the district court's appointment of directors was contrary to the Foundation's bylaws, was beyond the statutory authority of the court, and was not supported by the evidence. Relatedly, Shelley asserts that as Delbert's guardian and conservator, she could serve as his representative on the board.

Waiver and Authority to Act.

Before we reach Shelley's assignments of error, we address a few preliminary matters. First, Cavanaugh argues that Shelley has waived most of her arguments on appeal, because she did not object to the authority of the district court to appoint the directors in question, but instead took issue only with the qualifications of two of the four directors suggested by Cavanaugh and ultimately appointed by the court.

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[1] *Randy S. v. Nicolette G.*, 302 Neb. 465, 924 N.W.2d 48 (2019).

A review of the record shows that Shelley's motion to dismiss specifically noted that there was no vacancy on the board, and as such, that the Foundation's motion seeking the appointment of directors should be dismissed. Counsel renewed this argument at the hearing, but also responded to the court's direct questioning about whether it had "any particular problem with those individuals [that were being recommended as directors]." On these facts, we conclude that Shelley has not waived these arguments on appeal.

In addition, Shelley contends that Neb. Rev. Stat. § 30-2653 (Reissue 2016) authorizes her to act on Delbert's behalf. We decline to address this contention, because it was not addressed by the district court.

Appointment of Directors.

Shelley argues on appeal that the district court was not authorized by the Nebraska Nonprofit Corporation Act or by the Foundation's bylaws to appoint additional directors. A review of the pertinent language from both the Foundation's bylaws and articles and the act is helpful.

According to the articles of incorporation and their amendments, the Foundation's board of directors must have an odd number of directors, numbering at least three and no more than nine. Each director must reside in Hall County and cannot be a lineal descendant of Delbert or his wife or be a spouse of such descendant.

A quorum of the board is two directors. The bylaws also require an annual meeting and provide for regular meetings to be called by the board. In addition, special meetings may be called by the president, by the secretary-treasurer, or by two nonofficer members.

Directors may resign or may be removed from office for abandonment of duties of the office, for committing an act of moral turpitude against the Foundation, or for failure to meet residency or vocational requirements for the position held. "[R]emoval may be accomplished by resolution of the remaining directors or director, if only one," after notice is given.

The articles of incorporation provide that "[f]or so long as he remains in office as a Director of this Foundation, any vacancy occurring in the office of Director shall be filled by appointment made by [Delbert, who is] the Surviving Stueven Family Director," but that

> [a]fter the death, resignation or removal of the Surviving Stueven Family Director from the office of Director of this Foundation, the remaining Directors or Director, if there is only one, shall have the authority to elect the replacement for the Surviving Stueven Family Director and thereafter the incumbent Directors, or incumbent Director if there is only one, shall have the authority to elect the replacement necessary to replace any other Director whose office is vacated for any reason.

The articles also provide:

> Any vacancy . . . which is caused by there being no qualified appointee or the failure of a qualified appointee to accept the appointment or by the failure of the [board of] Directors to appoint an Appointed Director within sixty (60) days after a vacancy occurs . . . may be filled by appointment of a Hall County resident made by the Hall County District Court in an action brought by the Foundation for that purpose and to prevent the dissolution of the Foundation.

With respect to vacancies, the bylaws provide that "[a]ny vacancy occurring in the board of directors may be filled as provided in the Articles of Incorporation of the Foundation." Moreover, "[i]f all of the directors shall die, resign, or otherwise become disqualified, then any interested person acting for and on behalf of the Foundation may petition to the District Court of Hall County, Nebraska, for the appointment of successor directors."

As relevant to this assertion, Neb. Rev. Stat. § 21-1917 (Reissue 2012) provides:

> (a) If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates, or directors, or otherwise obtain their

consent, in the manner prescribed by its articles, bylaws, or the Nebraska Nonprofit Corporation Act, then upon petition of a director, officer, delegate, member, or the Attorney General, the district court may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates, or directors be authorized in such a manner it finds fair and equitable under the circumstances.

(b) The district court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the articles, bylaws and the act, whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this section the district court may determine who the members or directors are.

(c) The order issued pursuant to this section may dispense with any requirement relating to the holding of or voting at meetings or obtaining votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws, or the act.

(d) Whenever practical, any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this section. An order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger, or sale of assets.

(e) Any meeting or other method of obtaining the vote of members, delegates, or directors conducted pursuant to an order issued under this section, and that complies with all the provisions of such order, is for all purposes a valid meeting or vote, as the case may be, and shall have the

same force and effect as if it complied with every requirement imposed by the articles, bylaws, and the act.

We find no authority either under the Foundation's bylaws and articles or under § 21-1917 for the district court to appoint new directors in the situation presented by this case. The articles allow the Foundation to seek the appointment of directors to fill any vacancy which is "not filled by appointment and acceptance . . . within ninety (90) days after the vacancy." A vacancy is deemed to have occurred when a director dies or resigns, or where a director is removed from the board. Those things did not occur here: neither Delbert nor Burkhardt has died or resigned. Nor was either removed as a director from the board.

And § 21-1917(a) allows the court to call a meeting of the board of directors only when "for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its . . . directors, or otherwise obtain their consent, in the manner prescribed by its articles, bylaws, or the Nebraska Nonprofit Corporation Act." There is nothing in this language that suggests that the district court can appoint directors.

The bylaws and articles allow the district court to appoint new directors only when there was a vacancy on the board. Section 21-1917 does not independently authorize a district court to appoint new members to the board of a nonprofit corporation. As such, we find merit to Shelley's assignment of error on this point.

CONCLUSION

The district court lacked the authority to appoint new directors. Accordingly, we vacate the district court's order appointing new directors and remand the matter to the district court for further proceedings.

Vacated and remanded for
further proceedings.

Heavican, C.J., and 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. Jose C. Oliveira-Coutinho, appellant.

933 N.W.2d 825

Filed October 4, 2019. No. S-17-1262.

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: Right to Counsel: Appeal and Error.** An appellate court reviews the failure of the district court to provide court-appointed counsel in a postconviction proceeding for an abuse of discretion.
3. **Postconviction: Constitutional Law: Judgments.** Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.
4. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
5. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
6. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
7. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.

8. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
9. **Effectiveness of Counsel: Presumptions: 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, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.
10. **Effectiveness of Counsel.** Counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance.
11. **Aiding and Abetting: Indictments and Informations: Notice.** An information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified.
12. **Constitutional Law: Criminal Law: Right to Counsel.** A criminal defendant's Sixth Amendment right to the assistance of counsel attaches only after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.
13. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
14. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court to decide whether counsel shall be appointed to represent the defendant.

15. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** Where the alleged errors in the postconviction petition before the district court are either procedurally barred or without merit, thus establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint postconviction counsel for an indigent defendant.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Jose C. Oliveira-Coutinho, pro se.

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

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

Miller-Lerman, J.

NATURE OF CASE

Jose C. Oliveira-Coutinho appeals the order of the district court for Douglas County which denied his motion for postconviction relief. Oliveira-Coutinho, who is serving sentences of life imprisonment for three first degree murder convictions and 20 years' imprisonment for a theft by deception conviction, set forth numerous claims for postconviction relief. The district court determined that all of Oliveira-Coutinho's claims were either insufficiently pled, affirmatively refuted by the record, or procedurally barred, and the court therefore denied his motion for postconviction relief without an evidentiary hearing and without appointing counsel. We affirm the order denying postconviction relief.

STATEMENT OF FACTS

Oliveira-Coutinho was convicted of three counts of first degree murder in connection with the 2009 deaths of Vanderlei and Jaqueline Szczepanik and their son, Christopher Szczepanik. Oliveira-Coutinho lived with the Szczepaniks and worked for Vanderlei. He was also convicted of theft by deception based

on evidence that after their deaths, he withdrew money from the Szczepaniks' bank account. Oliveira-Coutinho's convictions and sentences were affirmed on direct appeal. Further details regarding the crimes are provided in our opinion on direct appeal. *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015).

On June 27, 2016, Oliveira-Coutinho filed a pro se motion for postconviction relief in which he set forth numerous claims of ineffective assistance of counsel both at trial and on direct appeal. Oliveira-Coutinho had the same counsel at trial and on direct appeal, and he alleged that this postconviction action was his first opportunity to raise issues of ineffective assistance of trial counsel. Oliveira-Coutinho requested an evidentiary hearing and appointment of postconviction counsel. Oliveira-Coutinho filed an amended motion for postconviction relief on June 26, 2017, in which he repeated his original claims and set forth several new claims. In the amended motion, Oliveira-Coutinho included almost 50 separate claims.

On November 14, 2017, the district court overruled Oliveira-Coutinho's amended motion for postconviction relief without an evidentiary hearing. Generally, the court determined that each of Oliveira-Coutinho's claims was either not pled with specificity, refuted by the record, or procedurally barred. In its order overruling the motion, the court stated that Oliveira-Coutinho's numerous claims fell into two categories—claims of ineffective assistance of counsel and claims of prosecutorial misconduct prior to the appointment of trial counsel. Regarding all the claims of ineffective assistance of counsel, the court determined generally that even if counsel's performance was deficient in any of the ways alleged, the record refuted any claim that Oliveira-Coutinho suffered prejudice as a result of such deficient performance. The court stated, "if counsel were deficient in any of the claims alleged, the decision in this case would not have been any different in light of the evidence adduced at trial, which is thoroughly outlined in the direct appeal opinion." The court further stated that in

reviewing Oliveira-Coutinho's motion, it "was unable to find any specific facts relating to prejudice and instead could only locate generic statements."

Although it determined that the failure to specifically allege prejudice was in itself reason to overrule the motion, the court addressed Oliveira-Coutinho's specific claims of ineffective assistance of counsel. The court stated the claims were "at times confusing and somewhat overlapping," and it therefore addressed the claims in the following 11 categories: (i) failure to challenge the competency of codefendant Valdeir Goncalves-Santos to be a witness against Oliveira-Coutinho, (ii) failure to object to a jury instruction regarding a potential mistrial if jurors violated rules set forth by the court, (iii) failure to challenge the court's suppression ruling on appeal, (iv) failure to challenge the court's refusal to sequester the jury, (v) failure to challenge the aiding and abetting instruction, (vi) failure to challenge the instruction on first degree murder, (vii) failure to file a motion to discharge on speedy trial grounds, (viii) failure to object to the testimony of Oliveira-Coutinho's wife on grounds of hearsay and marital privilege, (ix) failure to object to portions of the State's opening statements, (x) failure to object to the testimony of various witnesses based on hearsay and other bases, and (xi) failure to investigate certain witnesses and evidence. The court addressed these claims as follows.

(i) Failure to challenge competency of codefendant. As discussed further in our opinion on direct appeal, *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015), Goncalves-Santos testified at Oliveira-Coutinho's trial, and he generally testified that he and another individual helped Oliveira-Coutinho kill the Szczepaniks. In his amended motion for postconviction relief, Oliveira-Coutinho claimed that counsel was ineffective for failing to challenge Goncalves-Santos' competency to testify and for failing to raise the issue on appeal. The district court determined that these claims were refuted by the record, which showed that counsel filed a

motion challenging Goncalves-Santos' competency, the trial court overruled the motion after a hearing, and counsel asked for a reconsideration, which the trial court denied. The court also stated that this court had affirmed the trial court's rulings on these matters on direct appeal.

(ii) Failure to object to jury instruction regarding potential mistrial. Oliveira-Coutinho claimed that counsel was ineffective for failing to object to "Preliminary Jury Instruction No. 1," which he alleged stated in part:

> "Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, to the Court and the taxpayers."

(Emphasis omitted.) He argued that counsel should have objected to this instruction because it was confusing and prejudicial to his case and would discourage jurors from reporting misconduct. The district court determined that the record refuted this argument because the first jury instruction "filed October 9, 2012," did not contain the language alleged. The court also noted that Oliveira-Coutinho failed to cite any authority establishing that an objection to such an instruction would have been successful.

(iii) Failure to challenge suppression ruling on appeal. Oliveira-Coutinho claimed that counsel on direct appeal failed "to raise and argue a violation of [his] Fifth Amendment right." In this claim, he refers to a motion to "suppress [his] February 1st, 2010[,] Stop, Search and Detention under both the 4th Amendment and the 5th Amendment." Oliveira-Coutinho stated that counsel on appeal failed to assign and argue any Fifth Amendment violation, but he asserts that his "illiteracy prevents him from adequately present[ing] the Fifth Amendment claim and argu[ing] how this Claim would have changed the direct appeal result." The district court noted that counsel did challenge the suppression ruling on direct appeal but that the

challenge was not successful. The court determined that its review of the trial court's suppression ruling, "in combination with the lack of law supplied by [Oliveira-Coutinho]," revealed no additional challenges to the suppression ruling that would have changed the result of the direct appeal.

(iv) Failure to challenge refusal to sequester jury. Oliveira-Coutinho claimed that counsel on direct appeal failed to provide an adequate record for this court to review a claim that the trial court erred when it overruled a motion to sequester the jury for the entirety of the trial. He also claimed counsel failed to raise an issue on appeal regarding whether the trial court should have sequestered the jury at the start of deliberations. The district court determined that the record refuted these claims because (1) counsel raised and argued the denial of the motion to sequester for the entire trial, but the assignment of error was rejected on appeal, and (2) the record showed that "the jury was going to be sequestered at the request of [Oliveira-Coutinho] during deliberations."

(v) Failure to challenge aiding and abetting instruction. Oliveira-Coutinho claimed that trial counsel was deficient for failing to object to the felony murder instruction because the instruction allowed the jury to find him guilty if it found that the killing occurred during the course of a robbery that he committed either alone or while aiding and abetting another. He argues that the instruction was in error because he was not charged under a theory of aiding and abetting and because the instruction failed to include an intent element in connection with robbery. In separate but related claims, Oliveira-Coutinho asserted that counsel was deficient for failing to inform him prior to trial that he could be prosecuted under an aiding and abetting theory and for failing to challenge the constitutionality of Neb. Rev. Stat. § 28-206 (Reissue 2016), which provides that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." He argued that the statute was unconstitutional because it allowed the State to prosecute a

defendant under an aiding and abetting theory without giving notice to the defendant that it intends to do so. He argued that the statute "makes the fatal assumption" that those who are subject to it understand they can be prosecuted under an alternative theory, and he asserts that because he does not speak English, he was not aware of the possibility of being convicted as an aider or abettor.

The district court stated that "the principle of aiding and abetting has been a staple in Nebraska law" and that "[Oliveira-Coutinho] fails to provide any authority creating a realistic constitutional challenged [sic] to the statute." The court cited case law to the effect that an information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for having aided or abetted the crime. The court determined that a challenge to the constitutionality of the statute would have been unsuccessful and that an objection to the instruction also would have been unsuccessful because the instruction was supported by the evidence.

(vi) Failure to challenge instruction on first degree murder. Oliveira-Coutinho claimed that counsel was deficient for failing to object to the first degree murder instruction, which he asserted was "faulty, unconstitutional and incomplete." His claim focused on the provision in the instruction that the jury had to unanimously agree he was guilty of first degree murder but that it did not have to be unanimous as to whether he was guilty under a felony murder theory or under a premeditated murder theory. He argued that the instruction was confusing and misleading and that the evidence in this case did not support a premeditated murder theory. Oliveira-Coutinho made four additional claims related to this claim: He claimed that counsel was deficient for (1) failing on direct appeal to challenge "structural error" in the court's acceptance of a jury verdict that was erroneous because it did not require unanimity as to the theory of first degree murder, (2) failing to challenge on appeal the sufficiency of the evidence as to each theory,

(3) failing to propose a jury verdict form that would have required unanimity as to the theory of first degree murder, and (4) failing to challenge the constitutionality of a jury verdict form that did not require unanimity.

The district court cited case law which, it asserted, had rejected Oliveira-Coutinho's arguments regarding unanimity as to alternate theories of first degree murder. The court concluded that counsel was not ineffective, because the challenges proposed by Oliveira-Coutinho would not have been successful.

(vii) Failure to file motion to discharge on speedy trial grounds. Oliveira-Coutinho claimed counsel was deficient for failing to move for discharge based on statutory and constitutional speedy trial grounds and for failing to raise both issues on appeal. He alleged that he was charged by information on September 1, 2011; that trial did not begin until September 21, 2012; and that nothing extended the time for trial beyond 6 months.

The district court determined that the record showed that discharge would not have been granted even if counsel had filed the motion. The court agreed that Oliveira-Coutinho was charged on September 1, 2011, but it stated that trial began on September 17, 2012. The court further stated that three motions filed by Oliveira-Coutinho—a plea in abatement filed October 28, 2011, and ruled on January 5, 2012; a motion to sequester and change venue filed December 22, 2011, and ruled on July 9, 2012; and a motion to suppress filed March 21, 2012, and ruled on August 30, 2012—tolled the speedy trial clock to the extent that he was timely brought to trial. The court determined that counsel was not deficient, because a motion to discharge would have been unsuccessful.

(viii) Failure to object to testimony of Oliveira-Coutinho's wife. Oliveira-Coutinho claimed that counsel was ineffective for failing to object to testimony of his wife based on both hearsay and marital privilege. He argued that her testimony included hearsay because she testified regarding things he had

told her. He also argued that she should have been informed that she had the right to refuse to testify based on marital privilege.

The postconviction court determined that counsel was not deficient, because both objections would have been unsuccessful. The court first noted that Nebraska's rules of evidence provide a hearsay exception for statements made by the defendant. With regard to the marital privilege, the court noted that Neb. Rev. Stat. § 27-505(3)(a) (Reissue 2016) provides that the marital privilege may not be claimed in a criminal case where the crime charged is "a crime of violence."

(ix) Failure to object to State's opening statements. Oliveira-Coutinho claimed that counsel was deficient for failing to object to "[s]everal instances" within the State's opening statement in which the prosecutor was allegedly "vouching for the credibility" of Goncalves-Santos' testimony. Oliveira-Coutinho quoted portions of the opening statement in which the prosecutor said that Goncalves-Santos would "tell . . . the truth" and that he had taken certain actions because "he wanted to tell the truth."

The district court noted that counsel had raised the issue on direct appeal to this court and that the assignment of error was rejected. To the extent any of the specific statements cited by Oliveira-Coutinho were not included in the assignment of error on direct appeal, the court determined that this court's reasoning in rejecting the error showed that inclusion of the specific statements would not have changed the result. The court quoted a portion of this court's opinion in which we noted that by failing to object at trial, "Oliveira-Coutinho [had] likely waived any argument that the State erred in directly vouching for Goncalves-Santos"; however, we concluded that he had "preserved his argument that the State suggested the district court was also vouching for Goncalves-Santos." *State v. Oliveira-Coutinho*, 291 Neb. 294, 345, 865 N.W.2d 740, 777 (2015). We rejected the assignment of error because whether or not the State's comments amounted to misconduct, "such

misconduct was not prejudicial to Oliveira-Coutinho's right to a fair trial." *Id*. We concluded that "[t]he comments of the prosecutor during his opening statements were isolated in the overall context of the trial, [that] the jury was instructed specifically on Goncalves-Santos' testimony as well as on issues relating to arguments of counsel versus evidence presented," and that "the strength of the evidence overall was such that any alleged misconduct in opening statements was not prejudicial to Oliveira-Coutinho's right to a fair trial." *Id.* at 346, 865 N.W.2d at 778.

(x) Failure to make objections. The postconviction court's analysis included a section titled "Failure to make objections" in which it stated that Oliveira-Coutinho had made "a variety of arguments relating to trial counsel's failure to object to the testimony of different State witnesses based on hearsay and other arguments." By citing to pages of Oliveira-Coutinho's amended motion for postconviction relief, the court appears to include in this section several claims in which Oliveira-Coutinho claimed that counsel was deficient for (1) failing to object based on hearsay to testimony by three witnesses; (2) failing to challenge on direct appeal "prosecutorial misconduct by commenting on [Oliveira-Coutinho's] right to remain silent"; (3) failing to challenge on direct appeal prosecutorial misconduct based on the State's "withholding" notes and reports that a witness referred to in his testimony; (4) failing to move for a mistrial after the trial court noted on the record that during Goncalves-Santos' testimony, an unidentified person in the courtroom would nod or shake his head in a manner Oliveira-Coutinho characterized as "live co[a]ching" of the witness; (5) failure to either move for a mistrial or propose and request a limiting instruction after a witness "had an outburst" and "scream[ed], 'Why . . . did you kill my family?'"; (6) failing to raise on direct appeal the trial court's overruling an objection to evidence of his prior dismissed criminal charge; (7) failing to raise on direct appeal the trial court's overruling his hearsay objection to Goncalves-Santos' testimony regarding

a statement made by a victim; (8) failing to request a limiting instruction as to certain exhibits and failing to raise on direct appeal the court's failure to provide its own limiting instruction; (9) failing to raise on direct appeal the court's refusal to give a requested instruction regarding the credibility of the testimony of an accomplice; and (10) failing to raise on direct appeal the trial court's failure to instruct the jury that Oliveira-Coutinho's "'mere presence, acquies[c]ence or silence is not enough to sustain the State's burden of proving [Oliveira-Coutinho] guilty.'"

The district court stated that it was unnecessary to discuss each argument separately and that instead the claims could be "dealt with summarily due to the lack of prejudice asserted."

(xi) Failure to investigate. Oliveira-Coutinho made several claims that counsel was deficient for failing to investigate aspects of his case, including potential alibi defenses and witnesses. The district court concluded that Oliveira-Coutinho was not entitled to an evidentiary hearing on these claims. The court cited authority to the effect that postconviction claims of failure to investigate were insufficient when the defendant failed to allege how undertaking such investigative activities would have produced a different outcome at trial and that therefore, the allegations were insufficient to establish prejudice.

Finally, although Oliveira-Coutinho characterized all his claims as claims of ineffective assistance of counsel, the district court stated that one claim involved purported constitutional violations by the State prior to the appointment of the counsel who represented him at trial and on direct appeal. The court characterized the claim as "somewhat confusing" but stated that Oliveira-Coutinho appeared to claim that "the State violated his constitutional rights by assisting in obtaining [an attorney's] help in representing [Oliveira-Coutinho] and also by somehow obtaining [his] 'trial strategy' during the time frame that [the attorney] was appointed." The court noted that this attorney assisted Oliveira-Coutinho only in "determining

whether he wanted to provide a statement" to law enforcement and that the attorney "was not appointed to represent [him] any further in the proceeding." The court stated that it was "hard to see how [the attorney] could have even obtained the 'trial strategy' to reveal to the State," but that in any event, the claim could have been brought on direct appeal and was therefore procedurally barred in this postconviction action. The court stated that it could not identify a claim of ineffective assistance of counsel on direct appeal related to this claim, but it determined that any such claim that might have been raised on direct appeal was refuted by the record because the trial court overruled Oliveira-Coutinho's motion to suppress challenging, inter alia, the statement he provided to investigators after meeting with the attorney. The court stated that in its order overruling the motion to suppress, the trial court "found there was no error in any of the actions by the State or [the attorney] at the time [Oliveira-Coutinho] provided his statement to law enforcement." The court further noted that the State did not offer Oliveira-Coutinho's statement into evidence at his trial, and the court determined that he therefore suffered no prejudice.

Oliveira-Coutinho appeals the overruling of his motion for postconviction relief.

ASSIGNMENTS OF ERROR

Oliveira-Coutinho claims that the district court erred when it denied his claims without an evidentiary hearing. In his assignments of error and in his arguments, he includes most but not all of the claims he set forth in his amended motion. Oliveira-Coutinho also claims that the court erred when it failed to appoint postconviction counsel.

STANDARDS OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively

show that the defendant is entitled to no relief. *State v. Privett*, 303 Neb. 404, 929 N.W.2d 505 (2019).

[2] We review the failure of the district court to provide court-appointed counsel in a postconviction proceeding for an abuse of discretion. *State v. Taylor*, 300 Neb. 629, 915 N.W.2d 568 (2018).

ANALYSIS

As noted above, Oliveira-Coutinho in his amended motion for postconviction relief set forth almost 50 separately stated claims. The district court analyzed those claims in groupings and denied an evidentiary hearing on all claims. On appeal, Oliveira-Coutinho makes a general claim that the district court erred when it denied his claims without an evidentiary hearing. Oliveira-Coutinho then argues that the court erred when it found most but not all of his specific claims to be without merit; he argues the claims with varying degrees of depth.

We begin our analysis herein by setting forth standards that are applicable to our review of each postconviction claim. We then review all the claims Oliveira-Coutinho argues on appeal pursuant to those standards, and as discussed below, we determine that the claims were properly denied without an evidentiary hearing. Although we have reviewed each specific claim that Oliveira-Coutinho raises on appeal, our analysis below discusses in depth only certain claims that warrant such discussion, and we address the remaining claims in a more general fashion. Finally, we note that because the district court did not err when it denied Oliveira-Coutinho's claims without an evidentiary hearing, it also did not err when it denied his motion for appointment of postconviction counsel.

Postconviction Standards.

[3,4] Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. *State v. Martinez*, 302 Neb. 526, 924 N.W.2d 295 (2019). Thus, in

a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Martinez, supra*.

[5,6] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Martinez, supra*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

Oliveira-Coutinho's claims for postconviction relief assert that he received ineffective assistance of counsel. Because Oliveira-Coutinho was represented both at trial and on direct appeal by the same lawyers, this motion for postconviction relief was his first opportunity to assert ineffective assistance of counsel. See *id.*

[7-9] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Taylor*, 300 Neb. 629, 915 N.W.2d 568 (2018). To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Taylor, supra*. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Taylor, supra*. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine

confidence in the outcome. *Id*. The two prongs of this test may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable. *Id*.

With these principles in mind, we review Oliveira-Coutinho's claims of ineffective assistance of counsel.

Competency of Goncalves-Santos.

Oliveira-Coutinho claims that the district court erred when it refused an evidentiary hearing on his claims that counsel failed to properly challenge, both at trial and on appeal, the competency of Goncalves-Santos as a witness. The district court generally found that these claims were refuted by the record. We conclude that the record shows that Oliveira-Coutinho's proposed challenges to Goncalves-Santos' competency would not have been successful and that therefore, the district court did not err when it refused an evidentiary hearing on the claims.

In three separately stated claims in his amended motion, Oliveira-Coutinho generally claimed that counsel failed to (1) challenge Goncalves-Santos' competency at trial, (2) raise on direct appeal the trial court's error in allowing Goncalves-Santos to testify, and (3) "bring to the attention" of the trial court the mental competency of Goncalves-Santos. In these claims, Oliveira-Coutinho generally alleged that Goncalves-Santos had exhibited behaviors that indicated violent and antisocial tendencies that called his mental competency into question.

The district court determined that these postconviction claims were refuted by the record, which showed that counsel filed a motion challenging Goncalves-Santos' competency, that the trial court overruled the motion after a hearing, that counsel asked for a reconsideration, and that the trial court denied reconsideration. The court also stated that this court affirmed the trial court's ruling on these matters on direct appeal.

Oliveira-Coutinho argues on appeal that the district court's description of the record is inaccurate because counsel

requested an advance ruling only on what questions he might ask Goncalves-Santos regarding his competency and that counsel did not file a motion to determine Goncalves-Santos' competency. Oliveira-Coutinho claimed in his amended motion that counsel should have gone further than seeking to cross-examine Goncalves-Santos regarding his behavior and that instead, counsel should have asked the court to order a competency evaluation of Goncalves-Santos so that the court could determine whether he was competent to be a witness.

We agree with Oliveira-Coutinho that the district court in its postconviction order improperly focused on the motion regarding cross-examination rather than the actual focus of Oliveira-Coutinho's claim, which was that counsel should have moved the trial court to order a mental competency evaluation and determine whether Goncalves-Santos was mentally competent to be a witness. In our opinion in Oliveira-Coutinho's direct appeal, we stated that prior to trial:

> Oliveira-Coutinho filed a motion for advance ruling seeking to cross-examine Goncalves-Santos about his sexual relations with animals, his killing or harming of animals, his threats to kill his wife, and any other violent or antisocial tendencies or behaviors. . . . Oliveira-Coutinho argued that this evidence was relevant and went to the competency of Goncalves-Santos as a witness under rule 601.

State v. Oliveira-Coutinho, 291 Neb. 294, 308-09, 865 N.W.2d 740, 756 (2015). See Neb. Rev. Stat. § 27-601 (Reissue 2016). The trial court determined that Oliveira-Coutinho could not pursue the line of questioning because the matters "had no bearing on Goncalves-Santos' competency as a witness." *State v. Oliveira-Coutinho*, 291 Neb. at 309, 865 N.W.2d at 756. On direct appeal, Oliveira-Coutinho assigned error to this ruling. We affirmed the ruling on appeal on the basis that the competency of a witness was an issue to be determined by the court and not by the jury. We noted, however, that

"Oliveira-Coutinho did not assign that the district court erred in finding that Goncalves-Santos was competent to testify." *Id.* at 332, 865 N.W.2d at 770.

The issue decided by the trial court and affirmed by us on direct appeal was whether Oliveira-Coutinho would be allowed to cross-examine Goncalves-Santos on matters that allegedly went to his mental competency. But Oliveira-Coutinho's claim for postconvicton relief was that counsel should have sought a competency evaluation and should have sought to bar Goncalves-Santos' testimony because he was not mentally competent. It appears that trial counsel did not file such a motion, and we specifically stated in our opinion on direct appeal that Oliveira-Coutinho did not assign error to the trial court's finding that Goncalves-Santos was competent to testify. We therefore think the district court erred when it stated that the issue raised in these claims had been presented to the trial court and this court on direct appeal.

Nevertheless, we determine that for other reasons, the district court did not err when it refused an evidentiary hearing on these claims. In ruling that Oliveira-Coutinho could not cross-examine Goncalves-Santos regarding the matters he alleged had a bearing on mental competency, the trial court reasoned that such matters had no bearing on Goncalves-Santos' competency to testify. In its February 10, 2012, order overruling the motion, the trial court stated:

> Under Nebraska law, every person is competent to be a witness except as otherwise provided in the Rules of Evidence. Neb.Rev.Stat. § 27-601. Even insanity or mental illness does not automatically render a witness incompetent to testify; only when the witness is unable to comprehend the obligation of an oath, or to understand and intelligently answer questions is the witness incompetent. *Garcia v. State*, 159 Neb. 571, 592, 68 N.W.2d 151, 165 (1955). There is no evidence that [Goncalves-Santos] is unable to comprehend the obligation of the oath or unable to answer questions asked of him.

The State argues that the trial court's reasoning indicates that even if counsel had requested a competency evaluation of Goncalves-Santos, the trial court would not have ordered such an evaluation and would not have determined that Goncalves-Santos was not competent to testify.

Oliveira-Coutinho's claims regarding Goncalves-Santos indicate that he is confusing concepts of competency of witnesses with issues of competency of a defendant to stand trial or to represent himself or herself. Oliveira-Coutinho claims counsel should have sought a competency evaluation and hearing for Goncalves-Santos, which evaluation and hearing seem similar to the type of evaluation and hearing that might be required to determine a defendant's competency. However, Oliveira-Coutinho cites no statute, case, or other law that would authorize the court to require a witness to submit to a psychiatric evaluation to determine his or her mental competency to testify.

Instead, as the trial court indicated, our rules of evidence provide, "Every person is competent to be a witness except as otherwise provided in these rules." § 27-601. Oliveira-Coutinho asserts no rule of evidence pursuant to which his allegations regarding Goncalves-Santos would render him not competent to be a witness. Furthermore, the trial court found no evidence that Goncalves-Santos was "unable to comprehend the obligation of the oath or unable to answer questions asked of him," and Oliveira-Coutinho points to nothing in Goncalves-Santos' extensive testimony at trial that would indicate otherwise.

The district court erroneously reasoned that the claims asserted by Oliveira-Coutinho in this postconviction action with regard to Goncalves-Santos' competency as a witness were addressed on direct appeal. Nevertheless, we determine that such claims did not allege a valid basis for relief and that the record refutes the merits of the claims. We therefore conclude that the district court did not err when it refused an evidentiary hearing on these claims.

Jury Instruction Regarding Potential Mistrial.

Oliveira-Coutinho claimed that counsel was ineffective for failing to object to "Preliminary Jury Instruction No. 1," which he alleged stated in part,

> "Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, to the Court and the taxpayers."

(Emphasis omitted.) He argued that counsel should have objected to this instruction because it was confusing and prejudicial to his case and would discourage jurors from reporting misconduct. The district court determined that the record refuted this argument because the first jury instruction "filed October 9, 2012," did not contain the language alleged. The court also noted that Oliveira-Coutinho failed to cite any authority establishing that an objection to such an instruction would have been successful. Although our reasoning differs, we conclude that the court did not err when it denied this claim.

The district court referred to the instructions "filed October 9, 2012," and stated that they did not contain the language alleged by Oliveira-Coutinho. The record indicates that the instructions filed on October 9 were the instructions given at the close of evidence. Oliveira-Coutinho alleged that the instruction at issue was a preliminary jury instruction, and the record confirms that the language quoted in his amended motion was given as a preliminary jury instruction. The district court therefore erred when it indicated that the alleged instruction was not given.

[10] However, the district court also stated that Oliveira-Coutinho failed to cite authority showing that a challenge to the instruction would have been successful. We agree with the district court that Oliveira-Coutinho alleged no such authority. In his amended motion and in his brief on appeal,

Oliveira-Coutinho argues that the instruction was inappropriate because it was confusing and could discourage jurors from reporting misconduct. But he cites no authority to support his contention that it was error for the court to give the instruction, and therefore, the argument appears to be a novel legal theory. We have held that "counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance." *State v. Sanders*, 289 Neb. 335, 343, 855 N.W.2d 350, 357 (2014). Furthermore, Oliveira-Coutinho did not assert any actual prejudice that resulted from the instruction, such as juror misconduct that went unreported; he only alleged what might have occurred. We therefore conclude that the district court did not err when it denied this claim without an evidentiary hearing.

Aiding and Abetting.

Oliveira-Coutinho claims that the district court erred when it refused an evidentiary hearing on three claims related to the felony murder instruction, which allowed the jury to find him guilty based on a theory of aiding and abetting. In his amended motion, Oliveira-Coutinho claimed that trial counsel was deficient for (1) failing to object to the instruction, on the basis that he was not charged under a theory of aiding and abetting; (2) failing to challenge the constitutionality of § 28-206, which provides that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender"; and (3) failing to inform him prior to trial that he could be prosecuted under an aiding and abetting theory. We conclude that the district court addressed the first two of these claims and properly found that they did not warrant an evidentiary hearing. We further conclude that while the district court did not appear to explicitly address the third claim, the court did not err when it denied an evidentiary hearing on the claim, because Oliveira-Coutinho failed to adequately allege prejudice.

Regarding the first claim, Oliveira-Coutinho claimed in the amended motion that counsel was deficient for failing to object to the felony murder instruction because the instruction allowed the jury to find him guilty on an aiding and abetting theory when he was not arraigned on an aiding and abetting theory. On appeal, Oliveira-Coutinho asserts that the district court did not decide the merits of this claim. Without further argument regarding the merits of the claim, he contends that we should remand the cause for an evidentiary hearing on the claim.

[11] However, we find that the district court addressed this claim. The district court cited *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006), for the proposition that an information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified. The district court concluded that because of this precedent, a challenge by counsel to the instruction would have been unsuccessful and therefore, counsel's failure to make the challenge was not ineffective assistance.

We agree with the district court's reasoning. In addition to *State v. Stark, supra*, in *State v. Contreras*, 268 Neb. 797, 803, 688 N.W.2d 580, 585 (2004), we held that "notwithstanding the fact that the information charging the defendant does not contain specific aiding and abetting language, an aiding and abetting instruction is proper where warranted by the evidence." We therefore agree with the district court's conclusion that a challenge to the aiding and abetting instruction based on the failure to charge the offense under an aiding and abetting theory would not have been successful.

We note that as part of this claim, Oliveira-Coutinho also asserted that the felony murder instruction omitted elements necessary to prove the crime under an aiding and abetting theory—specifically that he intended to commit the underlying felony or knew that the person he aided or abetted intended to commit the crime. He also appeared to assert as part of this

claim that the evidence did not support an aiding and abetting theory. The State argues on appeal that the trial court instructed on the allegedly missing elements in a separate instruction relating to aiding and abetting and that there was sufficient evidence that Oliveira-Coutinho aided and abetted in the commission of a felony. We agree with the State's arguments and agree that a challenge to the instruction on these bases would have been unsuccessful. We conclude that the district court did not err when it refused an evidentiary hearing on the claim that counsel was ineffective for failing to object to the felony murder instruction.

Regarding the second claim, Oliveira-Coutinho alleged in the amended motion that counsel was deficient for failing to challenge the constitutionality of § 28-206. He asserted that the statute was unconstitutionally overbroad, and he argued that the statute was unconstitutional because it allowed the State to prosecute a defendant under an aiding and abetting theory without giving notice to the defendant. He argued that the statute "makes the fatal assumption" that those who are subject to it understand they can be prosecuted under an alternative theory, and he asserted that because he does not speak English, he was not aware of the possibility of being convicted as an aider or abettor. The district court rejected this claim, reasoning that Oliveira-Coutinho "fail[ed] to provide any authority creating a realistic constitutional challenged [sic] to the statute."

We agree with the district court that Oliveira-Coutinho provided no authority indicating that a constitutional challenge to § 28-206 would have been successful. Oliveira-Coutinho referred in his amended motion to an accused's right to be informed of the nature of the charges against him; however, as discussed above, an information charging a defendant with a crime gives the defendant notice that he or she may be prosecuted for having aided or abetted the crime. In any event, the lack of notice argument is better understood as a due process challenge to the procedure by which the statute was

implemented rather than a challenge to the constitutionality of the aiding and abetting statute itself. Similarly, Oliveira-Coutinho's argument that he did not understand the charges against him because of a language barrier would not undermine the constitutionality of § 28-206; instead, the argument relates to whether he received ineffective assistance of counsel in violation of the Sixth Amendment because counsel failed to ensure he was aware of the charges against him. That is the subject of the third claim discussed below. Because Oliveira-Coutinho did not adequately allege how § 28-206 was unconstitutional, we conclude that the district court did not err when it refused an evidentiary hearing on the claim of ineffective assistance for failing to challenge the constitutionality of the statute.

Finally, regarding the third claim, Oliveira-Coutinho claimed in the amended motion that counsel was deficient for failing to inform him prior to trial that he could be prosecuted under an aiding and abetting theory. He asserted that had he known he could have been convicted as an aider and abettor, "he would have weight [sic] his options prior to proceed [sic] with the trial" and "could have insisted to enter into further plea negotiations or he would have opted to plea [sic] guilty to the State's second plea offer." Oliveira-Coutinho argues on appeal that the district court did not address this claim.

We agree with Oliveira-Coutinho that the district court did not specifically address the claim that counsel was ineffective for failing to advise him that he could be convicted as an aider or abettor. Instead, this claim appears among the claims the court generally disposed of by stating that Oliveira-Coutinho failed to allege prejudice. We conclude that the court did not err when it refused an evidentiary hearing on this claim because Oliveira-Coutinho failed to adequately allege prejudice.

The State argues on appeal that whether or not counsel's performance was deficient in this respect, Oliveira-Coutinho failed to allege a claim of ineffective assistance of counsel, because he failed to allege how he was prejudiced by such deficient performance. The State argues that he did not allege

that if counsel had properly advised him that he could be convicted on a theory of aiding and abetting, he would have entered pleas to the charges instead of going to trial.

We agree with the State that Oliveira-Coutinho failed to adequately allege how he was prejudiced and that to the extent he did allege prejudice, the record refutes his allegations of prejudice. As quoted above, Oliveira-Coutinho alleged merely that if he had been properly advised, he would have weighed his options, "could have" insisted on further plea negotiations, or would have accepted "the State's second plea offer." The allegation that he would have weighed his options is too vague to establish that he was prejudiced, because it does not allege a specific course of action that he would have taken if he had been properly advised.

Oliveira-Coutinho's allegations that he "could have insisted to enter into further plea negotiations" and that he would have accepted "the State's second plea offer" are more concrete allegations of specific actions he could or would have taken if properly advised. However, the record refutes that the alleged courses of action were viable. When he alleged in his amended motion that he "would have opted to plea [sic] guilty to the State's second plea offer," Oliveira-Coutinho referenced an exhibit attached to the amended motion. That exhibit, however, contradicts his allegation that he would have accepted "the State's second plea offer." The exhibit includes a letter from Oliveira-Coutinho's trial counsel in which counsel actually stated that "[t]he State never made such an offer" and instead that counsel had made an offer that the State rejected. Counsel further stated that the State had previously made an offer for Oliveira-Coutinho to plead to "multiple counts of second degree murder with no sentencing agreement," but that Oliveira-Coutinho had rejected that offer. Oliveira-Coutinho's allegation that he would have accepted "the State's second plea offer" is refuted by his own evidence which shows that no "second plea offer" had been made by the State. The exhibit further undermines his allegation that he "could have"

insisted on further plea negotiations, because it shows that prior plea negotiations had resulted in an offer from the State that Oliveira-Coutinho did not find acceptable and because the State's rejection of counsel's counter-offer indicated that the State was not open to further plea negotiations that would have yielded a better plea deal than that already offered.

This claim of ineffective assistance of counsel failed because Oliveira-Coutinho did not sufficiently allege prejudice and because his own exhibit undermined the allegations of prejudice that he did make. We therefore conclude that the district court did not err when it refused an evidentiary hearing on the claim that counsel was ineffective for failing to advise Oliveira-Coutinho he could be convicted under an aiding and abetting theory.

State Vouching for Goncalves-Santos' Credibility.

Oliveira-Coutinho claims that the district court erred when it refused an evidentiary hearing on his claim that counsel was deficient for failing to raise on appeal "[s]everal instances throughout the State's case in chief" in which the prosecutor was allegedly "vouching for the credibility" of Goncalves-Santos' testimony. The district court found that the claim was without merit because counsel had raised the issue on direct appeal and that the assignment of error had been rejected because the error was not properly preserved. On appeal, Oliveira-Coutinho attempts to change his claim from counsel's failure to raise the issue on direct appeal to counsel's failure to preserve the issue for appeal by objecting at trial. We agree with the district court that the claim alleged in the amended motion was refuted by the record.

In his amended motion, Oliveira-Coutinho claimed, "Appellate counsel provided deficient performance by failing to assign, raise, and argue during the direct appeal stage that the [p]rosecutor committed misconduct by vouching for the credibility of Goncalves-Santos." He then quoted portions of the opening statement in which the prosecutor said

that Goncalves-Santos would "tell . . . the truth" and that Goncalves-Santos had taken certain actions because "he wanted to tell the truth." Oliveira-Coutinho also cited to portions of the trial record in which two homicide investigators who had interviewed Goncalves-Santos testified that when they interviewed him, they let him know they expected him to tell the truth. Oliveira-Coutinho further cited to portions of the State's closing statement in which the prosecutor made comments similar to the quoted comments from the opening statement. Oliveira-Coutinho claimed that a competent attorney would have "noted, assigned and argued prosecutorial misconduct by and when [the] prosecutor vouched for the credibility of [the State's] star witness."

In its order denying postconviction relief, the district court noted that counsel had raised the issue on direct appeal to this court and that we rejected this assignment of error, in part because counsel failed to object at trial. To the extent any of the specific statements cited by Oliveira-Coutinho were not included in the assignment of error on direct appeal, the court determined that this court's reasoning in rejecting the assigned error showed that inclusion of the specific statements would not have changed the result.

The district court quoted a portion of our opinion in which we noted that by failing to object at trial, "Oliveira-Coutinho [had] likely waived any argument that the State erred in directly vouching for Goncalves-Santos." *State v. Oliveira-Coutinho*, 291 Neb. 294, 345, 865 N.W.2d 740, 777 (2015). However, we concluded that he had "preserved his argument that the State suggested the district court was also vouching for Goncalves-Santos." *Id*. We rejected the assignment of error because whether or not the State's comments amounted to misconduct, "such misconduct was not prejudicial to Oliveira-Coutinho's right to a fair trial." *Id*. We concluded that "[t]he comments of the prosecutor during his opening statements were isolated in the overall context of the trial, [that] the jury was instructed specifically on Goncalves-Santos' testimony as

well as on issues relating to arguments of counsel versus evidence presented," and that "the strength of the evidence overall was such that any alleged misconduct in opening statements was not prejudicial to Oliveira-Coutinho's right to a fair trial." *Id.* at 346, 865 N.W.2d at 778.

The claim Oliveira-Coutinho set forth in his amended motion was that counsel failed to raise the issue on direct appeal. In fact, counsel raised the issue on appeal, but this court determined that the error had been waived because Oliveira-Coutinho failed to object at trial. On appeal, Oliveira-Coutinho attempts to recast his claim as a claim that trial counsel was ineffective for failing to object and preserve the claim for direct appeal. But that is not the claim he made in his amended motion, and we will not consider an issue on appeal that was not presented to or passed upon by the trial court. See *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018), *disapproved on other grounds, State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018).

The claim presented to the district court in this postconviction action was limited to the performance of counsel on direct appeal, and the district court did not err when it refused an evidentiary hearing on the basis that the record showed that counsel had in fact raised the issue on direct appeal.

Issues Related to Attorney's Representation of Oliveira-Coutinho.

Oliveira-Coutinho claims that the district court erred when it refused an evidentiary hearing on claims he made related to his representation by an attorney, Matthew Kahler, when Oliveira-Coutinho was deciding whether to make a statement to law enforcement. The court found that the claims were procedurally barred because they were not raised on direct appeal, but it further found that the claims were refuted by the record. Assuming that the claims were not procedurally barred because they were fashioned as claims of failure to raise the issues on direct appeal, we conclude the district court did not err when

it found that the claims were refuted by the record and that Oliveira-Coutinho could not show prejudice.

In two separately stated claims in the amended motion, Oliveira-Coutinho alleged that (1) his counsel on direct appeal failed to assign and argue "violations of [his] Constitutional rights" and (2) "the State violated his Fifth, Sixth and Fourteenth Amendment rights in light of the fact that the prosecution had knowledge and possession of [Oliveira-Coutinho's] trial strategy before he was charged and tried." In the first of these two claims, Oliveira-Coutinho simply asserted, without further specifying the nature of the alleged constitutional violations, that appellate counsel provided deficient representation. In the second of the two claims, Oliveira-Coutinho began with the general allegation that the State had violated his constitutional rights, and then over several pages, he set forth how he thought the State violated his rights based on its role in finding an attorney to advise him at a time when he was considering making a statement to law enforcement. He generally alleged that after he invoked his right to counsel, the county attorney "was informed and personally appointed [Kahler] to represent" him, and that thereafter, Kahler disclosed "confidential communications" and "his trial strategy" to prosecutors.

The district court in its postconviction order found that the claims related to Kahler were procedurally barred because they could have been raised on direct appeal. Apparently, the court read the second of the above-described claims in isolation from the preceding claim when it stated that it "could not identify an ineffective assistance of counsel argument within the claim[]" and therefore determined that the claim was procedurally barred. Although it was not made entirely clear in the amended motion that the two claims were meant to be read together, we will assume for purposes of review that the two claims were intended to be read together and that together, they set forth claims of ineffective assistance of counsel for failing to raise issues on direct appeal and are therefore not procedurally barred in this postconviction action. However, the district

court found that even if the claims were not procedurally barred, they were refuted by the record. We agree.

The district court in this postconviction action determined that Oliveira-Coutinho's claim related to Kahler was refuted by the record because the trial court overruled Oliveira-Coutinho's suppression motion challenging, inter alia, the statement he provided to law enforcement while being represented by Kahler. The court stated in the postconviction order that in the order denying the motion to suppress, the trial court had specifically "found there was no error in any of the actions by the State or . . . Kahler at the time [Oliveira-Coutinho] provided his statement to law enforcement." The court further determined that because Oliveira-Coutinho's statement was not offered into evidence at his trial, he suffered no prejudice.

Oliveira-Coutinho argues on appeal that appellate counsel deficiently failed to raise on direct appeal that "the State" violated his rights by "appointing" Kahler to represent him and that by "appointing" Kahler, brief for appellant at 18, the State "[i]nterfered [w]ith [Oliveira-Coutinho's] [t]rial [s]trategy and . . . [o]btained [i]ncriminating [e]vidence," *id.* at 22. Oliveira-Coutinho asserts that after he invoked his right to counsel, officers who were questioning him contacted the county attorney and the county attorney "appointed" Kahler to represent him. *Id.* at 19. He further asserts that after advising Oliveira-Coutinho "to confess everything he knew about the triple-homicide," Kahler then "debrief[ed]" the prosecutors about what Oliveira-Coutinho told him during their conversation. *Id.* Oliveira-Coutinho argues he would not have made a statement to police if he knew that the attorney was not court appointed and that the attorney was acting as an agent for the State with the purpose of advising him to confess and then revealing his trial strategy to prosecutors.

The district court determined that the record relating to Oliveira-Coutinho's motion to suppress the statement refuted these claims. We therefore review the information disclosed in the trial record related to the motion to suppress the statement.

Oliveira-Coutinho was questioned by investigators in this case "on February 1 and into February 2, 2010, and again later in February and March." *State v. Oliveira-Coutinho*, 291 Neb. 294, 302, 865 N.W.2d 740, 752 (2015). "Oliveira-Coutinho was first questioned on February 1 . . . and was placed on a U.S. Immigration and Customs Enforcement (ICE) hold within 24 hours after the interview." *Id.* at 312, 865 N.W.2d at 758. Oliveira-Coutinho "was not initially held by the State on any charges related to the Szczepanik family's disappearance, but instead was placed on an ICE hold by the federal government." *Id.* at 327, 865 N.W.2d at 767. "Between March 6 and 11, Oliveira-Coutinho contacted an investigator in this case and spoke to him, against his attorney's advice, regarding Goncalves-Santos' involvement on March 11." *Id.* It is the March 11 statement that is relevant to Oliveira-Coutinho's claims related to his representation by Kahler.

Prior to trial, Oliveira-Coutinho moved to suppress, inter alia, the statement he made to investigators on March 11, 2010. With specific regard to the March 11 statement, he alleged that he had been interrogated in the presence of Kahler and that Kahler was neither appointed by a judge nor retained by Oliveira-Coutinho. After an evidentiary hearing, the trial court overruled Oliveira-Coutinho's motion to suppress in an order filed August 30, 2012. In the order, the trial court noted the following facts relevant to the March 11, 2010, statement: Oliveira-Coutinho had been interviewed by Christopher Spencer, an Omaha police detective, a few times between February 1 and March 5. On March 11, based on telephone calls Oliveira-Coutinho had placed to him, Spencer arranged to have Oliveira-Coutinho brought to an interview room. Oliveira-Coutinho indicated that he wanted to continue talking with Spencer, but he inquired as to whether he could speak with an attorney first. Spencer told Oliveira-Coutinho he could retain an attorney, but Oliveira-Coutinho said he could not pay for an attorney. Spencer relayed Oliveira-Coutinho's request for an attorney to Teresa Negron, the lead sergeant in charge of

the case. Negron first attempted to contact one of the attorneys who would eventually become Oliveira-Coutinho's trial counsel; however, after failing to reach that attorney, she contacted the county attorney, who in turn contacted Kahler. Kahler, who had previously been employed in the county attorney's office but was now in private practice specializing in criminal defense, agreed to help.

Kahler testified at the hearing on Oliveira-Coutinho's motion to suppress. He testified that on the evening of March 11, 2010, he received two calls—one from Negron and one from the county attorney. The two asked him whether he would be willing to come to police headquarters to advise a suspect who had made statements to the police on whether or not he should make any further statements. Kahler's understanding at the time was that a court would appoint him to represent the suspect if and when charges were filed. Kahler went to police headquarters, where, at his request, police officers briefed him about the investigation and previous statements Oliveira-Coutinho had made. Kahler then met Oliveira-Coutinho and spoke with him through an interpreter. Kahler spoke with Oliveira-Coutinho with only the interpreter present for close to 2 hours. At the suppression hearing, Kahler replied "No" when the State's attorney asked whether there was "anything about the answering of the questions or the advice that [he] gave to [Oliveira-Coutinho] that was impacted by any other person or any agency, whether it be law enforcement, County Attorney's Office, or any other type of agency." Kahler testified that he told Oliveira-Coutinho, inter alia, that Oliveira-Coutinho was "obviously considered a suspect by the police" and that therefore, Kahler had "concern about him giving a statement . . . about knowing information about what other people had done." After Kahler had so advised him, Oliveira-Coutinho decided to continue speaking with officers. Kahler testified that Oliveira-Coutinho made the decision on his own and gave the ensuing statement voluntarily. Spencer thereafter interviewed Oliveira-Coutinho with Kahler and an interpreter present.

After the interview, Kahler asked the officers whether Oliveira-Coutinho was being charged based on admissions he had made related to accessing the victims' bank accounts; although officers were not certain, Kahler's understanding was that he would be charged sometime soon. Kahler also spoke with the county attorney about being appointed by the court, and he assumed he would be formally appointed the next day. However, Kahler learned the next morning that no charges had been filed against Oliveira-Coutinho. Kahler did not thereafter pursue appointment, and he did not meet with Oliveira-Coutinho again. The record shows that the State did not file any charge against Oliveira-Coutinho in connection with this case until approximately May 24, 2010, and that the court appointed different counsel at that time.

In its order overruling Oliveira-Coutinho's motion to suppress, the trial court stated with regard to the March 11, 2010, interview and Kahler's representation as follows:

> [Oliveira-Coutinho's] contention that . . . Kahler was not his attorney "at the time" of his interrogation on March 11th and in fact was "an agent of law enforcement and [the county attorney] and their attempt to get [Oliveira-Coutinho] to speak to them" is unfounded. [Oliveira-Coutinho] requested an attorney and before he made any further statements, a very well-qualified criminal defense attorney answered the call and provided him the help and legal advice he requested.
>
> After spending almost two hours privately with [Oliveira-Coutinho], Kahler then remained with him during the interview conducted by Spencer, whom [Oliveira-Coutinho] agreed to speak to, Kahler's professional advice notwithstanding.

[12] With regard to these issues, Oliveira-Coutinho generally alleged violations of 5th-, 6th-, and 14th-Amendment rights. A criminal defendant's Sixth Amendment right to the assistance of counsel attaches only after the initiation of adversary judicial criminal proceedings—whether by way of formal charge,

preliminary hearing, indictment, information, or arraignment. *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010). Oliveira-Coutinho was not charged by the State until May 2010, and therefore, the Sixth Amendment right to counsel was not implicated at the time of the March 11 interview. Oliveira-Coutinho's references to the Fifth Amendment are not clear as to whether he is alleging a violation of his right to remain silent or a violation of his right to due process.

But the crux of his allegation is that Kahler was somehow acting as an agent of the prosecution, including the county attorney and investigators, and that in that role, Kahler both encouraged Oliveira-Coutinho to confess and later disclosed Oliveira-Coutinho's confidential trial strategy to the prosecutors. These allegations, however, are contradicted by the testimony of Kahler at the suppression hearing. Kahler testified that he expressed concerns about Oliveira-Coutinho's providing a statement when he was considered a suspect and testified that despite such advice, Oliveira-Coutinho made his own decision to give a voluntary statement. Furthermore, testimony by Kahler and others at the suppression hearing refuted that Kahler shared any sort of confidential communications with the prosecution; instead, testimony at the suppression hearing indicated that Kahler and Oliveira-Coutinho were able to speak outside the presence of the investigators, and there is nothing to indicate that Kahler shared any confidential communications, much less trial strategy, with the prosecutors. Kahler testified to communications with the investigators that were limited to the investigators' briefing him on what had occurred in the investigation of Oliveira-Coutinho. He also testified to communications with the county attorney but that such communications were limited to discussing how Kahler might be appointed by a court to represent Oliveira-Coutinho. Kahler testified that his advice to Oliveira-Coutinho was not influenced by law enforcement or the county attorney's office.

Kahler's testimony and other testimony at the suppression hearing refute the claim that Kahler acted as an agent for the

prosecution. Furthermore, Oliveira-Coutinho makes only general allegations of "trial strategy" that was disclosed by Kahler to the prosecution; he does not allege any specific information relevant to his trial strategy that Kahler learned and provided to the prosecution. Brief for appellant at 25. As the postconviction court noted, the limited involvement of Kahler at a time well before trial and before charges had been filed made it highly unlikely that he would have become privy to any significant trial strategy, which would have later been decided upon by Oliveira-Coutinho and his trial counsel, who were appointed months after Kahler's limited involvement in this case.

While we determine that these claims are not sufficiently stated and are materially refuted by the record, we take this opportunity to disapprove the process by which Kahler was apparently brought in to advise Oliveira-Coutinho. The testimony of both Spencer and Negron at the suppression hearing indicated that the process by which Kahler was brought in to advise Oliveira-Coutinho was not a typical occurrence. We think it should not be. The county attorney's office should not be involved in finding an attorney to advise persons being questioned by investigators; the county attorney should remain independent and impartial in fact and in appearance, and any involvement of the county attorney in obtaining counsel to advise a suspect damages at least the appearance of impartiality.

That having been said, the record refutes Oliveira-Coutinho's claim that Kahler acted as an agent for the prosecution and provided confidential trial strategy to the prosecution. We therefore conclude that the district court did not err when it determined that Oliveira-Coutinho's postconviction claims related to Kahler did not warrant an evidentiary hearing.

Claims Not Addressed by District Court.

In his brief on appeal, Oliveira-Coutinho asserts arguments with regard to various claims that he contends the district court did not address in its order denying postconviction relief. We

find that several of those claims were addressed in connection with other related claims in one of the sections we discussed in our statement of facts above. However, there are some claims we do not think the court specifically addressed in one of these sections.

We note that the court stated in its order, prior to addressing specific claims, that all of Oliveira-Coutinho's claims of ineffective assistance of counsel were without merit because he failed to adequately plead prejudice or the record refuted any allegations of prejudice. Therefore, to the extent the district court did not appear to specifically analyze a particular claim, we have reviewed that claim on the basis that the district court found that the claim failed based on the prejudice prong of an ineffective assistance of counsel claim.

There are a few claims set forth in Oliveira-Coutinho's amended motion that we do not think were addressed in one of the sections in which the court discussed specific claims and instead were addressed only by the court's general finding regarding prejudice. One of those claims was Oliveira-Coutinho's claim that counsel was deficient for failing to inform him he could be convicted under an aiding and abetting theory; we considered that claim in connection with other claims related to the aiding and abetting issue in an earlier section of our analysis, and we determined that the court properly denied the claim without an evidentiary hearing because Oliveira-Coutinho failed to adequately plead prejudice.

Two other claims we do not think were specifically addressed by the district court were Oliveira-Coutinho's claims that counsel was deficient (1) for failing to request a lesser-included offense instruction on the charge of accessory to a felony after the fact and (2) for failing to raise on appeal an issue related to the court's "[u]nconstitutional interpretation of Neb. Rev. Stat. §27-1101." We determine that the district court properly denied each of these claims without an evidentiary hearing.

[13] With regard to the first of these two claims, Oliveira-Coutinho claimed that counsel was deficient for failing to

request instruction on "a lesser included offense of accessory to a felony after the fact pursuant to Neb. Rev. Stat. §28-204." In the amended motion, this claim focused on the charge as being a lesser-included offense of first degree murder. But Oliveira-Coutinho's arguments in his brief on appeal focus on its being a lesser-included offense of theft by deception. In any event, accessory to a felony is not a lesser-included offense of either greater offense. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017). Neb. Rev. Stat. § 28-204(1) (Reissue 2008) sets forth various ways in which one could "interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense" and therefore be guilty of being an accessory to a felony. The elements of accessory to a felony are not such that one could not commit either first degree murder or theft by deception without simultaneously committing accessory to a felony. Therefore, Oliveira-Coutinho would not have been entitled to a lesser-included offense instruction on accessory to a felony and he could not establish prejudice from counsel's failure to request such an instruction. We conclude the district court did not err when it denied this claim without an evidentiary hearing.

With regard to the second of these claims, in his amended motion, Oliveira-Coutinho claimed counsel on direct appeal was ineffective for failing to raise on appeal an issue related to the court's "[u]nconstitutional interpretation of Neb. Rev. Stat. §27-1101." He did not further explain the claim in the amended motion, but he cited to a portion of a pretrial hearing on his motion to dismiss due to loss of testimonial evidence. The trial court sustained the State's hearsay objection to his question

to an investigator which would have required the investigator to testify to statements made by Oliveira-Coutinho during the investigation. In his brief on appeal, Oliveira-Coutinho does not argue this claim beyond the allegations in his amended motion. Oliveira-Coutinho failed to allege how the trial court's interpretation of the statute was "unconstitutional" or how counsel's failure to raise the issue on appeal affected the outcome of the direct appeal. Therefore, Oliveira-Coutinho did not adequately allege a claim of ineffective assistance of counsel and the district court did not err when it denied this claim without an evidentiary hearing.

Remaining Claims.

With regard to the remaining claims that we have not specifically addressed above, we have reviewed such claims and the district court's disposition of those claims. In our statement of facts, we described how the district court resolved each of these claims. We determine that the district court adequately addressed such claims and that its conclusions regarding such claims were proper. We conclude that the district court properly found that the claims should be denied without an evidentiary hearing, and we do not believe such claims warrant further discussion herein.

In sum, we conclude that the district court did not err when it determined that the claims argued by Oliveira-Coutinho in this appeal did not warrant an evidentiary hearing. We therefore reject Oliveira-Coutinho's assignment of error asserting that the district court erred when it determined that the claims should be denied without an evidentiary hearing.

Appointment of Postconviction Counsel.

[14,15] Oliveira-Coutinho also claims that the district court erred when it denied his motion for appointment of counsel. Under the Nebraska Postconviction Act, it is within the discretion of the trial court to decide whether counsel shall be appointed to represent the defendant. See *State v. Taylor*, 300

Neb. 629, 915 N.W.2d 568 (2018). Where the alleged errors in the postconviction petition before the district court are either procedurally barred or without merit, thus establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint postconviction counsel for an indigent defendant. See *id*. We therefore conclude the district court did not abuse its discretion when it denied Oliveira-Coutinho's motion to appoint postconviction counsel.

CONCLUSION

We conclude that the district court did not err when it denied Oliveira-Coutinho's postconviction claims without an evidentiary hearing, and we further conclude that the court did not err when it denied his request to appoint postconviction counsel. We reject Oliveira-Coutinho's assignments of error, and we affirm the district court's order.

Affirmed.

Freudenberg, J., not participating.

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

Rickey Anderson and Lynnette Anderson, appellees, v. Gregory J. Babbe, M.D., et al., appellants.

933 N.W.2d 813

Filed October 4, 2019. No. S-18-847.

1. **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.
2. **Jury Instructions.** The giving or refusing to give a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the discretion of the trial court.
3. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial for an abuse of discretion.
4. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
5. **Jurors: Damages.** A "Golden Rule" argument tells the jurors to place themselves in the plaintiff's shoes and award the amount they would "charge" to undergo equivalent disability, pain, and suffering.
6. **Jurors: Appeal and Error.** Although an invitation to jurors to put themselves in the place of a party is improper argument, it is not a ground for a reversal unless the jurors were prejudicially affected by the remark.
7. **Juror Qualifications.** Parties may not use voir dire to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a party's position when presented with particular evidence.
8. **Directed Verdict: Waiver: Appeal and Error.** When a defendant's motion for directed verdict made at the close of plaintiff's case is

overruled and the defendant introduces evidence in support of allegations contained in its answer, the defendant waives any right to insist that the court erred in overruling the motion.

9. **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.
10. **Physicians and Surgeons: Expert Witnesses: Proof.** To establish the customary standard of care in a particular case, expert testimony by a qualified medical professional is normally required.
11. **Directed Verdict: Evidence.** A defendant, by introducing evidence after his or her motion for a directed verdict is denied, takes the chance that his or her evidence will aid the plaintiff's case.
12. **Evidence.** A plaintiff has a right to have the submission of his or her case determined from all of the evidence regardless of who introduces it.

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

Mary M. Schott and Joseph S. Daly, of Sodoro, Daly & Shomaker, P.C., L.L.O., for appellants.

Patrick J. Cullan and Joseph P. Cullan, of Cullan & Cullan, L.L.C., for appellees.

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

Cassel, J.

I. INTRODUCTION

A patient sued his doctors and obtained a favorable jury verdict. The doctors contend that (1) an improper "Golden Rule" discussion occurred during voir dire and (2) the patient failed to establish a breach of the standard of care. Because the voir dire discussion did not rise to a Golden Rule exhortation, the court did not abuse its discretion in denying requests for a mistrial, curative instruction, and new trial. The court did not err in denying the doctors' motions for directed verdict: The doctors waived any error in the denial at the close of the

patient's case by presenting evidence, and evidence subsequently adduced established a breach of the standard of care. We affirm.

II. BACKGROUND

1. Pleadings

Elisabeth L. Backer, M.D., and Gregory J. Babbe, M.D., practiced medicine in Omaha, Nebraska. They were employees of UNMC Physicians.

In November 2012, Backer and Babbe provided medical care and treatment to Rickey Anderson. On November 1, Backer saw Anderson for a red, swollen, right lower extremity. On November 6, Anderson was admitted to the Nebraska Medical Center. While hospitalized, he was under the care and treatment of Babbe. Anderson was discharged on November 10, and Backer thereafter continued to provide medical care regarding his right lower extremity. Neither Backer nor Babbe performed an x ray of Anderson's right lower extremity. Neither doctor reevaluated the diagnosis of cellulitis.

In January 2013, Anderson consulted with a podiatrist and was told that he had "Charcot foot." He was informed that if x rays had been taken in November 2012, the deformity would have been revealed and significant deterioration of his foot could have been prevented.

Anderson and his wife sued Backer, Babbe, and UNMC Physicians (collectively the doctors) for medical malpractice and loss of consortium. The doctors affirmatively alleged that they acted with the degree of care, skill, and knowledge ordinarily possessed by like physicians, under like circumstances, in Omaha.

2. Voir Dire

The matter proceeded to a jury trial. As we set forth in more detail in our analysis, the Andersons' counsel wished to talk with the venire about physical health and several prospective jurors discussed the importance of mobility. The doctors moved for a mistrial, but the court overruled the motion. It

also declined to give an admonishment or curative instruction at that time.

3. Evidence at Trial

The Andersons called two expert witnesses to testify during their case in chief. One was a podiatrist who treated Anderson and practiced in the Omaha area. Other than a 2-month rotation in residency, the podiatrist had never practiced family medicine. But the podiatrist was an adjunct clinical instructor who worked with residents from the University of Nebraska Medical Center during an elective rotation, and based on that, he was familiar with the material that family practice physicians training at the University of Nebraska Medical Center were to know with respect to foot care. The other expert was a family physician who was chairman of a community hospital in Baltimore, Maryland.

The podiatrist saw Anderson following a referral by Backer to the podiatrist's partner. The referral was for cellulitis and the removal of a toenail. The podiatrist opined that had the Charcot foot been diagnosed and treated appropriately on or prior to November 28, 2012, Anderson would not have suffered damage to his foot. The podiatrist explained how Charcot occurs in a patient with neuropathy: an event causes bones to release an osteoclast, the osteoclast releases a chemical that causes inflammation and redness, and "as the event occurs, you have two months to get it set up, immobilize it, [and] protect the foot." According to the podiatrist, if the foot is immobilized and the inflammation is allowed to resolve, the foot generally will not have a deformity. Having reviewed Anderson's records, the podiatrist testified that Anderson should have been immobilized and placed into a protective boot on November 1.

The podiatrist testified that based on an algorithm compiled by an international task force on Charcot foot, obtaining an x ray is the first thing that should be done if there is a clinical suspicion of a Charcot event. No x ray was taken until January 22, 2013. When asked if he had an opinion as to whether

the care Anderson received was malpractice, the podiatrist answered: "My opinion is it was a missed diagnosed Charcot and it was a mistake. So, unfortunately, that means it's malpractice, that we made a mistake and now there's damages that occurred because of our mistakes."

The family physician conducted a forensic review of the case. He explained that Anderson had a neuropathy, which put him at increased risk for developing a Charcot joint. Although Anderson presented himself with what may have "looked like a cellulitis," it did not "behave like a cellulitis." The family physician testified that "in a patient with neuropathy, who had these kinds of symptoms, I believe that [the doctors] needed to think about the possibility of a Charcot joint." He testified that it was unreasonable to not perform any x ray or MRI on Anderson on November 1, 2012, or thereafter. The following colloquy occurred between the Andersons' counsel and the family physician:

> Q. And do you have an opinion whether or not each and every one of the opinions you've proffered with respect to the violations of the standard of care independently was a — was a proximate cause of . . . Anderson's injuries?
>
> A. Yes.
>
> Q. So the failure to consider Charcot on each and every day was a cause of . . . Anderson's condition?
>
> A. I believe so, yes.
>
> Q. Well, alternatively, had they considered Charcot at any time in November, do you have an opinion whether or not we'd be here today, that he would have suffered the fractures, dislocations and subluxations that he did?
>
> A. From what I know about Charcot, if it's treated at Stage 0, it has an excellent prognosis.

After the Andersons rested, the doctors moved for a directed verdict. They asserted that neither of the Andersons' expert witnesses mentioned the words "'standard of care.'" The doctors noted that the family physician was never asked if he was familiar with the standard of care expected of family practice

physicians in Omaha, that the podiatrist was not asked if he knew what the standard of care was, and that neither expert testified that a breach of the standard of care occurred.

The court similarly did not recall hearing "the usual question point-blank." But the court remarked that the "substance of the testimony is really more important than the choice of words." The court overruled the motion for a directed verdict.

During the doctors' case in chief, the Andersons' counsel cross-examined Backer about the standard of care. Backer agreed that if a patient with neuropathy has symptoms wholly consistent with Charcot foot and if nothing is inconsistent with that condition, then the standard of care requires a physician to suspect Charcot foot. Backer recalled Babbe's testimony that Anderson's condition was wholly consistent with Charcot foot, that nothing was inconsistent with Charcot foot on November 6, 2012, and that Babbe did not consider Charcot foot. The Andersons' counsel then asked Backer, "Do you agree, based on that evidence, that . . . Babbe violated the standard of care?" The doctors' counsel objected, explaining that Backer had not been identified as an expert witness to testify as to anybody but herself. The Andersons' counsel directed the court to the doctors' third supplemental answers to interrogatories in which they designated their expert witnesses as "Dr. Frey" along with Babbe and Backer and stated that "they" would testify that "they" met the standard of care. The court overruled the objection.

Backer testified that when there is a clinical suspicion of Charcot foot, the standard of care required a specialty consultation with either an orthopedist or a podiatrist. Backer testified that based upon Babbe's testimony, he failed to meet the standard of care because he did not get any such specialty consultation. During questioning, Backer agreed that she was designated as an expert to defend the conduct of herself and Babbe.

Prior to seeing Anderson, Babbe spoke with Backer, who informed Babbe that Anderson had a foot infection that was

not improving. Babbe first saw Anderson on November 6, 2012. He diagnosed Anderson with cellulitis, and his diagnosis never changed. Babbe agreed that Anderson met the diagnostic criteria for Charcot foot every time Babbe saw him, and Babbe testified that he never ruled out Charcot foot. But Babbe testified that Anderson also had more swelling and redness up into his calf and responded to antibiotic treatment. According to Babbe, antibiotics will have no effect on redness caused by Charcot foot. Further, Babbe conducted a physical examination of Anderson's right foot and ankle on each of the 4 days that Babbe saw him and he never noted any abnormalities to the structure of the foot or ankle. Babbe testified that he was not negligent and did not commit malpractice.

At the close of all evidence, the doctors renewed their motion for directed verdict. The court denied the motion.

4. Verdict

The jury found that the Andersons met their burden of proof against each doctor. The jury allocated 75 percent of the liability to Babbe and UNMC Physicians and 25 percent to Backer and UNMC Physicians. The jury determined Anderson's economic damages to be $100,000 and his noneconomic damages to be $500,000. The jury decided Anderson's wife's loss of consortium damages amounted to $200,000. The court entered judgment on the verdict for the Andersons in the amount of $800,000.

The doctors filed a motion for new trial or, alternatively, for judgment notwithstanding the verdict. The court denied the motion. The doctors filed a timely appeal, which we moved to our docket.[1]

III. ASSIGNMENTS OF ERROR

The doctors assign three errors with respect to jury selection. They allege the court erred in (1) failing to grant a

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

mistrial, (2) failing to give a curative instruction, and (3) overruling their motion for new trial.

The doctors also assign three errors related to the alleged failure of the Andersons to establish a breach of the standard of care. They claim that the court erred in (1) failing to grant their motion for directed verdict at the close of the Andersons' case in chief, (2) allowing questioning of Backer about the standard of care of Babbe, and (3) failing to grant their motion for directed verdict at the close of all evidence.

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.[2] The doctors did not specifically assign that the court erred in overruling their motion for judgment notwithstanding the verdict; thus, we do not address any argument concerning that motion.

IV. STANDARD OF REVIEW

[1] 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.[3]

[2] The giving or refusing to give a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the discretion of the trial court.[4]

[3] An appellate court reviews a denial of a motion for new trial for an abuse of discretion.[5]

[4] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor

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[2] *Diamond v. State*, 302 Neb. 892, 926 N.W.2d 71 (2019).

[3] *Bank v. Mickels*, 302 Neb. 1009, 926 N.W.2d 97 (2019).

[4] See *Buhrman v. Smollen*, 164 Neb. 655, 83 N.W.2d 386 (1957).

[5] See *Bank v. Mickels, supra* note 3.

and to have the benefit of every inference which can reasonably be deduced from the evidence.[6]

V. ANALYSIS

1. Golden Rule Discussion in Voir Dire

(a) Additional Facts

During voir dire, the Andersons' counsel informed the prospective jurors that they "are to look at the evidence objectively and weigh the evidence objectively." Counsel advised that "there's no sympathy that's to be allowed to enter into your deliberations or your thought process."

The Andersons' counsel wished to speak with the venire about physical health. He stated:

> Now I just want to talk about how important your physical health is to you, your ability to walk, your ability to climb stairs, your ability to do things of that nature, and I'll just go through each and every one of you and probably break here in a minute for — for the noon break.

At that point, counsel for the doctors objected. He asserted that the Andersons' counsel was improperly "trying to put the [prospective] jurors in the position of a party." The court overruled the objection.

Several prospective jurors then spoke of the importance of mobility. One said it "would be a hit for sure" if he were unable to "[r]un around like a chicken with my head cut off making people drunk." Another prospective juror stated that her health was very important and that she "would want to be able to keep working, moving, and walking, being mobile." A third prospective juror explained how his life would change if he were unable to work. A fourth discussed that it "would change a lot about [her] lifestyle." A fifth prospective juror stated that he is "constantly walking around." A sixth stated that mobility is "very important, not just from

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[6] *Smith v. Meyring Cattle Co.*, 302 Neb. 116, 921 N.W.2d 820 (2019).

a quality-of-life aspect, but, yeah, being able to support yourself and your family." A seventh similarly stated that mobility is very important.

Immediately after the seventh's response, the court suggested a break for lunch and excused the prospective jurors. The record shows that at 11:55 a.m., in the presence of counsel and the parties but outside the presence of the prospective jury, the court addressed the objection made during voir dire. The court stated:

> [J]ust about five minutes ago or so, [the doctors' counsel] made an objection to [the Andersons' counsel's] last inquiry of a general question of each, which turned into a question of each of the jurors is how [the Andersons' counsel] was handling it. We got about five or six of them done before we broke for lunch, where the question was: How important is your general health? Which then got to a question of one of them: How important is your mobility? [The doctors' counsel] objected. The Court made its ruling and basically overruled that objection.
>
> Now that the Court's thought about it a little more . . . , the Court's going to change that ruling, and I'm going to sustain [the doctors'] objection and not allow that question to be asked, when we return, of the remaining jurors. Okay?

The court explained its initial belief that the prospective jurors would merely confirm that their health is important. But the court recognized that "the answers were starting to get . . . towards how they would feel to . . . be in the shoes of [Anderson], which we don't allow to be argued at closing." The court stated that "it's probably best I don't allow it to even be discussed in a voir dire." The doctors' counsel confirmed "that was my whole point when I made the objection." He asserted that the Andersons' counsel was "arguing the case" and had put the prospective jurors in the place of Anderson. The doctors moved for a mistrial, which the court overruled.

The court stated that it would "keep an open mind" about giving "a limiting instruction if [counsel] felt, at the end of this matter . . . that needed to be discussed." The doctors' counsel asked the court "to instruct the jury and to make a comment to them at least" and to do so now rather than at the end of trial. The following colloquy occurred:

> THE COURT: . . . [Y]ou want me to tell them something when they return?
>
> [Counsel for the doctors]: Yeah, I want to tell them, you know, the questioning that they were asked, you know, that has nothing to do with how they feel. In other words, they can't put themselves in the place of a party to a lawsuit.
>
> THE COURT: I understand.
>
> [Counsel for the doctors]: And have that . . . cloud their . . . decision on whether or not there's any liability and, if so, what the damages are, if there — if there are any damages. I just think that something has to be said . . . to the jury. I don't know that you could — you know, the — the milk has been spilled. I don't know if you can get it back in the bottle or not, but —
>
> THE COURT: Well, I'm not inclined to do that at this time. That's why I did bring it up, because I thought you might ask for that, and I may be inclined to do it as we get towards the end of this trial. I'm not so sure I see where we're in a worse position if I do it at the time of jury instructions as opposed to doing it at 1:00 when they return at voir dire. I don't know what worsens during that time is my point.
>
> So if you want to approach it back up and write something up you may — you may read that would —
>
> [Counsel for the doctors]: Well, I think I just kind of did tell you what I thought.
>
> THE COURT: Then I'm not going to do it at this time, but I certainly will entertain that motion or that thought later in the matter.

(b) Discussion

The doctors assign three errors related to voir dire. They argue that the court abused its discretion in overruling their motion for mistrial, in failing to give a curative instruction, and in overruling their motion for a new trial. Their arguments are premised upon a claim that the Andersons' counsel improperly invoked the Golden Rule during voir dire. We find no merit in any of the respects alleged.

[5,6] "A 'golden rule' argument tells the jur[ors] 'to place themselves in the plaintiff's shoes and award the amount they would "charge" to undergo equivalent disability, pain and suffering.'"[7] Such an argument is improper because it asks the jurors to place themselves or their loved ones in the plaintiff's position, effectively urging them to become advocates for the plaintiff.[8] Although an invitation to jurors to put themselves in the place of a party is improper argument, it is not a ground for a reversal unless the jurors were prejudicially affected by the remark.[9] Golden Rule cases typically involve remarks made during closing arguments.[10]

[7] Golden Rule challenges have been directed occasionally to remarks during voir dire. Parties may not use voir dire to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a party's position when presented with particular evidence.[11] In one case, a prosecutor asked prospective jurors questions such as whether they thought it was "'important to be able to feel safe and secure

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[7] *Janice H. v. 696 North Robertson, LLC*, 1 Cal. App. 5th 586, 603, 205 Cal. Rptr. 3d 103, 119 (2016).

[8] See *id.*

[9] See *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993).

[10] See, R. Collin Mangrum, *I Believe, The Golden Rule, Send a Message, and Other Improper Closing Arguments*, 48 Creighton L. Rev. 521 (2015); Annot., 70 A.L.R.2d 935 (1960).

[11] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

in [their] own home[s]' and 'to defend their child[ren] from danger,' and whether they had ever 'been jealous' or taken any 'sort of violent action' out of jealousy."[12] The appellate court reasoned that the open-ended voir dire questions were not improper Golden Rule questions. In another case, the plaintiffs' lawyer asked prospective jurors what they thought would be a fair amount of money for such a case and how they might feel if they lost a child.[13] The court stated that the Golden Rule arguably did not apply because questions asked during voir dire are not argument, and to the extent it did apply, the defendants were not unfairly prejudiced.

We find persuasive a case from the District Court of Appeal of Florida.[14] There, a prospective juror was asked whether she could conduct her family business without her spouse. The trial court initially sustained an objection to the question but denied a motion for mistrial. Later, the trial court granted a new trial, finding that the question was a Golden Rule argument. The appellate court disagreed. It observed that the question did not ask the prospective juror how much the juror would want to receive if placed in the plaintiffs' position nor did it ask the juror to identify with the plaintiffs' personal circumstances. The appellate court noted that at the time, the prospective jurors did not know anything about the facts of the case other than that the plaintiffs were suing because an accident killed a family member. The court reasoned that the question "asked what the juror's own personal circumstances were, which is the very reason for voir dire—to know whether something in the juror's personal experience is relevant to the issues to be tried in the case."[15]

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[12] *Rasheed v. State*, 237 So. 3d 822, 830 (Miss. App. 2017).

[13] See *Heimlicher v. Steele*, 615 F. Supp. 2d 884 (N.D. Iowa 2009).

[14] *Goutis v. Express Transport, Inc.*, 699 So. 2d 757 (Fla. App. 1997), *disapproved on other grounds, Murphy v. International Robotic Systems*, 766 So. 2d 1010 (Fla. 2000).

[15] *Id.* at 761.

Here, the prospective jurors were informed that this was a medical malpractice action. But the venire was unaware of the particular facts of the case. The Andersons' counsel specifically told the prospective jurors: "[W]hat we're not allowed to do right now is tell you about the facts. We're not supposed to give you any information about the case itself." The prospective jurors were not asked to place themselves in Anderson's situation or asked how much they would want to be awarded if so placed. While the discussion during voir dire may have been heading in an improper direction, it did not reach the point of stating "put yourself in the plaintiff's place" or asking the prospective jurors to do so. We conclude the court did not abuse its discretion in overruling the doctors' motion for mistrial.

Nor did the court abuse its discretion in declining to give a curative instruction. The court's apprehension about making the situation worse with a curative instruction during voir dire was reasonable. The voir dire discussion was relatively undeveloped. At that point, a trial judge could reasonably conclude that an admonishment or instruction would highlight the issue by making a vague interpretation explicit.

The court left open the possibility of giving an instruction "at the time of jury instructions." There is no argument that a specific curative admonishment or instruction was offered and refused. And both the preliminary and final jury instructions given made clear that sympathy should not factor into the jury's decision. Prior to the introduction of evidence, the jury was told, "Do not allow sympathy or prejudice to influence you." Once the jury had heard all of the evidence, it was instructed, "You must not allow sympathy or prejudice to influence your verdict." Specifically with regard to damages, the jury was instructed: "Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture, and you must not award any damages by way of punishment or through sympathy."

For the same reasons discussed above with respect to the motion for mistrial and request for a curative instruction, we

conclude that the court did not abuse its discretion in overruling the doctors' motion for new trial.

2. Motion for Directed Verdict After Andersons' Case in Chief

[8] The doctors argue that the district court erred in overruling their motion for directed verdict made after the Andersons' case in chief, but they waived any error by offering evidence. Over 100 years ago, this court declared that when a defendant's motion for directed verdict made at the close of the plaintiff's case was overruled and the defendant introduced evidence in support of allegations contained in its answer, it waived any right to insist that the court erred in overruling the motion.[16] This rule enjoys continued vitality.[17]

The doctors assert that "deciding whether to go forward with the trial puts defense counsel between the proverbial rock and a hard place."[18] But the rule they urge would allow them to "have [their] cake and eat it too." We decline their invitation to overrule this longstanding waiver rule.

The doctors also argue that case law indicates the first motion is not waived, but, rather, can be incorporated into the motion made at the close of all evidence. They misread the case law. A Missouri court cogently explained the effect of motions for directed verdict made at the close of the plaintiff's evidence and at the close of all evidence under its rule that governs motions for directed verdict, which is substantially similar to our Neb. Rev. Stat. § 25-1315.01 (Reissue 2016):

> At the close of plaintiff's evidence, Rule 72.01(a) provides defendant with the opportunity to challenge whether plaintiff has made a submissible case. If no further evidence is introduced, the case—both at trial and on appeal—is

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[16] See *Bradstreet v. Grand Island Banking Co.*, 89 Neb. 590, 131 N.W. 956 (1911).

[17] See *Denali Real Estate v. Denali Custom Builders*, 302 Neb. 984, 926 N.W.2d 610 (2019).

[18] Reply brief for appellants at 10.

> determined by the evidence on the record at that point. Should the trial court overrule the motion, defendant then has the choice of putting on evidence of his or her own. If defendant introduces evidence, the state of the record at the close of plaintiff's case is waived and the case—both at trial and on appeal—is determined in accordance with all evidence admitted: plaintiff's *and* defendant's. Rule 72.01(b) allows defendant the opportunity to move for a directed verdict at the close of all evidence.[19]

The state of the record at the close of the plaintiff's case ceases to be relevant (for purposes of a directed verdict) if the defendant introduces evidence.

An Arkansas court considering a similar issue in a medical malpractice action found a waiver.[20] In that case, the appellee argued that the assigned errors were immaterial, because the trial court should have directed a verdict for him. The appellee's argument was premised on the plaintiff's failure to prove by expert testimony that the doctor failed to meet the degree of skill ordinarily used by other doctors in the locality. But the appellate court did not reach the argument, because rather than standing on the motion for a directed verdict at the close of the plaintiff's proof, the appellee instead introduced testimony. The appellate court determined that the appellee waived his motion by not electing to stand on it.

Because the doctors in the instant case introduced evidence after the court denied their motion for directed verdict at the close of the Andersons' case in chief, they have waived any error in the ruling.

3. Questioning Regarding Standard of Care

The doctors argue that the court erred in allowing questioning of Backer about whether Babbe met the standard of care.

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[19] *Sanders v. Ahmed*, 364 S.W.3d 195, 207 (Mo. 2012) (emphasis in original).

[20] See *Haney v. DeSandre*, 286 Ark. 258, 692 S.W.2d 214 (1985).

They contend that Backer was not identified as an expert witness as to compliance with the standard of care for anyone other than herself.

In asking Backer questions about whether Babbe met the standard of care, the Andersons' counsel pointed to an interrogatory answer submitted on the doctors' behalf in which the doctors designated their expert witnesses as themselves and a third doctor. The answer stated that "they" would testify "they" met the standard of care. Assuming without deciding that the doctors' answers to interrogatories are sufficiently in our record, it cannot come as a surprise for a party opponent to be called to testify.

The doctors direct our attention to *Simon v. Drake*.[21] In that case, we concluded that the trial court erred in permitting a surgeon—the plaintiff's treating physician—who had not been designated as an expert to testify about standard of care issues and in refusing to give a curative instruction to the jury. We reasoned that "[c]ompared to the testimony of a hired expert, a juror was likely to give great weight to [the surgeon's] opinion because he was [the plaintiff's] treating physician and testifying as an expert against his own patient."[22] But here, unlike in *Simon*, Backer had been designated as an expert with regard to standard of care issues. We see no error.

4. Motion for Directed Verdict After Close of All Evidence

[9] The doctors also argue that their motion for directed verdict made at the close of all evidence should have been sustained. 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.[23]

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[21] *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013).

[22] *Id.* at 794, 829 N.W.2d at 693.

[23] *Denali Real Estate v. Denali Custom Builders, supra* note 17.

[10] The doctors contend that the Andersons failed to establish the applicable standard of care, that their experts were familiar with the applicable standard of care, and that a breach of the applicable standard of care occurred. To establish the customary standard of care in a particular case, expert testimony by a qualified medical professional is normally required.[24] Often, such testimony is premised on the expert's personal knowledge of, and familiarity with, the customary practice among medical professionals in the same or similar locality under like circumstances.[25]

The doctors' argument is based on their belief that the Andersons' experts failed to state that they were familiar with the standard of care applicable to physicians practicing family medicine in Omaha in November and December 2012 treating a patient such as Anderson. In other words, they ask us to consider only the expert testimony presented by the Andersons during their case in chief.

[11,12] But on a motion made at the close of all evidence, our review is not limited in that way. "The defendant, by introducing evidence after his or her motion for a directed verdict is denied, takes the chance that his or her evidence will aid the plaintiff's case."[26] "The plaintiff has a right to have the submission of his or her case determined from all of the evidence regardless of who introduces it."[27] The doctors' evidence clearly established a violation of the standard of care. Accordingly, the court properly denied the doctors' motion for directed verdict at the close of all evidence.

VI. CONCLUSION

We conclude that the voir dire discussion did not constitute a Golden Rule argument and that the court did not abuse its

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[24] *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018).

[25] *Id.*

[26] 89 C.J.S. *Trial* § 1353 at 770-71 (2012).

[27] *Id.* at 771.

discretion in denying the doctors' request for a mistrial, for an admonishment or curative instruction during voir dire, or for a new trial. Because the doctors presented evidence following the denial of their motion for directed verdict at the close of the Andersons' case in chief, they waived any error in the denial. And because the evidence—including the cross-examination of Backer—established a breach of the standard of care, the court did not err in denying the motion for directed verdict at the close of all evidence. We affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
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In re Estate of Sheila Foxley Radford, deceased. Provident Trust Company et al., appellees, v. Mary Radford, appellant.

933 N.W.2d 595

Filed October 4, 2019. No. S-18-863.

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: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
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. **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.
5. ____. 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.

Appeal from the County Court for Douglas County: Stephanie R. Hansen, Judge. Reversed and remanded for further proceedings.

Michael J. Decker for appellant.

Robert M. Schartz, Howard J. Kaslow, and M. Tyler Johnson, of Abrahams, Kaslow & Cassman, L.L.P., for appellees.

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

Funke, J.

Mary Radford appeals the county court's decision on an application for direction which found that money Sheila Foxley Radford gave Mary prior to Sheila's death was an ademption of Mary's interest in Sheila's trust. On appeal, Mary challenges the application of the ademption statute, Neb. Rev. Stat. § 30-2350 (Reissue 2016), to the trust. Alternatively, Mary claims the court erred in finding it was Sheila's intent to have the money be an ademption of Mary's interest. Mary additionally challenges the determination that an ademption could be made prior to an amendment of the trust and that a document created prior to the amended trust in which Mary acknowledged the money was "inheritance" constituted an ademption. For the reasons stated herein, we reverse, and remand to the county court for further proceedings.

BACKGROUND

Sheila died testate as a resident of Douglas County, Nebraska, in October 2014. At the time of her death, Sheila had four living children, including Mary, William Radford, Christopher Radford, and Brigid Radford. In 1996, Sheila had executed a "pour-over" will and a trust agreement for the distribution of her assets.

In May 2007, Sheila agreed to provide Mary $200,000 for the purchase of a home. On May 30, Mary signed a handwritten note stating: "This letter acknowledges that Sheila . . . is affording me $200,000 for purchase of a home and is recognized by me as inheritance." On June 11, a wire transfer of $200,000 was processed from Sheila's bank account to Mary's account. Mary alleges it was not her understanding that this payment would be counted against her share of the trust.

In April 2010, Sheila amended and restated her trust. As applicable, Sheila amended the residuary distribution from an equal distribution among her four children to a one-sixth distribution to each of Mary, William, and Christopher and a one-half distribution to Brigid. Sheila additionally updated her will. Neither the updated will nor the amended trust made any mention of the $200,000 transfer from Sheila to Mary.

After Sheila's death, William found the May 30, 2007, note in Sheila's apartment. While the note was not in the box holding Sheila's trust and will documents, it was found in a file also containing a receipt of the wire transfer in a cabinet in which Sheila kept financial papers. These documents were brought to the attention of Provident Trust Company, the trustee of Sheila's trust, who filed an application for direction to determine whether the $200,000 transfer in 2007 should be treated as an advancement of inheritance and counted against Mary's share of the residuary.

The county court held an initial hearing on this application and issued an order. However, we reversed, and remanded for a new hearing because the record was insufficient for appellate review.[1] Following remand, the county court held an additional hearing on the application and issued another order. In this order, the court applied § 30-2350 of the Nebraska Probate Code to the $200,000 payment. The court found that the 2007 note Mary executed satisfied the requirement of § 30-2350 that "the devisee acknowledge[] in a writing contemporaneous with the gift that it is in satisfaction [of the devise]." As such, the payment was an advancement of Mary's inheritance under Sheila's will and trust even though Sheila amended her will and trust after the payment and Mary's note acknowledging the payment. The court valued the gift at $200,000, which was the value at the time of the devise in 2007, and, accordingly, reduced Mary's one-sixth share of the residuary.

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[1] *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d. 261 (2017).

ASSIGNMENTS OF ERROR

Mary assigns, restated, that the county court erred by (1) applying § 30-2350 of the Nebraska Probate Code to a trust; (2) finding Sheila intended the $200,000 payment to be treated as an ademption of Mary's interest; (3) finding the payment was an ademption of Mary's interest when the payment was made prior to the trust being amended; and (4) finding that the May 30, 2007, note satisfied the requirements of § 30-2350.

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.[2] 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.[3]

[2] The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.[4]

[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.[5]

ANALYSIS

As an initial matter, we must address whether § 30-2350 is applicable because Sheila utilized a trust for the distribution of her assets. Mary argues that § 30-2350 is inapplicable because Sheila's will devised her assets to her trust and her trust designated Mary's distribution.

Ademption by satisfaction is defined by § 30-2350, which provides in part:

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[2] *In re Estate of Etmund*, 297 Neb. 455, 900 N.W.2d 536 (2017).

[3] *Id.*

[4] *Id.*

[5] *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

> Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if the will provides for deduction of the lifetime gift, or the testator declares in a writing contemporaneous with the gift that it is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in a writing contemporaneous with the gift that it is in satisfaction.

A testator is a maker of a will, and a devise is a testamentary disposition of real or personal property by a will.[6]

In defining a devisee as any person designated in a will to receive a devise, the Nebraska Probate Code addresses the possibility of a will making a distribution to a trust which makes further distributions to beneficiaries of the trust. Specifically, § 30-2209(8) provides that "[i]n the case of a devise to an existing trust or trustee, or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees."

Such a distribution scheme is used here. Sheila's will directs that upon her death her assets are to be transferred to her trust. The trust, in turn, provides that the trustee is to use these and any other assets held by the trust to pay certain expenses associated with Sheila's death and distribute the remainder to Sheila's children with a one-sixth distribution to each of Mary, William, and Christopher and a one-half distribution to Brigid. Therefore, under the plain language of § 30-2209(8), Sheila's trust is the devisee as the designated recipient of the assets of the estate and Mary, as a beneficiary of the trust, is not a devisee.

[4,5] As quoted above, § 30-2350 solely uses "devise" and "devisee" to identify an applicable distribution and the applicable party to whom the distribution is made when considering whether ademption by satisfaction applies. 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

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[6] Neb. Rev. Stat. § 30-2209(7) and (49) (Reissue 2016).

province of a court to read anything plain, direct, or unambiguous out of a statute.[7] 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.[8] Accordingly, under its plain language, § 30-2350 provides ademption only for devisees under a will. Because Mary is not a devisee under Sheila's will, the $200,000 payment cannot be a § 30-2350 ademption.

Not only does the plain language of §§ 30-2209(8) and 30-2350 compel this conclusion, it is strengthened by the Legislature's choice not to adopt the model act section that would have incorporated § 30-2350 into the Nebraska Uniform Trust Code.[9] At the time the Nebraska Uniform Trust Code was adopted in 2003,[10] the model act included a section stating that "[t]he rules of construction that apply . . . to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property."[11] The intent of the Legislature is expressed by omission as well as by inclusion.[12] Had the Legislature desired to apply § 30-2350 to trusts, it could have adopted § 112 of the model act. But it did not. Nor will we do so by judicial fiat in the guise of statutory interpretation. This leads to Brigid's alternative argument.

Regardless of the applicability of § 30-2350 as written, Brigid argues we should apply the doctrine of ademption by satisfaction to beneficiaries of trusts utilized in estate planning. Brigid argues that Nebraska has long recognized the

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[7] *JB & Assocs. v. Nebraska Cancer Coalition,* 303 Neb. 855, 932 N.W.2d 71 (2019).

[8] *Id.*

[9] Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Reissue 2016 & Cum. Supp. 2018).

[10] See § 30-3801.

[11] See Unif. Trust Code § 112, 7C U.L.A. 453 (2006) (model act promulgated in 2000).

[12] *Christine W. v. Trevor W.*, 303 Neb. 245, 928 N.W.2d 398 (2019).

doctrines of advancement and ademption by satisfaction and that because trusts are more commonly being utilized in estate planning schemes, it is necessary to extend the doctrine of ademption by satisfaction to such trusts to align and provide more consistency in the treatment of estate planning.

It is unclear on what authority Brigid is asking to expand ademption to beneficiaries of trusts. Brigid cites § 30-2350 and Neb. Rev. Stat. § 30-2310 (Reissue 2016)—the statute governing advancements in intestate estates—as well as cases applying or discussing prior incarnations of those statutes.[13] We initially note the instant case does not involve a question of advancement because advancements occur when a decedent dies intestate, but Sheila died testate. On expanding the definition of ademption, as discussed above, the applicable language of § 30-2350 and the definitions of its terms in § 30-2209 specifically excludes ademption from applying to the beneficiaries of a devisee trust. The Legislature chose to include the limiting definition in the statute, and we decline to ignore this provision.

Because Mary was a beneficiary under the trust and not a devisee under the will, Sheila's payment of $200,000 to Mary could not constitute an ademption by satisfaction. Accordingly, the county court erred in applying the $200,000 payment against Mary's share under the trust. We reverse, and remand to the county court for further proceedings consistent with this opinion.

CONCLUSION

The county court erred in finding the payment from Sheila to Mary constituted an ademption of Mary's share under Sheila's trust. We reverse, and remand for further proceedings.

Reversed and remanded for
further proceedings.

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[13] See, *In re Estate of McFayden*, 235 Neb. 214, 454 N.W.2d 676 (1990); *Lodge v. Fitch*, 72 Neb. 652, 101 N.W. 338 (1904); *Boden v. Mier*, 71 Neb. 191, 98 N.W. 701 (1904).

Nebraska Supreme Court
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Aubrie Green, appellant, v. Bryce Seiffert, appellee.

933 N.W.2d 590

Filed October 4, 2019. No. S-18-1125.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Time: Notice: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal.
3. **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.

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

Adolfo Daniel Reynaga, of Legal Aid of Nebraska, for appellant.

No appearance for appellee.

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

Papik, J.

After the district court dismissed Aubrie Green's petition for renewal of a domestic abuse protection order, Green filed a motion asking the court to vacate the order of dismissal. The court denied that motion, and Green filed this appeal. Green

acknowledges that because her notice of appeal was filed more than 30 days after the initial order dismissing the petition and because her motion to vacate did not extend or suspend the statutory deadline for filing an appeal, she did not timely appeal the order dismissing her petition. Green maintains, however, that we have jurisdiction to review the order denying her motion to vacate.

We disagree. While an order denying a motion to vacate or modify is appealable if it is based on grounds that make it independently final and appealable, Green's motion to vacate merely contended that the order she sought to vacate was erroneous. Because we do not have jurisdiction to review the denial of such a motion, we must dismiss the appeal.

BACKGROUND

Initial Domestic Abuse Protection Order and Request to Renew.

On August 31, 2017, Green filed a petition and affidavit requesting a domestic abuse protection order against Bryce Seiffert, the father of her minor child. In the petition and affidavit, Green alleged that Seiffert had abused her physically. The following day, the district court entered an ex parte protection order. Seiffert later challenged the protection order, but, after a hearing, the district court ordered that the protection order should remain in effect for 1 year from the date of its original issuance.

On August 31, 2018, when the original protection order was about to expire, Green filed a petition and affidavit to renew it pursuant to Neb. Rev. Stat. § 42-924 (Reissue 2016), which the Legislature has subsequently amended. See 2019 Neb. Laws, L.B. 532, § 3 (changes operative January 1, 2020). Green was not represented by counsel when she requested renewal, and the petition and affidavit are relatively sparse. Green stated the following as the reasons for seeking renewal of the protection order: "[Pressuring] full custody of [her daughter]. [Afraid] for safety [continues] as the case [continues]. All other reasons on first protection order."

Later in the day on August 31, 2018, the district court entered an order dismissing the petition for renewal of the protection order without a hearing.

Motion to Vacate.

On September 27, 2018, Green, now represented by counsel, filed a motion to vacate the order dismissing the petition to renew the protection order. In the motion, Green asked that the order of dismissal be vacated and that the court hold a hearing on her request for renewal of the protection order.

On November 5, 2018, the district court held a hearing on Green's motion to vacate. At that hearing, Green's counsel argued that, based on the allegations in the petition and affidavit seeking renewal of the protection order, the court should have entered a renewed order. Alternatively, counsel contended that the district court was obligated to hold an evidentiary hearing before denying the petition to renew the protection order and that the court should vacate the dismissal and hold a hearing on the petition.

On November 6, 2018, the district court entered a written order denying the motion to vacate. Green filed a notice of appeal on November 29.

ASSIGNMENT OF ERROR

Green assigns one error on appeal. She contends that the district court erred by not vacating its order dismissing the petition to renew the protection order.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Simms v. Friel*, 302 Neb. 1, 921 N.W.2d 369 (2019).

ANALYSIS

Before reaching the legal issues presented for review, it is our duty to determine whether we have jurisdiction to decide

them. *Simms, supra*. This is the case regardless of whether the issue is raised by the parties. See *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018). We find it necessary to exercise that duty here.

[2] Under Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal. *Bryson L. v. Izabella L.*, 302 Neb. 145, 921 N.W.2d 829 (2019). The notice of appeal must be filed within 30 days of the judgment, decree, or final order from which the party is appealing unless that time is terminated by the filing of a qualifying motion. See *id.*

Green does not dispute that the district court's August 31, 2018, order dismissing the petition requesting a renewed protection order was final and appealable. She also acknowledges that because her motion to vacate was filed more than 10 days after the order dismissing her petition, it does not qualify as a motion to alter or amend a judgment, which would have terminated the time in which a notice of appeal must be filed. See *id.* Having made these concessions, Green is also forced to concede that she did not timely appeal the order dismissing her petition.

While Green admits that she failed to timely appeal the order dismissing her petition, she maintains that we have jurisdiction to review her case by another means. She asserts that we may review the order denying her motion to vacate. She contends that she timely filed a notice of appeal within 30 days of that order and that such orders are appealable. Green argued in her initial brief on appeal that our opinion in *Capitol Construction v. Skinner*, 279 Neb. 419, 778 N.W.2d 721 (2010), *overruled on other grounds, McEwen v. Nebraska State College Sys.*, 303 Neb. 552, 931 N.W.2d 120 (2019), holds that orders denying a motion to vacate or modify a final order affect a substantial right upon a summary application in an action after judgment and are thus appealable under § 25-1902.

In *Capitol Construction*, a defendant appealed a decision from the county court to the district court. The district court

dismissed the appeal when the defendant did not reply to a progression letter from the court. The defendant later filed a motion to reinstate, contending that the court did not send the progression letter to its appellate counsel. The district court denied the motion to reinstate, and the defendant appealed to the Nebraska Court of Appeals. On petition for further review, we held that while the Court of Appeals did not have jurisdiction to consider the merits of the order of dismissal because the defendant did not timely appeal, the Court of Appeals did have jurisdiction to review the denial of the motion to reinstate. Green's initial brief contended that the order denying her motion to vacate is reviewable for the same reasons the denial of the motion to reinstate was appealable in *Capitol Construction*.

After the filing of Green's initial brief, however, we had occasion in *McEwen, supra*, to address essentially the same argument regarding the scope of *Capitol Construction*. In *McEwen*, the appellant argued that even if we lacked jurisdiction to review a district court order denying his petition in error because it was not timely appealed, we nonetheless had appellate jurisdiction to review a subsequent denial of a motion to vacate that order under *Capitol Construction*. We disagreed.

We explained in *McEwen* that in *Capitol Construction*, our finding that an order denying a motion to vacate or modify was appealable was predicated on the conclusion that the order was "'independently final and appealable and the merits of that order [were] the issue raised on appeal.'" 303 Neb. at 560, 931 N.W.2d at 127, quoting *Capitol Construction, supra*. We pointed out that unlike the motion to reinstate and subsequent appeal in *Capitol Construction*, the motion to vacate and subsequent appeal in *McEwen* did not introduce an "intervening new matter" and instead merely contended that the initial order rejecting plaintiff's claims was erroneous. 303 Neb. at 561, 931 N.W.2d at 128.

After the release of our opinion in *McEwen*, we issued an order to show cause, directing Green to address whether her

appeal should be dismissed in light of *McEwen*. Green submitted a supplemental brief in response to the order to show cause. In it, she makes three arguments. First, she contends that her case is distinguishable from *McEwen* because she is challenging the district court's denial of her motion to vacate, as opposed to the initial order dismissing her petition. Second, she argues that we should review the denial of her motion to vacate for reasons of judicial efficiency. And finally, she argues that we should review the denial of the motion to vacate because the district court's order dismissing her petition for a protection order was void. We take up these arguments in turn, but, as we will explain, we find each unpersuasive.

We begin with Green's argument that her case is distinguishable from *McEwen v. Nebraska State College Sys.*, 303 Neb. 552, 931 N.W.2d 120 (2019), because she is challenging the denial of her motion to vacate and not the order dismissing her petition. While Green attempts to frame her arguments as a challenge to only the denial of her motion to vacate, the reason she offers for why vacation was required is that the district court acted contrary to law when it denied her petition without first providing the opportunity for a hearing. In other words, Green contends that the district court should have granted her motion to vacate its initial decision because that decision was erroneous. So while Green is framing her argument as challenging the denial of the motion to vacate, Green is, in fact, contending that the order she failed to timely appeal was incorrect. Like the appellant in *McEwen* and unlike the appellant in *Capitol Construction v. Skinner*, 279 Neb. 419, 778 N.W.2d 721 (2010), she has not identified any reason why the order denying her motion to vacate was "independently final and appealable." 303 Neb. at 561, 931 N.W.2d at 128.

Neither are we moved by Green's invocation of judicial efficiency as a basis for appellate jurisdiction. Here, Green contends that it is more efficient if litigants in her position can ask the district court to reconsider its decision without potentially compromising a future appeal. We find Green's

argument is misplaced for multiple reasons. First, appellate jurisdiction exists only when conferred by the Legislature; it is not controlled by our notions of what might promote judicial efficiency. See, e.g., *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017). Second, even if addressed on its own terms, Green's argument that a finding of no jurisdiction in this case would force litigants to choose between a request for reconsideration in the district court and an appeal is simply incorrect. As noted above, a timely filed motion to alter or amend terminates the time in which a notice of appeal must be filed and thus parties may use such motions to seek alteration of a final order or judgment in the trial court without concern that their time to appeal will expire in the process. Green failed to file such a motion in this case.

[3] Finally, we disagree with Green's contention that we have the power to vacate the district court's order dismissing her petition because it was somehow void. While we understand Green's position that the order dismissing her petition was erroneous, we see no basis to conclude that the district court lacked the authority 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. *D.W. v. A.G.*, 303 Neb. 42, 926 N.W.2d 651 (2019). The district court plainly had authority to hear and determine requests for the renewal of domestic abuse protection orders, a fact Green understood when she filed her petition in that court.

CONCLUSION

Because we conclude we lack appellate jurisdiction, we dismiss the appeal.

Appeal dismissed.

Nebraska Supreme Court
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Terry Bortolotti, appellee and cross-appellant, v. Universal Terrazzo and Tile Company and Acuity Insurance Company, appellants and cross-appellees, and Columbia Insurance Group, appellee.

933 N.W.2d 851

Filed October 11, 2019. No. S-17-1024.

1. **Workers' Compensation: Evidence: Appeal and Error.** The findings of fact made by the Nebraska Workers' Compensation Court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence to support an award, an appellate court must modify, reverse, or set aside the award.
2. **Workers' Compensation: Wages: Appeal and Error.** The determination of average weekly wage is a mixed question of fact and law. To the extent the determination involves a question of fact, the Workers' Compensation Court's factual findings will not be set aside unless clearly wrong; to the extent a question of law is involved, an appellate court is obligated to make its own determination.
3. **Pleadings.** An amended pleading supersedes the original pleading, whereupon the original pleading ceases to perform any office as a pleading.
4. **Pleadings: Proof.** The pleadings alone are not proof but mere allegations of what the parties expect the evidence to show.
5. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
6. **Workers' Compensation.** The Nebraska Workers' Compensation Act should be construed liberally to carry out its spirit and beneficent purposes.
7. **Workers' Compensation: Corporations: Words and Phrases.** Net profits or net income of a subchapter S corporation do not necessarily qualify as "wages" under Neb. Rev. Stat. § 48-126 (Reissue 2010).

8. **Workers' Compensation: Corporations: Employer and Employee: Wages: Words and Phrases.** "Wages" under Neb. Rev. Stat. § 48-126 (Reissue 2010) do not include payments received solely because of the recipient's status as an S corporation shareholder. Rather, "wages" under § 48-126 are compensation for the recipient's activities as a corporate employee.
9. ____: ____: ____: ____: ____. The determination of "wages" under Neb. Rev. Stat. § 48-126 (Reissue 2010) for an employee-shareholder of a subchapter S corporation is a fact-specific inquiry.
10. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
11. **Workers' Compensation: Appeal and Error.** On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Bishop and Arterburn, Judges, on appeal thereto from the Workers' Compensation Court, Julie A. Martin, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed and remanded with direction.

John W. Iliff and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellants.

John F. Thomas and Jay D. Koehn, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee Terry Bortolotti.

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

Cassel, J.

I. INTRODUCTION

On appeal from the Nebraska Workers' Compensation Court's award to Terry Bortolotti, the Nebraska Court of Appeals

reduced his weekly income benefit from the maximum to the minimum and eliminated the award of out-of-pocket medical expenses.[1] On further review, we uphold the reduced weekly benefit but reinstate the medical expense award.

The income benefit depends on the correct determination of Bortolotti's average weekly wage, which the compensation court erroneously based on a superseded pleading. In a matter of first impression, we address the definition of "wages" where the worker is both an employee and a shareholder of a subchapter S corporation.

Regarding Bortolotti's medical expenses, the Court of Appeals failed to give his testimony the inferences mandated by the deferential standard of review.

II. BACKGROUND

1. Trial Proceedings

Bortolotti worked in a family business, Universal Terrazzo and Tile Company (Universal), for over 30 years as an installer of terrazzo tile and fabricator and installer of granite. In 2011, Bortolotti became the sole stockholder and the president of Universal—a subchapter S corporation. Universal had at least 15 employees. As president, Bortolotti spent 60 percent of his time performing office and managerial work as opposed to physical labor. While he was president, Universal changed workers' compensation insurance providers from Columbia Insurance Group to Acuity Insurance Company.

The injury at issue in this appeal occurred in June 2013. Bortolotti's operative petition for workers' compensation benefits alleged weekly earnings of $3,625 at the time of the injury. Universal and Acuity Insurance Company denied the allegation. Henceforth, we collectively refer to Universal and Acuity Insurance Company as "Universal." We set forth additional facts in our analysis.

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[1] *Bortolotti v. Universal Terrazzo and Tile Co.*, No. A-17-1024, 2019 WL 446630 (Neb. App. Feb. 5, 2019) (selected for posting to court website).

The compensation court determined that Bortolotti sustained a compensable injury. It specifically found Bortolotti to be a credible witness. The compensation court had difficulty determining Bortolotti's average weekly wage due to a lack of exhibits. Based on an allegation in a superseded pleading, the court held that Bortolotti's average weekly wage was $1,399.45, entitling him to the maximum compensation rate of $728 per week.

With regard to past medical expenses, the compensation court stated that it was unable to use an exhibit offered by Bortolotti, because it did not comply with a court rule. But the court awarded Bortolotti $9,849.38—the amount that he testified he personally paid for his medical expenses and which was itemized in greater detail on the exhibit he offered.

Universal appealed, and Bortolotti cross-appealed. Universal challenged, among other things, the calculation of Bortolotti's average weekly wage and the award of out-of-pocket medical expenses.

2. Court of Appeals' Decision

The Court of Appeals affirmed the compensation court's award as modified. It noted that documents establishing Bortolotti's 2013 income were records in his control and that he did not produce any such documentation. The Court of Appeals concluded that the compensation court erred in determining Bortolotti's average weekly wage from the allegations in his petition, noting that Universal denied the allegations. Because Universal adduced evidence that Bortolotti's 2013 wages were $3,950, the Court of Appeals determined that Bortolotti should have been awarded the minimum income benefit of $49 per week under Neb. Rev. Stat. § 48-121.01 (Reissue 2010).

The Court of Appeals eliminated the award for Bortolotti's out-of-pocket medical expenses. It agreed with Universal that because the compensation court did not rely on the exhibit offered by Bortolotti, it had no basis to award the $9,849.38 in expenses.

Bortolotti filed a petition for further review, which we granted.

III. ASSIGNMENTS OF ERROR

Bortolotti assigns two errors. He alleges that the Court of Appeals erred by substituting its own judgment for that of the compensation court in (1) failing to give him the benefit of all factual inferences when it reduced his average weekly wage and (2) finding that he failed to prove entitlement to recover his out-of-pocket medical expenses.

IV. STANDARD OF REVIEW

[1] The findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong.[2] However, where there is not sufficient competent evidence to support an award, an appellate court must modify, reverse, or set aside the award.[3] These standards are central to our review, but we set forth other standards where applicable.

V. ANALYSIS

1. Average Weekly Wage

(a) Standard of Review

Our case law regarding whether determination of average weekly wage is a question of law or fact or both is muddled. Initially, we recognized it as a mixed question of fact and law.[4] In that case, we stated that "[t]he formula for computing the average weekly wage depends upon whether plaintiff was engaged in an occupation involving seasonal employment or nonseasonal employment."[5] When we next considered determination of average weekly wage, we stated that it was

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[2] See *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985). See, also, Neb. Rev. Stat. § 48-185 (Reissue 2010).

[3] *Hare v. Watts Trucking Service, supra* note 2.

[4] *Elrod v. Prairie Valley*, 214 Neb. 697, 335 N.W.2d 317 (1983).

[5] *Id.* at 698, 335 N.W.2d at 318.

"essentially" a question of fact.[6] Unsurprisingly, the next time the issue arose, we treated it as a factual question, stating that the trial court's factual finding as to average weekly wage was not clearly wrong.[7] Nine months later, the Court of Appeals addressed the question of what is included within the word "wages" as a factual one.[8]

Our decision in *Hull v. Aetna Ins. Co.*[9] appears to have created confusion. We stated:

> We note that the determination of the definition of the average weekly wage of a self-employed claimant is a question of law. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. [Citations omitted.] Thus, we are obligated to clarify the meaning of the term "business expenses" in our previous holding.[10]

This is a correct statement as to the *definition* of such wage. Importantly, we did *not* say the *determination* of average weekly wage is a question of law. The Court of Appeals next confronted the issue and, without citing *Hull*, opined that the trial court's determination of average weekly wage was a question of fact.[11]

Since then, published Nebraska appellate cases have uniformly stated that the determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law. It began with *Harmon v. Irby Constr.*

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[6] *Clifford v. Harchelroad Chevrolet*, 229 Neb. 78, 80, 425 N.W.2d 331, 332 (1988).

[7] See *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

[8] *Logan v. Rocky Mountain Rental*, 3 Neb. App. 173, 524 N.W.2d 816 (1994).

[9] *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996).

[10] *Id.* at 131, 541 N.W.2d at 634-35.

[11] See *McGinnis v. Metro Package Courier*, 5 Neb. App. 538, 561 N.W.2d 587 (1997).

Co.,[12] where we proclaimed: "The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law. *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996)." But, as set forth above, that does not accurately recite what we said in *Hull*. It snowballed from there. We cited *Harmon* in *Ramsey v. State*.[13] The Court of Appeals then cited *Ramsey* in two cases,[14] and we cited *Ramsey* in *Mueller v. Lincoln Public Schools*.[15] In our most recent case to address determination of average weekly wage,[16] we cited *Mueller*.

[2] Having traced the jurisprudential underpinnings regarding the standard of review, we believe our original iteration to be correct: The determination of average weekly wage is a mixed question of fact and law. To the extent the determination involves a question of fact, the compensation court's factual findings will not be set aside unless clearly wrong; to the extent a question of law is involved, we are obligated to make our own determination.[17]

(b) Additional Facts

An amended petition alleged an average weekly wage of $1,399.45 in June 2013. But a second amended petition and the third amended petition—the operative petition—alleged weekly earnings of $3,625 at the time of the June 2013 injury. In Universal's respective answers to each of these pleadings, it denied the allegation of average weekly wage.

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[12] *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 429, 604 N.W.2d 813, 820 (1999).

[13] *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000).

[14] See, *Griffin v. Drivers Mgmt., Inc.*, 14 Neb. App. 722, 714 N.W.2d 749 (2006); *Arbtin v. Puritan Mfg. Co.*, 13 Neb. App. 540, 696 N.W.2d 905 (2005).

[15] *Mueller v. Lincoln Public Schools*, 282 Neb. 25, 803 N.W.2d 408 (2011).

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

[17] See *Elrod v. Prairie Valley, supra* note 4.

During trial, counsel for each party referenced figures contained on a tax return for Bortolotti, but documents containing such figures are not in our record. Our record contains only a 2013 "Schedule E," titled "Income From Passthrough Statement," which showed self-employment wages of $3,950 and qualified production activities income of $186,783. Additional information can be gleaned from the following colloquy between Bortolotti and his counsel:

> Q [by counsel for Bortolotti]. Okay. All right. Let's talk about your average weekly wage.
>
> Now, in looking at your tax return, I see that you were the —
>
> Did Universal . . . file a 2013 tax return?
>
> A [by Bortolotti]. Yes.
>
> Q. And it shows that the — that under your —
>
> That was a joint tax return with you and your wife; correct?
>
> A. Yes.
>
> Q. And under Item 17, it shows rental real estate, royalties, partnerships, S Corporations, trusts, attached Schedule E. And that number is 198,873.
>
> Is that the income that the corporation would have received from the work for 2013?
>
> A. Yes.

Later, during cross-examination, the following questions and answers ensued:

> Q [by counsel for Universal]. Now, there was some questions about your tax return.
>
> On your tax return, there's also a line for wages; correct?
>
> A [by Bortolotti]. Yes.
>
> Q. And you and your wife were wage earners at Universal . . . ?
>
> A. Yes.
>
> Q. And you put on your Form 1040 that you submitted to the Internal Revenue Service that you and your wife had wages of $12,000 in 2013.

Do you recall that?
A. Yes.

Bortolotti believed the $12,000 in wages to be his wife's wages. According to Bortolotti, he did not receive a salary and he considered his wage to be whatever tax returns showed the corporation's net amount to be. Bortolotti also testified that he took a weekly draw of $3,625 from the corporation's income of $198,873.

Universal submitted a document containing its calculation of Bortolotti's average weekly wage. The document showed six payments in 2013 totaling $1,350: five made in January and February in the amount of $250 each and one payment of $100 in June. Universal thus calculated Bortolotti's average weekly wage as "$1,350.00 ÷ 26 weeks = $51.92." Another exhibit, summarizing a payroll journal, showed 32 payments to Bortolotti during 2013 which totaled $3,950. Bortolotti testified that these exhibits were not accurate records of his weekly income.

The compensation court recognized that Bortolotti had the burden to establish his average weekly wage. The court then explained the difficulty it encountered in determining Bortolotti's average weekly wage:

> The Court spent a considerable amount of time on this issue, more time than it should have. The lack of exhibits left the Court with a formidable and difficult task. Clearly, [Bortolotti] should have provided better evidence. Without tax returns, the Court was unable to verify if business expenses had been properly deducted from the company's gross earnings he relied upon. . . . A simple mathematical calculation did not substantiate the weekly draw testified to ($198,873/52 weeks=$3,824.48), leaving the Court to question his testimony on this issue. On the other hand, the Court does not find [Universal's] calculation to represent his correct earnings either. The only consistent figure, to some extent, that the Court found came from the pleadings. His first two Petitions alleged

> a weekly wage of $1,300.00 and the Third Amended Petition alleged the more specific number of $1,399.45. Accepting the allegations in the pleadings as true and not being sufficiently persuaded the amount is incorrect, the Court holds that [Bortolotti's] average weekly wage on June 13, 20l3, was $1,399.45.

(c) Discussion

An award of the compensation court may be modified if the findings of fact by the compensation court do not support the order or award.[18] We agree with the Court of Appeals that the compensation court erred in determining Bortolotti's average weekly wage was $1,399.45.

[3,4] No evidence supported this amount. Although one of Bortolotti's earlier petitions alleged this amount, Universal's answer denied that allegation. Thus, there was no admission derived from that pleading, and certainly no judicial admission.[19] An amended pleading supersedes the original pleading, whereupon the original pleading ceases to perform any office as a pleading.[20] Essentially, the allegation of $1,399.45 ceased to exist upon the filing of subsequent amended petitions. So when the compensation court found that "the Third Amended Petition alleged the more specific number of $1,399.45," it clearly erred for two reasons. First, the number came from the ineffective, superseded pleading. But there was a more fundamental flaw. The pleadings alone are not proof but mere allegations of what the parties expect the evidence to show.[21] Because the finding was based solely upon a pleading, which was not evidence, the finding had literally no evidence to support it. This finding was clearly wrong. Thus, the Court of

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[18] See *Martinez v. CMR Constr. & Roofing of Texas*, 302 Neb. 618, 924 N.W.2d 326 (2019).

[19] See *Cook v. Beermann*, 202 Neb. 447, 276 N.W.2d 84 (1979).

[20] *deNourie & Yost Homes v. Frost*, 295 Neb. 912, 893 N.W.2d 669 (2017).

[21] *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

Appeals was required to reverse or modify that portion of the award. We now review its determination.

In determining average weekly wage, neither the compensation court nor the Court of Appeals discussed any significance of Universal's status as a subchapter S corporation. The compensation court, citing *Hull v. Aetna Ins. Co.*,[22] stated merely that "[a] self-employed claimant's average weekly wage under Neb. Rev. Stat. § 48-121(2) shall be based upon the claimant's gross income less business expenses, i.e., net income." During oral arguments, counsel for the parties agreed that *Hull* does not apply here. The Court of Appeals recognized that Bortolotti was the sole shareholder and an employee of Universal, but its analysis did not mention the corporation's status as an S corporation.

Universal's status as an S corporation with Bortolotti as its sole shareholder is a complicating feature. "Subchapter S is a tax status designed to tax corporate income on a pass-through basis to shareholders of a small business corporation."[23] A subchapter S corporation is not taxed on its earnings; rather, the income, expenses, and other tax items "'"pass through"'" and are taxable to or deductible by shareholders.[24] In a child support case, after recognizing that income for the purpose of child support is not synonymous with taxable income, we stated that the owner of a wholly owned S corporation is self-employed within the meaning of the child support guidelines.[25] But for tax purposes, self-employed individuals and S corporation shareholders are treated differently.

Whether the profits of an S corporation should be included as wages in determining average weekly wage is an issue of first impression in Nebraska. A treatise on workers' compensation law does not provide clear guidance:

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[22] *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

[23] *Gase v. Gase*, 266 Neb. 975, 983, 671 N.W.2d 223, 230 (2003).

[24] *Id.*

[25] See *Gase v. Gase, supra* note 23.

> Generally, profits from a business, whether commercial or farm, are not considered as wages for purposes of establishing average wage. But close questions have arisen in connection with corporate officers, who may also be stockholders, whose remuneration is not fixed but depends to some extent on the fortunes of the business. One court has held that the employee's share of profits was not the correct measure, but that the test should be the wage of another employee performing similar duties.[26]

A different resource states:

> If a corporate officer or stockholder is a wage-earning corporate employee, and the wages reflect services rendered, presumably the wages paid would normally constitute the basis for computing workers' compensation benefits. It has been said that where an officer of a corporation is injured while performing the duties of an ordinary employee, compensation for the injury must be based on wages received by him in the capacity of such employee. . . .
>
> . . . A stockholder's share in the corporate profits cannot be deemed wages for workers' compensation purposes.[27]

Legal commentators agree that profits from the injured worker's own business enterprise are not considered in determining the average wage unless they are almost entirely the direct result of the worker's personal management and endeavor.[28]

Decisions from other jurisdictions provide some insight. In a case where an injured employee and three others each held a 25-percent interest in a closely held corporation and the injured employee received no wages from the company, the Tennessee

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[26] 8 Arthur Larson et al., Larson's Workers' Compensation Law § 93.01[2][e] at 93-26 to 93-27 (2017).

[27] 2 John P. Ludington et al., Modern Workers Compensation § 201:15 at 25-26 (Matthew J. Canavan & Donna T. Rogers eds., 1993).

[28] See, 82 Am. Jur. 2d *Workers' Compensation* § 411 (2013); 100 C.J.S. *Workers' Compensation* § 592 (2013).

Supreme Court reasoned that the employee's earnings should be based on the compensation paid by the same company to another employee performing the same or similar duties.[29] A Virginia appellate court held that profits from a sole proprietorship or a wholly owned S corporation were not earnings that could be used to calculate the average weekly wage.[30] In a New York case where the claimant was the owner, president, and sole shareholder of an S corporation and also performed work as a mechanic, the court affirmed a determination that the claimant's average weekly wage was $500 per week based on payroll entries indicating those weekly payments.[31]

In a Pennsylvania workers' compensation case,[32] the commonwealth court considered what the term "wage" meant in the context of an injured worker's dual role as employee and as president and sole owner of an S corporate employer. Viewing the controversy as an issue of fact, the court stated that substantial evidence supported the findings below: that the net of the worker's $96,000 salary and the corporation's $66,472 net loss represented the worker's earnings from the business. The court observed that "[i]n several cases, the compensation authorities and appellate courts have treated the determination of an employee's average weekly wage as a factual issue, subject to review for support by substantial evidence."[33] And its discussion of two earlier cases showed that the result was driven by the substantial evidence standard. In one case,[34] the claimant was the sole proprietor of a home repair business and it was determined that gross income rather than net profit was a more accurate reflection of the claimant's earnings. In the

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[29] *P & L Const. Co., Inc. v. Lankford*, 559 S.W.2d 793 (Tenn. 1978).

[30] *Smith v. Robert W. Smith*, 32 Va. App. 242, 527 S.E.2d 463 (2000).

[31] *Joyce v. European Auto Service*, 226 A.D.2d 952, 641 N.Y.S.2d 175 (1996).

[32] *Mullen v. W.C.A.B. (Mullen's Truck)*, 945 A.2d 813 (Pa. Commw. 2008).

[33] *Id.* at 818.

[34] *Moore v. W.C.A.B.*, 539 Pa. 333, 652 A.2d 802 (1995).

other case,[35] the claimant was both an employee and an owner of a small corporation and compensation authorities declined to rely on corporate income in determining average weekly wage. The court explicitly recognized that "[a] decision as to whether a claimant's gross income or net income most accurately reflects earnings is a question of fact for the [workers' compensation judge]."[36]

An Illinois case relied in part on a state statute defining average weekly wage to mean actual earnings.[37] In that case, an employee sustained an injury while working as a refuse scavenger for a village. While working for the village, the employee was also the president and sole shareholder of a landscaping business, which was an S corporation. The employee received no wages from the corporation but did receive income in the form of net profits. The arbitrator did not include such net profits, stating that salary, wages, or earnings had never been liberally construed to include net profits. It found that the employee's earnings during the period of the injury were $22,679.80 and that his average weekly wage was $436.15. Both parties appealed to an industrial commission, which affirmed the judgment as modified. On further appeal, the employee argued that the commission erred in failing to include the income generated by his landscaping business in calculating his average weekly wage. The appellate court held: "[A] claimant's business income should not be included in the calculation of average weekly wage. We would be legislating from the bench if we were to hold that 'actual earnings' should be construed to include net profit."[38]

[5,6] Of course, fundamentally, this is a question of statutory interpretation. Two principles govern. First, statutory

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[35] *Bi-Thor Elec., Inc. v. W.C.A.B.*, 702 A.2d 1145 (Pa. Commw. 1997).

[36] *Mullen v. W.C.A.B. (Mullen's Truck), supra* note 32, 945 A.2d at 819.

[37] *Paoletti v. Industrial Com'n*, 279 Ill. App. 3d 988, 665 N.E.2d 507, 216 Ill. Dec. 447 (1996).

[38] *Id.* at 996, 665 N.E.2d at 512, 216 Ill. Dec. at 452.

language is to be given its plain and ordinary meaning.[39] Second, the Nebraska Workers' Compensation Act should be construed liberally to carry out its spirit and beneficent purposes.[40]

Thus, we turn to our statutory definition of "wages." Neb. Rev. Stat. § 48-126 (Reissue 2010) provides in relevant part:

> Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. . . . In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, his or her weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer, except as provided in sections 48-121 and 48-122. The calculation shall also be made with reference to the average earnings for a working day of ordinary length and exclusive of earnings from overtime, except that if the insurance company's policy of insurance provides for the collection of a premium based upon such overtime, then such overtime shall become a part of the basis of determining compensation benefits.

Like the conclusion reached by the Illinois court, we cannot read "wages" in § 48-126 to include net profit for an employee of an S corporation.

Bortolotti asks us to find, as the compensation court did, that he was entitled to the statutory maximum weekly income benefit[41] of $728. He directs us to the Schedule E showing

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[39] *Christine W. v. Trevor W.*, 303 Neb. 245, 928 N.W.2d 398 (2019).

[40] *Krause v. Five Star Quality Care*, 301 Neb. 612, 919 N.W.2d 514 (2018).

[41] See § 48-121.01(1)(b) and Neb. Rev. Stat. § 48-121.02 (Reissue 2010).

"Qualified production activities income" of $186,783 and to his testimony that he took a weekly draw from the corporation of $3,625 and that his tax return showed a net income for Universal of $198,873. We note that the compensation court did not accept this evidence. The court stated that it was unable to verify if business expenses had been properly deducted from the company's gross earnings due to the absence of tax returns in the record. It also specifically "question[ed]" Bortolotti's testimony regarding his weekly draw.

The compensation court also rejected evidence that Bortolotti's earnings for 2013 were $3,950. It stated that it did "not find [Universal's] calculation to represent [Bortolotti's] correct earnings" and that it did "not believe that [Bortolotti] only earned $3,950.00 in 2013." This disbelief is understandable. After all, he was the president and sole shareholder of a company that appeared to be profitable.

[7-9] Net profits or net income of a subchapter S corporation do not necessarily qualify as "wages" under § 48-126. This statute requires us to focus on the "money rate at which the service rendered is recompensed."[42] Where both the corporation and the shareholder-employee expressly treat payments as wages for all purposes, including for purposes of income and employment taxes, the evidence may be clear. But, as we have explained, "wages" under § 48-126 do not include payments received solely because of the recipient's status as an S corporation shareholder. Rather, "wages" under § 48-126 are compensation for the recipient's activities as a corporate employee. The determination of "wages" under § 48-126 for an employee-shareholder of a subchapter S corporation is a fact-specific inquiry.

Two of our prior decisions provide only limited guidance. In *Bituminous Casualty Corp. v. Deyle*,[43] the claimant was the president, general manager, and majority stockholder of a

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[42] § 48-126.

[43] *Bituminous Casualty Corp. v. Deyle*, 225 Neb. 82, 402 N.W.2d 859 (1987).

construction company. The claimant received no cash wages or bonus from the company, but he kept profits from buying properties constructed by the company at cost and reselling or leasing them. The claimant did not report those profits as income, and the company did not report the benefits as salary paid to the claimant. We determined that no "wages" were paid and that thus, the claimant was not entitled to receive any compensation other than the payment of his medical bills. On the other hand, in *Hull v. Aetna Ins. Co.*,[44] we stated that a self-employed claimant's average weekly wage should be based on net income. We subsequently affirmed a review panel's determination that the self-employed individual's average weekly wage was $123.44, based on net business income of $6,419.[45] This precedent does not permit us to articulate any bright-line rule regarding an employee-shareholder of a subchapter S corporation.

Competent evidence in the record supports the Court of Appeals' determination of average weekly wage. The Court of Appeals determined Bortolotti's average weekly wage to be $49—the minimum weekly income benefit provided by statute[46]—based on Universal's evidence that Bortolotti earned $3,950 in wages in 2013. That amount is supported by the record—the Schedule E from Bortolotti's 2013 tax return showed wages of $3,950, which was the same amount of total payments to Bortolotti shown on Universal's payroll journal for 2013. As the parties recognized, Bortolotti had the burden to establish his average weekly wage from this S corporation. Thus, he was required to provide evidence differentiating his wages as a corporate employee from his profits as a corporate shareholder. He failed to do so, and Universal presented competent evidence respecting this distinction. We affirm

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[44] *Hull v. Aetna Ins. Co., supra* note 22.

[45] See *Hull v. Aetna Ins. Co., supra* note 9.

[46] § 48-121.01(2).

the Court of Appeals' determination that Bortolotti's average weekly wage benefit was $49.

2. Out-of-Pocket Medical Expenses

(a) Standard of Review

[10] When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.[47]

[11] On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[48]

(b) Additional Facts

Exhibit 41, offered by Bortolotti, was a one-page exhibit which listed the date, provider, cost, and payer of various medical bills. The court received the exhibit into evidence without objection. During trial, the following colloquy occurred between Bortolotti and his counsel:

> Q. All right. Now, have you then put together in Exhibit 41 the monies that have been made paid to [a doctor's] office by Columbia Insurance, the bills that have been paid by United Health and then the bills that have been paid by you for your left shoulder injury?
>
> A. Yes.
>
> Q. And so you've paid, according to this, $9,849.38?
>
> A. Yes.

Universal did not inquire about these out-of-pocket expenses on cross-examination.

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[47] See *Krause v. Five Star Quality Care, supra* note 40.

[48] *Id.*

The compensation court stated that "Although offered [Bortolotti's] own itemization of claimed expenses and summaries of payments made by third parties . . . , the Court finds it is unable to use these for entering an award in favor of [Bortolotti] as to the payment of medical expenses." The court cited Workers' Comp. Ct. R. of Proc. 10 (2018), which called for itemized bills. The court's award stated: "[Bortolotti] testified that he personally paid $9,849.38 for his medical expenses, which was itemized in greater detail in Exhibit 41. He should be reimbursed by [Universal] for his out-of-pocket expenses."

The Court of Appeals reasoned that because the compensation court rejected exhibit 41 and Bortolotti "based his answer 'according to' exhibit 41," the compensation court had no basis to make the award of out-of-pocket medical expenses.[49]

(c) Discussion

The premise of the Court of Appeals' conclusion is that the second question posed to Bortolotti was based solely on exhibit 41. We disagree.

On this issue, the appellate court failed to apply the deferential standard of review, which required it to view the testimony most favorably to Bortolotti and to give him the benefit of every inference reasonably deducible from the evidence. The colloquy between Bortolotti and his counsel showed that Bortolotti "put together" exhibit 41, which raised an inference that he had personal knowledge of the amounts shown thereon. In other words, the second question and answer must be viewed deferentially in the context of the preceding question and answer.

The compensation court relied on Bortolotti's testimony in finding that he paid $9,849.38 in out-of-pocket medical expenses. Viewing that testimony most favorably to Bortolotti and giving him the benefit of every reasonable inference, the

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[49] *Bortolotti v. Universal Terrazzo and Tile Co., supra* note 1 at *8.

compensation court's factual finding was not clearly wrong. Accordingly, the Court of Appeals erred in disturbing the compensation court's award of out-of-pocket expenses.

VI. CONCLUSION

The compensation court's average weekly wage determination, based on an allegation in an inoperative pleading, was clearly wrong. Because the Court of Appeals' determination of average weekly wage was supported by competent evidence in the record, we affirm that determination.

The compensation court was not clearly wrong in finding that Bortolotti paid $9,849.38 in out-of-pocket medical expenses. We reverse the decision of the Court of Appeals in part and remand the matter with direction to affirm the compensation court's award of out-of-pocket medical expenses.

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

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

In re Interest of Donald B. and Devin B., children under 18 years of age. State of Nebraska, appellee, v. Candice I., appellant.

933 N.W.2d 864

Filed October 11, 2019. No. S-18-675.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Parental Rights: Proof.** In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 2016) exists and that termination is in the children's best interests.
3. **Parental Rights: Juvenile Courts: Pleadings.** In a termination proceeding, pursuant to Neb. Rev. Stat. § 43-247(6) (Reissue 2016), a court may accept an in-court admission from a parent as to all or part of the allegations in the petition.
4. **Pleas: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
5. **Parental Rights: Proof.** When a parent admits to the State's allegations regarding the statutory ground for termination of parental rights and that termination is in the children's best interests, the State does not have to prove those allegations by clear and convincing evidence.
6. **Parental Rights: Juvenile Courts: Pleadings.** Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is

in reference to a time period before or after the filing of the termination petition.

7. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
8. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Arterburn, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, Chad M. Brown, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

John J. Ekeh, of Ekeh Law Office, for appellant.

Donald W. Kleine, Douglas County Attorney, Natalie Killion, and Jennifer Chrystal-Clark for appellee.

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

Cassel, J.

I. INTRODUCTION

Candice I. petitions for further review of the Nebraska Court of Appeals' decision affirming the termination of her parental rights to one of her minor children based upon her admissions and the State's factual basis presented at the termination hearing. Upon a de novo review of the record, the indistinguishable progress made by Candice with both children does not support a sufficient factual basis that termination of her parental rights was in only one child's best interests. Accordingly, we reverse, and remand with directions.

II. BACKGROUND

Candice is the natural mother of Donald B., born in 2003, and Devin B., born in 2004. In 2015, the juvenile court

adjudicated that both children shall be under the temporary custody of the Department of Health and Human Services (DHHS). Since the adjudication, the children have remained in the custody of DHHS.

1. Hearing on Termination of Parental Rights to Devin

In January 2018, the State filed its third motion to terminate Candice's parental rights to both Donald and Devin. Six months later, the juvenile court held a hearing on the motion.

Pursuant to a "plea deal" announced at the hearing, Candice admitted to count I (Devin was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016)), count II (Candice failed to comply with several court-ordered rehabilitation plans), count IV (Devin came within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 2016)), count IX (terminating Candice's parental rights was in Devin's best interests), and count X (reasonable efforts under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2018) were not required due to abandonment). And in return, the State dismissed all the allegations as to Donald and the remaining allegations as to Devin. As a condition of the "plea deal," the State represented that Candice's admissions would be treated as a "voluntary relinquishment."

During the termination and permanency hearing, the court recited the allegations contained in the third motion to terminate parental rights. Before and after the recitation, the court conducted a colloquy with Candice to advise her of the rights that she would be waiving. Candice then admitted to the allegations.

After Candice's admissions, the State set forth a factual basis for the plea, and we summarize its recitation. It stated it would show that Devin was removed from his parental care in 2015. As part of the removal, the court entered several orders. Candice failed to comply with the orders to reunify with Devin. Prior to filing the motion for termination, she did not have contact with Devin for 2 years. And other case

professionals would testify to the lack of contact between Candice and Devin. Devin's caseworker would testify that she made efforts to engage Candice in reunification. Based upon the caseworker's education, training, and experience with the family, she would testify that it was in Devin's best interests to terminate Candice's parental rights.

Based upon Candice's admissions and the factual basis recited by the State, the juvenile court made several findings. Pursuant to count III, the court took judicial notice of its own record and orders in the case. It found that (1) there was a factual basis for the counts; (2) the admissions to the motion were true by clear and convincing evidence; (3) the plea was knowingly, intelligently, and understandingly made; and (4) it was in Devin's best interests to terminate Candice's parental rights. It terminated Candice's parental rights and found that "this is to be treated as a voluntary relinquishment to this Court and it cannot be used for any further filings or proceedings by the county attorney or any other party." The hearing continued with respect to Donald's status, during which evidence was considered. We will return to that evidence later.

2. Court of Appeals' Decision

Candice timely appealed and challenged the termination of her parental rights.[1] She assigned that the court lacked authority to accept her admissions as a voluntary relinquishment. Additionally, she assigned that the court erred in terminating her parental rights to Devin.

The Court of Appeals reasoned that the juvenile court was empowered to accept Candice's admissions and to rely on the admissions when terminating her parental rights. It disregarded the cases she discussed about relinquishment of parental rights, because, it said, those cases were concerned about a juvenile court's authority to order DHHS to accept a voluntary relinquishment from a parent.

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[1] *In re Interest of Donald B. & Devin B.*, 27 Neb. App. 126, 927 N.W.2d 67 (2019).

It also reasoned that based on Candice's admission that termination was in Devin's best interests, her acquiescence to the factual basis, and her reunification efforts with Donald, there was sufficient evidence to terminate her parental rights to Devin. It emphasized that "[t]he record shows that although Candice ceased having contact with Devin more than 2 years prior to the State's filing the third petition for termination of parental rights, she was maintaining contact with Donald."[2] It concluded that based on the record, it could find no basis to set aside the parties' agreement when the plea was entered into knowingly, voluntarily, and intelligently. It affirmed the termination of Candice's parental rights to Devin.

Candice timely petitioned for further review, which we granted.[3]

III. ASSIGNMENTS OF ERROR

Candice assigns that the Court of Appeals (1) erred in failing to make a proper de novo review when "it disregarded evidence that the [j]uvenile [c]ourt erred in terminating [her parental] rights" and (2) erred in affirming the juvenile court's decision to accept her admissions as a voluntary relinquishment of her parental rights to Devin.

IV. STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[4]

V. ANALYSIS

1. Termination of Parental Rights

(a) Candice's Arguments

In her petition for further review, Candice argues that if she is a fit parent to strive for reunification with Donald, then the

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[2] *Id.* at 133-34, 927 N.W.2d at 73.

[3] See Neb. Ct. R. App. P. § 2-102(F) (rev. 2015).

[4] *In re Interest of Michael N.*, 302 Neb. 652, 925 N.W.2d 51 (2019).

same must be true with Devin. She analogizes her case to *In re Interest of Xavier H.*,[5] where the facts were insufficient to show that the mother was an unfit parent to her child in DHHS custody, when she was a fit parent to the other children in her care. Candice contends that the court should not have accepted an agreement that makes a parent choose between her children. She asserts that the "plea deal" was suggestive she prefers one child over another and that thus, she "had to choose between giving up her rights of one child over the other."[6]

(b) Statutory Grounds for Termination

[2,3] In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the children's best interests.[7] In a termination proceeding, pursuant to § 43-247(6), a court may accept an in-court admission from a parent as to all or part of the allegations in the petition.[8] Here, the juvenile court had authority to accept the in-court admissions during the termination proceeding pursuant to § 43-247(6).

[4] When a parent, pursuant to § 43-279.01(3), admits to allegations in a termination proceeding, we have characterized it as a judicial admission.[9] A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.[10]

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[5] *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[6] Brief for appellant in support of petition for further review at 2.

[7] *In re Interest of Joseph S. et al.*, 291 Neb. 953, 870 N.W.2d 141 (2015).

[8] See Neb. Rev. Stat. § 43-279.01 (Reissue 2016).

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

[10] *Id*. See, also, *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015).

[5] When a parent admits to the State's allegations regarding the statutory ground for termination of parental rights and that termination is in the children's best interests, the State does not have to prove those allegations by clear and convincing evidence.[11] Regarding a factual basis, § 43-279.01(3) requires only that "[t]he court shall ascertain a factual basis for an admission . . . ." "The statute does not specify precisely what the factual basis must entail."[12]

Because Candice admitted to the allegations in the motion to terminate, the State did not have to prove them by clear and convincing evidence. It was only required to set forth a factual basis. We must examine whether the factual basis was sufficient to support the admissions. Here, we have an unusual series of events, where a factual basis, apparently sufficient on its face, is undermined by evidence presented during the hearing.

(c) Best Interests of Child

[6] We first address the factual basis to support Devin's best interests. Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is in reference to a time period before or after the filing of the termination petition.[13] While statutory grounds for termination are based on past conduct, the best interests element focuses on future well-being of the child and should not be seen through a microscope, but a telescope.[14]

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[11] *In re Interest of Brooklyn T. & Charlotte T.*, 26 Neb. App. 669, 922 N.W.2d 240 (2018).

[12] *In re Interest of Zanaya W. et al., supra* note 10, 291 Neb. at 28, 863 N.W.2d at 810.

[13] See *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013).

[14] See 4 Christine P. Costanakos, Nebraska Practice, Juvenile Court Law and Practice § 5:14 (2018).

(i) Additional Facts

[7] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[15] We will consider all the evidence presented at the hearing which is relevant to Devin's best interests. Additional evidence relevant to our analysis was presented during the second half of the termination hearing, when the court conducted a permanency hearing for Donald.

In the State's factual basis, it specifically stated that Devin's caseworker would testify that "it was in the best interest due to the length of time that [Candice and Devin] did not have contact, as well as the lack of progress being made."

During the permanency hearing, the State entered several exhibits, including the DHHS court report signed 3 days before the hearing. In an update from December 2017, the DHHS court report stated that Candice had been meeting with the caseworker and that Candice "[had] not started visiting with the boys yet as there are concerns with her visiting them when she has been out of the picture for 2 years now. Therapeutic visits are looking into being set up." In February 2018, Candice began weekly therapy with Donald and therapy every other week with Devin. Since that time, Candice had consistently participated in therapy with the children.

In the DHHS court report, it recommended that the court adopt the case plan and court report. DHHS stated that in regard to Donald and Devin, "[f]air progress is being made to alleviate the causes of out-of-home placement." It further stated that "[t]he primary permanency plan of Reunification is being achieved by [December 2018]." It recommended that the court adopt a permanency objective of reunification concurrent with adoption for both Donald and Devin.

During the permanency hearing, the parties discussed the improvements in Candice's life. Candice was employed and

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[15] *Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018).

had a one-bedroom home. And all of her drug tests had come back negative. Additionally, she purchased "shoes, clothes, a phone, and [gave] the boys money . . . to assist with their care."

The court remarked that it was "impressed with where [she was] today" and how she "kind of def[ied] odds here." The juvenile court ordered a permanency objective of reunification concurrent with guardianship for Donald. It further ordered that Candice shall have supervised visitation with Donald.

(ii) Case Law

In *In re Interest of Zanaya W. et al.*,[16] the father admitted to the statutory ground for termination and that termination was in the children's best interests. The juvenile court relied upon the State's factual basis. The father was convicted of possession with intent to distribute marijuana and sentenced to 3 to 5 years' imprisonment. While incarcerated, he was convicted of third degree assault and sentenced to an additional 120 days' imprisonment. The father had admitted he used marijuana on a daily basis when the children were in his care, custody, and control. The caseworker would testify that termination was in the children's best interests, "because [the father] was not able to provide permanency for them."[17]

On appeal, the father asserted that the court relied extensively on his incarceration and that thus, the factual basis was insufficient. We discussed that the factual basis did not rely solely on incarceration. We reasoned that the juvenile court relied on the crimes committed, length of incarceration, prior drug use, length of time the children were in DHHS custody, and prospective testimony to find that the factual basis supported termination. We affirmed the termination of the father's parental rights.

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[16] *In re Interest of Zanaya W. et al., supra* note 10.

[17] *Id.* at 30, 863 N.W.2d at 811.

In *In re Interest of Brooklyn T. & Charlotte T.*,[18] the mother challenged the sufficiency of the factual basis to support her admissions for termination of her parental rights to both children. The State's factual basis stated that the older child was removed from the mother's home a year prior to the petition for termination, the mother failed to follow through with court-ordered services, and she did not rectify her drug use when her younger child was born. Also, the State recited that the family permanency specialist would testify that termination would be in the children's best interests because of the mother's history with DHHS and the services provided but not utilized. The juvenile court terminated the mother's parental rights to both children.

The Court of Appeals there reasoned that the factual basis was sufficient to support both the statutory ground for termination and the best interests of the children. In its best interests analysis, it examined the additional evidence presented during the hearing. An exhibit contained an affidavit by the family permanency specialist stating that the mother had over 16 intakes with DHHS, the mother relinquished her parental rights to another child, and she used methamphetamine while pregnant with her younger child. The mother made no efforts to regain custody of the older child. She was discharged unsuccessfully from family support services, and she did not participate in court-ordered drug or psychological evaluations. It reasoned that because of her history with DHHS and her failure to address the initial concerns that led to the children's removal, there was a sufficient factual basis to support the best interests admission. The Court of Appeals affirmed the juvenile court's judgment. But there, the Court of Appeals was not presented with evidence contradicting the State's factual basis.

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[18] *In re Interest of Brooklyn T. & Charlotte T., supra* note 11.

(iii) Application

Although the State did not have to prove the admissions by clear and convincing evidence, we must examine whether there was a sufficient factual basis to support that it was in Devin's best interests to terminate Candice's parental rights. After a de novo review of the entire record, we conclude that there was not.

The record shows that Donald and Devin were identical in their relationship with Candice. In light of the record, the Court of Appeals' statement that Candice did not have contact with Devin but did maintain contact with Donald was not accurate. For 2 years prior to the motion to terminate, both children did not have contact with Candice. In February 2018, both children began therapy with Candice and continued regularly until the hearing. Candice provided the children with money, clothing, and shoes for their care. In the DHHS case report, it stated that "[f]air progress [was] being made" and that reunification was supposed to be achieved by December 2018. Unlike *In re Interest of Brooklyn T. & Charlotte T.*,[19] the additional evidence presented did not support the factual basis. The record failed to show a contrast in Candice's relationship with Donald and Devin to support that Devin's best interests favored termination while Donald's did not.

Further, the record shows Candice's progress toward reunification with both children. In addition to the facts discussed earlier, Candice successfully completed a substance abuse treatment program, she was attending therapy by herself and with each child, her drug tests were all negative, she had legal and steady income, and she had suitable housing. We cannot ignore the substantial progress made by Candice. And neither did the juvenile court when it remarked on how she "kind of def[ied] odds here." Unlike *In re Interest of Zanaya W. et al.*,[20] there

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[19] *Id.*

[20] *In re Interest of Zanaya W. et al., supra* note 10.

is little recent evidence to support a persistent lack of effort toward reunification by the parent. Candice's relationships with both children had progressed enough that the DHHS court report recommended reunification as the primary objective for both children. The record does not support the recitation that there was a "lack of progress being made" by Candice.

The children are so factually indistinguishable that the State could have interchanged the children's names and reached the same result. There was no evidence presented, either before or after the court terminated Candice's parental rights, that showed how or why the children differ in their relationship with Candice. Nor was there any evidence presented as to why Candice's rights to Devin were terminated but as to Donald they were not.

At oral argument, the State forthrightly explained that due to Donald's age, he would have to consent to an adoption, but that Devin was below the age requiring such consent. This reason was insufficient to establish that termination of parental rights was in the younger child's best interests. Although there are cases where termination is in the best interests of one sibling and not another,[21] this is not one of them.

Based upon our de novo review of the entire record, we conclude that the factual basis was insufficient to support that it was in Devin's best interests to terminate Candice's parental rights. Accordingly, the Court of Appeals erred in affirming the termination of Candice's parental rights to Devin.

2. Voluntary Relinquishment

Candice argues that the juvenile court erred in accepting her admissions as a voluntary relinquishment. The "plea deal" entered between the parties conditioned the termination of parental rights to be treated as a voluntary relinquishment. At oral argument, the State conceded that its representation of

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[21] See *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010).

the proceeding as a "relinquishment" would not be binding on the State in other counties. Nor, perhaps, might it bind a future county attorney in the same county.

[8] We think that the mixing of terminology in this way is fraught with danger. As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.[22] Under the adoption statutes, a voluntary relinquishment is effective when a parent executes a written instrument and DHHS or an agency, in writing, accepts responsibility for the child.[23] Under the Nebraska Juvenile Code, termination of parental rights is determined by judicial action.[24] Although the practical result may be similar, the mechanisms and effects of those procedures are different and should be treated so. We discourage the practice of characterizing termination and relinquishment interchangeably. The juvenile court should be careful to follow the statutory authority conferred upon it and not to confuse the proceedings by inaccurate or incomplete descriptions.

VI. CONCLUSION

We conclude that the factual basis was insufficient to support that termination of Candice's parental rights was in Devin's best interests. We reverse the decision of the Court of Appeals and remand the cause to that court with directions to reverse the judgment of the juvenile court and remand the cause to the juvenile court for further proceedings consistent with this opinion.

Reversed and remanded with directions.

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[22] *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010).

[23] See Neb. Rev. Stat. §§ 43-104(2) and 43-106.01 (Reissue 2016).

[24] See Neb. Rev. Stat. § 43-293 (Reissue 2016).

Nebraska Supreme Court
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State of Nebraska, appellee, v. Talon J. Lee, appellant.

934 N.W.2d 145

Filed October 11, 2019. No. S-18-702.

1. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on the admissibility of a defendant's other crimes or bad acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), or under the inextricably intertwined exception to the rule.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
3. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
4. **Effectiveness of Counsel: Appeal and Error.** 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. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
6. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
7. **Rules of Evidence: Other Acts.** Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, 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, or is necessary for the prosecution to present a coherent picture of the charged crime.

8. ____: ____. The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of other conduct that forms an integral part of the crime charged is not rendered inadmissible under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016), merely because the acts are criminal in their own right, but have not been charged.
9. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
10. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
11. ____: ____. Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
12. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory guidelines, the sentence will be disturbed by an appellate court only when an abuse of discretion is shown.
13. **Judgments: Words and Phrases.** 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.
14. **Sentences.** 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: 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.
16. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.

17. ____: ____. To show deficient performance in a claim of ineffective assistance of counsel, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
18. ____: ____. To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
19. **Effectiveness of Counsel: Records.** Trial counsel cannot be ineffective for failing to do that which the record affirmatively establishes was done.
20. **Hearsay.** Statements are not hearsay if they are offered to show the effect on the listener.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Stephen P. Kraft for appellant.

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

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

Freudenberg, J.

I. NATURE OF CASE

Defendant was charged with two counts of sexual assault of a child in the first degree, one count of attempted sexual assault of a child in the first degree, one count of sexual assault of a child in the third degree, and one count of incest with a victim age 17 or under. After trial, a jury found defendant guilty and convicted him on all charges. The district court sentenced him to an aggregate period of 100 years' to life imprisonment, plus an additional imprisonment term of 32 to 73 years. Defendant appeals his convictions and sentences. On appeal, defendant assigns a number of evidentiary errors, including errors involving Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016) (Rule 403); Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016) (Rule 404); and Neb. Evid.

R. 412, Neb. Rev. Stat. § 27-412 (Reissue 2016) (Rule 412). Defendant also alleges that the district court inappropriately instructed the jury regarding venue in this case. We affirm the decision of the district court.

II. FACTS

1. Charges

On September 19, 2017, the State of Nebraska charged Talon J. Lee with two counts of sexual assault of a child in the first degree, a Class IB felony; one count of attempted sexual assault of a child in the first degree, a Class II felony; one count of sexual assault of a child in the third degree, a Class IIIA felony; and one count of incest with a victim age 17 or under, a Class IIA felony. The charges arose from reports of Lee's sexual abuse against R.W., Lee's 10-year-old daughter, and another girl, M.B., who was 9 to 10 years old at the time of the alleged abuse. Lee pled not guilty to the State's charges, and the case proceeded to trial.

2. Motion in Limine

Prior to trial, the State made a motion in limine seeking to admit at trial evidence of a sexual assault of R.W. that occurred in Iowa shortly after the incidents of sexual assault of R.W. and M.B. being charged in this case. Specifically, the State wished to introduce at trial witness testimony as to R.W.'s statements that Lee sexually penetrated her, made her "play with his private part," and showed her pornographic videos at Lee's Iowa home approximately 3 months after the incidents occurring in Nebraska. The State's motion alleged that this evidence was relevant and admissible because it was inextricably intertwined with Lee's current charges and, thus, not subject to Rule 404. Alternatively, the State alleged the testimony was admissible under Rule 404(2) and Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Reissue 2016) (Rule 414). The State withdrew its argument regarding Rule 414, however, prior to the hearing. The defense claimed that the Iowa incident should be excluded because, unlike other incidents

found to be admissible under our case law as inextricably intertwined, the Iowa assault was not one continuous chain of events. Further, defense counsel pointed out that according to R.W.'s allegations, the incident in Iowa was the last incident to occur. So, according to the defense, the Iowa incident formed no part of the factual setting of the Nebraska charges and was not inextricably intertwined.

The district court granted the State's motion, ultimately entering two orders on the matter. In its first order, entered March 19, 2018, the court found that the Iowa incident was relevant and material to the State's charges. As such, the district court concluded that the evidence related to the Iowa incident was inextricably intertwined to the State's charges. In the alternative, the district court concluded that the evidence of the Iowa incident was admissible under Rule 414.

Subsequently, the district court entered a second order nunc pro tunc to its previous order, where it removed its analysis and conclusion relating to Rule 414, but reaffirmed its finding that the evidence was inextricably intertwined. In doing so, the district court stated:

> [T]he evidence of sexual abuse in Council Bluffs[,] Iowa is inextricably intertwined with the other allegations of sexual abuse [Lee] perpetrated on his daughter over the period of time alleged by the State and is so blended or connected to the charged crimes that it will be necessary to show a complete and coherent picture of this relationship.

3. Lee's Rule 412 Motion

Lee filed a pretrial motion to obtain permission to adduce testimony about R.W.'s having been sexually abused in the past by her biological brother. According to Lee's motion, this evidence was relevant to show that someone other than the accused was the "source of injury" to R.W. Lee's motion alleged that such evidence was admissible under Rule 412 and that the exclusion of such evidence would "violate [his] constitutional rights."

At the hearing on Lee's Rule 412 motion, Lee asserted that during the investigation in this case, R.W. disclosed that she was sexually abused by her brother at some point around 2016, when she was approximately 10 years old. R.W. reportedly indicated that her brother tried to penetrate her with his penis in the same way that Lee did. Lee acknowledged that R.W.'s brother had not been adjudicated of the allegations, but noted that there was a juvenile proceeding pending against him pertaining to these allegations.

Lee argued that this alleged prior sexual assault of R.W. was relevant to show how R.W. had a "prior source of sexual knowledge." In other words, Lee explained, the jury would likely be wondering how R.W., as a 10-year-old child, could possess the type of sexual knowledge she has if she was not sexually abused by Lee. The fact she has been sexually abused by her brother in the past would show why she has such knowledge and that it came from a source other than Lee.

The State disagreed and argued that this evidence was inadmissible and improper because it would lead to a credibility debate regarding R.W.'s allegations in the separate and unrelated matter, which would create "a trial within a trial." Based on this, the State argued that any probative value of the incident would be outweighed by the danger of unfair prejudice.

The district court denied Lee's motion and ruled that the evidence at issue was inadmissible. The district court entered a written order on the matter, which concluded:

> There is no evidence the acts of [R.W.'s brother] have any relevance to the sexual assault committed by [Lee] or that the sexual behavior of R.W. incident to being assaulted by [her brother] in any way contributed to any physical injury of R.W. The court does not find the same to be relevant nor material to the charges against [Lee] nor would exclusion of this evidence violate the constitutional rights of [Lee].

4. Trial

At trial, the State elicited testimony from both victims; the victims' mothers; several members of law enforcement from both Omaha, Nebraska, and Iowa; and a physician who examined R.W. The State also called witnesses employed by Project Harmony, a child advocacy center that serves children when there have been allegations of abuse, who were involved in the investigation. The Project Harmony employees included a pediatric nurse who examined and interviewed R.W. and M.B. and a forensic interviewer who examined and interviewed R.W. and M.B. The defense offered testimony from Lee's wife, Nikisha Lee.

(a) Incidents

Testimony from R.W., M.B., and the victims' mothers established the following facts.

From the fall of 2016 to the spring of 2017, Lee was living with Nikisha in Council Bluffs, Iowa. R.W. lived with Lee and Nikisha in November and December 2016. Aside from those 2 months, R.W. lived in Omaha with her mother.

The victims' mothers testified that they knew each other because they both have children with Lee. Lee fathered at least one of M.B.'s siblings. R.W. would often spend time with M.B. and her siblings. Lee would occasionally watch R.W. and M.B. when he was in Omaha, which is when the alleged incidents occurred. Lee was 29 years old at the time of the alleged incidents.

After R.W. moved back to Omaha to live with her mother, R.W. and her mother stayed for a few weeks with one of R.W.'s mother's friends, Jasmine Kelly. One night at approximately 5 p.m., while they were staying with Kelly, Lee arrived unannounced and took R.W. to a store. When Lee and R.W. were leaving for the store, R.W.'s mother also left to run an errand. R.W.'s mother testified that this errand took about 30 to 45 minutes. When she returned to Kelly's house, Lee and R.W. were still gone. R.W.'s mother testified that she called Lee to find out where they were, because it was a school night and

R.W. needed to get home. Lee responded that they were "down the street" and would be home soon. As more time passed and Lee and R.W. still were not home, R.W.'s mother continued to call Lee. R.W.'s mother testified that she called Lee roughly 50 times that night and that Lee answered only a couple of those calls. Lee eventually brought R.W. home around midnight.

R.W. testified that after she and Lee left Kelly's house that night, Lee drove her to a "dark place" where there was a building with gates and a "bunch of trees." Lee parked the car and asked R.W., "Can you do me a favor?" R.W. agreed, and Lee proceeded to suck on her finger and say "'no teeth.'" Lee then asked her to suck his "private part" and told her he would take her to the store afterward. Lee put his "private part" in her mouth, and she sucked on it until "[s]ome stuff" went into her mouth, which she said tasted "[n]asty." R.W. testified that her mother called Lee's cell phone several times but Lee told her not to answer it, so she did not. Lee also told her not to tell anyone about what happened. He took her to the store and eventually back to Kelly's house. R.W. testified that she did not tell anyone what happened when she got back to Kelly's home, because she was scared.

R.W. testified that another incident of abuse occurred when she was having a sleepover with M.B. at M.B.'s house. R.W. and M.B. woke up when they heard a deep voice downstairs. The girls went downstairs and learned that the voice was Lee's. R.W. and M.B. then sat on the couch and started playing "Truth or Dare." Eventually, Lee sat between them and told the girls that they were going to play "Dirty Truth or Dare."

R.W. testified that Lee made M.B. do the first dare and told her to suck his "private part" and said, "[Y]ou got to wake him up," referring to his penis as "him." Lee told M.B. to "play with it" to "wake it up," and she complied. Lee told her to suck it, and it "got bigger in her mouth." Then, according to R.W., while M.B. was sucking on Lee's penis, Lee told R.W. to pick a dare, which she did, and he "made me play with it while she was sucking it." Lee then had R.W. and M.B. take

turns sucking it. R.W. testified that as this was going on, Lee also played a video on his cell phone of "[a] girl sucking a boy private part."

M.B., through her testimony, confirmed that she and R.W. played a game of "Dirty Truth or Dare" with Lee in her basement the morning after R.W. spent the night. She testified that when she or R.W. would pick a dare, he would ask them to suck his "private part" or to lick each other's "boobs," but that they said no. Then, he asked R.W. "to let him finger her," but R.W. again said no. M.B. said she and R.W. went upstairs for a while. When they came back downstairs, Lee was on his cell phone "watching porn," which she described as girls with no clothes touching each other and doing "nasty things." Then, according to M.B., Lee pulled R.W. over next to him and told R.W. to "lick his private part," which R.W. did. M.B. stated that Lee then made M.B. move her hand up and down on his penis. M.B. testified that Lee also asked her to suck his penis but that she said no.

R.W. and M.B. testified that on another day at M.B.'s house, they played "Hide and Seek" with Lee. When Lee found where R.W. and M.B. were hiding, he told them to kiss each other. Lee wanted them to kiss on the lips or to put their tongues in each other's mouths, but they kissed on the cheek instead. R.W. testified that Lee also made them strip down to their underwear and a tank top and that he touched both of them on the buttocks.

According to R.W. and M.B, on one of the same days that they played "Truth or Dare" or "Hide and Seek," Lee called R.W. and M.B. into M.B.'s mother's bedroom, where Lee was lying on the floor next to the bed. Lee asked the girls to "sit on his private part," which neither of them did. According to M.B., Lee then pulled R.W. toward him and had her sit on his stomach. R.W. testified that she thought Lee had his clothes on during this incident, but M.B. testified that he did not have any clothes on and recalled seeing his "private part" when this occurred.

R.W. testified about another incident, involving only R.W. and Lee, which occurred at Lee and Nikisha's house in Council Bluffs. R.W. testified that one day, when Nikisha was not home, Lee was lying on the bed in his bedroom and he called her into the room to ask for a "favor." They watched another pornographic video, and Lee asked R.W. to play with his penis. R.W. complied. R.W. testified that Lee told her to take off her pants, which she did. Lee then stood up behind her and put his penis inside her buttocks and vagina. R.W. testified that it hurt, so she told Lee she needed to go to the bathroom, where she noticed that she was bleeding from her anus. When she told Lee about it, he told her to get into the bathtub. R.W. testified that this incident in Council Bluffs was the last time Lee did anything to her, although on cross-examination, she gave differing responses on the timeline of the sexual assaults. Lee objected to the evidence about the Council Bluffs incident on Rule 404 grounds. Lee received a continuing objection on these grounds to the testimony relating to the incident in Council Bluffs.

R.W. testified that she did not initially tell anyone about any of these incidents, because Lee had told her and M.B. that he would "make up a bad lie" about them if they ever did so. Later that summer, however, in June 2017, R.W. decided to tell M.B.'s aunt about what Lee had been doing to her while she was at M.B.'s mother's house with M.B. M.B.'s aunt relayed this disclosure to M.B.'s mother, who, in turn, told R.W.'s mother.

R.W.'s mother testified that she got a call from M.B.'s mother on the night of June 22, 2017, while she was at work. R.W.'s mother immediately called R.W. and spoke with her about what she'd heard from M.B.'s mother. R.W.'s mother testified that when R.W. told her about the incident in Lee's car, it all "ma[de] sense," because she remembered "calling, calling, calling" Lee's cell phone on the night he took R.W. to the store. R.W.'s mother called M.B.'s mother again after that,

because, based on what R.W. told her, it appeared the abuse also involved M.B.

R.W.'s mother testified that she left work that night to take R.W. to an emergency room. She said that after the abuse was revealed, R.W. started acting out at school and getting into fights, and that she eventually got "kicked out of school."

On June 23, 2017, after speaking further with M.B., M.B.'s mother filed a police report regarding the sexual assault of M.B. M.B.'s mother testified that when she spoke with M.B. about what she had heard, M.B. started to cry and eventually told her things that had happened, which disclosure led to her decision to file a police report. M.B.'s mother confirmed that her house was in Omaha and said that she could recall three times that Lee came over to her house and watched the children in February and March 2017.

(b) Dr. Cynthia Hernandez

R.W. was seen at an emergency room in the early morning hours of June 23, 2017. The doctor who examined R.W., Dr. Cynthia Hernandez, testified that she spoke with R.W. about why she was there. R.W. told her that on one occasion, Lee put his penis in her mouth until "white stuff" came out, and that on another occasion, he put his penis in her vagina and anus, which caused her to bleed. Hernandez testified that R.W. told her that one of the incidents occurred about 1 month earlier and the other about 2 months earlier. When Hernandez examined R.W., she did not find any signs of physical injury and referred R.W. to Project Harmony for a more detailed examination. Hernandez explained that this was not surprising given how much time had passed since the incidents. Hernandez also testified that, in general, it is not uncommon in cases of sexual assault for there to be no physical signs of trauma. However, on cross-examination, Hernandez agreed that signs of internal injury, especially with anal penetration, could possibly be detected months after an assault had occurred.

(c) Law Enforcement

The State elicited testimony from several law enforcement officers who were involved in the joint investigation that was being conducted by the Omaha Police Department (OPD) and the Council Bluffs Police Department (CBPD).

Amber Kennedy, the lead detective for CBPD, testified that the date range for CBPD's investigation was January 1 to May 13, 2017. Kennedy described that Project Harmony had originally referred the case to CBPD. She had watched the video-recorded forensic interview and determined it contained evidence to show that a crime had been committed in Omaha and also in Council Bluffs. After reviewing all of the evidence, CBPD decided that OPD needed to be involved as well, because it appeared that their investigations would overlap. Kennedy testified that CBPD and OPD were aware of each other's investigations and maintained communication throughout the investigations, which ultimately led to Lee's arrest. Though it was asserted by Kennedy that charges have been filed in Iowa, there was no evidence presented of the charges and it was conceded that a trial had not occurred regarding the alleged incidents in Council Bluffs.

From OPD, the State examined Mark McKenna and Lisa Crouch. McKenna testified that he was the officer who took M.B.'s mother's report of the sexual abuse of M.B. McKenna confirmed that M.B.'s mother identified Lee in her report. Upon the filing of the report, McKenna forwarded the investigation to the child victim sexual assault unit.

Crouch testified that she was a detective in the special victims unit, specifically the child victim sexual assault unit. Crouch testified that the date range of their investigation was January to March 2017. She stated that her involvement in this case began when an information report was generated through OPD indicating possible sexual abuse. Crouch stated that upon receiving that assignment, she received other information while observing a video-recorded forensic interview of R.W. by a forensic examiner at Project Harmony.

(d) Project Harmony

(i) Amy Cirian

The State called Amy Cirian, a forensic interviewer at Project Harmony who interviewed R.W. and M.B regarding the reported assaults. Cirian testified as to R.W.'s and M.B.'s demeanors throughout the forensic interview. Cirian described R.W.'s demeanor as calm but a little nervous and "fidgety," while M.B. was calm throughout most of her interview. Cirian opined that there is no singular demeanor that she would expect a child to have when discussing sexual abuse, because many children react differently. She noted further that it is not her role to determine the credibility or reliability of the girls' statements or disclosures, but, rather, to simply gather information throughout the interview process as to the abuse allegations.

At the outset of this demeanor testimony, defense counsel objected on the basis of relevance, which was overruled by the district court. On cross-examination, defense counsel elicited testimony from Cirian that just as there is no particular behavior she can look to in order to determine whether a child has been sexually abused, there is no way of determining from behavior whether a child has not been abused.

Cirian also testified as to certain procedures and protocols that are followed throughout these interviews. Cirian's testimony specifically detailed what actions were taken or what protocols were triggered in response to the girls' disclosures. Cirian testified that per these protocols, she is required to meet with the multidisciplinary team only when there is a sexual assault disclosure made at the forensic interview. Cirian stated that she met with the multidisciplinary team after interviewing the girls.

(ii) Sarah Cleaver

R.W. and M.B. were examined by a pediatric nurse practitioner at Project Harmony. Both of their physical examinations came back normal with no signs of injury or sexually

transmitted diseases. The nurse practitioner, Sarah Cleaver, who has conducted over 1,000 sexual assault examinations, testified that it is normal to find no signs of physical injury in child sexual assaults, because children often do not disclose right away and their bodies heal very quickly. Cleaver testified that an estimated 95 percent of children who report sexual abuse have normal physical examinations.

Cleaver testified that during R.W.'s examination, R.W. indicated that Lee's penis had been in her mouth more than once and that his ejaculate had been in her mouth. Cleaver also stated R.W. claimed that Lee had penetrated her anus with his penis one time and that he took the condom off and continued to penetrate her anus, but that there was no ejaculate. R.W. reported that bleeding followed after she was penetrated anally. Cleaver testified that R.W. reported that Lee penetrated R.W. vaginally while wearing a condom. Finally, Cleaver testified that M.B. indicated during her examination that Lee had touched her buttocks over her clothes and had made her touch his penis with her hand.

(e) Nikisha

After the State rested, Lee called Nikisha to testify. Nikisha confirmed that R.W. would occasionally stay with her and Lee between January and March 2017. She testified that when R.W. stayed with them in Council Bluffs, they always interacted as a family and Lee was never alone with R.W. at their home. The only interactions Nikisha observed between Lee and R.W. were normal father-daughter activities. Nikisha acknowledged, however, that Lee would occasionally go to Omaha without her to care for his other children and that he may have had contact with R.W. and M.B. at those times.

5. Jury Instruction Conference

At the close of all the evidence, the parties held a jury instruction conference outside the presence of the jury. During the conference, the parties focused on the venue element of count I, sexual assault of a child in the first degree, and

count V, incest with a victim age 17 or younger. The disputed venue elements were addressed in jury instructions Nos. 5 and 6.

The relevant portion of jury instruction No. 5 provided:

> COUNT I
>
> . . . .
>
> The material elements which the State must prove by evidence beyond a reasonable doubt, in order to convict the Defendant of the crime of First Degree Sexual Assault on a Child as charged in the Amended Information are:
>
> 1. That on or about January 1[,] 2017 through January 31, 2017, the Defendant, Talon Lee, did subject [R.W.] to sexual penetration;
>
> 2. That Defendant, Talon Lee, (a) did so in Douglas County, Nebraska, or (b) brought [R.W.] into or out of Douglas County, Nebraska in the commission of the offense, or (c) did an act in Douglas County, Nebraska instigating, procuring, promoting, or aiding in the commission of the offense;
>
> 3. That at that time Talon Lee was nineteen years of age or older; and
>
> 4. That at that time, [R.W.] was under twelve years of age.
>
> . . . .
>
> COUNT V
>
> . . . .
>
> The material elements which the State must prove by evidence beyond a reasonable doubt, in order to convict the Defendant of the crime of Incest of a Victim 17 or Under as charged in the Amended Information are:
>
> 1. That on or about January 1, 2017 through January 31, 2017, the Defendant Talon Lee did knowingly engage in sexual penetration with [R.W.];
>
> 2. That Defendant, Talon Lee, (a) did so in Douglas County, Nebraska, or (b) brought [R.W.] into or out of Douglas County, Nebraska in the commission of the

offense, or (c) did an act in Douglas County, Nebraska instigating, procuring, promoting, or aiding in the commission of the offense;

3. That Talon Lee and [R.W.] are parent and child; and

4. That at that time, [R.W.] was under eighteen years of age.

Also related to the venue element of counts I and V, jury instruction No. 6 provided:

> According to the law in the State of Nebraska, when an offense is committed in this state, in a car or motor vehicle, the accused may be tried in any county through, on or over which the vehicle passes in the course of its trip, or in the county in which the trip terminates.

Lee objected solely to the venue element definitions for counts I and V of jury instruction No. 5, arguing that it incorrectly incorporated language from Neb. Rev. Stat. § 29-1301.01 (Reissue 2016). Lee argued that this statute was inapplicable to this case, because it applies only when an offense is alleged to have occurred in different counties within the state, which was not the case here. Lee argued that this case involved the possibility that Lee "crosse[d] a state line" in the process of committing the alleged offense, but that it did not involve an allegation that it occurred in two different counties within Nebraska. As such, Lee argued that § 29-1301.01 was inapplicable.

The State disagreed and argued that jury instruction No. 5 correctly incorporated § 29-1301.01. The State noted that there was no evidence the offense in Lee's car occurred in Iowa or some other state, but argued that instruction No. 5, as written, nonetheless appropriately addressed the notion that a portion of the offense could have occurred in Douglas County while another portion of the offense could have occurred elsewhere.

Ultimately, the district court agreed with the State and overruled Lee's objection to jury instruction No. 5. The court read jury instruction No. 5 as written.

Neither party objected to jury instruction No. 6. Jury instruction No. 6 incorporated the language of Neb. Rev. Stat. § 29-1301.02 (Reissue 2016), which relatedly addresses venue for crimes committed on moving means of transportation.

6. Jury Verdict and Sentencing

The jury found Lee guilty as charged on all five counts. In June 2018, the sentencing hearing was held. The district court reviewed the presentence investigation report and considered Lee's age, mentality, education, experience, social and cultural background, criminal record, and law-abiding conduct, as well as the motivations for these offenses and the nature of the offenses, including the presence or absence of violence. Based on this information, the court determined that Lee was a dangerous sexual predator and sentenced him as follows: 50 years' to life imprisonment on count I, sexual assault of a child in the first degree; 50 years' to life imprisonment on count II, sexual assault of a child in the first degree; 20 to 50 years' imprisonment on count III, attempted sexual assault of a child in the first degree; 2 to 3 years' imprisonment on count IV, sexual assault of a child in the third degree; and 10 to 20 years' imprisonment on count V, incest with a victim age 17 or under. Lee's sentences were ordered to run consecutively, resulting in an aggregate period of 100 years' to life imprisonment, plus an additional term of 32 to 73 years' imprisonment. Lee was also ordered to register as a sex offender under Nebraska's Sex Offender Registration Act.

III. ASSIGNMENTS OF ERROR

Lee assigns, restated and renumbered, that the district court erred by (1) granting the State's motion to allow evidence that Lee sexually assaulted R.W. in the State of Iowa, (2) denying Lee's Rule 412 motion, (3) giving erroneous and misleading jury instructions which relieved the State from proving essential elements of the crimes charged, (4) failing to give a limiting instruction, and (5) imposing excessive sentences.

He also assigns that he received ineffective assistance of counsel at trial, because his trial counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area and such deficient performance prejudiced his defense. Lee specifically asserts that his trial counsel (1) made inappropriate comments to the prosecutor and Lee, (2) did not review discovery with him, (3) told Lee that he could not call witnesses he wished to call at trial, (4) failed to raise a *Batson*[1] challenge, (5) failed to litigate Lee's motion to sever charges, and (6) failed to object to improper hearsay evidence.

IV. STANDARD OF REVIEW

[1] An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on the admissibility of a defendant's other crimes or bad acts under Rule 404(2), or under the inextricably intertwined exception to the rule.[2]

[2,3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[3] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[4]

[4] 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]

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

[2] *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

[3] *Id.*

[4] *Id.*

[5] *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017).

[5] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[6]

[6] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[7]

V. ANALYSIS

Lee argues that the district court erred by (1) granting the State's motion to allow evidence that Lee sexually assaulted R.W. in the State of Iowa, (2) denying Lee's Rule 412 motion, (3) giving erroneous and misleading jury instructions which relieved the State from proving essential elements of the crimes charged and failing to give a limiting instruction, and (4) imposing excessive sentences. Lee also asserts that he received ineffective assistance of counsel throughout his proceedings below. We affirm the decision of the district court.

1. Inextricably Intertwined Incident

At the outset, Lee assigns that the district court abused its discretion by granting the State's motion in limine, allowing it to admit evidence regarding R.W.'s sexual assault allegations that occurred in Iowa, and, relatedly, overruling Lee's renewed objections at trial to the admission of that evidence. In its order on the motion in limine, the district court concluded:

> [T]he evidence of sexual abuse in Council Bluffs[,] Iowa is inextricably intertwined with the other allegations of sexual abuse [Lee] perpetrated on his daughter over the period of time alleged by the State and is so blended or connected to the charged crimes that it will be necessary to show a complete and coherent picture of this relationship.

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[6] *State v. Paez*, 302 Neb. 676, 925 N.W.2d 75 (2019).

[7] *State v. Chairez*, 302 Neb. 731, 924 N.W.2d 725 (2019).

Lee, however, claims the evidence regarding the alleged incident of sexual assault in Iowa was inadmissible under Rule 404 and should have been excluded at trial. Specifically, Lee argues that the court failed to conduct a hearing pursuant to Rule 404(3) finding clear and convincing evidence of the other crime.

[7,8] We agree with the district court that Rule 404 did not apply, because the alleged Iowa incident was inextricably intertwined with the crimes charged.[8] Further, since Rule 404 did not apply, the court was not required to conduct a hearing under Rule 404(3). Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, 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, or is necessary for the prosecution to present a coherent picture of the charged crime.[9] The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of other conduct that forms an integral part of the crime charged is not rendered inadmissible under Rule 404 merely because the acts are criminal in their own right, but have not been charged.[10]

The State asserts that evidence of the Iowa incident was integral to the development of an accurate timeline in this case.[11] The State asserts that without the evidence of the Iowa incident, it would have appeared that it took R.W. much longer to disclose the sexual abuse than it actually did. Further, the absence of such evidence would have created a misleadingly incoherent picture that would have adversely impacted R.W.'s credibility.[12] We agree.

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[8] See *State v. Burries, supra* note 2.

[9] See *id.*

[10] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Kelly*, 20 Neb. App. 871, 835 N.W.2d 79 (2013).

[11] See *id.*

[12] See *id.*

Our precedent shows that we have upheld the admission of evidence under the inextricably intertwined rule when the defendant's other bad acts showed his pattern of sexually abusing a child or exposing the child to sexually explicit material.[13] For example, in *State v. Baker*,[14] we held that the inextricably intertwined exception applied where the defendant's other bad acts showed his pattern of sexually abusing the victim. In *Baker*, the State's evidence included the victim's testimony that the defendant had threatened her with harm if she reported him, the mother's testimony that the defendant threatened her and physically assaulted her if she did not bring the victim to the bedroom at his direction, and the mother's testimony that the defendant became sexually aroused while watching the victim administer a massage. The defendant claimed this evidence was inadmissible under Rule 404(2), but we concluded the State was entitled to present this evidence as part of a coherent factual setting of the crime.

We likewise conclude here that the district court did not abuse its discretion in determining the evidence of a subsequent sexual assault involving the same victim was inextricably intertwined with the charged offenses. The evidence adduced at trial established that R.W. and her mother were living in Omaha with Kelly, one of R.W.'s mother's friends, in January 2017 when Lee sexually assaulted R.W. in his car, which was the first incident of sexual assault that occurred. Throughout R.W.'s testimony, she had difficulty providing the exact dates of the subsequent sexual assaults at M.B.'s house. Nevertheless, R.W. recalled that the incident in Iowa was the last incident that had occurred. This information was significant, because Hernandez testified that when R.W. spoke with her at the emergency room on June 23, 2017, R.W. told Hernandez that the most recent incident occurred about 1 month earlier and that

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[13] See, e.g., *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

[14] *State v. Baker, supra* note 13. See, also, *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

another incident occurred about 2 months earlier. This information in its entirety creates a timeline demonstrating that the sexual assaults charged occurred in Omaha, lending coherence as to why R.W. would have reported to Hernandez that the last assault occurred around May 2017.

R.W.'s testimony of the Iowa incident forms the factual setting of the charged offenses and is necessary to present a complete and coherent picture of the facts of this case. Such evidence showed a pattern of Lee's sexually abusing R.W. and exposing her to sexually explicit material. Based on this, it cannot be said that the district court abused its discretion in admitting the testimony regarding the alleged Iowa incident into evidence.

2. Defendant's Rule 412 Motion

Next, Lee assigns that the district court abused its discretion in denying Lee's motion under Rule 412 seeking to admit testimony regarding R.W.'s sexual assault allegation against her brother. Lee argues that he was prejudiced by the district court's denial of his motion, because evidence of R.W.'s alleged sexual assault by her brother would be relevant to show a "prior source of [R.W.'s] 'sexual knowledge.'"[15] The State opposed the motion and argued that this evidence was more prejudicial than probative because it would result in a "trial within a trial." The district court agreed with the State's argument and reasoned, "How do we know her brother didn't do all of these things? . . . I don't think we're going to put [R.W] on trial on that issue."

In denying Lee's request, the district court stated:

> There is no evidence the acts of [R.W.'s brother] have any relevance to the sexual assault committed by [Lee] or that the sexual behavior of R.W. incident to being assaulted by [her brother] in any way contributed to any physical injury of R.W. The court does not find the same to be relevant nor material to the charges against [Lee]

[15] See brief for appellant at 32.

> nor would exclusion of this evidence violate the constitutional rights of [Lee].

It is apparent from the hearing on Lee's motion and the district court's subsequent order that it excluded the evidence upon both Rule 403 and Rule 412 grounds.

Lee claims that this case is similar to *State v. Lavalleur*,[16] in which we held it was reversible error to exclude evidence of other independent sexual acts involving the victim. In *Lavalleur*, the State had charged the defendant with sexually assaulting the victim, who was a friend and coworker of the defendant. At trial, the defendant sought to introduce evidence that the victim was involved in an intimate relationship with a third party on the date in question, which, according to the defense, gave the victim a motive to falsely report the sexual assault against the defendant to preserve her relationship with the third party. The trial court excluded the evidence, finding that it was irrelevant under Rule 403 and inadmissible under Rule 412. In reversing, we explained that Rule 412 generally prohibits evidence only of sexual predisposition or "'sexual behavior,'" which we explained refers to specific instances of conduct.[17] We explained that "'[i]f questioning about [a] subject were to lead to evidence or questions about details of particular acts, encounters, or practices, then such evidence and quests are indeed covered by rape shield legislation . . . .'"[18] But, we reasoned that the mere fact that the complaining witness is in an ongoing relationship raises no such concerns about details of particular acts, encounters, or practices, because being in an ongoing relationship is not ordinarily described as "'sexual conduct,'" even if the relationship involves ongoing sexual intimacy.[19] Accordingly, we found that the evidence the defendant sought to introduce was

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

[17] *Id.* at 111, 853 N.W.2d at 212.

[18] *Id.*

[19] *Id.*

not precluded and that it was both relevant and material to the defense that the victim had a motive to lie about the nature of her sexual encounter with the defendant to "dispel any air of infidelity."[20]

Here, unlike *Lavalleur*, the defense was not seeking to attack the credibility of R.W. by showing that she was involved in another ongoing relationship which gave her a motive to lie about the allegations against Lee. Rather, Lee sought to introduce this evidence to show that there was some other conceivable basis for R.W.'s sexual knowledge. Lee asserts that the evidence of R.W.'s prior alleged sexual abuse by her brother was particularly relevant in this case because, without this evidence, "the only conclusion for the jury to make is that this allegation against [Lee] must have occurred or how else would this child know about this sort of behavior."[21]

Such evidence requires a finding of admissibility under both Rule 403 and Rule 412. Here, the district court agreed with the State's argument that the evidence would be more prejudicial than probative and thus was not admissible under Rule 403. We do not believe the district court abused its discretion in reaching that conclusion. R.W.'s brother had not been convicted or adjudicated of the allegations that he had sexually assaulted R.W. As a result, admission of the evidence would have led to a potentially distracting "trial within a trial" which would have substantially risked confusing the issues and misleading the jury. Moreover, an inquiry into whether R.W. was also abused by her brother would have done nothing to offset M.B.'s testimony that Lee had abused her.

3. Jury Instructions

Next, Lee asserts that the district court erred in giving jury instruction No. 5, because it was misleading and relieved the State from proving an essential element of the crimes charged.

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[20] *Id.* at 115, 853 N.W.2d at 214.

[21] Brief for appellant at 32-33.

Specifically, Lee asserts that the district court erred by failing to properly instruct the jury regarding venue on both count I (first degree sexual assault of R.W.) and count V (incest of R.W.), both of which pertained to the first incident in Lee's car in January 2017.

Relatedly, Lee assigns that the district court erred by failing to give a limiting instruction to the jury on the importance of keeping separate during its deliberations the charges from the evidence related to those charges. However, based on the record, Lee did not object to the court's jury instructions on this basis at the trial court level. He made an objection solely as to jury instruction No. 5. An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.[22] Because this assignment was not raised below, we address only Lee's assignment of error regarding jury instruction No. 5.

[9-11] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[23] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[24] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[25]

Lee maintains that jury instruction No. 5 incorrectly instructed the jury regarding venue on counts I and V, because the instruction did not limit the venue to Douglas County, or even Nebraska. He claims that jury instruction No. 5 allowed

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[22] *Ecker v. E & A Consulting Group*, 302 Neb. 578, 924 N.W.2d 671 (2019).

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

[24] *Id.*

[25] *State v. Paez, supra* note 6.

the jury to find him guilty on counts I and V if they believed that these counts occurred "anywhere," which effectively relieved the State of its burden to prove venue on these counts.[26] He argues that the overbreadth of this instruction was especially prejudicial because of the evidence presented at trial regarding Lee's alleged sexual abuse of R.W. in Iowa.

Jury instructions Nos. 5 and 6, read together, set forth the elements for venue in this case. Jury instruction No. 5, specifically subsection 2, incorporated the language of § 29-1301.01 and provided that one of the material elements which must be proved was

> [t]hat Defendant, Talon Lee, (a) did so in Douglas County, Nebraska, or (b) brought [R.W.] into or out of Douglas County, Nebraska in the commission of the offense, or (c) did an act in Douglas County, Nebraska instigating, procuring, promoting, or aiding in the commission of the offense.

Jury instruction No. 6 similarly incorporates language from § 29-1301.02 and provided: "[W]hen an offense is committed in this state, in a car or motor vehicle, the accused may be tried in any county through, on or over which the vehicle passes in the course of its trip, or in the county in which the trip terminates."

Reading jury instructions Nos. 5 and 6 together, we disagree with Lee's argument. When these instructions are read in conjunction, they correctly instruct the jury that the offenses that occurred in a motor vehicle (counts I and V) must have been "committed in this state." Further, based on the record before us, there was no evidence presented that would indicate that the relevant incident occurring between Lee and R.W. in his car occurred in Iowa or a state other than Nebraska, leaving no basis for a jury to reach that conclusion. As such, we conclude that Lee was not prejudiced as to necessitate a reversal on these grounds.

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[26] Brief for appellant at 44.

4. Excessive Sentences

[12] Lee next assigns that that the district court erred by imposing excessive sentences. When a trial court's sentence is within the statutory guidelines, the sentence will be disturbed by an appellate court only when an abuse of discretion is shown.[27]

On counts I and II, Lee was found guilty of first degree sexual assault of a child, which is a Class IB felony punishable by a mandatory minimum of 20 years' imprisonment and a maximum of life in prison.[28] Lee was sentenced to 50 years' to life imprisonment on each count of this offense.

On count III, Lee was found guilty of attempted first degree sexual assault of a child, which is a Class II felony punishable by 1 to 50 years' imprisonment.[29] Lee was sentenced to 20 to 50 years' imprisonment on this offense.

On count IV, Lee was found guilty of third degree sexual assault of a child, which is a Class IIIA felony punishable by up to 3 years' imprisonment and 18 months' postrelease supervision, a $10,000 fine, or both.[30] Lee was sentenced to 2 to 3 years' imprisonment on this offense.

Finally, on count V, Lee was found guilty of incest with a victim age 17 or under, which is a Class IIA felony punishable by 0 to 20 years' imprisonment.[31] Lee was sentenced to 10 to 20 years' imprisonment on this offense.

Running consecutively, Lee's sentences equate to an aggregate period of 100 years' to life imprisonment, plus an additional 32 to 73 years' imprisonment.

Lee does not contest that his sentences were within the statutory limitations. He solely argues that the district court abused

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[27] See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[28] See Neb. Rev. Stat. §§ 28-319.01 and 28-105 (Reissue 2016).

[29] See § 28-319.01, Neb. Rev. Stat. § 28-201(4)(a) (Reissue 2016), and § 28-105.

[30] See Neb. Rev. Stat. §§ 28-320.01 (Reissue 2016) and 28-105.

[31] See Neb. Rev. Stat. §§ 28-703 (Reissue 2016) and 28-105.

its discretion by imposing an unjustly lengthy total sentence as compared to other Nebraska cases where defendants were convicted of similar crimes. Consequently, Lee's sentences will be disturbed only upon a finding of abuse of discretion.

[13,14] Abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[32] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the crime.[33] 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.[34]

There is no evidence in the record demonstrating that the sentencing court considered inappropriate or unreasonable factors in forming Lee's sentences. The district court reviewed the presentence investigation report, which revealed Lee had an extensive criminal history. The district court also considered Lee's age, mentality, education, experience, social and cultural background, and law-abiding conduct, as well as the motivations for these offenses, the nature of the offenses, and the presence or absence of violence, including sexual violence. Considering the totality of this information, the court determined that Lee was a dangerous sexual predator and imposed his above-described sentences.

We cannot conclude that the district court made its decision based upon reasons that were untenable or unreasonable,

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[32] *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

[33] *State v. Huff, supra* note 27.

[34] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

nor was the district court's action clearly against justice or conscience, reason, and evidence. Therefore, we conclude that the sentencing court did not abuse its discretion and that Lee's sentences are not excessive.

5. Ineffective Assistance of Counsel

Lastly, Lee asserts a number of claims of ineffective assistance of trial counsel. Specifically, he argues that (1) he overheard his trial counsel talking with the prosecutor and indicating she believed Lee was guilty, and that when he confronted her about it, she told him to "go back to his cell and taste his own semen and see what it tastes like"[35]; (2) his trial counsel did not review discovery with him; (3) his trial counsel told him that he could not call any other witnesses that he wished to call at trial; (4) his trial counsel failed to raise a *Batson*[36] challenge, which he believes was appropriate because there was "not a single African American" in the venire[37]; (5) he was prejudiced by his trial counsel's deficient performance by failing to litigate Lee's motion to sever charges; and (6) he was prejudiced by his trial counsel's deficient performance by failing to object to improper hearsay and opinion testimony from Cirian, the forensic interviewer.

[15] Lee has new 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.[38] Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.[39]

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[35] Brief for appellant at 50.

[36] *Batson v. Kentucky, supra* note 1.

[37] Brief for appellant at 51.

[38] *State v. Chairez, supra* note 7.

[39] *Id.*

In order to know whether the record is insufficient to address assertions on direct appeal that trial counsel was ineffective, appellate counsel must assign and argue deficiency 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.[40] When a claim of ineffective assistance of trial counsel is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.[41]

Lee and the State agree that the record is insufficient to address four of Lee's assertions on direct appeal that trial counsel was ineffective, made under the heading "Defendant's preservation of Post Conviction Relief issues."[42] In this regard, Lee asserts, first, that he overheard trial counsel telling the prosecutor she believed he was guilty and, when confronted about the conversation, told Lee to "go back to his cell and taste his own semen and see what it tastes like." Second, Lee contends that trial counsel refused to allow him to review the entire discovery in the case, including the Project Harmony reports and the video-recorded forensic interview, which he asserts impeded his ability to assist in his defense and would have led Lee to insist that trial counsel call "adverse witnesses, including . . . Kelly who was purportedly present during an alleged assault."[43] Third, Lee argues that trial counsel told him he could not call any other witnesses in his defense, which prevented him from adducing the testimony of "adverse witnesses," including Kelly. Fourth, Lee asserts trial counsel was

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[40] See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[41] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[42] Brief for appellant at 50.

[43] *Id.* at 51.

ineffective by failing to raise a *Batson* challenge to a jury consisting of "not a single African American" and by failing to preserve any *Batson* challenge by not having a record made of the lack of diversity of the venire.

We find these assertions sufficient to preserve the alleged claims of deficiency, with one caveat. Appellate counsel must give on direct appeal the names or descriptions of any uncalled witnesses forming the basis of a claim of ineffective assistance of trial counsel.[44] Otherwise, a potential postconviction court would be unable to identify whether a claim based on the alleged failure to call a particular witness was preserved on direct appeal.[45] Here, appellate counsel raised only the failure to call witness Kelly with sufficient specificity. Any other claim as to "adverse witnesses" has not been preserved.

As we have held in countless cases where the record on direct appeal was insufficient for assessing ineffective assistance of counsel claims, the issue that often arises is that the trial record reviewed on appeal is "devoted to issues of guilt or innocence" and does not usually address issues of counsel's performance.[46] The same can be said in this case. The record on appeal is simply devoid of any evidence of the circumstances and facts regarding the four contentions of ineffective assistance of counsel that were adequately presented. Therefore, we decline to reach these claims on direct appeal based on the insufficiency of the record before us.

However, we find that the record is sufficient to address on direct appeal Lee's claims that his trial counsel was deficient by failing to (1) litigate Lee's motion to sever charges and (2) object to improper hearsay and opinion testimony from Cirian. Where the record is sufficient to address the ineffective assistance of counsel claim, an appellate court reviews

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[44] See *State v. Abdullah, supra* note 40.

[45] See *id.*

[46] *Id*. at 128, 853 N.W.2d at 864.

the factual findings of the lower court for clear error.[47] But with regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[48] an appellate court reviews such legal determinations independently of the lower court's decision.[49]

[16-18] To prevail on a claim of ineffective assistance of counsel under *Strickland*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[50] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[51] 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.[52]

(a) Motion to Sever

[19] Lee contends that the charges involving R.W. should have been severed from the charges involving M.B., so his trial counsel should have pursued their motion to sever and was ineffective in failing to do so. However, based on the record before us, trial counsel did in fact "litigate" and "pursue" Lee's motion to sever. Lee's trial counsel filed a four-page motion detailing the requested severances. At the beginning of a pretrial hearing on March 15, 2018, trial counsel stated that she wished to withdraw the motion, but then she argued the motion toward the end of these pretrial hearings. Trial counsel

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[47] *State v. Chairez, supra* note 7.

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

[49] *State v. Filholm, supra* note 41.

[50] *Id.*

[51] *State v. Chairez, supra* note 7.

[52] *Id.*

maintained that a severance was warranted and laid out the requested severances. The district court subsequently denied severance via a written order. Thus, this motion to sever was in fact argued and ruled upon. Trial counsel cannot be ineffective for failing to do that which the record affirmatively establishes was done.

(b) Failure to Object to Cirian's Testimony

[20] Regarding counsel's failure to object to Cirian's testimony on hearsay grounds, Lee argues that his trial counsel should have objected to Cirian's testimony about what actions were required to be taken or what protocols were triggered in response to R.W.'s and M.B.'s disclosures, because this was inadmissible "derivative hearsay."[53] Lee cites no authority to support this "derivative hearsay" argument, nor are we aware of any precedent or authority that indicates such evidence constitutes inadmissible "derivative hearsay." To the contrary, the law generally provides that statements are not hearsay if they are offered to show the effect on the listener.[54]

Cirian's testimony regarding the requisite protocols when certain disclosures by the interviewed children are made was nothing more than her description of the steps she was required to take during the girls' interview process. Cirian testified only as to her actions as a result of the disclosures made to her during these interviews. We find that Cirian's testimony regarding the actions that were required to be taken and the protocols that were triggered in response to the girls' disclosures was not hearsay. As such, as a matter of law, Lee's trial counsel was not deficient for failing to object to Cirian's testimony as "derivative hearsay."

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[53] See brief for appellant at 39.

[54] See, *State v. Poe*, 292 Neb. 60, 870 N.W.2d 779 (2015); *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

Lee also argues that trial counsel was ineffective for failing to object to Cirian's allegedly improper opinion testimony when Cirian testified that the demeanor of R.W. and M.B. was consistent with the demeanor of a victim of sexual abuse. Lee argues that this testimony amounted to improper vouching for the credibility of the victims and was an improper opinion.

The record reflects that when the State initially questioned Cirian regarding the girls' demeanor and its consistency with children alleging sexual abuse, Lee's trial counsel objected to the testimony on the basis of relevance. Such an objection necessarily encompassed the propriety of Cirian's opinion.[55] Lee's trial counsel was not ineffective for failing to object to Cirian's conclusion, because the record demonstrates that such an objection was made. Moreover, we conclude that Cirian did not opine as to the reliability or the credibility of the girls' statements or allegations made during their respective interviews.

VI. CONCLUSION

For the reasons set forth above, we affirm the decision of the district court.

Affirmed.

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[55] See *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013). See, also, *In re Interest of Kyle O.*, 14 Neb. App. 61, 703 N.W.2d 909 (2005).

Cassel, J., concurring.

I write separately only to remind the practicing bar that assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance and that an appellate court will not scour the remainder of the brief in search of such specificity.[1] Our decision making this rule explicit was released on April 19, 2019.

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

In the appeal before us, Lee's sole assignment of error relating to ineffective assistance stated only, "Defendant's preservation of Post Conviction Relief issues." But for having been filed on December 21, 2018, it clearly would have failed the specificity requirement. Although we have declined to apply the specificity requirement retroactively,[2] that time is already gone for briefs being filed now. Counsel should understand that briefs filed after April 19, 2019, which fail to comply may have consequences beyond loss of such claims.[3]

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[2] See *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019).

[3] See Neb. Ct. R. of Prof. Cond. § 3-501.1 (rev. 2017).

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

Rev. Stephen C. Griffith and Senator Ernie Chambers, appellants, v. Nebraska Department of Correctional Services et al., appellees.

934 N.W.2d 169

Filed October 18, 2019. No. S-18-569.

1. **Standing: Jurisdiction: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from those of a trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Standing: Jurisdiction.** A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.
4. **Standing.** Standing relates to a court's power to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Amy A. Miller, of American Civil Liberties Union of Nebraska, Christopher L. Eickholt, of Eickholt Law, L.L.C., and David Litterine-Kaufman, Rene Kathawala, and Suzette J. Barnes, of Orrick, Herrington & Sutcliffe, L.L.P., for appellants.

Douglas J. Peterson, Attorney General, and Ryan S. Post for appellees.

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

Papik, J.

Two Nebraska citizens brought this action alleging that the Nebraska Department of Correctional Services (DCS) did not comply with statutory and constitutional requirements when, in January 2017, it adopted an "Execution Protocol," a regulation setting forth how death sentences are to be carried out. The plaintiffs, proceeding under Neb. Rev. Stat. § 84-911 (Reissue 2014), asked that the Execution Protocol be declared void and that DCS and other defendants be enjoined from carrying out executions under the Execution Protocol. The district court, however, found that the plaintiffs lacked standing to bring the action and dismissed it without reaching the merits.

On appeal, we reach the same conclusion as the district court. The plaintiffs do not face death sentences, and thus the Execution Protocol does not impair or threaten to interfere with their legal rights. And while we have recognized, under our common law of standing, some exceptions to the requirement that a plaintiff show a concrete injury to his or her legal rights in order to invoke a court's jurisdiction, we find that those exceptions do not apply in an action brought under § 84-911. Accordingly, we affirm the district court's dismissal.

BACKGROUND

Adoption of Execution Protocol.

Plaintiffs are Rev. Stephen C. Griffith and Senator Ernie Chambers (hereinafter collectively Plaintiffs). Griffith is a retired minister. Chambers is a member of the Nebraska State Legislature. Both are Nebraska citizens.

Plaintiffs' allegations in this case center on DCS' adoption of an Execution Protocol. After the 2016 general election in which Nebraska voters, via referendum, repealed a 2015 law that abolished the death penalty, DCS sought to make revisions to its Execution Protocol. The Execution Protocol is a

regulation that sets forth the process to be followed when carrying out a death sentence. Generally, the Execution Protocol provides for how drugs for lethal injection procedures shall be obtained, verified, and maintained; notification requirements; and the process for carrying out executions. 69 Neb. Admin. Code, ch. 11 (2017).

Plaintiffs allege that after DCS announced that it was considering revisions to the Execution Protocol and would be holding a public hearing on the proposed revisions, Griffith requested information regarding the proposed revisions from DCS. Plaintiffs admit that DCS gave Griffith a draft regulation, but they contend that he was also entitled to a fiscal impact statement and "working copies" of the proposed revisions under Neb. Rev. Stat. § 84-907(2) (Reissue 2014) and that DCS did not give him these materials.

Both Griffith and Chambers later testified at the public hearing on the proposed revisions to the Execution Protocol. They assert, however, that they were unable to provide fully informed testimony, because Griffith was not given access to all the materials to which he was entitled under § 84-907.

Following the public hearing, DCS adopted the Execution Protocol.

Plaintiffs' Lawsuit.

Plaintiffs filed this lawsuit against DCS and the following individuals in their official capacities: Gov. John Peter Ricketts, Attorney General Doug Peterson, and DCS director Scott Frakes (hereinafter collectively Defendants). In the lawsuit, Plaintiffs contended that the Execution Protocol should be declared invalid for two reasons.

First, Plaintiffs contended that because Griffith was not given access to all the materials to which he was entitled under § 84-907, the Execution Protocol was adopted without compliance with statutory procedures. Second, and alternatively, Plaintiffs alleged that if "[DCS] did not prepare any drafts or revisions of the . . . Execution Protocol and did not consult

with anyone regarding the [Execution] Protocol," the adoption of the Execution Protocol violated the due process clause of the Nebraska State Constitution.

Plaintiffs requested a declaration that the Execution Protocol was void. They also asked that Defendants be enjoined from carrying out any executions until a new Execution Protocol was adopted.

District Court's Dismissal.

Defendants moved to dismiss on the grounds that the district court lacked subject matter jurisdiction and that Plaintiffs failed to state a claim upon which relief can be granted. After a hearing, the district court granted Defendants' motion to dismiss.

In a written order, the district court found that Plaintiffs lacked standing to pursue the action. The district court found that because the Execution Protocol did not affect Plaintiffs' rights, they did not have traditional common-law standing to challenge the validity of the regulation. The district court also found that Plaintiffs did not fall within any of the exceptions to the traditional common-law standing doctrine. It therefore dismissed Plaintiffs' complaint for lack of subject matter jurisdiction.

Plaintiffs appealed, and we granted their petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Plaintiffs assign multiple errors on appeal, but they can effectively be condensed into one: that the district court erred in finding that they did not have standing.

STANDARD OF REVIEW

[1] Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent

from those of a trial court. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *DeLima v. Tsevi*, 301 Neb. 933, 921 N.W.2d 89 (2018).

ANALYSIS

General Principles Regarding Doctrine of Standing.

The district court dismissed Plaintiffs' lawsuit on the ground that they lacked standing. Before turning to Plaintiffs' contentions that this decision was incorrect, we pause to review some basics regarding the doctrine of standing.

[3,4] A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding. *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010). Standing relates to a court's power to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. See *Ritchhart v. Daub, supra*. The focus of the standing inquiry is not on whether the claim the plaintiff advances has merit; it is on whether the plaintiff is the proper party to assert the claim. See *Heiden v. Norris*, 300 Neb. 171, 912 N.W.2d 758 (2018). Indeed, in considering standing, the legal and factual validity of the claim presented must be assumed. *Id.*

While the U.S. Constitution limits the jurisdiction of federal courts to certain "[c]ases" and "[c]ontroversies," U.S. Const. art. III, § 2, and federal courts have interpreted that language to impose standing requirements for the exercise of federal court jurisdiction, see, e.g., *West v. Lynch*, 845 F.3d 1228 (D.C. Cir. 2017), the Nebraska Constitution does not contain an analogous provision, see *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989). As we will discuss in more detail below, in some cases, the Legislature provides by statute

who has standing to pursue relief. See *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). In other cases, we rely on common-law standards to determine whether a plaintiff has standing. See *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996) (concluding Legislature did not supplant common-law standing doctrine by statute). Our common-law standing doctrine, like other doctrines of justiciability, arises "out of prudential considerations of the proper role of the judiciary in democratic government." *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 546, 731 N.W.2d 164, 176 (2007).

Our common-law standing inquiry generally focuses on whether the party bringing suit has suffered or will suffer an injury in fact. See, e.g., *Central Neb. Pub. Power Dist. v. North Platte NRD, supra*. We have said that such an injury must be "concrete in both a qualitative and temporal sense" and that it must be "distinct and palpable, as opposed to merely abstract." *Id.* at 542, 788 N.W.2d at 260. We have also phrased the standing inquiry as whether the plaintiff demonstrated a "direct injury" as a result of the action or anticipated action of the defendant and emphasized that it is generally insufficient for a plaintiff to have "merely a general interest common to all members of the public." *Ritchhart v. Daub*, 256 Neb. 801, 806, 594 N.W.2d 288, 292 (1999). Accordingly, in order to have standing to bring suit to restrain an act of a municipal body, the persons seeking such action must usually show some injury peculiar to themselves. See *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

Does § 84-911 Confer Standing for "Procedural" Injuries?

Plaintiffs brought this action under § 84-911 and contend that they have standing thereunder. Section 84-911, a provision within Nebraska's Administrative Procedure Act, provides as follows:

> (1) The validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. . . .
>
> (2) The court shall declare the rule or regulation invalid if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, or was adopted without compliance with the statutory procedures.

Plaintiffs' argument for standing under § 84-911 rests on language in our opinion in *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 385-86, 810 N.W.2d 149, 157 (2012), in which we observed that "[g]enerally, § 84-911 requires a plaintiff to have common-law standing to challenge an agency's regulation or its threatened application" and that common-law standing usually requires the demonstration of "an injury in fact that is actual or imminent." Plaintiffs claim they have suffered a loss of their right under Nebraska's Administrative Procedure Act to "informed participation in the regulationmaking process" and that this qualifies as a sufficient injury in fact. Brief for appellants at 11. As we will explain, we find that Plaintiffs do not have standing based on this asserted injury.

Plaintiffs concede that the injury they are claiming in this case is procedural in nature. Indeed, Plaintiffs attempt to distinguish *H.H.N.H., Inc. v. Department of Soc. Servs.*, 234 Neb. 363, 451 N.W.2d 374 (1990), a case in which we found the plaintiffs did not have standing under § 84-911, because their legal rights were not affected by the challenged regulations, as governing only cases in which the *substance* of a regulation is challenged. Plaintiffs, however, do not cite any authority recognizing that a party has injury-in-fact standing based solely on a claim that a procedural right to participate in administrative rulemaking was violated.

In fact, federal courts have rejected the notion that a party has standing to challenge government action merely because a procedural right was violated. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), the U.S. Supreme Court reversed a lower court's decision finding that a party had standing based on a government official's alleged failure to follow a statutory procedure "notwithstanding [the plaintiff's] inability to allege any discrete injury flowing from that failure." The Supreme Court explained that individuals have standing to enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest . . . that is the ultimate basis of . . . standing." 504 U.S. at 573 n.8. Years later, in *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009), the U.S. Supreme Court relied on its decision in *Lujan* to hold that individuals who claimed they had been denied the procedural right to file comments regarding certain actions by the U.S. Forest Service did not have standing in the absence of a showing that their concrete interests were affected as a result of the alleged procedural violation.

Following *Lujan*, federal courts of appeals have similarly held that a plaintiff claiming a procedural violation suffers the requisite injury for standing purposes only if they also suffered "a concrete injury as a result of the disregarded procedural requirement." *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 712 (6th Cir. 2015). See, also, *Iowa League of Cities v. E.P.A.*, 711 F.3d 844 (8th Cir. 2013); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) ("we may recognize a 'procedural injury' when a procedural requirement has not been met, so long as the plaintiff also asserts a 'concrete interest' that is threatened by the failure to comply with that requirement"); *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996) ("[t]o fully establish injury in fact, a plaintiff must be able to show that a separate injury to its concrete, particularized interests flows from the agency's

procedural failure"); *Humane Soc. of U.S. v. Babbitt*, 46 F.3d 93, 99 (D.C. Cir. 1995) ("a 'procedural injury' arises where the claimant asserts a substantive injury from the denial of the statutorily required procedure").

We find the rule for procedural injuries set forth in the above federal cases to be especially appropriate for claims brought under § 84-911. Section 84-911(1) provides that the validity of a rule or regulation may be challenged if "it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner." As we held in *H.H.N.H., Inc. v. Department of Soc. Servs.*, 234 Neb. 363, 367, 451 N.W.2d 374, 377 (1990), this language requires a plaintiff challenging the validity of a regulation under § 84-911 to "prove that he or she is a person whose legal rights and privileges are or may be impaired *by the challenged regulation*." (Emphasis supplied.) Requiring plaintiffs bringing claims under § 84-911 to show that any asserted procedural injury led to a rule or regulation that interferes with or impairs their rights gives effect to the text of § 84-911(1).

As we described above, Plaintiffs' argument for standing under § 84-911 rests on a procedural injury. They cannot, however, show that the procedural injury they assert led to a rule or regulation that interferes with or impairs their rights. Plaintiffs allege that DCS violated procedural requirements in the adoption of the Execution Protocol. The Execution Protocol sets forth how death sentences are to be carried out. Neither of the Plaintiffs is subject to a death sentence. Plaintiffs have not shown and neither can we discern a way in which their rights are threatened or violated by the Execution Protocol.

Faced with the fact that the Execution Protocol itself does not affect their legal rights, Plaintiffs attempt to find refuge in the language in § 84-911(2), which authorizes courts to declare rules and regulations invalid if "adopted without compliance with the statutory procedures." Plaintiffs contend that this language shows the Legislature must have intended to allow

challenges to regulations by individuals asserting the infringement of a procedural right to participate in the regulationmaking process. We are not persuaded.

Section 84-911(2), to be sure, provides that a court may declare a rule or regulation invalid if it finds it was adopted without compliance with statutory procedures, but that subsection addresses the reasons a court may declare a rule or regulation invalid. It does not speak to *who* may seek invalidation, as § 84-911(1) does. We could reach the conclusion Plaintiffs urge only by reading meaning into § 84-911(1) that is not reflected in its text. We do not interpret statutes in that manner. See *State v. Garcia*, 301 Neb. 912, 920 N.W.2d 708 (2018).

For these reasons, we find that Plaintiffs did not have standing under § 84-911 based on their assertion that their procedural rights were violated during the course of DCS' adoption of the Execution Protocol.

Do Common-Law Exceptions to Injury-in-Fact Standing Apply in Actions Brought Under § 84-911?

Plaintiffs argue that even if the district court correctly determined that they did not have standing as a result of their claimed injury to their right to participate in the regulationmaking process, they nonetheless have standing as Nebraska taxpayers. Plaintiffs claim they have taxpayer standing for two reasons: first, because they are seeking to enjoin the illegal expenditure of public funds, and second, because this action involves a matter of great public concern.

Plaintiffs' arguments for taxpayer standing are based on cases in which this court has, in the course of applying our common-law standing doctrine, recognized exceptions to the usual requirement that a plaintiff demonstrate an injury in fact that is actual, imminent, concrete, and particularized. See, *Thompson v. Heineman*, 289 Neb. 798, 814, 857 N.W.2d 731, 747 (2015) (describing taxpayer standing as "exception to

the injury-in-fact requirement"); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002) (holding taxpayer had standing to challenge illegal expenditure of public funds); *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979) (holding taxpayer had standing to challenge constitutional amendment because it raised matter of great public concern). Furthermore, Plaintiffs correctly point out that in *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012), we allowed a taxpayer to bring an action under § 84-911 challenging a regulation that allegedly failed to comply with a statutory duty to assess and collect taxes on the grounds that the challenge mirrored a claim that public funds were being illegally spent.

Defendants ask us to reconsider and overrule the portion of *Project Extra Mile* holding that taxpayer standing applies in an action brought under § 84-911. They argue that this aspect of *Project Extra Mile* expanded the class of persons who may bring a suit under § 84-911 beyond the express limits set by the Legislature. For reasons explained below, we agree.

As noted above, the Nebraska Constitution does not contain a provision analogous to the U.S. Constitution's limitation of the jurisdiction of federal courts to "cases" and "controversies." Accordingly, the Nebraska Legislature may, so long as it acts within the bounds of other constitutional provisions, confer standing that is broader than the common-law baseline. For example, we have held that the Legislature conferred standing on "'[a]ny citizen of this state'" to bring a challenge under the Open Meetings Act. See *Schauer v. Grooms*, 280 Neb. 426, 441, 786 N.W.2d 909, 922 (2010), quoting Neb. Rev. Stat. § 84-1414(3) (Cum. Supp. 2004) (emphasis omitted).

But just as the Legislature can provide for standing that is broader than common-law standards, so too can it provide for more specific or more restrictive standing requirements. For example, in *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013), we held that the plaintiffs did not have standing to bring an action for judicial dissolution of a

corporation under the Business Corporation Act. Our analysis did not turn on common-law standing principles. Instead, we held that the text of the statute at issue allowed for such actions to be brought by "'a shareholder,'" but that the plaintiffs did not qualify as such. 285 Neb. at 926, 830 N.W.2d at 479, quoting Neb. Rev. Stat. § 21-20,162(2)(a) (Reissue 2012).

As we discussed above, the Legislature specifically provided who may seek relief under § 84-911(1): those whose "legal rights or privileges" are impaired or threatened by the challenged regulation. We stated in *Project Extra Mile* that the language of § 84-911 "[g]enerally . . . requires a plaintiff to have common-law standing . . . ." 283 Neb. at 385, 810 N.W.2d at 157. We then went on to consider whether standing was present under a common-law exception to the usual injury-in-fact requirement. See, also, *Thompson*, 289 Neb. at 814, 857 N.W.2d at 747 (describing taxpayer standing as "exception to the injury-in-fact requirement").

But, in fact, § 84-911 makes no reference to common-law standing. Neither does *H.H.N.H., Inc. v. Department of Soc. Servs.*, 234 Neb. 363, 451 N.W.2d 374 (1990), the sole case cited in *Project Extra Mile* for the proposition that § 84-911 tracks our common-law standing doctrine. Rather than incorporating the entirety of our common-law standing jurisprudence, both general rules and exceptions alike, the language of § 84-911 is framed in injury-in-fact terms: to have standing, a plaintiff must show his or her legal rights or privileges are or will be affected or impaired by the challenged regulation. The statute does not mention exceptions. And since the Legislature expressly limited the class of permissible plaintiffs under § 84-911 to those who can demonstrate an injury in fact tied to the regulation, it is not clear what authority this court had in *Project Extra Mile* to expand that class of permissible plaintiffs to include those that have standing under a common-law exception to the injury-in-fact requirement.

If forced to defend our recognition of standing under a common-law exception to the injury-in-fact requirement

in *Project Extra Mile*, one might attempt an argument that § 84-911 is not so clearly limited to those plaintiffs who can demonstrate an injury in fact and that this court merely construed statutory ambiguity to allow plaintiffs to proceed under a common-law exception. But even if such an argument might have some merit in another context, it fails to reckon with another issue we did not consider in *Project Extra Mile*: the fact that § 84-911 is a waiver of the State's sovereign immunity. See, e.g., *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998). Our rules of construction require us to strictly construe such statutes in favor of the sovereign and against the waiver. See *Rouse v. State*, 301 Neb. 1037, 921 N.W.2d 355 (2019). This leaves no room for finding a waiver "'beyond what the [statutory] language requires.'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S. Ct. 3274, 77 L. Ed. 2d 938 (1983), quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 47 S. Ct. 289, 71 L. Ed. 472 (1927).

It is certainly not the case that § 84-911 *must* be read to permit suits brought by plaintiffs proceeding under only a common-law exception to the injury-in-fact requirement. Accordingly, our obligation to strictly construe § 84-911 against such a waiver of the State's sovereign immunity leads us to conclude that § 84-911 cannot be interpreted to allow such suits. We overrule *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012), to the extent it recognized common-law exceptions to injury-in-fact standing in an action brought under § 84-911.

Because § 84-911 confers standing on only those individuals who can demonstrate an injury in fact as a result of the challenged regulation, these Plaintiffs lack standing. They seek to challenge the Execution Protocol, but they are not subject to death sentences. The only injury in fact they claim to have suffered is a procedural injury in the course of the regulation-making process. As we have explained, that is insufficient to proceed in an action brought under § 84-911.

CONCLUSION

Our decision today does not speak to the merits of Plaintiffs' claims regarding the adoption of the Execution Protocol or to the Execution Protocol more generally. Instead, we find that the district court correctly dismissed the action without reaching the merits, because Plaintiffs lack standing under § 84-911 to bring the claims they have asserted. We therefore affirm the district court's dismissal for lack of subject matter jurisdiction.

Affirmed.

Freudenberg, J., not participating.

Miller-Lerman, J., concurring.

Because we did not fully impose the limitations occasioned by the waiver of sovereign immunity contained in Neb. Rev. Stat. § 84-911 (Reissue 2014) in the case *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012), I concur in the opinion of the court and the decision that these plaintiffs lack standing.

With respect to a suitable challenge to the adoption and substance of the "Execution Protocol," I note that in the defendants' brief, they state, "[O]ther persons . . . with a personal stake in the application of the Execution Protocol exist: those on Nebraska's death row," and "the Execution Protocol affects only those with death sentences." Brief for appellees at 11,12. Thus, I understand that the defendants acknowledge that upon a showing of relevant facts, those persons who have received a death sentence have been impacted by the substance of the Execution Protocol.

Further, at oral argument, the defendants were asked, "Anybody on death row can say the process was imperfect?" to which the defendants replied, "I do think they could." And the defendants added, "Could someone who is impacted by a regulation bring a challenge about a procedural violation that they did not personally witness? And I think the answer [would be] yes." And finally, when asked, based on § 84-911

under discussion, whether a death row inmate who would not have "receive[d] notice from the Attorney General's office that we will soon seek a death warrant" could assert a claim, the defendants replied, "I do think they could."

Based on their position articulated in briefing and at oral argument, the defendants indicated that death row inmates are potential plaintiffs under § 84-911 both as to the procedure by which the Execution Protocol was adopted and its substance. So the propriety of the adoption and substance of the Execution Protocol may not go unchallenged.

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

Mark S. Krejci, appellant, v. Christina Krejci, appellee.

934 N.W.2d 179

Filed October 18, 2019. No. S-18-908.

1. **Appeal and Error.** As a threshold matter, an appellate court must determine what assignments of error were properly raised and argued on appeal.
2. ____. The cross-appeal section of an appellate brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of the facts, and when a brief of an appellee fails to present a proper cross-appeal, an appellate court declines to consider its merits.
3. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Contempt.** Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party.
6. **Contempt: Words and Phrases.** Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order.

7. **Contempt: Presumptions: Proof.** Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence.
8. **Visitation: Statutes.** In Nebraska, grandparent visitation is controlled by statute.
9. **Due Process: Notice.** It is fundamental to due process that 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.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed in part, and in part reversed and vacated.

Edith T. Peebles, of Brodkey, Cuddigan, Peebles, Belmont & Line, L.L.P., for appellant.

Barry S. Grossman for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

After the father of two children passed away in 2014, the children's paternal grandfather obtained a decree for grandparent visitation in 2016. On one planned visit in 2018, the children refused to visit their grandfather and the mother was unable to compel them. The grandfather brought a civil contempt proceeding against the mother, and the mother filed a complaint for modification of grandparent visitation. With regard to the contempt proceeding, following a hearing, the Douglas County District Court found that the mother did not willfully and contumaciously violate the visitation decree. Although the court dismissed the complaint for modification and did not hold a separate hearing on modification, it ultimately modified the decree to, inter alia, reduce summer visitation with the grandfather. The grandfather appeals,

and the mother attempts to cross-appeal. We affirm the dismissal of the complaint for contempt but vacate the order of modification.

STATEMENT OF FACTS

At the time the proceedings giving rise to this appeal were initiated, the minor children—a girl who was 15 years old and a boy who was 11 years old—lived in Nebraska with their mother, Christina Krejci. The biological father of the two children died in 2014. Following his death, Mark S. Krejci, the children's paternal grandfather, sought and obtained a decree for grandparent visitation under Neb. Rev. Stat. § 43-1802(1) and (2) (Reissue 2016). The decree, filed in December 2016, ordered visitation that included 17 consecutive days each summer and part of a weekend every 3 months, or as agreed in advance by the parties in writing. Mark and his wife live in Florida. Visits under the decree went smoothly until May 19, 2018.

Prior to the May 19, 2018, event from which this action arises, the parties made arrangements for Mark and his wife to visit. As planned, Mark and his wife flew to Omaha, Nebraska, in May 2018. However, the children informed Christina that they did not want to visit with the grandfather because May 19 was the date of their deceased father's birthday. The grandfather and his wife made several attempts to contact Christina to pick up the children, and Christina replied, generally, that the birthday was "a touchy day for all of [us]" and that she felt it was "hard . . . to force them to go somewhere they don't want to [go]" and she did not want to "add to the[ir] pain." The grandfather was ultimately unable to exercise his visitation on May 19.

The grandfather brought a civil contempt proceeding and complaint for interference of visitation against Christina, and Christina filed a complaint for modification of the visitation decree. The district court dismissed the motion for modification on its own motion without holding a separate hearing

because it found that it lacked jurisdiction "to allow grandparent visitation to take place or not take place upon the wishes of the minor children."

As part of the hearing on the civil contempt action to determine whether Christina had willfully and contumaciously violated the court's visitation order, the granddaughter appeared in chambers. She testified that Christina had not told her not to visit her grandfather. She testified that on May 19, 2018, "I didn't even want to be around my mom" and "I just think that on that day I should have been asked and not told" to have the visitation. She testified that she understood that her brother felt similarly. In addition to her objections to exercising grandparent visitation on her father's birthday, she generally expressed that she did not wish to be out of town for as long in the summer as in the past because a lengthy visitation affected her ability to work a summer job, complete driver's education classes, and participate in school activities. She testified in particular that she was not able to participate in cheerleading because of the grandparent visitation schedule. However, she acknowledged that visitation with her grandfather was an "important ingredient" to sustaining a relationship with him.

The record also contained email and text message exchanges between Christina and Mark and Christina and Mark's wife in which Christina raised concerns that the length of visitation was "a really long time for them to be gone." Mark submitted photographs showing the vacations the children had enjoyed with him and correspondence showing his efforts to arrange the visitation according to the decree.

In an order filed July 2, 2018, the district court found that Christina had not interfered with visitation and had not willfully and contumaciously violated the visitation decree. Accordingly, the court dismissed the complaint for contempt and for interference of visitation. In the same order, the district court determined that in light of the children's ages, the

children's desire to remember their deceased father privately on his birthday, and the summer activities that children have as they get older, the decree of grandparent visitation should be modified. The order modified the decree so that future visitation would not include the date of the deceased father's birthday or the anniversary of his death and that summer visitation would be reduced from 17 days to 8 days of continuous vacation visitation.

Mark appeals, and Christina attempts to cross-appeal.

ASSIGNMENTS OF ERROR

On appeal, Mark claims, summarized and restated, that the district court erred when it (1) determined that Christina was not in contempt and (2) modified the decree of grandparent visitation.

[1,2] Christina also attempts to raise a cross-appeal related to her complaint to modify the decree. As a threshold matter, we must determine what assignments of error were properly raised and argued on appeal. *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018). Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014) provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

Thus, the cross-appeal section of an appellate brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of the facts. *In re Estate of Graham, supra*. However, Christina's cross-appeal section fails to set forth a separate title page and a table of contents. When a brief of an appellee fails to present a proper cross-appeal pursuant to § 2-109, as in this case, we decline to consider its merits. See *In re Estate of Graham, supra*.

STANDARD OF REVIEW

[3,4] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion. *Martin v. Martin*, 294 Neb. 106, 881 N.W.2d 174 (2016). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id*.

ANALYSIS

Contempt.

Mark claims that the district court erred when it determined that Christina was not in contempt of the decree of grandparent visitation as a result of the May 19, 2018, event. We find no merit to this assignment of error.

[5-7] We recently described civil contempt proceedings as follows:

> Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party. See, *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh, supra*. Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order. *Hossaini v. Vaelizadeh, supra*.

> Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence. See, *id.*; *Smeal Fire Apparatus Co. v. Kreikemeier, supra*.

Martin v. Martin, 294 Neb. at 117, 881 N.W.2d at 182.

We are aware that a parent may use a child's hesitation to visit a noncustodial person as a subterfuge for contumaciously interfering with the visitation. Mark relies on the event of May 19, 2018, to establish his claim of contempt. However, in *Martin*, we observed that a "singular event," which is not in accordance with a court decree, may be defensible. 294 Neb. at 119, 881 N.W.2d at 183. Except for this event, the record shows that grandparent visitation had gone smoothly. To illustrate this history, we refer to the order dismissing the contempt complaint in which the district court found "[e]vidence was also adduced that as recently as March of 2018 [the granddaughter] traveled to Florida to visit with her grandfather over spring break. Her brother was unable to attend because of a recent ear surgery." This case presents a singular event, but not a pattern.

The district court heard the evidence and stated that the "primary reason" for the failure of grandparent visitation was the fact that it was scheduled on the deceased father's birthday, which the court described as an "upsetting day."

In its order, the district court stated: "[The granddaughter] testified that she and her brother were very upset because the visitation was to take place on the birthday of their deceased father. She further testified that her mother, [Christina], did in no way encourage them not to participate in the visitation." The district court accepted this testimony and did not err in doing so. The district court specifically found that with respect to the granddaughter, "[i]t definitely was her decision not to visit."

While we do not endorse the proposition that the responsibility for adhering to a visitation plan devolves to the children,

a logical conclusion which results from the district court's findings in this contempt case is that Christina did not encourage or instruct the minor children to refuse to participate in the grandparent visitation. The district court viewed the event of May 19, 2018, in the overall context of a general history of compliance with the decree and the unusual circumstances of that particular day persuaded it that Christina's failure to strictly enforce the terms of the order on that date was not willful. The district court's determination that Christina was not in contempt was not an abuse of discretion.

Modification.

Mark claims that the district court erred when it modified the grandparent visitation decree in its order filed after the contempt hearing. Given the procedural history of this case, we find merit to this assignment of error. Accordingly, we reverse that portion of the order of July 2, 2018, which modified the decree of grandparent visitation, and we vacate the order of modification.

[8] At common law in Nebraska and elsewhere, "'"grandparents lacked any legal right to visitation and communication with their grandchildren if such visitation was forbidden by the parents . . . . Indeed, the parents' obligation to allow such visitation was a moral, not a legal obligation."'" *Hamit v. Hamit*, 271 Neb. 659, 673, 715 N.W.2d 512, 525 (2006), quoting *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999). However, every state has adopted a statutory scheme permitting grandparent visitation under varying circumstances

> [i]n part due to changing demographics and the presence of single-parent households in which grandparents and other persons "outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing," *Troxel v. Granville*, 530 U.S. 57, 64, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), and in part due to a recognition of "the importance of the grandparent-grandchild relationship in the lives of children," *Moriarty*

> *v. Bradt*, 177 N.J. 84, 97, 827 A.2d 203, 210 (2003), *cert. denied* 540 U.S. 1177, 124 S. Ct. 1408, 158 L. Ed. 2d 78 (2004) . . . .

Hamit v. Hamit, 271 Neb. at 673-74, 715 N.W.2d at 525. Thus, in Nebraska, grandparent visitation is controlled by statute. *Id*.

Modification of grandparent visitation may be ordered pursuant to § 43-1802(3), which provides: "The court may modify an order granting or denying such visitation upon a showing that there has been a material change in circumstances which justifies such modification and that the modification would serve the best interests of the child." Because we determine, as explained below, that the process by which the district court modified the grandparent visitation plan was flawed in this case, we do not address the propriety of combining contempt and modification of grandparent visitation in one hearing upon proper notice.

As explained in our statement of facts, Christina filed a complaint to modify the decree of grandparent visitation on June 21, 2018. An evidentiary hearing on Mark's complaint for contempt was conducted on June 28. The district court dismissed Christina's complaint to modify on its own motion on July 2, because it found that it lacked jurisdiction. The result of the evidentiary hearing on Mark's complaint for contempt was contained in the district court's order of July 2, in which it dismissed the complaint but proceeded to modify the decree of grandparent visitation.

Mark contends in general that he did not receive proper notice that modification would be considered at the hearing of June 28, 2018, and in particular that he was denied the opportunity to present certain evidence that would have pertained to modification. The record is consistent with Mark's contentions.

[9] It is fundamental to due process that 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. See *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018). The procedural record in this case shows that the district court effectively dismissed Christina's complaint to modify prior to the contempt hearing and that it was reasonable for the parties to conclude that modification was off the table. In fact, the bill of exceptions shows that the court stated at the commencement of the hearing on June 28, 2018, that the purpose of the hearing was to consider Mark's complaint for contempt.

We agree with Mark's contention that under the circumstances of this case, the court's consideration and determination of modification as a consequence of the contempt hearing were improper due to a lack of notice and an opportunity to be heard. Accordingly, we reverse that portion of the order of July 2, 2018, which modified the decree of grandparent visitation, and we vacate the order of modification.

CONCLUSION

For the reasons explained above, we affirm the district court's ruling dismissing Mark's complaint for contempt but we reverse the portion of the order which modified the decree of grandparent visitation and vacate the order of modification.

Affirmed in part, and in part
reversed and vacated.

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

Jay Williamson, Personal Representative of the Estate of Peggy Williamson, deceased, appellant, v. Bellevue Medical Center, LLC, appellee.

934 N.W.2d 186

Filed October 18, 2019. No. S-18-1069.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations in the pleadings and show conclusively that the controlling facts are other than as pled.
4. **Summary Judgment: Proof.** The party moving for summary judgment must make a prima facie case by producing enough evidence to show that the movant is entitled to judgment if the evidence were uncontroverted at trial.
5. ____: ____. If the party moving for summary judgment makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
6. **Summary Judgment.** At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. It does not resolve the factual issues.
7. **Negligence: Liability: Proximate Cause.** A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the

condition; (2) the possessor should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the possessor should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the possessor failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

Appeal from the District Court for Sarpy County: Nathan B. Cox, Judge. Affirmed.

Michelle D. Epstein, of Ausman Law Firm, P.C., L.L.O., for appellant.

Kathryn J. Cheatle, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Peggy Williamson sustained injuries when she fell on a curb between a driveway and a sidewalk outside the entrance to Bellevue Medical Center, LLC (BMC), in Bellevue, Nebraska. She brought an action for negligence and premises liability in the district court for Sarpy County. Following her death, the action was revived in the name of her husband, Jay Williamson, as personal representative of Peggy's estate (Williamson). The district court granted summary judgment in favor of BMC, noting that BMC presented evidence that there was no defect in the curb, that it did not violate any code or ordinance, and that Williamson failed to produce evidence that the curb created an unreasonable danger. Williamson appeals, arguing it was error to grant summary judgment because a material issue of fact remained as to whether BMC should have expected that lawful entrants such as Peggy would not discover or realize the danger of an unpainted sidewalk curb or would fail to protect themselves against such danger. We affirm.

STATEMENT OF FACTS

Peggy fell on a curb at BMC's premises on August 5, 2012. Peggy brought a personal injury action alleging BMC was negligent with regard to the unpainted curb between the driveway and sidewalk approaching the BMC main entrance. The complaint alleged, summarized and restated, that BMC was negligent because it (1) created a hazardous condition on its premises; (2) knew or should have known the unpainted curb posed an unreasonable risk of harm to others, such as Peggy; and (3) failed to reasonably warn or protect visitors against the danger. Peggy alleged that she suffered significant injuries and damages as a result of her fall, including a nasal bone fracture, a closed head injury, and a right knee meniscus tear.

BMC's answer generally denied that it was negligent and asserted various affirmative defenses not relevant to this appeal. BMC later moved for summary judgment. While the proceedings in the trial court were pending, Peggy died on February 3, 2018. Williamson was appointed personal representative of Peggy's estate, and the action was revived in his name as personal representative of Peggy's estate.

At a hearing on the motion for summary judgment, the district court admitted evidence submitted by both parties, including surveillance footage of the fall; photographs; depositions of Peggy and Williamson; and affidavits and depositions regarding the construction of the curb, BMC's ongoing initiatives to increase safety throughout the BMC campus, and remedial measures taken after Peggy's fall to mark the elevation change of the curb.

The evidence generally showed that on Sunday, August 5, 2012, at approximately 2 p.m., Peggy and Williamson drove to BMC to visit a friend. They attempted to enter the BMC main entrance and found the doors locked because it was the weekend. A sign rerouted visitors to entrance doors at the emergency department. They began to walk toward the emergency department when a person stepped out from the main entrance doors and offered to let them in. At this point, Peggy turned,

approached the main entrance again, and fell on an unpainted curb area between the driveway to BMC and the sidewalk approaching the main entrance. The curb featured a tapered or flared edge where the elevation gradually changed from a flat curb to a raised curb. The curb was the same color as the surrounding concrete on the sidewalk and driveway.

At her deposition, Peggy described the events leading up to and following her fall. She watched the surveillance video that showed her walking along the sidewalk; stepping down the curb into the driveway; turning around to proceed back along the same general area toward the main entrance, ahead of Williamson; and tripping on the curb. Peggy denied having observed any taper or elevation change in the sidewalk prior to her fall and believed that the area was flat without a curb. Peggy testified that the sole cause of her tripping was the change in elevation between the driveway and the curb. She stated in her affidavit that she believed that if the curb cutout had been painted bright yellow at the time she fell, as was done sometime after the incident, she would have "stepped differently" and not tripped over the change in elevation.

Williamson testified in his disposition that he did not observe Peggy actually trip and fall and that he did not know exactly where she tripped. He helped Peggy up and into BMC, where she was treated in the emergency department.

In her deposition, Paulette Davidson, BMC's chief executive officer, acknowledged that she visited Peggy when she was in the emergency department and apologized for the main entrance doors being locked, for staff of the emergency department not coming out to help her, and for the fall itself. Peggy averred in her affidavit that Davidson stated that the curb should have been painted or marked. However, Davidson testified that she did not remember making this statement and believed she could not have known whether the curb was painted at the time she spoke with Peggy because she was unfamiliar with the curb when they spoke and did not know exactly where Peggy had fallen.

Brian Hovey, BMC's acting facilities manager, and Brandon Quindt, BMC's director of support services at the time of the fall, were also deposed. Both denied knowing of any complaints, safety concerns, or discussions about issues navigating the curbs along the driveway between the emergency room doors and the main entrance doors prior to Peggy's fall. They testified that because of their job duties, any incidents of tripping or any concerns related to tripping over the curb in question would have been brought to their attentions. They also testified they did not recall that the curb was obstructed from view, difficult to view, damaged, in a state of disrepair, or anything other than a standard curb.

A letter (McGill Letter) dated August 2, 2012, to Hovey, prior to Peggy's fall, from Timothy McGill, the president of McGill Restoration, discussed a bid to enhance markers on the curb in question. Specifically, the McGill Letter stated that McGill Restoration could "[m]ark the entire curb between the two entrances and in the circle lane near the southeast entrance yellow to identify the curb and hopefully eliminate trip and fall incidents." McGill Restoration is a business which specializes in concrete restoration and specialty coating systems with a primary focus on the repair, strengthening, and protection of parking structures, stadiums, bridges, and other infrastructures. Hovey testified that he did not recall why the bid was requested from McGill Restoration, but, as noted above, he stated he did not recall any incidents in the area, issues with the curb, or complaints about the curb's visibility prior to Peggy's incident.

McGill acknowledged that he was asked to "submit a bid to paint the slope between the street, curb, and handicap accessible ramp . . . to make the change in slope more noticeable for drivers and pedestrians." McGill did not recall whether the bid was requested as a result of an incident. McGill stated that he inspected the area at issue before making his bid. The McGill Restoration bid recommended several markings in the area, including re-marking existing crosswalks, marking curbs

between the entrances, crosshatching the sidewalk, installing signs for employees instructing them to avoid walking in the driveway, and touching up faded pavement parking throughout the facility.

Quindt testified in his deposition that the McGill Letter was consistent with work by a committee at BMC which was painting curbs throughout the BMC campus to "call out" elevation points or, in other words, to provide additional notification to visitors of elevation changes throughout the campus. Quindt testified that the committee's discussion or identification of steps to make an aspect of BMC safer did not indicate it was a hazard as it existed, but, rather, that it was part of continuing efforts to try and improve the overall safety of the BMC campus. He testified that the committee was not connected to specific prior incidents or complaints.

With regard to the curb construction, the court received the affidavits of Bruce Carpenter and McGill submitted by BMC. Carpenter is a senior vice president at an architectural firm, a licensed member of Nebraska's Board of Engineers and Architects, and a member of relevant professional organizations. Both Carpenter and McGill stated that the curb at issue complied with all applicable building codes and regulations. Carpenter denied the existence of "a building code or requirement that the curb at issue be painted or otherwise marked." He stated that the design contract and planning documents were in compliance with the applicable building codes when the city of Bellevue issued a building permit to BMC in 2008. He further stated that all habitable portions of BMC were inspected by Bellevue's city inspector, who issued temporary and permanent occupancy certificates stating the structure was in compliance with the ordinances of the city of Bellevue regulating building construction and use.

The district court evaluated the evidence presented by both parties and granted the motion for summary judgment filed by BMC. In its written order granting BMC's motion, the district court noted that there was no unreasonable defect in the curb, it

did not violate any code or ordinance, and no expert had identified the construction of the curb as a danger.

Williamson appeals.

ASSIGNMENTS OF ERROR

Williamson claims that the district court erred when it granted summary judgment in favor of BMC. Specifically, he contends there was evidence which could support an inference that the unpainted, tapered curb at the BMC main entrance posed an unreasonable risk of harm to lawful entrants such as Peggy who would predictably fail to protect themselves against the danger.

STANDARDS OF REVIEW

[1,2] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Williamson claims that the district court erred when it granted summary judgment in favor of BMC and dismissed his claims for negligence and premises liability related to Peggy's fall over an unpainted, tapered curb located between the driveway and the BMC main entrance. He argues that the evidence and inferences, viewed in his favor, created genuine disputes of material facts as to whether the unpainted curb between the driveway and the BMC main entrance created a dangerous condition and whether BMC should have expected that Peggy would not discover or realize the danger or would fail to

protect herself against the danger. As we discuss below, BMC carried its burden to show it was entitled to summary judgment, and even if the curb were deemed a dangerous condition, Williamson failed to produce evidence showing a genuine issue of material fact as to whether BMC should have expected persons such as Peggy would not discover or realize the danger from the unpainted curb and protect themselves against the danger. Accordingly, we affirm.

[3-6] We have noted that the primary purpose of the summary judgment procedure is to pierce the allegations in the pleadings and show conclusively that the controlling facts are other than as pled. *Hughes v. School Dist. of Aurora, supra*. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2018) provides in part that a motion for summary judgment shall be granted "if the pleadings and the evidence admitted at the hearing show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment must make a prima facie case by producing enough evidence to show that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Hughes v. School Dist. of Aurora, supra*. If the party moving for summary judgment makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id.* At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. It does not resolve the factual issues. *Wynne v. Menard, Inc.*, 299 Neb. 710, 910 N.W.2d 96 (2018). Where reasonable minds could draw different conclusions from the facts presented, there is a triable issue of material fact. See *id.*

[7] We have recognized that a possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the possessor should have

realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the possessor should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the possessor failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. See *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003). See, also, *Warner v. Simmons*, 288 Neb. 472, 849 N.W.2d 475 (2014); NJI2d Civ. 8.26.

Had the matter proceeded to trial, Williamson, as plaintiff, would have had the burden of proving each of the five elements identified above. But because the case was disposed of by a ruling on BMC's motion, it was incumbent on BMC to make a showing that even giving the inferences in favor of Williamson, Williamson's case would not be successful and it was entitled to judgment. See *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

In the district court and on appeal, BMC contends that no reasonable finder of fact could infer from the evidence that Williamson could prove all five elements of a premises liability claim. Thus, BMC argued particularly that Williamson could not show that the unpainted curb posed an unreasonable risk of harm, because although it was unpainted and tapered, it was located between a driveway and a sidewalk where one ordinarily expects to find a curb. BMC asserts that a curb is not a condition which subjects it to liability as summarized in NJI2d Civ. 8.26. That is, the curb is merely an ordinary risk. See *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998). To put our analysis in context, we note that we have held that curbs are not inherently dangerous. See *id.* In the alternative, BMC also submitted evidence with regard to the third element identified above, because even if the unpainted curb did present an unreasonable risk of harm, its evidence showed that BMC should not have expected that a lawful visitor such as the plaintiff would

fail to discover and protect himself or herself against that risk. See *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

The evidence BMC adduced showed that the curb was not obstructed from view, was in good repair, and met applicable building codes. Although BMC had previously elicited bids from McGill Restoration that included a bid to paint and mark curbs, including the curb where Peggy tripped, the uncontroverted evidence showed that the McGill Letter was not a response to an incident or specific safety concern, but instead was part of an initiative to improve safety across the BMC campus. According to the evidence, BMC had received no prior complaints and BMC employees denied there was any reason to have safety concerns with the curb where Peggy tripped or similar curbs at BMC. Although not the determinative factor, BMC also directs our attention to the uncontroverted evidence that Peggy had successfully walked down the curb in the same area 12 seconds before her fall.

BMC relies on our precedent stating that even where a dangerous condition exists, a premises owner will not be liable unless the premises owner should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger. E.g., *Edwards v. Hy-Vee*, 294 Neb. 237, 883 N.W.2d 40 (2016); *Aguallo v. City of Scottsbluff, supra*; *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996). This principle follows the language of the Restatement (Second) of Torts § 343 (1965) and is consistent with 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 51 (2012).

We agree with the district court that BMC carried its initial burden showing it was entitled to judgment as a matter of law. Even assuming that a curb could pose a risk of danger, there was no evidence that BMC was on notice that a visitor such as Peggy either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger.

To the contrary, the curb was, by all accounts, ordinary and obvious, despite its tapered edge, and traversing it is the type of action a pedestrian walking between a parking lot and sidewalk would expect to encounter and navigate successfully. There was no evidence that the tapered edge made it less visible than a more commonplace step-style curb and no evidence of prior falls. Given BMC's showing, the burden shifted to Williamson to produce evidence that the curb posed an unreasonable risk of harm and that BMC should have been aware that persons similar to Peggy would fail to protect themselves against the danger or peril associated with the unpainted curb in this location. Williamson failed to do so.

In its order, the district court stated:

> There is no indication from the evidence received that there was any defect in the curb. There is no evidence that the unpainted curb was in violation of any code or ordinance. There is, likewise, no evidence of an expert identifying this unpainted curb as a danger. Moreover, [Peggy] walked over the exact same spot seconds earlier without issue, turned around and when walking back over the same spot, she then fell. These facts are undisputed and Williamson has failed to offer evidence to contradict the same.

Although our reasoning differs somewhat from that of the district court, we conclude that the district court did not err when it granted summary judgment in favor of BMC.

CONCLUSION

There was no evidence from which a reasonable finder of fact could infer that Williamson had established all the elements of his premises liability case, and accordingly, we affirm the order of the district court which granted summary judgment in favor of BMC.

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. Craig A. Hoffman, respondent.

934 N.W.2d 194

Filed October 25, 2019. No. S-17-1123.

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, Craig A. Hoffman, on September 10, 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 17, 2002. This court temporarily suspended him on May 17, 2018. There are presently five Class IIA felony charges of theft by deception ($5,000 or more) pending against respondent in Lancaster County Court. On September 10, 2019, respondent filed a voluntary surrender of license to practice law, in which he stated that he was being investigated by relator for various complaints implicating respondent's client trust account. The surrender stated that relator is prepared to file formal disciplinary charges against

respondent. Respondent states that he knowingly does not contest the truth of the allegations indicated by relator. 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 could be made against him in connection with his client trust account. 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. 2019) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

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

State of Nebraska, appellee, v. Raymond Mata, Jr., appellant.

934 N.W.2d 475

Filed October 25, 2019. No. S-18-740.

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: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.
3. **Constitutional Law: Trial.** Inherently prejudicial practices, like shackling, are constitutionally forbidden during the guilt phase of a trial unless the use is justified by an essential state interest specific to each trial.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
5. **Limitations of Actions.** The doctrine of equitable tolling permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstances beyond his or her control, the plaintiff cannot be expected to file suit on time.
6. **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.
7. **Postconviction: Proof.** In a postconviction proceeding, an evidentiary hearing is not required when the motion does not contain factual

allegations which, if proved, constitute an infringement of the movant's constitutional rights.

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

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

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

Brian William Stull, of American Civil Liberties Union Foundation, and Amy A. Miller, of American Civil Liberties Union of Nebraska Foundation, for amici curiae American Civil Liberties Union of Nebraska and American Civil Liberties Union Foundation.

Tracy Hightower-Henne, of Hightower Reff Law, G. Michael Fenner, of Creighton University School of Law, and Kevin Barry, of Quinnipiac University School of Law Legal Clinic, for amici curiae Legal Scholars.

Robert F. Bartle, of Bartle & Geier, and Anne C. Reddy, Keith Hammeran, and Tom Lemon, of Greenberg Traurig, L.L.P., for amici curiae former Nebraska Justices and Judges.

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

Funke, J.

Raymond Mata, Jr., appeals the district court's denial of his second amended motion for postconviction relief without an evidentiary hearing. This postconviction action follows our decisions on direct appeal (*Mata I*),[1] after remand (*Mata II*),[2]

[1] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[2] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

and after denial of an initial motion for postconviction relief (*Mata III*).[3] Mata argues the district court erred in denying his constitutional claims that he was made to wear shackles in front of the jury during jury selection, overruling and finding untimely his claims that the sentencing scheme requiring a judge to make factual findings to impose the death penalty was unconstitutional, and overruling and finding untimely his claims that his constitutional rights were violated by the Legislature's passing a bill repealing the death penalty but a public referendum reimposing it. For the reasons stated herein, we affirm.

BACKGROUND

Mata was found guilty of first degree premeditated murder, first degree felony murder, and kidnapping in association with the death of 3-year-old Adam Gomez. In *Mata I*,[4] we explained the evidence adduced at trial showed Adam was the son of Patricia Gomez and Robert Billie. Patricia, Billie, and Adam lived together until September 1998, when Patricia and Billie ended their relationship and Billie moved out. Shortly thereafter, Mata and Patricia began dating, and Mata moved in with Patricia and Adam in October or November. Patricia later told police that although Mata did not treat Adam badly, Mata consistently expressed resentment of Adam.

Mata moved out on February 10, 1999, and moved in with his sister. That night, Patricia and Billie had sexual relations. On February 11, Patricia obtained a restraining order against Mata. However, Patricia continued to see Mata and they had sexual relations on February 14.

Later in February 1999, Patricia found out she was pregnant. Mata became aware of Patricia and Billie's sexual encounter and heard that the child had been conceived between February

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[3] *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010), *disapproved, State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[4] *Mata I, supra* note 1.

7 and 10. Mata had separate confrontations with both Patricia and Billie about their relationship.

On March 11, 1999, Mata discovered that Patricia, Billie, and Adam attended a doctor's appointment for Adam together. That day, Mata unsuccessfully attempted to have Patricia come to his sister's house to visit him. When Patricia would not come to him, Mata went to Patricia. At her residence, Adam was watching television and Mata sent him to bed. Patricia testified she fell asleep while Mata watched television. Patricia said that when she woke up, Mata and Adam were gone, as was the sleeping bag that Adam had been using as a blanket. Mata denied knowing where Adam was when Patricia called at 3:37 a.m. Mata came back to Patricia's house and told Patricia that Adam was likely with her mother or Billie.

In subsequent searches of Mata's sister's residence, police found Adam's sleeping bag and clothing Adam had been wearing in a bag in the dumpster behind the residence. The bag also contained trash identified as being from the residence, including a towel and a boning knife that Mata's sister denied throwing away. In the residence, police found human remains in the basement room occupied by Mata. Hidden in the ceiling was a package wrapped in plastic and duct tape which contained a crushed human skull. The skull was fractured in several places by blunt force trauma that had occurred at or near the time of death. The head had been severed from the body by a sharp object at or near the time of death. In the kitchen refrigerator, police found a foil-wrapped package of human flesh. Mata's fingerprint was found on the foil. Human remains were also found on a toilet plunger and were found to be clogging the sewer line from the residence. Human flesh, both cooked and raw, was found in a bowl of dog food and in a bag of dog food. Human bone fragments were recovered from the digestive tract of Mata's sister's dog. All of the recovered remains were later identified by DNA analysis as those of Adam. Adam's blood was also found on Mata's boots.

After Mata was convicted, he was sentenced to life imprisonment for kidnapping and a three-judge panel sentenced him to death for first degree premeditated murder, finding the existence of an aggravating circumstance under Neb. Rev. Stat. § 29-2523(1)(d) (Cum. Supp. 2002). In *Mata I*, we affirmed these convictions and the life imprisonment sentence for kidnapping. Based upon *Ring v. Arizona*,[5] which was decided after the sentencing, we vacated the death sentence and remanded the cause with directions for a new penalty phase hearing and resentencing on the first degree premeditated murder conviction, requiring the jury to determine the existence of aggravating circumstances.[6]

On remand, the jury unanimously found the existence of the aggravating circumstance of exceptional depravity. A three-judge panel then heard evidence on mitigating circumstances and sentencing disproportionality. The panel found no statutory mitigating circumstances, considered five nonstatutory mitigating circumstances, and concluded the mitigating factors did not approach or exceed the weight of the exceptional depravity finding. The panel determined the penalty was not excessive or disproportionate to the penalty imposed in similar cases and again sentenced Mata to death on the first degree premeditated murder conviction.

In *Mata II*, issued February 8, 2008, we affirmed the imposition of Mata's death sentence. However, we determined that electrocution, as a means of carrying out that sentence, was cruel and unusual punishment in violation of Neb. Const. art. I, § 9, and issued an indefinite stay of Mata's execution.[7] Mata filed a petition for certiorari with the U.S. Supreme Court. On October 6, the Supreme Court denied Mata's petition.

On July 2, 2009, Mata filed a pro se motion for postconviction relief. At a preliminary hearing in October to consider

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[5] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[6] *Mata I, supra* note 1.

[7] *Mata II, supra* note 2.

whether to grant a request of counsel and an evidentiary hearing, Mata argued that he believed an evidentiary hearing would be premature because he was not "'ready'" and wished for the court to first consider the appointment of counsel who he hoped could assist him in evaluating the record and amending the motion before the merits would be determined.[8] Mata explained that he filed the motion for postconviction relief without first fully reviewing the record, because he needed to toll the 1-year statute of limitations for filing an application for a writ of habeas corpus in federal court. He claimed that our indefinite stay of his execution had placed him in a legal "'limbo'" which prevented him from filing a habeas action within a year from the final judgment.[9] Mata stated he would like an opportunity to amend his motion, with or without counsel.

In a single final order, the district court denied both an evidentiary hearing and Mata's request for appointment of counsel. The court did not specifically determine whether the motion for postconviction relief presented any justiciable issue which would entitle Mata to appointment of counsel. Instead, the court found that the files and records affirmatively showed that Mata was entitled to no relief based on the allegations in his motion.

In *Mata III*, we found it was an abuse of the district court's discretion to deny Mata leave to amend his motion for postconviction relief, reversed the district court's judgment, and remanded the cause with directions to appoint Mata counsel and grant him leave to amend his motion. The mandate in *Mata III* was issued on March 8, 2011, and Mata was appointed postconviction counsel on March 15.

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. Within L.B.

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[8] *Mata III, supra* note 3, 280 Neb. at 851, 790 N.W.2d at 717.

[9] *Id.* at 851, 790 N.W.2d at 718.

268, the Legislature provided that "in any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment." 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.[10]

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].'"[11]

On December 4, 2017, Mata filed his first amended motion for postconviction relief, and on March 16, 2018, he filed a second amended motion. The district court denied Mata's second amended motion for postconviction relief without an evidentiary hearing. Mata timely appealed.

ASSIGNMENTS OF ERROR

On appeal, Mata assigns, consolidated and restated, that the district court erred in (1) denying the claim that his constitutional rights were violated by being shackled during jury selection, because it could have been, and was, brought and decided on direct appeal; (2) denying and finding untimely Mata's claims that his Sixth Amendment rights were violated by having a panel of judges find mitigating circumstances and weigh those circumstances against the jury's finding of aggravating

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[10] See *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

[11] See *id.* at 706, 931 N.W.2d at 877. See, also, Neb. Const. art. III, § 3.

circumstances; (3) denying and finding untimely Mata's claims that the referendum process and result amounted to an impermissible bill of attainder, cruel and unusual punishment, and violations of his due process rights by imposing a death sentence on Mata after it was changed to life imprisonment by L.B. 268; and (4) denying and finding untimely Mata's claims that the process of the referendum and its supporting campaign were an improper exercise violating constitutionally recognized separation of powers.

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.[12]

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.[13]

ANALYSIS

Use of Shackles During Jury Selection

Mata first assigns that the district court erred in denying the claim that his constitutional rights were violated by being shackled during jury selection. On this assignment, Mata alleges he was required to walk with shackles into the courtroom, in front of the jury to be selected, before being seated. Mata argues the district court incorrectly determined this issue could have been, and was, brought and decided on direct appeal, because *Deck v. Missouri*[14] was not decided until after Mata's first appeal.

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[12] *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018).

[13] *State v. Tyler*, 301 Neb. 365, 918 N.W.2d 306 (2018).

[14] *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

[3] This argument is without merit. *Deck* did not establish a new rule for the use of shackles throughout a trial. *Deck* extended the existing holding detailed in *Holbrook v. Flynn*[15] that inherently prejudicial practices, like shackling, are constitutionally forbidden during the guilt phase of a trial unless the use is "justified by an essential state interest specific to each trial." *Deck* clarified that this requirement also applies to the penalty phase.[16]

[4] In *Mata I*, we addressed Mata's claim of a constitutional violation of his rights due to his being shackled during jury selection and specifically analyzed it under the requirement detailed in *Holbrook*.[17] In his current appeal, Mata makes no new arguments based upon *Deck*'s extension of that requirement. Instead, Mata seeks to relitigate his claims which were rejected on direct appeal, because *Deck* was decided after *Mata I* and restated *Holbrook*'s holding. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.[18] Accordingly, this assignment is procedurally barred.

Use of Panel of Judges in Mata's Sentencing

Mata next assigns the district court erred in denying and finding untimely his claims challenging the use of the panel of judges to consider mitigating circumstances and weigh those circumstances against the jury's finding of aggravating circumstances. In considering this constitutional challenge to Nebraska's capital sentencing scheme, we must first determine whether these claims are time barred under Neb. Rev. Stat. § 29-3001(4) (Reissue 2016).

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[15] *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

[16] *Deck, supra* note 14.

[17] *Mata I, supra* note 1.

[18] *Allen, supra* note 12.

The Nebraska Postconviction Act contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.[19] The triggering events are:

> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review[.][20]

Mata first made his postconviction claims challenging the use of a panel of judges to find and consider mitigating circumstances in his initial amended postconviction motion filed December 2017. Mata argues his claims are not time barred, because the U.S. Supreme Court in *Hurst v. Florida*[21] provided newly recognized constitutional requirements for capital sentencing schemes. Although *Hurst* was decided in January 2016,[22] Mata and amici curiae argue that equitable tolling should apply because the passage of L.B. 268 and its repeal through public referendum created uncertainty as to Mata's sentence.

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[19] *State v. Harrison*, 293 Neb. 1000, 881 N.W.2d 860 (2016).

[20] § 29-3001(4).

[21] *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

[22] *Id.*

[5] The doctrine of equitable tolling permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstances beyond his or her control, the plaintiff cannot be expected to file suit on time.[23] However, to date, we have not determined whether the doctrine of equitable tolling applies to postconviction actions brought under § 29-3001.[24] In this matter, we again need not make the determination as to whether equitable tolling applies to postconviction actions. In order for *Hurst* to be pertinent, the holding must have recognized a constitutional claim and that the newly recognized right is applicable retroactively to cases on postconviction collateral review.

In *State v. Lotter*,[25] we considered the question of whether *Hurst* was a triggering event under § 29-3001(4) to challenges to Nebraska's capital sentencing scheme. In *Lotter*, the defendant filed a motion for postconviction relief alleging Nebraska's capital sentencing scheme was unconstitutional in light of *Hurst* and within a year of the *Hurst* decision. In finding this claim time barred, we determined that the *Hurst* decision did not initially recognize a constitutional claim and set forth a new rule of law for sentencing. We explained *Hurst* merely applied the constitutional requirement recognized in *Ring*[26] that "capital defendants are entitled to a jury determination of any fact that would increase the possible maximum punishment," which was a holding that utilized a rule from *Apprendi v. New Jersey*[27] that "'"[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that

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[23] *State v. Conn*, 300 Neb. 391, 914 N.W.2d 440 (2018).

[24] See, *id.*; *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015).

[25] *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), *cert. denied* ___ U.S. ___, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019).

[26] *Ring, supra* note 5.

[27] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

increase the prescribed range of penalties to which a criminal defendant is exposed."'"[28]

In *Lotter*, we specifically addressed the argument Mata now raises that *Hurst* expanded on *Ring* and *Apprendi* and announced a new requirement that a jury must find and consider mitigating circumstances instead of a panel of judges. We stated:

> Most federal and state courts agree that *Hurst* did not hold a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. The 10th Circuit aptly observed: "[T]he Supreme Court's holding in *Hurst* only referenced the [finding of aggravating circumstances] . . . . The Court thus did not address whether the second of the required findings—that mitigating circumstances do not outweigh the aggravating circumstances—is also subject to *Apprendi*'s rule." . . . The plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. And this court has previously concluded that neither *Apprendi* nor *Ring* require[s] that the determination of mitigating circumstances, the balancing function, or the proportionality review be undertaken by a jury.[29]

We find no reason to depart from our determination in *Lotter* that the *Hurst* opinion merely applied previously recognized constitutional requirements to Florida's sentencing statute and that it did not extend the holding in *Ring* and *Apprendi* to finding and considering mitigating circumstances in capital sentencing schemes. As such, *Hurst* did not create a triggering event under § 29-3001(4) and Mata's claims concerning Nebraska's sentencing scheme are untimely and procedurally barred.

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[28] *Lotter, supra* note 25, 301 Neb. at 129, 917 N.W.2d at 855.

[29] *Id.* at 144-45, 917 N.W.2d at 863-64.

L.B. 268 and Public Referendum

Mata assigns that his constitutional rights against cruel and unusual punishment were violated and that he was deprived due process of law by L.B. 268 and its repeal by public referendum, which constituted an impermissible bill of attainder. Central to all three constitutional claims is the proposition that L.B. 268 changed his sentence to life imprisonment and the public referendum changed it back to death.

Contrary to this proposition, however, L.B. 268 never went into effect. L.B. 268 was passed in May 2015 and was set to take effect on August 30.[30] On August 26, opponents filed with the Nebraska Secretary of State approximately 166,000 signatures in support of a referendum.[31] Under the Nebraska Constitution, when a referendum is invoked as to any act "by petition signed by not less than ten percent of the registered voters . . . , it shall suspend the taking effect of such act" until a vote on the referendum.[32] Therefore, L.B. 268 was suspended 4 days before the effective date.

Mata and amici curiae argue a suspension under article III, § 3, of the Nebraska Constitution applies only once the Secretary of State determines the validity, sufficiency, and count of the petition's signatures and determines whether constitutional and statutory requirements have been met. In the instant case, the Secretary of State did not certify the validity of sufficient signatures until October 16, 2015. Under Mata and amici curiae's view, L.B. 268 was not suspended until the October 16 certification and was in effect from its August 30 effective date until this certification.

We addressed this argument in *State v. Jenkins*.[33] In that case, Nikko Jenkins, who was convicted but not sentenced to death prior to the passage of L.B. 268, argued L.B. 268 and its

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[30] See *Jenkins, supra* note 10.

[31] See *id.*

[32] Neb. Const. art. III, § 3.

[33] *Jenkins, supra* note 10.

subsequent repeal amounted to a violation of the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions. In denying this claim, we rejected the notion that signatures must be verified and certified before an act's operation will be suspended. We reasoned:

> Jenkins' notion conflicts with several fundamental principles. The power of referendum must be liberally construed to promote the democratic process. The power is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. The constitutional provisions with respect to the right of referendum reserved to the people should be construed to make effective the powers reserved. 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. The right of referendum should not be circumscribed by narrow and strict interpretation of the statutes pertaining to its exercise.
>
> 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.[34]

[6] As in *Jenkins*, 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.[35] Accordingly, L.B. 268 was suspended on August 26, 2015, 4 days prior to the effective date by the filing of the referendum petition and necessary signatures. Mata's cruel and unusual punishment, due process, and bill of attainder claims which assert that L.B. 268 changed his sentence to life imprisonment and that the repeal of L.B. 268 resentenced him to death fail, because L.B. 268 was suspended and no such changes in his sentence occurred.

It appears Mata may also be claiming he was subjected to cruel and unusual punishment by the political debate on the death penalty, the possibility that his sentence would be changed by L.B. 268 regardless of whether it went into effect, and the threat of his sentence of death remaining through the repeal of L.B. 268. However, the entirety of Mata's analysis and supporting authority presumes his sentence was changed by L.B. 268, which, as determined above, did not occur, because it was suspended prior to its effective date. Mata provides no argument or authority for the proposition that a cruel and unusual punishment violation could occur from a stated possibility of a change in a defendant's sentence and the public debate on that issue, and we find none.

Additionally, Mata's assertion that public debate and the potential effect of a suspended bill is enough to warrant a cruel and unusual punishment finding is flawed. Assuming without deciding that emotional or psychological harm alone

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[34] *Id.* at 709-10, 931 N.W.2d at 878-79.

[35] *Jenkins, supra* note 10.

is to be considered pain in an Eighth Amendment analysis, the U.S. Supreme Court has repeatedly held that because some risk of pain is inherent in any method of execution, the Constitution does not require the avoidance of all risk of pain.[36] "'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.'"[37]

If the potential for a modification in a defendant's conviction or sentence were sufficient, any defendant convicted and sentenced for violating a law would be eligible for relief every time a change in that law were contemplated by the Legislature, contemplated by a public referendum, vetoed by the Governor, or subjected to public debate. Moreover, it would open the door to a cruel and unusual challenge following every case where an appeal of a conviction or sentence is granted, whether successful or unsuccessful, in that the appeal process would also provide a possibility for a change in the party's conviction or sentence. While we acknowledge the potential for modification of a defendant's conviction or sentence is likely to affect that defendant, this potential does not rise to the level of unnecessary and wanton infliction of pain necessary for a determination of cruel and unusual punishment.[38] Instead, they are necessary aspects of our democratic system which demands the examination and reexamination of its laws and participation of the electorate through political

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[36] *Bucklew v. Precythe*, 587 U.S. 119, 139 S. Ct. 1112, 203 L. Ed. 2d 521 (2019); *Glossip v. Gross*, 576 U.S. 863, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015); *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008).

[37] *Wilkins v. Gaddy*, 559 U.S. 34, 37-38, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010), quoting *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992).

[38] See, U.S. Const. amend. VIII; Neb. Const. art. I, § 9. See, also, *Mata II, supra* note 2.

debate. Accordingly, Mata was not subjected to cruel and unusual punishment by the political debate on the death penalty, the possibility that his sentence would be changed by L.B. 268, and the threat of his sentence of death remaining through the repeal of L.B. 268.

Separation of Powers

Mata next challenges the process involved in the repeal of L.B. 268 through the public referendum. To the extent Mata's claims under this assignment require that L.B. 268 went into effect prior to being suspended by the referendum process, those claims are without merit as described in the previous section.[39]

On Mata's remaining claims under this assignment, Mata asserts the Governor and State Treasurer impermissibly organized and contributed to a group which opposed L.B. 268 and worked toward its repeal through the public referendum, solicited money for the opposition group, and took on leadership within the opposition group. Mata seems to make claims of due process and cruel and unusual punishment violations derived from separation of powers requirements under the Nebraska Constitution. However, while Mata states that the participation of the Governor and State Treasurer in the process of the referendum violated his due process rights and rights against cruel and unusual punishment, it is unclear on what basis Mata is alleging such violations occurred. Instead, Mata's argument exclusively centers on how the Governor's and State Treasurer's actions supporting and participating in the referendum violated the constitutional separation of powers requirements and that such violations invalidated the referendum.

Mata relies on two provisions under the Nebraska Constitution: Neb. Const. art. III, § 1, and Neb. Const. art. II, § 1. Article III, § 1, provides:

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[39] See *Jenkins, supra* note 10.

> The legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative. The people also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum.

Article II, § 1, provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.

Mata contends these provisions establish that legislative authority is vested solely within the Legislature and the people through the referendum process unless expressly directed or permitted under the Constitution. Mata argues that this means members of the executive branch, such as the Governor and State Treasurer, are prohibited from initiating, participating, instructing, and actively supporting legislative initiatives through a referendum or organizing, participating, instructing, and actively supporting groups to do the same.

Without determining the constitutional appropriateness of the Governor's and State Treasurer's participation in the referendum process, Mata's separation of powers claims fail because the result of the referendum is not invalidated even if such actions were constitutionally improper as alleged. Such a determination is in line with cases where we have previously found dual-service violations.[40] In those cases, the remedy

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[40] See, *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995); *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991).

was not abandonment of any action in which the violating party participated but was to remove the party from the violating position.[41]

In addition, Mata asserts the Governor and State Treasurer acted improperly but does not allege that the Governor's and State Treasurer's participation influenced the referendum, that the referendum would have been frustrated if they had not participated, that votes were changed due to their participation, or how the referendum and its results are impossibly linked to the alleged inappropriate participation. At oral argument, Mata's counsel admitted that he was unsure what impact the Governor or the State Treasurer had on the referendum process.

In contrast, the facts which Mata did allege demonstrate the repeal of L.B. 268 did not occur solely at the Governor's and State Treasurer's direction. The referendum process was a public process which required a petition with the signatures of more than 10 percent of the registered voters for its initiation, it required public debate and deliberation, and it required a public vote.

[7] In a postconviction proceeding, an evidentiary hearing is not required when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights.[42]

Mata did not allege facts sufficient to invalidate the repeal of L.B. 268 due to separation of powers violations, and therefore, Mata's claims under this assignment fail to establish a denial or infringement on his rights so as to render his sentence void or voidable. Accordingly, Mata's separation of powers claims fail.

CONCLUSION

For the reasons stated above, Mata is not entitled to postconviction relief for his constitutional claims involving being

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[41] See *id.*

[42] *Allen, supra* note 12.

shackled during jury selection, his having a panel of judges find and weigh mitigating circumstances, the effect of L.B. 268 and the referendum rejecting it, and the Governor's and State Treasurer's participation in the referendum process. Accordingly, the district court did not err in denying Mata's motion for postconviction relief without an evidentiary hearing.

Affirmed.

Freudenberg, J., not participating.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Pamela Nelssen, appellant, v. Hal T. Ritchie, appellee.

934 N.W.2d 377

Filed October 25, 2019. No. S-18-1020.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. An appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Equity: Estoppel.** Although a party can raise estoppel claims in both legal and equitable actions, estoppel doctrines have their roots in equity.
3. **Equity: Appeal and Error.** In reviewing judgments and orders disposing of claims sounding in equity, an appellate court decides factual questions de novo on the record and reaches independent conclusions on questions of fact and law.
4. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.
5. **Equity: Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his or her detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
6. ____: ____. The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or

status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

7. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim.
8. **Waiver: Estoppel.** To establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

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

David L. Welch and Kellie Chesire Olson, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee.

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

Papik, J.

Over 2 decades ago, Pamela Nelssen obtained a judgment against Hal T. Ritchie. Nelssen never executed on the judgment, but Ritchie made payments to her for many years. After Ritchie stopped making payments, Nelssen filed a motion to revive the judgment. The district court overruled Nelssen's motion on the ground that the statutory deadline to revive the dormant judgment had expired. Nelssen now appeals the district court's decision. We affirm.

BACKGROUND

Initial Judgment.

This dispute arises out of a judgment Nelssen obtained against Ritchie in the district court for Lancaster County in 1996. The record suggests that Nelssen sued Ritchie for failure to pay amounts owed under a promissory note, that Ritchie failed to respond to the lawsuit, and that Nelssen obtained the judgment as a result of Ritchie's default. The judgment was in the amount of $200,000, plus 6 percent interest.

Ritchie did not immediately satisfy the judgment, and Nelssen did not immediately execute on it. Instead, Ritchie made payments to Nelssen beginning in 1996 and ending in 2017. Ritchie apparently stopped making payments at some point in 2017.

According to Nelssen, Ritchie paid her $132,300 during that time. Nelssen contends that, accounting for interest, Ritchie now owes her over $360,000.

Motion for Revivor.

In 2018, Nelssen filed a motion for revivor of the judgment. Ritchie filed an objection to the motion. In it, he argued that Nelssen's motion was untimely. He contended that the judgment became dormant in 2001 under Neb. Rev. Stat. § 25-1515 (Reissue 2016) and that, under Neb. Rev. Stat. § 25-1420 (Reissue 2016), the time period to revive the dormant judgment expired in 2011.

At a hearing on the motion, Nelssen offered an affidavit in which she referred to the periodic payments Ritchie made to her after the judgment was entered in 1996. The affidavit stated, in relevant part:

> 3. That I agreed to accept payments from the Defendant, . . . Ritchie, in consideration of my agreement to forego [sic] executing on the judgment I have against [him] in this matter.
>
> 4. That I relied on [Ritchie] to continue to make payments on the judgment I obtained in this matter.

Attached to Nelssen's affidavit was a list of payments she claimed Ritchie made to her. The attachment listed 374 payments with amounts ranging between $200 and $15,400. Aside from a period between November 2009 and March 2011 in which no payments are listed, the attachment lists a payment in most months. The only other evidence offered at the hearing was an affidavit signed by Nelssen's counsel that also attached the same list of payments. Nelssen contended that the affidavits demonstrated that the motion for revivor was timely filed.

The district court overruled Nelssen's motion for revivor in a written order. It concluded that Neb. Rev. Stat. § 25-216 (Reissue 2016), a statute which provides that partial payments generally toll the limitations period in contract actions, did not extend the time period for Nelssen to seek revivor of a judgment. It also concluded that the time period was not extended by equitable estoppel or waiver.

Nelssen appeals from this order.

ASSIGNMENTS OF ERROR

Nelssen assigns two errors on appeal. She contends that the district court erred (1) in finding that Nelssen's motion for revivor of the judgment was time barred and (2) in failing to revive the judgment.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. *Weyh v. Gottsch*, 303 Neb. 280, 929 N.W.2d 40 (2019). An appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

[2,3] Although a party can raise estoppel claims in both legal and equitable actions, estoppel doctrines have their roots in equity. *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014). In reviewing judgments and orders disposing of claims sounding in equity, we decide factual questions de novo on the record and reach independent conclusions on questions of fact and law. *Id.*

ANALYSIS

Dormant Judgments and Revivor.

Two Nebraska statutes that dictate when a judgment becomes dormant and when a dormant judgment can be revived are at issue in this appeal. Section 25-1515 generally provides that a judgment becomes dormant if it has not been executed upon within 5 years. See *Fry v. Fry*, 281 Neb. 1001, 800 N.W.2d 671 (2011). When a judgment becomes dormant, it ceases to operate as a lien on the estate of the judgment debtor. § 25-1515.

Even if a judgment creditor allows a judgment to become dormant, Nebraska law allows the judgment creditor to seek to revive it. Section 25-1420 provides that dormant judgments "may be revived in the same manner as is prescribed for reviving actions before judgment." That same statute, however, comes with an important caveat: "[N]o judgment shall be revived unless action to revive the same be commenced within 10 years after such judgment became dormant." *Id.*

The parties in this case agree that the judgment was entered in 1996, that Nelssen did not execute on the judgment, and that she did not attempt to revive it until 2018. The parties disagree, however, as to the legal consequences of these facts. Ritchie takes the position adopted by the district court: that the judgment became dormant in 2001 after Nelssen failed to execute within 5 years of its entry and that the time period for revivor expired 10 years later in 2011.

Nelssen asserts that the matter is not that simple. She contends that Ritchie's payments to her after the entry of judgment extended the time period in which she could seek to revive the judgment. Nelssen claims that Ritchie's payments tolled the deadline. She also argues that Ritchie cannot rely on the deadline under the doctrines of equitable estoppel and waiver. We address each of Nelssen's arguments below.

Was Deadline for Revivor Tolled?

Nelssen contends that the deadline for reviving the dormant judgment was tolled as a result of Ritchie's agreement to make payments to her over the years. Nelssen made the same argument in the district court, relying on § 25-216. Nelssen is less clear on appeal as to the basis for her tolling argument. She asserts that the trial court erred by concluding that the deadline to seek revivor was not tolled, but does not mention § 25-216 or point to other authority in support of her assertion.

Although Nelssen does not explicitly rely upon it, we believe § 25-216 is relevant to the question of whether the deadline to revive a dormant judgment is tolled if the judgment debtor

makes payments in partial satisfaction of the judgment. Section 25-216 states:

> *In any cause founded on contract*, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made in writing, an action may be brought in such case within the period prescribed for the same, *after such payment*, acknowledgment or promise . . . .

(Emphasis supplied.)

This statute has long been understood to provide for tolling of a statute of limitations if a party makes a voluntary payment of part of a debt. See, e.g., *Alexanderson v. Wessman*, 158 Neb. 614, 64 N.W.2d 306 (1954). The statute is limited, however, to causes "founded on contract." The statute thus would only provide for tolling in this case if Nelssen's cause is "founded on contract."

On the surface, it may appear that Nelssen's cause is founded on a contract. As noted above, she obtained the judgment based on her allegation that Ritchie failed to make payments he promised to pay. It is incorrect, however, to focus on Nelssen's original claim. When a valid and final judgment is entered, the original claim "is extinguished and rights upon the judgment are substituted for it." Restatement (Second) of Judgments § 18, comment *a*. (1982). See, also, *American Nat. Bank v. Medved*, 281 Neb. 799, 801 N.W.2d 230 (2011); *Yergensen v. Ford*, 402 P.2d 696 (Utah 1965).

Because Nelssen's rights now arise from a judgment, tolling would be available under § 25-216 only if the term "contract" encompasses judgments. We find that it does not.

We are persuaded by the reasoning of many other courts that have concluded that a judgment is not a contract for purposes of their similar tolling statutes. See, e.g., *Quaintance v. Fogg*, 392 So. 2d 360, 361 (Fla. App. 1981) (concluding that Florida statute allowing part payments to toll limitations period in actions "'founded on a written instrument'" did not include

judgments); *Sharp v. Sharp*, 154 Kan. 175, 181, 117 P.2d 561, 565 (1941) ("it would be anomalous to hold that 'contract' in the part payment statute was broad enough to embrace judgments"); *Olson v. Dahl*, 99 Minn. 433, 437, 109 N.W. 1001, 1002 (1906) ("the weight of authority, both in England and this country, is to the effect that a judgment is not a contract in any proper sense of the term"); *La Salle Extension University v. Barr*, 19 N.J. Misc. 387, 390, 20 A.2d 609, 611 (1941) (concluding that statute tolling limitations period for cases founded on simple contract "does not apply to a judgment, for a judgment is not included within its terms"). Additionally, our law makes a distinction between a contract and a "specialty," see Neb. Rev. Stat. § 25-205 (Reissue 2016), and a domestic judgment has long been recognized as a specialty. See, e.g., *Farmers & Merchants Bank v. Merryman*, 126 Neb. 684, 254 N.W. 428 (1934).

[4] Having concluded that the tolling provision of § 25-216 does not toll the time period to revive a dormant judgment, we see no basis to find tolling here. The Legislature has chosen to provide for tolling when partial payments are made on a debt founded on contract, but we are aware of no similar statute applying to judgments. The intent of the Legislature is expressed by omission as well as by inclusion. *Christine W. v. Trevor W.*, 303 Neb. 245, 928 N.W.2d 398 (2019). And, as at least one other state court has noted, there is a policy reason why a legislature might choose not to extend contractual tolling provisions to judgments:

> A contract is ordinarily not a matter of public record and the tolling of the statute of limitations . . . would have no significant effect except upon the parties to the contract. By contrast, a judgment is a public record, and this record is relied upon to determine the status of legal title to real property. A written acknowledgment or a part payment would not ordinarily be reflected upon the official records and, if they could extend the limitation period on judgments, it would not be possible to ascertain from

> the public records a correct assessment of the legal title to real property.

Yergensen v. Ford, 402 P.2d at 698.

The deadline to revive the dormant judgment was not tolled by Ritchie's payments.

Does Equitable Estoppel or Waiver Apply?

Nelssen also argues that Ritchie could not claim that the motion for revivor was untimely under the doctrines of equitable estoppel and waiver. Nelssen argues that by agreeing to make payments to her in exchange for her commitment not to execute on the judgment, Ritchie is barred by equitable estoppel and waiver from claiming the motion for revivor was untimely.

Ritchie responds that the 10-year time period in § 25-1420 is never subject to claims of equitable estoppel or waiver. Ritchie's argument has some appeal. Dicta in one of our older opinions could be read to suggest that a dormant judgment cannot be revived after 10 years regardless of circumstances. See *Farmers & Merchants Bank v. Merryman*, 126 Neb. at 686, 254 N.W. at 429 (stating that if plaintiff failed to revive judgment within 10 years after it became dormant, "its right to have the judgment revived was forever barred" by earlier codification of § 25-1420). That is certainly a possible reading of § 25-1420, which says that "no judgment shall be revived unless action to revive the same be commenced within ten years after such judgment became dormant" and mentions no exceptions. In addition, as discussed above, if the time period to revive a dormant judgment could be extended by interactions between only the judgment debtor and judgment creditor, third parties interested in the status of a judgment would be left to wonder if a judgment was subject to revivor or if the time to do so had expired.

Although we harbor serious doubts about whether a party could ever be precluded from claiming a motion for revivor was untimely under § 25-1420 under the doctrines of equitable

estoppel or waiver, we need not decide that question today. Even assuming that is a possibility, Nelssen has not shown that either of those doctrines would apply here.

[5,6] The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his or her detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed. *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. *Omaha Police Union Local 101 v. City of Omaha*, 292 Neb. 381, 872 N.W.2d 765 (2015). As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Id.* Assuming equitable estoppel could apply in these circumstances, Nelssen would have the burden to establish its elements. See *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016).

Nelssen has not shown the required elements of equitable estoppel. As noted above, the record is quite sparse as to the interactions between Nelssen and Ritchie that led to Ritchie's making payments toward the judgment over a number of years. The only evidence of their interactions comes from Nelssen's affidavit, which simply asserts that Ritchie agreed to make payments and that she agreed not to execute on the judgment.

Nelssen's affidavit, however, provides no insight into Ritchie's state of mind. There is not even a suggestion Ritchie knew that at some point the judgment would become dormant and that the time period to revive it would expire. There is thus no evidence that Ritchie engaged in conduct resulting in false representations or concealment of material facts all while knowing the real facts, essential elements of a claim of equitable estoppel.

[7,8] For similar reasons, we find no basis to conclude that Ritchie could have waived the right to contend that the time to revive the judgment had expired. Waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim. *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 280 Neb. 729, 790 N.W.2d 866 (2010). Waiver can also be demonstrated by, or inferred from, a person's conduct. See *id.* To establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part. *Id*. Further, the waiving party must have full knowledge of all material facts. See *id*. Again, we have no indication in our record as to what Ritchie intended to do by agreeing to make payments to Nelssen. We have no basis to determine he intended to relinquish a right to someday assert that the judgment had become dormant and that the time to revive it had expired.

Because we see no reason to conclude that the deadline to revive a dormant judgment was extended, we conclude that it expired in 2011. The district court was correct to overrule the motion for revivor on the ground that it was untimely.

CONCLUSION

We find that the judgment became dormant and that the time period to revive it expired. Accordingly, we affirm the district court's order overruling Nelssen's motion for revivor.

Affirmed.

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

Harlan D. Burgardt, appellee and cross-appellant, v. Shirley L. Burgardt, appellant and cross-appellee.

934 N.W.2d 488

Filed November 1, 2019. No. S-17-1116.

1. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.
2. **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.
3. **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. 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.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Evidence: Proof.** Unless an exception applies, the burden of proof in civil cases requires only the greater weight of the evidence.
6. ____: ____. There is no general rule of evidence that a party must produce the best evidence which the nature of the case permits.

7. **Evidence: Witnesses: Testimony.** A witness' testimony, like a document, is a kind of evidence.
8. **Divorce: Property Division.** The first step in the equitable division of property 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.
9. **Divorce: Property Division: Pensions.** Contributions to retirement accounts before marriage are not assets of the marital estate.
10. **Divorce: Property Division: Presumptions.** Gifts and inheritances, even when received during the marriage, are presumed to be nonmarital.
11. **Divorce: Property Division: Proof.** In a marital dissolution proceeding, the burden of proof rests with the party claiming that property is nonmarital.
12. **Divorce: Property Division: Proof: Testimony.** A nonmarital interest in property may be established by credible testimony.
13. **Trial: Witnesses: Evidence.** Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof.
14. **Divorce: Property Division: Evidence: Proof.** The value of the nonmarital portion of an asset must be established by the greater weight of the evidence.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Arterburn, Judges, on appeal thereto from the District Court for Adams County, Terri S. Harder, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Richard L. Alexander, of Richard Alexander Law Office, for appellant.

Nicholas D. Valle, of Langvardt, Valle & James, P.C., L.L.O., for appellee.

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

Cassel, J.

I. INTRODUCTION

On appeal from a district court's dissolution of marriage, the Nebraska Court of Appeals reversed the determinations

that a portion of the husband's 401K and proceeds from an inheritance constituted nonmarital property.[1] We disapprove of two imperatives articulated by the Court of Appeals: nonmarital property must be proved by documentary evidence and its value must be "definitively" established. Because we cannot say the district court abused its discretion in setting off property as nonmarital in accordance with the husband's testimony, we reverse the decision of the Court of Appeals and remand the cause with direction.

II. BACKGROUND

1. Evidence at Trial

Harlan D. Burgardt and Shirley L. Burgardt married in 1992. The district court dissolved their marriage in 2017. On further review, we focus on two items of property: the portion of a 401K accumulated before marriage and the proceeds from an inheritance. At this stage, neither party otherwise contests the division of property. We limit our recitation of evidence accordingly.

(a) 401K

In 1978, Harlan began working for a natural gas distribution company. Fourteen years later, he married Shirley. And 14 years after that, Harlan retired. Through his employment, he had a 401K account.

Harlan believed that he began contributing to the 401K in "about '85." He testified that on the date of his marriage in 1992, his 401K was valued at $130,000. Upon questioning, he stated that the number "sticks out in my mind just plain as day." Although Harlan tried to obtain documentation from his former employer to support the value, the company did not keep records dating back to 1992.

Shirley testified that she was not aware of any 401K that Harlan had prior to marriage worth $130,000. Thus, she

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[1] *Burgardt v. Burgardt*, 27 Neb. App. 57, 926 N.W.2d 452 (2019).

valued the premarital portion at $0 on the parties' joint property statement. She had no evidence to dispute that Harlan contributed to the 401K prior to marriage.

In 2010, Harlan withdrew the funds from the 401K and "moved it into an IRA into a cash fund" solely in his name. A bank statement shows a beginning balance for the IRA on January 1 to be $445,486.12. The money was later spent on four major purchases or projects. It was used to purchase the "other farm," which was titled in both parties' names. Money was used for improvements to the "home farm," which contained a house where the parties once lived. Harlan also used money from the IRA to buy equipment. The equipment was "all auctioned off" and the proceeds put in the bank. Finally, the money was used to buy gold and silver coins. In 2013, Harlan purchased 1,000 silver coins for $53,120, followed shortly thereafter by a purchase of 1,859 coins for $99,735.35. In 2014, Harlan exchanged silver coins to acquire 71 gold coins for $29,962. He testified that he currently had 51 gold coins in his possession, but that there should be 71 (i.e., one sheet containing 20 coins was missing).

(b) Inheritance

Harlan testified that after his father died in 2006 (during the marriage), he received an inheritance from the estate. Harlan received a 25-percent share, which amounted to $60,000. Instead of receiving money, Harlan used his share as a credit toward the purchase of the home farm from his siblings. The additional money needed to purchase the farm—approximately $100,000—came from a bank account.

Shirley testified that the funds to purchase the farm came from their joint bank account, which was funded by the sale of the parties' house in Colorado. The parties later sold the home farm for $348,800. The sale proceeds were placed in the parties' joint account at Great Western Bank, which had a balance of $358,000 in July 2015.

2. Property Division in Decree

As part of the division of the marital estate, the decree awarded Harlan 71 gold coins valued at $19,330 (which placed the responsibility for the lost coins solely upon Harlan). In effect, the decree equally divided the proceeds from the 401K, but it separately set off to Harlan $130,000 for the value of the nonmarital proceeds from the 401K.

The decree awarded each party $179,000 (one-half of the balance) of the Great Western Bank account. But it separately set off $60,000 to Harlan as "[l]and inheritance."

Including both marital and nonmarital property, the decree awarded Harlan assets totaling $399,730 and Shirley assets amounting to $205,300. After deducting amounts representing nonmarital property ($190,000 at issue here, plus $4,000 attributable to a truck which is not now disputed), the ultimate division of property was an award of $205,730 to Harlan and an award of $205,300 to Shirley.

Shirley appealed, and Harlan filed a cross-appeal.

3. Court of Appeals' Decision

The Court of Appeals found that Harlan did not meet his burden of proving that his 401K had a value of $130,000 at the time of marriage and that he did not prove the amount he inherited from his father.

[1] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.[2] But instead of affirming as modified, the Court of Appeals reversed in part and remanded to the trial court with directions. It directed the trial court to award Shirley half of the awards of $130,000 and $60,000 previously set off to Harlan as nonmarital property. It also found that the net tax liability of $27,494 should be divided evenly between the parties and deducted from the shares of each party's marital property. The

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

Court of Appeals' effective modification of the decree regarding the tax liability is not contested on further review and, thus, shall be carried out in a modified decree.

Harlan filed a petition for further review, which we granted.

III. ASSIGNMENTS OF ERROR

In his petition for further review, Harlan assigns two errors which we consolidate. He claims that the Court of Appeals erred in determining that because he offered no documentary evidence at trial to support his undisputed testimony, he failed to meet his burden of proof that he had $130,000 in a 401K at the time of marriage and that he received a $60,000 inheritance during the marriage.

IV. STANDARD OF REVIEW

[2-4] 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.[3] 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.[4] 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.[5] 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.[6]

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[3] *Dooling v. Dooling*, 303 Neb. 494, 930 N.W.2d 481 (2019).

[4] *Id.*

[5] *Id.*

[6] *Id.*

V. ANALYSIS

1. Foundational Principles

We begin by recalling three foundational principles that, along with the standard of review, guide our decision.

[5] The first principle is the burden of proof imposed in this case. In the realm of factfinding, the function of a standard of proof is to instruct the fact finder concerning the degree of confidence our society thinks he or she should have in the correctness of factual conclusions for a particular type of adjudication.[7] Unless an exception applies, the burden of proof in civil cases requires only the greater weight of the evidence.[8] The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true.[9] That burden of proof applies here.

[6,7] Second, we are mindful that there is no hierarchy of evidence. "'[T]here is no general rule of evidence that a party must produce the best evidence which the nature of the case permits.'"[10] A witness' testimony, like a document, is a kind of evidence.[11] A trial court weighs the credibility of the witnesses and the evidence and determines what evidence should be given the greater weight in arriving at a factual determination on the merits.[12] In doing so, a trial court may choose to accord greater weight to a document. Given the frailties of memories, documentary evidence relating to a long past event and

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[7] See *In re Interest of Christopher T.*, 281 Neb. 1008, 801 N.W.2d 243 (2011).

[8] See, *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019); *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

[9] *Flores v. Flores-Guerrero, supra* note 8.

[10] *Equitable Life v. Starr*, 241 Neb. 609, 615, 489 N.W.2d 857, 862 (1992), quoting Michael H. Graham, Handbook of Federal Evidence § 1001.0 (3d ed. 1991).

[11] See *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, 77 N.W. 346 (1898).

[12] *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980).

prepared by one not affected by it may be entitled to greater consideration than oral testimony.[13] Ordinarily, a contemporaneous memorandum of an event is entitled to greater evidentiary weight than another recollection of it.[14] But it does not follow that where there is no documentary evidence, a party's testimony alone cannot satisfy a burden of proof.

[8-11] Third, it is well settled that the first step in the equitable division of property 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.[15] Contributions to retirement accounts before marriage are not assets of the marital estate.[16] Gifts and inheritances, even when received during the marriage, are presumed to be nonmarital.[17] In a marital dissolution proceeding, the burden of proof rests with the party claiming that property is nonmarital.[18]

With these principles in mind, we turn to the two imperatives upon which the Court of Appeals relied.

2. Necessity of Documentary Evidence

Although the district court accepted Harlan's testimony as sufficient to establish portions of the property as nonmarital, the Court of Appeals rejected Harlan's claims solely on the basis that he lacked documentation. Regarding the 401K, the Court of Appeals stated:

> The problem with Harlan's claim is that it is based solely on his own recollection. Harlan failed to adduce any documentation whatsoever regarding when the 401K came into existence, what contributions were made to it

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[13] See 32A C.J.S. *Evidence* § 1286 (2008).

[14] *Id.*

[15] See *Rohde v. Rohde*, 303 Neb. 85, 927 N.W.2d 37 (2019).

[16] See *Lorenzen v. Lorenzen*, 294 Neb. 204, 883 N.W.2d 292 (2016).

[17] *Westwood v. Darnell*, 299 Neb. 612, 909 N.W.2d 645 (2018).

[18] *Rohde v. Rohde, supra* note 15.

> by him or his employer, and how it was invested or grew over the years.[19]

The Court of Appeals recognized that Harlan tried to obtain records to demonstrate the value of his 401K in 1992, but could not do so because his former employer did not maintain those records. The Court of Appeals then suggested a number of other records that perhaps Harlan could have obtained. It found that the trial court erred in setting off $130,000 to Harlan "based solely on his testimony."[20] And with regard to the inheritance, the Court of Appeals noted that Harlan presented documentation to support his claim that he received an inheritance, but that he "presented no documentation which in any way establishes or corroborates the amount of that inheritance."[21] In effect, the Court of Appeals held that Harlan's testimony could not be accepted without documentary support. That goes too far.

[12,13] A nonmarital interest in property may be established by credible testimony.[22] In *Brozek v. Brozek*,[23] we recognized that a spouse's own testimony can establish a "'tracing link,'" i.e., tracking an asset to a nonmarital source. Of course, triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof.[24] Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.[25] We

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[19] *Burgardt v. Burgardt, supra* note 1, 27 Neb. App. at 65, 926 N.W.2d at 460.

[20] *Id.* at 67, 926 N.W.2d at 461.

[21] *Id.* at 68, 926 N.W.2d at 462.

[22] See *Kerr v. Kerr*, 770 N.W.2d 567 (Minn. App. 2009).

[23] *Brozek v. Brozek*, 292 Neb. 681, 701, 874 N.W.2d 17, 32 (2016).

[24] *State on behalf of Mariah B. & Renee B. v. Kyle B.*, 298 Neb. 759, 906 N.W.2d 17 (2018).

[25] *Fredericks Peebles v. Assam*, 300 Neb. 670, 915 N.W.2d 770 (2018).

acknowledged in *Brozek* that the trial court was "entitled to discount [the husband's] testimony about [an alleged premarital asset] because of his admitted uncertainty."[26]

While documentary evidence may be more persuasive, it is not absolutely required. In a case where the husband did not produce bank statements proving the premarital balance of his bank accounts but the wife did not contest the values he listed on a joint property statement, we found an abuse of discretion by the trial court in failing to set off the value of premarital bank accounts.[27] In *Onstot v. Onstot*,[28] we affirmed the trial court's decision to not grant the husband credit for the value of a premarital house at the time of marriage, stating that "assuming [the husband's] testimony established the value of the residence at $100,000 at the time of the marriage, he did not *testify* or supply any documentation as to whether the residence was either encumbered or unencumbered at that time and, if encumbered, to what extent." This statement implies that premarital equity could have been established by testimony alone. In a case where undisputed testimony established items as premarital, the Court of Appeals determined that the trial court erred in classifying the items as marital property.[29]

Of course, a party opting to rely upon his or her testimony alone does so at the risk of nonpersuasion. In a case where the trial court set aside the total amount of premarital funds that the husband claimed he used to purchase property, we reduced the amount of the set aside—even though the husband's testimony was uncontradicted—because there was nothing in the record to show the source of certain funds.[30] In *Brozek*, we affirmed the trial court's decision declining to set off any amount to the

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[26] *Brozek v. Brozek, supra* note 23, 292 Neb. at 701, 874 N.W.2d at 32.

[27] See *Osantowski v. Osantowski, supra* note 2.

[28] *Onstot v. Onstot*, 298 Neb. 897, 904, 906 N.W.2d 300, 306 (2018) (emphasis supplied).

[29] See *Schmeidler v. Schmeidler*, 25 Neb. App. 802, 912 N.W.2d 278 (2018).

[30] See *Frost v. Frost*, 227 Neb. 414, 418 N.W.2d 220 (1988).

husband for the premarital portion of two checking accounts (he testified one account had about $79,000 at the time of marriage), crops from a 1993 harvest, and machinery owned at the time of marriage (but later sold or traded).[31] A party seeking recognition of nonmarital property may find it easier to meet his or her burden of persuasion with documentary support. But its absence does not automatically defeat the claim.

3. Definitively Proved

The Court of Appeals also determined that Harlan "failed to meet his burden of proof to *definitively* identify the value of his claimed premarital asset."[32] "Definitively" means "[s]o as to decide or settle the matter; decisively, conclusively, finally, definitely."[33]

In doing so, the Court of Appeals misread our decision in *Brozek*. The Court of Appeals stated that we "reversed the trial court judgment, finding that the husband had not definitively identified the values of his premarital assets."[34] We did neither. Rather, we *affirmed* the trial court's judgment, concluding, as did the trial court, that the husband failed to trace the value of property alleged to be premarital. We stated that he did "not identify the different permutations that his premarital property underwent during the marriage" and that "we cannot follow the threads in the hodgepodge of figures."[35]

[14] It is axiomatic that an item must be identified in order to be set off as nonmarital. But its value need not be definitively or conclusively proved; the greater weight of the

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[31] *Brozek v. Brozek, supra* note 23.

[32] *Burgardt v. Burgardt, supra* note 1, 27 Neb. App. at 68, 926 N.W.2d at 462 (emphasis supplied).

[33] "Definitively," Oxford English Dictionary Online, http://www.oed.com/view/Entry/4889 (last visited Sept. 24, 2019).

[34] *Burgardt v. Burgardt, supra* note 1, 27 Neb. App. at 66, 926 N.W.2d at 461.

[35] *Brozek v. Brozek, supra* note 23, 292 Neb. at 699, 874 N.W.2d at 31.

evidence is sufficient. In other words, the value of the nonmarital portion of an asset must be established by the greater weight of the evidence.

4. Resolution

In summary, we reject the Court of Appeals' articulations that documentary evidence is necessary to establish a claim to nonmarital property and that a nonmarital value must be proved "definitively." While Harlan had the burden of persuading the district court of the nonmarital character of the property and its value, he succeeded in doing so. On appeal, our standard of review governs. And here, it is important to recognize that the district court heard and observed the witnesses and accepted one version of the facts rather than another. As we have said, this court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.[36]

The district court set off to Harlan $130,000 as the nonmarital value of his 401K and $60,000 as the nonmarital value of his inherited share of the home farm. Evidence supports the court's award. Harlan testified that his 401K was valued at $130,000 at the time of marriage. When asked, "Are you aware of any kind of 401-K Harlan had before marriage worth $130,000," Shirley responded, "No." But on cross-examination, she admitted she had no evidence to dispute that Harlan contributed to the 401K prior to marriage. Harlan testified that his inherited share of his father's farm was worth $60,000, and Shirley did not dispute this. This was not a situation where the trial court rejected a party's unsupported testimony and, in affirming, an appellate court noted the lack of documentary evidence. Here, the district court evidently found Harlan's testimony to be credible and set off the amounts claimed as nonmarital. Upon our de novo review, we cannot say it abused its discretion in doing so.

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[36] *Tavlin v. Tavlin*, 194 Neb. 98, 230 N.W.2d 108 (1975).

VI. CONCLUSION

Upon our de novo review, we find no abuse of discretion by the district court in setting off to Harlan amounts representing nonmarital portions of his 401K and inheritance. We reverse the decision of the Court of Appeals as to those items and remand the cause to that court with direction to affirm the district court's decree as modified to divide the net tax liability of $27,494 evenly between the parties.

Reversed and remanded with direction.

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

State of Nebraska, appellee, v. Charles M. Simmer, appellant.

935 N.W.2d 167

Filed November 1, 2019. No. S-18-500.

1. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
2. **Judgments: Expert Witnesses: Words and Phrases.** An abuse of discretion in the trial court's determination under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), 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. **Courts: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
4. **Trial: Expert Witnesses: Intent.** The purpose of the gatekeeping function is to ensure that the courtroom door remains closed to "junk science" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact.
5. **Trial: Expert Witnesses.** A trial court can consider several nonexclusive factors in determining the reliability of an expert's opinion: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.
6. ____: ____. Once the reasoning or methodology of an expert opinion has been found to be reliable, the court must determine whether the

expert's reasoning or methodology can be properly applied to the facts in issue.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

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

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

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

Papik, J.

Charles M. Simmer appeals his conviction for first degree murder. DNA evidence presented at Simmer's jury trial linked him to the crime. The sole issue presented by this appeal is whether the district court erred in admitting DNA analysis conducted by using TrueAllele probabilistic genotyping software, over Simmer's *Daubert*/*Schafersman* challenges. Finding no abuse of discretion, we affirm.

I. BACKGROUND

1. Overview

On November 3, 2007, Simmer's aunt, Joy Blanchard, was murdered in her home. She was discovered lying face down on the floor with two knives protruding from her neck. Close by was a spindle broken from the nearby bannister. An autopsy revealed the cause of death to be blunt force trauma and stab wounds to the head and neck.

When law enforcement processed the crime scene, they swabbed several items for DNA, including the spindle, the handles on both knives, and the interior doorknob on the front door of the residence. DNA testing and analysis conducted in 2015 and 2016 indicated the presence of Simmer's DNA on one of the knife handles and the interior doorknob.

On June 7, 2016, Simmer was charged by information in Douglas County District Court with one count of first degree murder, a Class IA felony. Prior to trial, Simmer filed a motion in limine asserting a challenge to DNA analysis performed by Cybergenetics, Inc., which challenge was pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Daubert*/*Schafersman*). He sought to preclude the State from introducing at trial "any and all testimony concerning DNA testing and the results of said testing," including "identification" and "comparison" of DNA testing. Simmer alleged that the reliability of the theories, techniques, and procedures used by the State's experts had not been established and that the proposed testimony was "based on insufficient facts and data." Hearings were held on the motion, and the district court overruled it.

At the subsequent jury trial, Simmer preserved the *Daubert*/*Schafersman* challenges raised in his pretrial motion. He lodged a continuing objection when Dr. Mark Perlin, the chief scientist and executive officer at Cybergenetics, was called to testify about TrueAllele probabilistic genotyping and its application in this case. The district court overruled the objection. The jury heard DNA evidence and other circumstantial evidence connecting Simmer to Blanchard's murder, and Simmer was convicted of the crime charged and sentenced to life imprisonment.

The sections below summarize the *Daubert*/*Schafersman* proceedings and the relevant evidence at trial.

2. *Daubert*/*Schafersman* Proceedings

At pretrial proceedings on Simmer's motion in limine, the district court received exhibits and heard expert testimony about DNA evidence from three witnesses. Generally, Mellissa Helligso's testimony provided context for Perlin's testimony about Cybergenetics' TrueAllele probabilistic genotyping

program. Simmer elicited testimony from Nathaniel Adams to challenge TrueAllele's methodology.

(a) Testimony of Helligso

Helligso, a forensic DNA analyst employed by the University of Nebraska Medical Center (UNMC), testified about the DNA tests that she performed in this case. Helligso explained the process by which an autosomal DNA profile is obtained and analyzed. Upon receiving evidence containing biological material, she extracts the DNA, quantifies and amplifies it, and ultimately runs it through a genetic analyzer. The genetic analyzer generates a DNA profile that can then be compared to DNA from known individuals. Typically, the analysis is limited to specific locations in the DNA and does not include a full profile. If she identifies consistencies between the evidence profile and the known individual's profile, she will "generate a statistic to show the likelihood of that match happening."

Helligso also explained the difference between autosomal DNA and Y-STR DNA. Humans have 23 pairs of chromosomes with each pair consisting of one each from the father and mother. The term "allele" describes the varying forms of a gene that can be specific to an individual but found for everyone at the same place in the same chromosome. Differences in alleles at predetermined chromosome locations, referred to as "loci," define a person's DNA profile and can be used for comparison with evidence samples.

Helligso explained that autosomal DNA is composed of DNA inherited from both parents. Y-STR DNA, on the other hand, involves only the Y chromosome, which is found only in males and is passed from father to son. Because all males in the same family have the same Y-STR DNA, it cannot identify a particular male within that family and is less discriminating than autosomal DNA. In Y-STR DNA testing, a DNA extract is amplified with a particular "kit" that only looks at the Y-STR locations found on the Y chromosome.

In this case, among the items that Helligso received in 2007 were swabs obtained from one of the knife handles and

the spindle. Y-STR DNA testing of both items disclosed the presence of two Y chromosomes, indicating a mixture of two males. Simmer could not be excluded as the major male contributor in either sample, but neither could his brother, since they share the same Y chromosome. The probability of a match was stronger on the knife handle than on the spindle.

In November 2015, Helligso received several additional items for testing, including a swab from the interior doorknob on the front door to Blanchard's residence. Helligso determined the sample contained autosomal DNA from at least two individuals. Neither Blanchard nor Simmer could be excluded as full contributors on the doorknob, and "[t]he probability of a random individual matching a DNA profile within the mixture, given that . . . Simmer expresses such a profile, [was] 1 in 357 million . . . for Caucasians, 1 in 844 million . . . for African Americans, and 1 in 2.37 billion . . . for American Hispanics."

Helligso suggested sending her work to Perlin at Cybergenetics for additional analysis. To provide the background for that decision, Helligso explained the process by which a DNA profile is obtained and analyzed and the significance of data "thresholds." She stated that for any type of testing done by UNMC, the laboratory must go through a validation process:

> [O]ne of the things that you have to establish is your threshold, which is the height at which, in your laboratory, you can determine the difference between what would be considered a real peak or real allele and background noise of the instrumentation, because every instrument has background noise just by the technology in which it works. And so every laboratory, for their own instrumentation, has to determine where that cutoff lies within the data.
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> . . . .
>
> . . . In our laboratory, the threshold for autosomal, and I believe for Y-STR in this case as well, was set at 50

> [relative fluorescence units (RFU)]. So any peak that is below 50 RFU does not get labeled by the software program that we have, so then we, in general, do not look at those peaks. They can be considered if you're trying to determine if you have a mixture, but, in general, no, we don't look at those peaks then.

Helligso explained that at UNMC, none of the data below the threshold is used in her statistical calculations.

Helligso testified that Cybergenetics had developed a software program that is not bound by data thresholds. Using a series of mathematical calculations, the software analyzes every peak to determine whether it is "an artifact [or] a real allele." Helligso also testified that Perlin does not retest the evidence; rather, his software simply uses all the data compiled by the laboratory during its analysis. Helligso testified that the human brain could perform the same calculations as the software, but it would require "an extreme amount of time." She stated that it makes sense to use software that performs the necessary calculations quickly and accurately.

Helligso testified that probabilistic genotyping has "definitely been a hot topic for a couple of years now." When Helligso was asked whether there was some dispute about the general acceptance of Perlin's approach in the broader scientific community, Helligso replied, "[I]f you [had] asked me that question six or seven years ago, I would have agreed, but I would say now within the last five years that, in general, the community is — is agreeing that these types of software programs are necessary." The number of people who do not agree are "becoming fewer and fewer." She pointed out that TrueAllele addresses a need in the DNA analysis community by facilitating the use of all of the DNA data to calculate a "good statistic." Helligso noted that the accuracy of TrueAllele software had been tested over at least 10 years with thousands of known profiles with an "extremely high success rate." She also noted that a similar program, "STRmix," is "being highly touted by the FBI and the

national government" and "has kind of taken off to where lots of laboratories have those."

(b) Testimony of Perlin

As noted above, Perlin is the chief scientist and executive officer at Cybergenetics, a bioinformation company. He testified about his company's software, TrueAllele, and its application in Simmer's case.

Perlin explained that TrueAllele is designed to separate the various contributors to DNA samples processed by crime laboratories and assess the likelihood that a contributor matches a known sample. Like Helligso, Perlin testified that TrueAllele's method of analysis differs from traditional DNA analysis performed by humans in that TrueAllele does not utilize thresholds, which exclude or discard data that falls below a predetermined level. Instead, it analyzes all of the data, taking into account peak heights and other patterns. According to Perlin, TrueAllele yields more accurate results, that is, it can produce a stronger "match statistic" or, alternatively, exclude an individual who may have otherwise been included.

Crime scene samples can consist of very small amounts of DNA, incomplete DNA, and DNA from more than one contributor. Using a series of complex probability equations and statistical sampling, TrueAllele tries out thousands of possible explanations, or possible genotypes, for the crime scene data, and calculates the probability of each explanation. Those that explain the data well generate higher probability, while those that explain the data not as well, or not at all, generate lower probability. This process suggests genotypes and their probabilities at every genetic location for each contributor to the crime scene sample.

Perlin testified that TrueAllele ultimately infers a genotype, or DNA barcode, for each contributor to the crime scene evidence, which is a probability distribution over possible allele pairs, and then calculates the probability that an inferred genotype matches (1) the suspect and (2) a random person in

the population. The program then divides the former by the latter to generate a likelihood ratio or "match statistic." The match statistic answers the question: "How much more does the suspect match the evidence at this location than a random person?"

Perlin explained that TrueAllele is more objective than the traditional method, because the computer analyzes the data without comparing it to a known sample from a suspect or "anybody's preferred answer." A suspect's genotype is not given to the computer until it calculates the match statistic.

Perlin recounted the development of TrueAllele. Perlin, who has a bachelor's degree in chemistry, is a doctor of medicine, and has Ph.D.'s in mathematics and computer science, began using computers to interpret genetic information in the early 1990's while working on the Human Genome Project. At that time, he became involved in the development of software that would enable a computer to understand and eliminate artifacts in DNA data. He continued that work after founding Cybergenetics in 1994 and published his first article on the subject in 1995. Over the course of 15 years, Perlin developed TrueAllele. TrueAllele is based on "Bayesian" probability modeling and "Markov chain Monte Carlo" statistical sampling, both widely accepted in the relevant communities for decades. Perlin testified that TrueAllele uses mathematics and algorithms developed 20 years prior to trial, with the "core math of calculating genotypes [remaining] the same since 2008."

Perlin testified that TrueAllele is widely used. He stated that he and his company have been extensively involved in educating and training laboratory analysts to use TrueAllele. Perlin testified that at least 10 laboratories around the country have used TrueAllele, 7 of them regularly, and have done their own internal validations of the software. TrueAllele had conducted analyses in at least 500 cases in 37 states, though not all of the analyses were used in court. Further, TrueAllele had been used to analyze small quantities of damaged DNA

from thousands of human remains to help identify victims of the September 11, 2001, terrorist attack on the World Trade Center. Perlin also testified that TrueAllele had been used by the DNA group at the National Institute of Standards and Technology, a part of the U.S. Department of Commerce that "create[s] resources for the forensic community in the U.S. and the world that are standards." He stated that the national institute had used TrueAllele to create standards for a DNA mixture against which laboratories could check their equipment and methods.

Perlin testified that TrueAllele had been used in court proceedings. He stated that he had testified in at least 10 admissibility hearings and that no court had found his testimony to be inadmissible. The district court received nine trial court admissibility rulings from other jurisdictions in the United States allowing TrueAllele evidence, five of them applying a *Daubert* standard. Perlin testified that Cybergenetics does work for both the prosecution and the defense. He noted that TrueAllele had been used in more than 10 cases by the Innocence Project, a group that seeks to exonerate the wrongly convicted. Perlin testified that Cybergenetics screens DNA from any group at no cost and only charges for additional services, such as a written report or testimony. He also stated that TrueAllele provides the opportunity for any group to run its software for free to independently confirm results and that results could also be confirmed through competing software.

Perlin also testified concerning approval of TrueAllele by the Scientific Working Group on DNA Analysis Methods (SWGDAM). SWGDAM is composed of highly respected individuals in the DNA analysis community who author guidelines for DNA analysis that are often adopted by accrediting agencies. SWGDAM approved the use of probabilistic genotyping software in 2010, as long as it had been validated and documented. And in 2015, SWGDAM issued guidelines for validating probabilistic genotyping programs, centering on laboratory validation, sensitivity, specificity, and reproducibility.

Sensitivity reflects the extent to which interpretation identifies the correct person, specificity reflects the extent to which interpretation does not identify the wrong person, and reproducibility reflects the extent to which interpretation consistently gives the same answer to the same question. According to Perlin's testimony and documentary evidence generated by Cybergenetics, TrueAllele complies with those guidelines.

The district court received numerous validation studies of TrueAllele. Perlin described validation studies as "tests that are done where known data is put into a method, like a computer program for calculating match statistics, and the results are assessed on 10 to 100 samples, depending on the study, and its performance is measured, along with error rates." According to Perlin, 34 studies conducted by the TrueAllele laboratory and other crime laboratories and groups had shown that TrueAllele produces accurate and reliable results with "no surprises."

Perlin stated that typically in the field of science, a method like TrueAllele would be featured in only one peer-reviewed publication. However, of the 34 validation studies in evidence, 7 studies had been published in peer-reviewed journals and 6 of the 7 studies in evidence identified Perlin as a coauthor.

Perlin testified that TrueAllele's error rates had been tested multiple times in two ways, which Perlin described in detail. First, error rates had been tested through validation studies of large ensembles of "real," "less pristine" samples from casework to demonstrate how the system works in practice. And second, error rates were tested by the application of information theory to determine the expected distribution of match statistics from one evidence genotype of known composition to "provide information about a sample in a case and what the error rate would be for a particular match statistic." Of the seven peer-reviewed validation studies, four used laboratory samples of known composition and three drew from less pristine crime scene data.

In this case, Perlin used TrueAllele to analyze the data from UNMC and calculated likelihood ratios for Simmer on both the knife handle and the doorknob. According to Perlin's analysis, the match between the knife handle and Simmer was 3.71 thousand times more probable than a coincidental match to an unrelated person, while the match between the doorknob and Simmer was 4.22 quintillion times more probable than a coincidental match to an unrelated person. Perlin also calculated likelihood ratios for Simmer's brother as to both items; however, his ratios were exclusionary.

Other portions of Perlin's testimony are mentioned, as relevant, in the analysis section below.

(c) Testimony of Adams

Adams has a bachelor's degree in computer science and is employed by a company that "consult[s] with lawyers to help them understand what kind of [DNA] testing was conducted, whether there are any issues with that testing with the analysis or interpretation of the data." The company reviews "standard operating procedures, validation studies of the testing laboratories, [and] relevant literature in the forensic DNA field." Adams' duties involve the review of electronic data generated during the course of forensic DNA testing and case files from criminal investigations involving DNA testing.

Adams' testimony and written report expressed concerns about the validity of TrueAllele's probabilistic genotyping program from a software engineering perspective. Adams' primary objection to the software was that it had not been confirmed that the software does what Perlin says it does. He testified, "This is one of the major topics of verification and validation . . . in the field of software engineering. We need to demonstrate, not just assume or expect, that a program is operating as described . . . ."

Adams testified that the problem with probabilistic genotyping programs like TrueAllele is that "[t]he field of forensic DNA does not have any standards specific to it that software

must adhere to before it's utilized in casework." He stated that TrueAllele encompassed computing statistics and biology and that minimum quality assurance standards required a multidisciplinary, multiparty approach. Adams' report acknowledged that the International Society of Forensic Genetics and SWGDAM had published guidance documents addressing validation of probabilistic genotyping software, but the field of forensic DNA analysis still lacked formal standards specific to its development and validation. His report observed that while there were no common software development standards for probabilistic genotyping, general software engineering industry standards and principles could be used to ensure correctness of the systems. However, this had not been done. As a result, he contended that defects may exist in the software and that their significance to its operation would persist undetected.

Adams noted that a program's source code, the programming language instructing the computer what to do, can be inspected to determine whether the software program has been appropriately constructed. However, according to Adams, the TrueAllele source code had never been independently reviewed to determine whether the program operates as described by Perlin. The district court received evidence that Cybergenetics had recently decided to allow defense experts access to the TrueAllele source code, with limitations. In Adams' view, reviewing the source code in the context of a particular case was prohibitive under the time and financial constraints of litigation, especially if certain software development materials were not involved in the review. In Adams' opinion, review of the source code ought to occur over a long period prior to use in a criminal case.

Adams acknowledged that one way to determine whether a program works as intended is to use it, but that it was not the only way under software engineering general practices for quality assurance. He considered it "dangerous to allocate our only software defect detection efforts to the actual use of that

software" because of the significant impact latent defects could have. Adams testified that TrueAllele had achieved only the "illusion of validation" because it had not been validated in the domain of software engineering. And while he also acknowledged that TrueAllele had been developed over a period of several years before it was ever used in a criminal case, he stated that he still had concerns about it since he "[didn't] know what defect prevention or mitigation strategies were employed during that time."

In addition, Adams' report questioned validation studies of the quantitative likelihood ratios generated by probabilistic genotyping "because no knowable correct output exists for any given input, against which the system's behaviors could be tested." Adams explained that "we can't know exactly what likelihood ratio should be developed, even if we know the inputs to the systems, the genotypes of the true contributors."

Adams also expressed concern about the accuracy of likelihood ratios in general, even with known contributors, and stated that while he also has concerns about the accuracy of traditional DNA analysis, he prefers it to computer programs because it is more transparent and its calculations "can be replicated by anybody with a pocket calculator or an Excel spreadsheet."

(d) Motion in Limine Overruled

Following the hearing, the district court overruled Simmer's motion in limine. It found Perlin to be an expert in the field of probabilistic genotyping. The district court further found that the TrueAllele evidence was relevant and that it would be helpful to the finder of fact in this case. The district court applied the *Daubert*/*Schafersman* analytical framework and determined the methodology of TrueAllele probabilistic genotyping was reliable, noting that the *Daubert* test was flexible and that not every factor need be considered. We summarize the district court's ruling in detail in the analysis section below.

3. Relevant Evidence at Trial

At trial, the State presented DNA evidence connecting Simmer to the crime scene. Helligso and Perlin both gave testimony consistent with their testimony at the hearing on Simmer's motion in limine. Helligso testified that her analysis showed that neither Simmer nor his brother could be excluded as the major male contributor to DNA on the spindle and the knife handle. As for the DNA on the interior doorknob, Helligso's analysis determined that the sample contained a mixture of at least two individuals and that neither Blanchard nor Simmer could be excluded as full contributors. She stated that the probability of a random individual matching a DNA profile within the mixture on the interior doorknob, given that Simmer expresses such a profile, was 1 in 357 million. Regarding the TrueAllele analysis of the evidence in this case, Perlin testified that the match between the knife handle and Simmer was 3.71 thousand times more probable than a coincidental match to an unrelated person, while the match between the doorknob and Simmer was 4.22 quintillion times more probable than a coincidental match to an unrelated person. As he did at the hearing on Simmer's motion in limine, Perlin also described at trial how TrueAllele works.

In addition to DNA evidence, the State introduced other evidence linking Simmer to Blanchard's murder. Although there was no direct evidence that Simmer had been at Blanchard's residence on the night of the murder, from early on, he was a suspect in the police investigation. The State presented evidence at trial that Simmer had not been to Blanchard's residence during the 2½ years prior to Blanchard's murder; that Simmer had misinformed police about his whereabouts during the timeframe of Blanchard's murder; that 2 days after the murder, Simmer tried to conceal injuries to his hands from police; that he physically resisted providing a court-ordered DNA sample; and that about 3 months after the murder, he had confided in a friend about stabbing someone to death.

II. ASSIGNMENTS OF ERROR

Simmer assigns that the district court committed reversible error in rejecting his *Daubert*/*Schafersman* challenge and in allowing the State to present Perlin's expert opinion testimony and evidence concerning Perlin's conclusions on DNA evidence connecting Simmer to the crime scene.

III. STANDARD OF REVIEW

[1,2] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018). An abuse of discretion in the trial court's *Daubert*/*Schafersman* determination 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. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014).

IV. ANALYSIS

Simmer's sole assignment of error challenges the admission of TrueAllele probabilistic genotyping evidence linking him to the crime scene. While Simmer's appeal focuses exclusively on the admission of this evidence, his arguments fall into two different categories within the *Daubert*/*Schafersman* analysis. Simmer makes a number of arguments aimed at the general reliability of TrueAllele. Other arguments focus on whether TrueAllele, even if generally reliable, was properly applied to the facts in this case. After briefly reviewing the basic governing legal principles, we will proceed to analyze Simmer's arguments in turn.

1. *Daubert*/*Schafersman* Standards

The Nebraska Evidence Rules provide: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Evid. R. 702, Neb. Rev.

Stat. § 27-702 (Reissue 2016). Perlin's qualifications are not at issue in this appeal. Rather, Simmer argues that the State failed to demonstrate that the TrueAllele evidence was admissible under the *Daubert*/*Schafersman* framework and that the district court therefore abused its discretion in allowing it in evidence. See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010) (burden is on proponent of evidence to establish admissibility under *Daubert*/*Schafersman*).

[3,4] Under the *Daubert*/*Schafersman* framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018). The purpose of this gatekeeping function is to ensure that the courtroom door remains closed to "junk science" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact. *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014). The *Daubert*/*Schafersman* standards require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion. See *Hemsley v. Langdon, supra.*

[5] A trial court can consider several nonexclusive factors in determining the reliability of an expert's opinion: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community. *State v. Braesch,* 292 Neb. 930, 874 N.W.2d 874 (2016). A trial court may consider one or more of these factors when doing so will help determine that testimony's reliability, but the test of reliability is "'flexible'" and the list of specific factors neither necessarily nor exclusively applies to all experts or in every case. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), quoting *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[6] Once the reasoning or methodology of an expert opinion has been found to be reliable, the trial court must determine whether the expert's reasoning or methodology can be properly applied to the facts in issue. *See State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

2. General Reliability of TrueAllele Evidence

Simmer contends that the State failed to show the evidence generated by TrueAllele was sufficiently reliable under the *Daubert*/*Schafersman* framework. The district court concluded otherwise. In its order denying Simmer's motion in limine, the district court first observed that TrueAllele had been tested by 34 validation studies and that it conforms to the SWGDAM guidelines for validating probabilistic genotyping systems. The district court next stated that TrueAllele had, on multiple occasions, been peer reviewed and subject to publication in an "unusually large number" of validation studies and that no significant scientific evidence suggested the reliability of TrueAllele had been refuted. Regarding TrueAllele's error rate, the district court cited evidence that it had been assessed through validation studies and information theory comparing one evidence genotype to the expected distribution of match statistics. Finally, the district court determined that TrueAllele had been generally accepted in the relevant scientific community because it had been used in over two-thirds of the states in the United States, it had been used to identify mass casualty victims of the 2001 terrorist attack on the World Trade Center, it was used in over 10 cases by the Innocence Project, and 7 crime laboratories were using the software regularly.

Simmer does not contest many of the facts underlying the district court's analysis summarized above. Rather, he contends that the district court ignored other factors that call into question the reliability of TrueAllele.

Simmer, for example, does not and cannot dispute the significant number of validation studies in the record concerning TrueAllele. Instead, he suggests that the validation studies must be discounted because Perlin is a coauthor of some of the publications and, as the owner of the company that owns TrueAllele, has a financial interest in seeing it found reliable. In other words, Simmer is contending that there are reasons to question Perlin's credibility. Even assuming that is true, an attack on the credibility of an expert witness is not aimed at the expert's reasoning or methodology and is thus not the proper basis for a *Daubert*/*Schafersman* challenge. See *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005) (stating that challenge to expert witnesses' credibility is not *Daubert*/*Schafersman* claim).

In any event, Perlin's part in the validation studies was not as pervasive or unchecked as Simmer suggests. Perlin was not involved in 10 validation studies in the record. In addition, six of the studies in which he was listed as an author were published in peer-reviewed publications. As this court has previously recognized, "The reason that peer-reviewed publication is valuable is that it places research in the public domain and permits evaluation and criticism." *State v. Daly*, 278 Neb. 903, 914, 775 N.W.2d 47, 60 (2009). See, also, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) ("submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected"). Furthermore, Perlin was not the lone author on any of the published, peer-reviewed validation studies. That is, other members of the scientific community also staked their reputations on the reliability of TrueAllele. We see no basis to say that the district court abused its discretion by relying on the validation studies.

Simmer also argues that, apart from Perlin's involvement in some of the validation studies, the studies themselves do not

demonstrate TrueAllele's reliability. Here, Simmer relies heavily on the testimony of his expert, Adams. Adams acknowledged the studies in the record validating TrueAllele, but claimed that there is a difference between the "forensic DNA definition of validation and the software engineering definition of validation." Adams emphasized that TrueAllele had not been tested from a software engineering perspective. In particular, Adams expressed concerns that the TrueAllele software source code had not been subjected to independent testing. He testified that without such a review, confirmation was lacking as to whether the TrueAllele software actually performs as described by Perlin.

We do not believe that the district court was required to find that TrueAllele had been validated "from a software engineering perspective" to find it reliable. In the *Daubert/Schafersman* context, a trial court has discretion to decide what factors are reasonable measures of reliability in each case. See *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004), citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (Scalia, J., concurring). While a review of the TrueAllele source code might also have confirmed the reliability of TrueAllele, we cannot say that the district court abused its discretion by relying on the numerous validation studies confirming the reliability of TrueAllele by other means. See *Com. v. Foley*, 38 A.3d 882 (Pa. Super. 2012) (noting in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), analysis of TrueAllele that scientists can validate reliability of computerized process even if source code underlying process is unavailable to public). See, also, Edward J. Imwinkelried, *Computer Source Code: A Source of the Growing Controversy Over the Reliability of Automated Forensic Techniques*, 66 DePaul L. Rev. 97 (2016).

Neither are we persuaded by Simmer's argument that the validation studies are inadequate because the likelihood ratios generated by TrueAllele cannot be confirmed as accurate. Here again, Simmer relies heavily on Adams' assertions. Adams

conceded that by running the TrueAllele software on known DNA profiles, one can determine whether TrueAllele accurately includes or excludes potential contributors. But Adams asserted that these same studies cannot confirm whether the specific likelihood ratios are accurate because there is no "knowable correct output."

Perlin, however, testified that TrueAllele's match statistics can be verified by comparing a broad range of match statistics to an expected distribution based on probability theory. At least one of the peer-reviewed validation studies did so and concluded that there was no significant difference between TrueAllele's match statistics and a uniform distribution. The study concluded that this provided statistical support for the system's accuracy. This method of testing may not have demonstrated to an absolute certainty that match statistics generated by TrueAllele are accurate, but a court performing a *Daubert*/*Schafersman* inquiry should not require absolute certainty. See, e.g., *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014).

Finally, Simmer argues that the district court failed to acknowledge the existence of a California study which, Simmer contends, reported "significant errors" by TrueAllele. Brief for appellant at 21. This study, however, is not in the record in this case. Perlin referred to it in his testimony, but he also testified that it was a "procurement study," which was never published, and that the laboratory conducting the study changed the parameters of TrueAllele so it did not work properly. We do not see how the district court could have abused its discretion by declining to rely on a study that was not in the record and was undermined by Perlin's unrefuted testimony.

For the reasons we have explained, we disagree with Simmer's argument that the district court ignored information it was required to consider in determining whether the TrueAllele evidence was reliable. Neither do we believe the district court's ultimate conclusion that the State proved the reliability of TrueAllele amounted to an abuse of discretion.

The State adduced significant evidence that TrueAllele is reliable. The State presented Perlin's testimony and copious documentary evidence describing TrueAllele's methodology, which is based on established mathematical principles. SWGDAM has approved the use of validated and documented probabilistic genotyping software and provided guidelines for its validation. TrueAllele has complied with those guidelines: TrueAllele's methodology has been repeatedly tested and validated in peer-reviewed studies.

Even if TrueAllele has not garnered universal acceptance in the relevant scientific community, that does not automatically disqualify it for admission. See *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). The wide use of TrueAllele by government crime laboratories and other groups nationwide, Perlin's participation in multiple lectures and conferences, and Helligso's testimony that the scientific community had agreed in recent years that programs like TrueAllele are necessary, all tend to show that TrueAllele has been generally accepted in the relevant scientific community. Moreover, at least one appellate court opinion and several trial court orders in our record have found, based on similar evidence, that TrueAllele has gained such acceptance. See, e.g., *Com. v. Foley*, 38 A.3d 882 (Pa. Super. 2012) (rejecting challenge to TrueAllele, under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), standard, which requires general acceptance in relevant scientific community). See, also, e.g., *State v. Wakefield*, 47 Misc. 3d 850, 9 N.Y.S.3d 540 (2015) (same).

3. Application of TrueAllele in This Case

As mentioned above, some of Simmer's arguments on appeal are not directed to the TrueAllele methodology in a general sense, but instead attack the application of the methodology in this particular case. Specifically, Simmer contends that two reports, a 2015 validation study conducted by the Virginia Department of Forensic Science and a 2016 report by

the President's Council of Advisors on Science and Technology (PCAST), suggest that TrueAllele could not be reliably applied to the particular facts in this case.

While Simmer criticizes the district court for not addressing his arguments based on these reports, we note that it is not clear that Simmer adequately raised these arguments in the district court. Simmer's pretrial motion in limine challenged the reliability of TrueAllele evidence, but it did not specifically raise any concern about whether TrueAllele could properly be applied to the particular facts of this case. A challenge to the admissibility of evidence under *Daubert*/*Schafersman* should take the form of a concise pretrial motion. *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014). It should identify, in terms of the *Daubert*/*Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case, along with all other bases for challenging its admissibility. See *id.* See, also, *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011). The closest Simmer's motion in limine came to raising a challenge to the application of TrueAllele in this case was its allegation that the proposed testimony was "based on insufficient facts and data." It is far from clear this was specific enough to signal a challenge to the application of TrueAllele to the facts of this case. See *id.*

Even assuming Simmer properly preserved the issue, however, we see no basis to find that a conclusion that TrueAllele could be reliably applied to the facts of this case would amount to an abuse of discretion. To begin, we do not believe the Virginia validation study demonstrates that TrueAllele could not be reliably applied in this case. Simmer contends a portion of that study casts doubt on the conclusions reached in this case. One section of that study did, based on testing, conclude that TrueAllele produced a "[p]oor" analysis when the standard deviation in the mixture weight was less than .03. And, as Simmer points out, Perlin acknowledged that runs of the

TrueAllele software yielded a standard deviation below .03 for the knife handle.

Perlin did not, however, agree with the Virginia study to the extent it concluded that TrueAllele could not produce a reliable analysis when the standard deviation on mixture weights fell below a certain threshold. He testified that the Virginia study's results were "a reflection of the data" the authors analyzed and that they inappropriately tried to apply "hard and fast thresholds on statistical parameters" rather than "actually looking at concordance in the genotypes in their probability distributions." Perlin described concordance as similar results with acceptably small variations across multiple runs of the software. Perlin's trial testimony also suggests that the Virginia laboratory that performed the study eventually came to hold his view regarding the reliability of TrueAllele even with a low standard deviation in mixture weights: Perlin testified that the laboratory now uses TrueAllele "for all their reported mixtures."

Even setting aside Perlin's testimony disagreeing with the Virginia study's conclusion as to TrueAllele's analysis of mixture weights with a standard deviation below .03, the Virginia study reached that conclusion in the context of testing performed on *three-person mixtures*. There is no dispute that the sample from the knife handle in this case is a two-person mixture. The record does not show that the Virginia study's conclusion regarding standard deviation applies to the facts in this case, much less demonstrates that TrueAllele's analysis was unreliable here. Perlin testified that even a 1-percent standard deviation for the two-person mixture on the knife handle did not pose a problem for the reliability of the TrueAllele results.

Simmer's argument based on the PCAST report fares no better. Simmer contends that this report found that TrueAllele was reliable when the minor contributor to a two-person DNA mixture contributes at least 10 percent of the mixture. Simmer asserts that because the minor contribution on the knife handle

in this case was only 2 percent, the PCAST report casts doubt on the reliability of the TrueAllele analysis in this case. As we will explain, however, the record before us is murky as to what the PCAST report concluded, the basis for those conclusions, and the weight those conclusions deserve.

The PCAST report is not in our record. Unable to cite directly to the report, Simmer directs us to a Washington trial court order containing a description of the report. That order does note that the report concluded that TrueAllele and a similar software program "appear to be reliable for . . . two person mixtures where the minor contributor constitutes at least 10% of the mixture." The same order, however, summarized several experts' criticism of the PCAST report, including its statements regarding mixture weights. It also observed that the PCAST report did not cite to any study that supported mixture weight limitations, a point Perlin also emphasized when he was asked about the report on cross-examination. The Washington trial court ultimately denied the defendant's motion to exclude TrueAllele evidence despite the fact that the minor contributor fell below the limitations purportedly expressed in the PCAST report. With no scientific evidence in the record indicating that TrueAllele could not generate reliable results under the circumstances here, we cannot say that a conclusion that TrueAllele could reliably be applied to the facts of this case would amount to an abuse of discretion.

In addition, other evidence in the record did address the effect that low mixture weights can have on the TrueAllele analysis, but it did not suggest that TrueAllele's analysis of low mixture weights was unreliable. Perlin and the Virginia study explained that mixture weights are reflected in the match statistic generated by TrueAllele: the lower the mixture weight, the lower the probability given by the match statistic. Therefore, the low mixture weight of minor contributor DNA found on the knife handle was reflected by the finding that the match between the knife handle and Simmer was 3.71 thousand times more probable than a coincidental match to an unrelated

person, a probability much lower than the match between the doorknob and Simmer (4.22 quintillion times more probable than a coincidental match to an unrelated person).

The fact that a lower mixture weight makes a match statistic less certain is not a basis for exclusion of the evidence. We have previously recognized that DNA analysis is not subject to exclusion simply because the probability of a match falls below a certain threshold. See, *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018); *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011). Instead, we have emphasized the need for DNA analysis to "be accompanied by evidence of the statistical significance of the findings," and we have rejected arguments that jurors are not capable of assigning appropriate weight to those statistics. *Tucker*, 301 Neb. at 866, 920 N.W.2d at 688. Here, the evidence furnished the jury with the statistical context to carry out its duty. To the extent the disparity between the major and minor contributor on the knife handle reduced the certainty of a noncoincidental match, that was an issue of weight for the jury to consider and not a bar to admissibility.

We see no basis to conclude that the district court could not, consistent with our abuse of discretion standard of review, conclude that TrueAllele could be reliably applied to the particular facts of this case.

4. Limitations of Our Decision

We conclude by cautioning that this opinion should not be understood as mandating the admission of TrueAllele evidence in all future cases. "*Daubert* . . . does not require that courts reinvent the wheel each time that evidence is adduced, but it does permit the re-examination of certain types of evidence where recent developments raise doubts about the validity of previously relied-upon theories or techniques." *Schafersman v. Agland Coop*, 262 Neb. 215, 228, 631 N.W.2d 862, 874 (2001). And our *Daubert* framework "permits re-examination of the issue if the validity of the prior determination can be

appropriately questioned." *Schafersman v. Agland Coop, supra*. See, also, *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). As the instant case demonstrates, "[s]cientific conclusions are subject to perpetual revision" and "hypotheses . . . that are incorrect will eventually be shown to be so." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Based on the record before us in this case, however, we cannot say that the district court abused its discretion in allowing admission of the TrueAllele evidence.

V. CONCLUSION

For the foregoing reasons, we determine that the district court did not abuse its discretion in admitting DNA analysis conducted by using TrueAllele, over Simmer's *Daubert*/*Schafersman* challenges. Therefore, 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.
Jason D. Roberts, appellant.
934 N.W.2d 845

Filed November 1, 2019. No. S-18-1196.

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. **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.
4. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or similar problem.

Appeal from the District Court for Pierce County: James G. Kube, Judge. Appeal dismissed.

Melissa A. Wentling for appellant.

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

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

Papik, J.

Jason D. Roberts was convicted of a felony offense in one district court and multiple felony and misdemeanor offenses in another. His sentences in both courts included terms of incarceration and terms of postrelease supervision and were ordered to be served consecutively. After Roberts had served the incarceration portion of his sentences and had been released, the State filed a motion in one court alleging that he had violated the terms of his postrelease supervision and asking that his postrelease supervision be revoked. The district court did so and ordered that he serve the entirety of the time remaining on his postrelease supervision term in jail. Roberts appeals, contending that the court ordered him to serve more time in jail than was permitted by law.

At this point, however, Roberts has completely served his sentence. The parties agree that this renders Roberts' appeal moot. And although Roberts asks that we nonetheless decide the merits of his appeal under exceptions to the mootness doctrine, we decline to do so and dismiss the appeal.

BACKGROUND

Roberts' Convictions and Sentences.

In April 2016, Roberts was sentenced in the district court for Madison County for possession of morphine. The court sentenced him to 364 days in jail plus 9 months' postrelease supervision. His sentence was ordered to run consecutive to any sentence imposed or being served in other cases.

Two months later, in June 2016, Roberts was sentenced in the district court for Pierce County for his convictions of driving under suspension, reckless driving, and two counts of child abuse. For these convictions, the court imposed an aggregate sentence of 394 days in jail, 18 months' postrelease supervision, and a 1-year suspension of his driver's license. Again, the court ordered that his sentence be served consecutively to any sentences imposed or being served in other cases.

Roberts did not appeal his convictions or sentences.

Roberts served the Madison County jail term and then the Pierce County jail term. He was released on June 18, 2017, and began serving postrelease supervision. Nine months later, in an order filed March 21, 2018, the district court for Madison County released Roberts from postrelease supervision for the Madison County conviction, effective March 18.

Revocation of Postrelease Supervision.

On April 10, 2018, the State charged Roberts in the district court for Pierce County with violating the terms of his postrelease supervision for the Pierce County convictions. The State alleged that Roberts' 18-month term of postrelease supervision for those convictions began on March 18 and that Roberts had violated the terms of that postrelease supervision in multiple respects shortly thereafter. The State asked that the court revoke Roberts' postrelease supervision and sentence him accordingly.

In response, Roberts filed an "Objection & Motion to Determine the Term of Post-Release Supervision." In it, he asserted that the term of postrelease supervision for the Pierce County sentence should have begun upon his release from the incarceration portion of that sentence on June 18, 2017, and end on December 18, 2018. He pointed to language in the district court's June 2016 journal entry that "[f]ollowing release from incarceration, [Roberts] is hereby sentenced to 18 months of Post-Release Supervision." He also suggested that if the court revoked his postrelease supervision, it was prohibited by statute from imposing a term of incarceration extending beyond December 18, 2018. The court held a hearing on Roberts' motion in which his counsel stated that "you can't have consecutive terms of post-release supervision."

The district court issued a written order rejecting Roberts' position. It explained that the two sentences were ordered to be served consecutively and that, in that situation, the terms of postrelease supervision run consecutively. Accordingly, the district court reasoned, Roberts' term of postrelease supervision for the Pierce County sentence did not begin until he had

served the term of postrelease supervision for the Madison County conviction and was thus scheduled to end 18 months later on September 18, 2019.

The district court later found Roberts had violated the terms of postrelease supervision. It revoked his postrelease supervision and ordered him to serve the time remaining on his term of postrelease supervision in jail with a release date of September 18, 2019. Roberts filed a timely appeal of this order.

Prior to oral argument, we issued an order directing the parties to be prepared to address whether the appeal was moot in light of the fact that Roberts was scheduled to complete his sentence on September 18, 2019. At oral argument, the parties confirmed that Roberts has completely served his sentence.

ASSIGNMENT OF ERROR

Roberts assigns one error on appeal. He contends that the district court erred by ordering him to remain in jail until September 18, 2019, as a consequence of violating conditions of postrelease supervision.

STANDARD OF REVIEW

[1,2] Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we review mootness determinations under the same standard of review as other jurisdictional questions. *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 930 N.W.2d 551 (2019). 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. *Id.*

ANALYSIS

Under the version of Neb. Rev. Stat. § 29-2268(2) (Reissue 2016) that was in effect at the time Roberts' postrelease supervision was revoked, if a district court finds that an individual

serving a term of postrelease supervision has violated a condition of postrelease supervision, it may revoke the postrelease supervision and order the offender to a term of imprisonment "up to the remaining period of post-release supervision." But, see, 2019 Neb. Laws, L.B. 686, § 8 (amending "remaining" to "original" in § 29-2268(2), effective September 1, 2019). The sole issue on appeal is whether the district court ordered Roberts to serve too much time in jail when it found he violated conditions of his postrelease supervision and ordered that he be incarcerated until September 18, 2019.

By the time this case reached us, however, Roberts had completely served his sentence and had been released. This raises a question of whether this appeal should be dismissed as moot.

An action becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of the litigation. See *State ex rel. Peterson v. Ebke, supra*. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights or in which the issues presented are no longer alive. See *id.* The central question in a mootness analysis is whether a change in circumstances during the course of the litigation has made it impossible for the court to provide any meaningful relief. See *id.* We have applied these principles to hold that, generally, an appeal of a conviction is moot when a criminal defendant has completely served his or her sentence. See *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991). See, also, *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016) (holding appeal of dismissal of petition for writ of habeas corpus was moot because at time of appeal, petitioner was no longer in custody).

The parties agree that because Roberts has completely served the sentence at issue, this appeal is moot. They disagree, however, as to whether we should reach the merits of his appeal. The State argues we should dismiss the appeal without addressing the merits. Roberts argues that we should address

the merits by way of the public interest exception to the mootness doctrine.

[3,4] 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. *Bramble v. Bramble*, 303 Neb. 380, 929 N.W.2d 484 (2019). When determining whether a case involves a matter of public interest, we consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or similar problem. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). Roberts argues that this case qualifies because there is a public interest in our clarifying whether courts may, consistent with Neb. Rev. Stat. §§ 29-2204.02(7)(d) and 29-2246(13) (Reissue 2016), order terms of postrelease supervision to run consecutively to each other.

Even if it might be in the public interest for us to determine whether a court may order terms of postrelease supervision to be served consecutively, we do not believe that question is properly before us in this appeal. We have held on several occasions that in an appeal of an order revoking probation, a party may not attack an aspect of their underlying conviction. See, e.g., *State v. Englehart*, 231 Neb. 579, 437 N.W.2d 468 (1989); *State v. Osterman*, 197 Neb. 727, 250 N.W.2d 654 (1977); *State v. Williams*, 194 Neb. 483, 233 N.W.2d 772 (1975). In those decisions, we reasoned that a party wishing to challenge some aspect of his or her underlying conviction must do so in a timely appeal of the conviction.

Roberts' argument in this appeal is not meaningfully different from those we refused to address in *Englehart*, *Osterman*, and *Williams*. He is attempting to challenge an aspect of his original sentence—that the terms of postrelease supervision were to run consecutively—in an appeal of an order revoking his postrelease supervision. We have recognized that

postrelease supervision is a form of probation. See *State v. Dill*, 300 Neb. 344, 913 N.W.2d 470 (2018). And just as allowing parties to challenge their convictions in an appeal of a revocation of probation would allow parties to make an end run around the normal deadline for filing a notice of appeal, so too would allowing parties to challenge their underlying conviction or sentence in an appeal of an order revoking postrelease supervision. Permitting such challenges would also be inconsistent with the "'fundamental principle'" that "'[t]he need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.'" See *State v. Paulsen, ante* p. 21, 31, 932 N.W.2d 849, 856 (2019).

Because we would not reach Roberts' argument in a case that was not moot, we believe it would be inappropriate to decide its merits via the public interest exception to the mootness doctrine. Accordingly, we dismiss the appeal.

CONCLUSION

Because Roberts' completion of the sentence at issue has rendered his appeal moot and we do not believe it appropriate to reach the merits of his appeal under an exception to our mootness doctrine, we dismiss the appeal.

Appeal dismissed.

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. Brandon J. Weathers, appellant.

935 N.W.2d 185

Filed November 8, 2019. No. S-18-665.

1. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.
2. **Effectiveness of Counsel: Appeal and Error.** An appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.
3. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
4. **Right to Counsel: Appeal and Error.** A trial court's decision to sustain or overrule a defendant's motion to dismiss appointed counsel and appoint substitute counsel is reviewed for an abuse of discretion.
5. **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.

6. **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. 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.
7. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
8. ____: ____. 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.
9. ____: ____. 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.
10. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
11. **Effectiveness of Counsel: Presumptions: 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, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.
12. **Effectiveness of Counsel: Proof: Appeal and Error.** When an ineffective assistance of counsel claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.
13. ____: ____: ____. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal.
14. **Effectiveness of Counsel: Records: Appeal and Error.** Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial.

15. ____: ____: ____. An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice.
16. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** In the case of an argument presented for the purpose of avoiding procedural bar to a future postconviction proceeding, appellate counsel must present a claim 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.
17. **Claims.** A claim insufficiently stated is no different from a claim not stated at all.
18. **DNA Testing: Convictions.** The requirement for a convicted felon to provide a DNA sample pursuant to Neb. Rev. Stat. § 29-4106(1)(a) (Reissue 2016) exists once the convicted felon begins serving his or her sentence.
19. ____: ____. Neb. Rev. Stat. § 29-4106 (Reissue 2016) inherently authorizes the use of reasonable force to collect a DNA sample from a convicted felon.
20. **Criminal Law: Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.
21. ____: ____: ____. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading.
22. **Evidence.** Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.
23. **Trial: Evidence.** Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis.
24. **Right to Counsel.** When a defendant becomes dissatisfied with court-appointed counsel, unless he or she can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if he or she is competent to do so.
25. ____. An indigent defendant's right to have counsel does not give the defendant the right to choose his or her own counsel.

26. ____. Mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
27. **Right to Counsel: Waiver: Effectiveness of Counsel.** Appointed counsel must remain with an indigent accused unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.
28. **Right to Counsel.** Once a defendant requesting substitute counsel has raised a seemingly substantial complaint about counsel, the court has a duty to thoroughly inquire into the complaint.
29. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** When an appellate court finds, on direct appeal, that the record is not sufficient to resolve a claim of ineffective assistance, it should not be misunderstood as a finding that the claim will necessarily require an evidentiary hearing if raised in a motion for postconviction relief, because that determination is governed by an entirely different standard.
30. ____: ____: ____: ____. Just because an appellate court finds the record on direct appeal is insufficient to resolve a claim of ineffective assistance, it does not mean that a postconviction court will necessarily be precluded from later finding the existing record affirmatively refutes the same claim.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Brandon J. Weathers appeals his convictions in the district court for Douglas County for four counts of first degree sexual assault. Weathers, who has new counsel on direct appeal, claims that his trial counsel provided ineffective assistance in

various respects, including in failing to adequately challenge the admission of DNA evidence that linked him to the assaults and that he claims was obtained in violation of his constitutional rights and in violation of statutory limitations on the use of DNA samples. He further claims, independent of his ineffective assistance of counsel claims, that admission of the DNA evidence was plain error. Weathers also claims that the district court erred when it refused to remove his counsel and appoint new counsel after he asserted that his counsel had a conflict of interest and had performed deficiently in other respects. We affirm Weathers' convictions and sentences.

STATEMENT OF FACTS

In 2014, Weathers was being investigated for sexual assault of a child in a case unrelated to the charges in the present case. Police obtained a DNA sample from Weathers in connection with the investigation of the 2014 assaults. Following a trial in December 2015, Weathers was convicted of two counts of first degree sexual assault of a child based on the 2014 assaults, and the district court sentenced Weathers to two consecutive terms of imprisonment for 50 to 80 years. The Nebraska Court of Appeals affirmed Weathers' convictions and sentences for the 2014 assaults. *State v. Weathers*, No. A-16-305, 2017 WL 24777 (Neb. App. Jan. 3, 2017) (selected for posting to court website). As will be discussed below, Weathers asserts that the DNA sample collected in connection with the investigation of the 2014 assaults was used to connect him to the 2002 and 2004 assaults that are the subject of the present case.

As part of Weathers' sentencing for the 2014 assaults, pursuant to Neb. Rev. Stat. § 29-4106 (Reissue 2016), the district court ordered Weathers to submit a DNA sample for use in the State DNA Sample Bank. On June 5, 2017, the district court entered an order in response to the State's "Motion to Enforce Order." The court stated that employees of the Department of Correctional Services had twice attempted to obtain a DNA sample from Weathers but that he refused to comply voluntarily.

The court further stated that despite Weathers' refusal, he was still required to submit a DNA sample. The court then cited authority to the effect that it had "'the power to enforce [its decision] by making such orders as are necessary to carry its judgment or decree into effect'" (quoting *Evans v. Frakes*, 293 Neb. 253, 259, 876 N.W.2d 626, 632 (2016)) and that it had "authority to do such things as are reasonably necessary for the proper administration of justice" (citing *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994)). Based on such authority and on its finding that the law and its sentencing order required Weathers to submit to the collection of a DNA sample, the court ordered that "employees of the Department of Correctional Services shall forthwith collect a DNA sample from [Weathers] via buccal swab" and that "such employees of the Department are hereby authorized to use such force as is reasonably necessary to obtain or collect a DNA sample from [Weathers]."

Under the authority of the June 5, 2017, order, a DNA sample was collected from Weathers; the DNA sample was then provided to the Nebraska State Patrol DNA identification laboratory and entered into a state DNA database. On June 12, Det. Christy Jaworski received a letter from the DNA database "indicating that . . . Weathers was matched to four outstanding sexual assaults" that had occurred in 2002 and 2004. Based on protocol, that same day, Jaworski obtained a court order to collect four additional DNA samples from Weathers to be tested against the DNA evidence that had been collected in each of the four outstanding cases. After the additional samples were collected and tested, the results showed that Weathers' DNA profile matched that of the assailant in the four sexual assaults from 2002 and 2004. The results of the testing of the DNA samples obtained pursuant to the June 12 order would ultimately be admitted into evidence at the trial in this case.

On August 9, 2017, the State filed an information charging Weathers with four counts of first degree sexual assault related

to the 2002 and 2004 incidents. Prior to trial, Weathers filed a motion to suppress evidence obtained as a result of the DNA samples collected in June 2017. He asserted that the samples were seized and collected from him in violation of his constitutional rights and in violation of statutes governing the collection and use of DNA samples.

At a hearing on the motion to suppress, Jaworski testified regarding her investigation of the present case and how she went about obtaining the DNA samples that were used to tie Weathers to the 2002 and 2004 assaults. The court received into evidence the February 17, 2016, sentencing order related to the 2014 assaults; the June 5, 2017, order authorizing corrections employees to collect a DNA sample using reasonably necessary force; and the June 12, 2017, court order requiring collection of the DNA samples used in this case.

On cross-examination by Weathers at the suppression hearing, Jaworski testified that it was her understanding that in 2014, when Weathers was being investigated for the 2014 assaults and a DNA sample had been collected from Weathers in connection with that investigation and submitted to a laboratory for testing, a laboratory technician "recognized a very rare DNA allele that . . . Weathers has." Jaworski was notified in 2014 that "Weathers was a match to the serial rape case [from 2002 and 2004] because they had been aware of this rare allele." Jaworski further testified on cross-examination that in 2014, she had asked Weathers to give his consent to provide a DNA sample for use in the investigation of the sexual assaults from 2002 and 2004 but he had declined. She testified that in 2014, she did not further pursue a DNA sample related to the earlier assaults, because "the decision was made by the County Attorney's Office to try [the 2014 assaults] case first and separately." She testified, however, that "our department did compare the [un]known suspect DNA in the four outstanding sexual assaults against . . . Weathers' buccal swab [in the 2014 case] and it was — at that time it was a match" and that "that's how we knew he was identified."

On redirect, Jaworski testified that the DNA sample given by Weathers in connection with the investigation in 2014 was not and could not have been entered into the state DNA database. She testified, however, that the presence of the rare allele in the DNA evidence from the earlier sexual assaults had been "widely known" among law enforcement personnel since 2002.

At the end of the suppression hearing, Weathers generally argued that the DNA sample collected in connection with the investigation of the 2014 assaults was improperly compared to the DNA evidence from the 2002 and 2004 assaults, because at that time, there was no probable cause to link Weathers to the 2002 and 2004 assaults. He argued that the comparison to the 2002 and 2004 DNA evidence violated his constitutional rights and that it violated Neb. Rev. Stat. § 29-4126 (Reissue 2016), which he argued prohibited use of a DNA sample without probable cause as to the particular crime being investigated. He argued that the same limitations applied to the DNA samples taken in 2017 and that the DNA evidence collected in 2017 was "fruit of the poisonous tree" because it was obtained as a result of the unconstitutional comparison of the 2014 investigative DNA sample to the DNA evidence in the 2002 and 2004 assaults. He further argued that, independently of what occurred in 2014, the State failed to show that the 2017 DNA samples were collected in compliance with the DNA Identification Information Act, Neb. Rev. Stat. §§ 29-4101 to 29-4115.01 (Reissue 2016 & Cum. Supp. 2018).

The district court overruled Weathers' motion to suppress the DNA evidence. The court first addressed Weathers' arguments regarding the use of the DNA sample collected in 2014 as follows:

> Much of [Weathers'] motion and his argument revolves around the DNA collection from the unrelated 2014 investigation for first-degree sexual assault of a child, but there was no evidence adduced during the hearing to support a finding that the 2014 DNA sample was ever submitted

> for comparison in this current case. Thus, the Court finds the 2014 DNA collection and investigation irrelevant for purposes of this motion . . . .

The court focused instead on the two collections of DNA samples that occurred in June 2017.

Regarding the DNA sample collected pursuant to the June 5, 2017, order, the court determined that collection of the DNA sample was authorized by § 29-4106 because Weathers was a convicted felon. The court further determined that collection of a DNA sample from a convicted felon pursuant to a statute such as § 29-4106 did not violate the Fourth Amendment. The court noted that the subsequent submission of the DNA sample into the state DNA database was "anticipated under [the] DNA Identification Information Act."

Regarding the DNA samples collected pursuant to the June 12, 2017, order, the court determined that Jaworski's affidavit provided probable cause for the order, based on the notification Jaworski received indicating that submission of the DNA sample obtained based on the June 5 order to the state DNA database showed that Weathers' DNA profile "matched the DNA profile of the previously unknown suspect from four sexual assaults that occurred in 2002-2004." The court determined that because it was supported by probable cause, the June 12 order did not violate the Fourth Amendment, nor did it violate Neb. Rev. Stat. § 29-3303 (Reissue 2016), which requires probable cause for an order to collect identifying physical characteristics, or § 29-4126, which provides that no DNA sample may be obtained in connection with an investigation of a crime without probable cause, a court order, or voluntary consent.

Having concluded that the State had met its burden to establish that the Fourth Amendment had not been violated, the court briefly addressed, and rejected, Weathers' other arguments. The court rejected Weathers' argument that use of the 2014 DNA sample in connection with the 2002 and 2004 assaults was not supported by probable cause. The court

repeated its determination that there was no evidence that the 2014 investigative DNA sample "was ever submitted to be tested against the DNA collected from the 2002-2004 sexual assaults or put into [the state DNA database]." The court stated that, instead, "law enforcement waited to do an investigatory comparison of [Weathers'] DNA to the 2002-2004 sexual assault DNA evidence until [2017, when] there was a match to [Weathers'] DNA collected under the DNA Identification Information Act."

The court next rejected Weathers' argument that collection of the DNA samples in June 2017 violated the DNA Identification Information Act because the act requires that a medical or corrections professional, rather than a law enforcement officer, collect the DNA from a defendant. The court stated that the evidence presented at the suppression hearing showed only that Jaworski did not personally collect the DNA samples and that she did not know specifically who had collected the samples. The court determined that Weathers had not provided evidence to support his claim of a violation of the act, and the court further determined that even if there was a violation, Weathers cited no authority to the effect that such a violation would require suppression of the DNA evidence. Having rejected these and Weathers' other arguments, the court overruled the motion to suppress DNA evidence.

A few days prior to the date trial was scheduled to begin, Weathers filed a pro se motion to dismiss his current counsel and appoint new counsel. He alleged, inter alia, that counsel had proved to be ineffective or incompetent because counsel had missed a pretrial conference and had failed to meet with Weathers prior to trial to discuss the case or to review discovery. He further alleged that counsel, who worked for the public defender's office, had a conflict of interest, because in a postconviction action in a separate criminal proceeding, Weathers was raising ineffective assistance claims involving a different attorney who also worked for the public defender's office. Weathers requested that new counsel be appointed and

that a continuance be granted to allow new counsel to prepare for trial.

The day after Weathers filed the motion, the court held a hearing on it and other motions. The court asked whether Weathers had any reason other than those set forth in his motion why counsel should be dismissed, and Weathers replied that there was not. The court then stated that the reasons set forth by Weathers constituted mere dissatisfaction with counsel, which would not be sufficient to justify removal of counsel absent a showing of good cause. The court found that Weathers had not shown good cause for removal of his counsel, and the court then told Weathers that if it denied his request, Weathers' only options would be to continue with his current counsel or represent himself. Weathers stated that he would stay with his appointed counsel.

At trial, the State presented witnesses, including the four victims of the assaults in 2002 and 2004. The four victims were not able to identify the person who committed the assaults, because he had taken steps to conceal his identity, but each of them gave descriptions of the perpetrator's general appearance and size that were similar to one another and that were similar to Weathers' general appearance and size. The four victims each gave descriptions of how the assaults were carried out, which included details that were similar to the other victims' accounts. The State also presented evidence regarding the testing of the DNA samples that were obtained from Weathers in 2017, which testing showed that Weathers' DNA profile matched that of DNA evidence collected in the investigations of the 2002 and 2004 assaults. Weathers' counsel did not renew the motion to suppress such evidence and did not object to the admission on the bases presented in the motion to suppress or on the basis that a chain of custody was lacking for the DNA evidence collected in the investigation of the assaults.

The jury found Weathers guilty of four counts of first degree sexual assault, and the court accepted the verdicts. The court

thereafter sentenced Weathers to imprisonment for 40 to 50 years for each count and ordered the sentences to be served consecutively.

Weathers appeals his convictions.

ASSIGNMENTS OF ERROR

Weathers, who has new counsel on appeal, claims that his trial counsel provided ineffective assistance in certain respects. The first few claims of ineffective assistance of counsel relate to the DNA evidence. Weathers claims that counsel provided ineffective assistance of counsel when counsel at trial failed to object to admission of the DNA evidence and renew the motion to suppress on the bases that (1) the comparison of the 2014 DNA sample to the DNA evidence in the 2002 and 2004 assaults violated § 29-4126 and Weathers' constitutional rights and (2) the June 5, 2017, order authorizing corrections employees to obtain a DNA sample from Weathers using force violated his constitutional rights. He further claims that apart from the claims of ineffective assistance of counsel, it was plain error for the court to admit the DNA evidence, because it was obtained as the result of violations of his constitutional rights.

Weathers also claims that counsel provided ineffective assistance by failing to object to the DNA evidence on the basis that the State failed to establish a chain of custody for the DNA evidence collected in the investigations of three of the four assaults.

Weathers further claims that the district court erred when it refused to remove his trial counsel and appoint new counsel on the basis of counsel's alleged ineffective assistance in pretrial proceedings and trial preparation and on the basis of an alleged conflict of interest. Weathers also claims, independently of the claim related to the court's ruling on the motion to remove counsel, that trial counsel provided ineffective assistance of counsel as alleged in the motion—i.e., in failing to attend a pretrial conference, in failing to meet with Weathers prior to

trial to discuss the case or to review discovery, and in representing Weathers despite a conflict of interest.

Finally, Weathers makes two additional claims of ineffective assistance of trial counsel: (1) that counsel failed to move for a continuance of the trial on the bases that counsel had not adequately prepared for trial and that the State had been granted a motion to endorse an additional witness only 3 days prior to the start of the trial and (2) that counsel failed to adequately investigate and present several aspects of his defense.

STANDARDS OF REVIEW

[1,2] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. *State v. Hood*, 301 Neb. 207, 917 N.W.2d 880 (2018). We determine as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance. *Id*.

[3] When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Brown*, 302 Neb. 53, 921 N.W.2d 804 (2019). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *Id*.

[4] A trial court's decision to sustain or overrule a defendant's motion to dismiss appointed counsel and appoint substitute counsel is reviewed for an abuse of discretion. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). See, also, *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988).

ANALYSIS

Ineffective Assistance Claims.

Weathers, who has new counsel on appeal, makes several claims on direct appeal that his trial counsel provided ineffective assistance in various respects. Before specifically addressing those and his other claims, we set forth standards applicable to claims of ineffective assistance of counsel raised on direct appeal.

[5,6] When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding. *State v. Munoz*, 303 Neb. 69, 927 N.W.2d 25 (2019). The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id*. The determining factor is whether the record is sufficient to adequately review the question. *Id*. 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. *Id*.

[7-11] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Munoz, supra*. 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. *Id*. 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. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the

outcome. *Id*. The two prongs of this test may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable. *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

[12,13] When an ineffective assistance of counsel claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel. *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (2019). General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal. *Id.*

[14-17] Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial. *Id.* An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice. *Id*. In the case of an argument presented for the purpose of avoiding procedural bar to a future postconviction proceeding, appellate counsel must present a claim 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. *State v. Hood*, 301 Neb. 207, 917 N.W.2d 880 (2018). A claim insufficiently stated is no different from a claim not stated at all. *Id*.

Failure to Object to DNA Evidence and Renew Motion to Suppress Was Not Ineffective Assistance of Counsel, and It Was Not Plain Error to Admit Such Evidence.

Weathers' first three assignments of error relate to the admission of the DNA evidence that tied Weathers to the 2002 and 2004 sexual assaults. He claims that trial counsel provided ineffective assistance when counsel failed to preserve challenges to admission of the DNA evidence for appeal by failing to renew his motion to suppress and failing to object to the admission of the evidence at trial. He further claims that in light of the alleged constitutional violations in the collection of the DNA evidence, it was plain error for the district court to admit the evidence. We determine that the DNA evidence was admissible and should not have been suppressed. We therefore conclude that Weathers could not show ineffective assistance of trial counsel in this respect and that the district court did not commit plain error when it admitted the evidence. Weathers' challenges to the admission of the DNA evidence are without merit.

The DNA evidence admitted at trial consisted of the results of the testing of the DNA samples that were collected from Weathers pursuant to the June 12, 2017, order. In its order overruling Weathers' motion to suppress, the district court concluded that the order was supported by probable cause based on the notification investigators received from the state DNA database indicating that Weathers' DNA profile matched the DNA profile of the previously unknown suspect from the four sexual assaults that are the subject of the charges in this case. On appeal, Weathers does not argue that the match of his DNA profile to the DNA profiles in the state DNA database did not provide probable cause to support the June 12 order to collect DNA samples for purposes of investigating the 2002 and 2004 assaults. Instead, he argues that two prior DNA collections violated his constitutional and statutory rights and that therefore the DNA samples

collected pursuant to the June 12, 2017, order were "fruit of the poisonous tree."

Weathers argues that the DNA evidence should have been suppressed because (1) the comparison of the 2014 DNA sample to the DNA evidence in the 2002 and 2004 assaults violated § 29-4126 and Weathers' constitutional rights and (2) the June 5, 2017, order authorizing corrections employees to obtain a DNA sample from Weathers using force violated his constitutional rights. As discussed below, we determine that the June 12 order was not dependent on the 2014 DNA sample and that therefore even if the collection or use of the 2014 DNA sample were improper, evidence obtained pursuant to the June 12 order did not need to be suppressed. We further determine that while the June 12 order was dependent on the DNA sample collected pursuant to the June 5 order, the collection of Weathers' DNA sample under the authority of the June 5 order did not violate Weathers' Fourth Amendment rights.

Regarding the 2014 DNA sample, Weathers argues that the collection of the sample was in violation of his Fourth Amendment rights, because in the present case, the State did not provide "evidence that police had a court order allowing police to take Weathers' DNA in 2014, nor did the State introduce evidence that an exception to the warrant requirement applied." Brief for appellant at 24. Weathers further argues that once the DNA sample had been collected, it was improper to compare the DNA sample collected in connection with the 2014 assaults to the DNA evidence in the unsolved cases from 2002 and 2004. He argues that such comparison violated his Fourth Amendment rights and that it also violated § 29-4126. Weathers argues that § 29-4126(1) requires "probable cause, a court order, or voluntary consent" related to the investigation of a particular crime and that even if the collection of the DNA sample in 2014 was justified as to the investigation of the 2014 assaults, investigators did not have probable cause, a court order, or Weathers' consent to collect or use the DNA sample for the investigation of the 2002 and 2004 assaults. He

argues that "police simply chose to violate the law by comparing Weathers' 2014 sample, taken as part of an unrelated investigation, to the unknown suspect sample from the 2002-2004 sexual assaults." Brief for appellant at 23.

In its order overruling the motion to suppress, with regard to the 2014 DNA sample, the district court found that "there was no evidence adduced during the hearing to support a finding that the 2014 DNA sample was ever submitted for comparison in this current case." The district court determined that the 2014 DNA sample was "irrelevant" to the motion to suppress and overruled the motion. The State in its brief on appeal acknowledges that there was evidence in the record that "there was some sort of comparison of Weathers' DNA sample in 2014, though the extent of that comparison is unclear." Brief for appellee at 16. The State takes the position that even if the DNA sample collected in connection with the 2014 assaults was compared to the DNA evidence in the unsolved cases from 2002 and 2004, it does not follow that the State violated either the Fourth Amendment or § 29-4126. The State contends that once the DNA sample from the 2014 assaults was lawfully in its possession, neither the Fourth Amendment nor § 29-4126 restricted its use of that sample.

The evidence of a comparison included Jaworski's testimony at the suppression hearing that "our department did compare the [un]known suspect DNA in the four outstanding sexual assaults against . . . Weathers' buccal swab [in the 2014 case] and it was — at that time it was a match" and that "that's how we knew he was identified." However, Jaworski did not testify that she had personally made such a comparison and she could not testify as to exactly what sort of comparison was made in 2014 to the evidence from the 2002 and 2004 cases.

Instead, during the trial, Weathers made an offer of proof of testimony by Kaye Shepard, a laboratory DNA analyst who in 2014 had analyzed Weathers' DNA sample in connection with the investigation of the 2014 assaults. Shepard testified that she noted Weathers' DNA contained "a very rare allele that

we hadn't seen for many, many years in the laboratory" and that she remembered seeing the rare allele in a sample she had analyzed in 2004. Shepard denied that the 2014 DNA sample was put into a DNA system for a comparison, and she resisted testifying that she compared Weathers' entire DNA profile to a suspect DNA profile, testifying instead that "I remember just the [rare allele] standing out." Shepard further acknowledged that in 2014, she "may have called somebody at the Omaha Police Department to tell them that we had" a DNA sample with the rare allele, "which they know about from previous years."

Jaworski testified that after being informed in 2014 by the laboratory that "Weathers was a match to the serial rape case because they had been aware of this rare allele," she had asked Weathers to give his consent to provide a DNA sample in connection with the earlier serial rapes, but that after he declined his consent, she did not further pursue a DNA sample related to the earlier assaults, because "the decision was made by the County Attorney's Office to try [the 2014 assaults] case first and separately." Jaworski further testified that the DNA sample given by Weathers in 2014 was not and could not have been entered into the state DNA database and that the presence of the rare allele in the DNA evidence from the earlier sexual assaults had been "widely known" among law enforcement personnel since 2002.

Therefore, the evidence in this case does not indicate a "comparison" of the 2014 DNA sample to the evidence from the 2002 and 2004 assaults, at least in the sense of a comparison of Weathers' full DNA profile or the entry of his DNA profile into a database. Instead, it indicates that a laboratory technician noted the presence of a rare allele which might tie Weathers to the earlier cases and that she had reported her observation to investigators. Jaworski sought Weathers' consent to give a DNA sample to use in the investigation of the earlier cases. However, after he refused consent, she did not further pursue obtaining a DNA sample or obtaining evidence

to tie Weathers to the prior assaults. Instead, it appears that investigators determined, after consultation with the county attorney, that the possible connection of Weathers to those prior assaults would not be pursued at that time and that instead they would wait to see whether Weathers was convicted of the 2014 assaults. Therefore, it appears the State made a strategic decision to wait and see whether Weathers would become a convicted felon, at which time his DNA would be collected and put into the state DNA database pursuant to the DNA Identification Information Act.

Even if we were to assume that Shepard's observation of the rare allele constituted a "comparison" of the 2014 DNA sample to the evidence in the 2002 and 2004 cases and even if we were to assume this comparison violated the Fourth Amendment or § 29-4126, we agree with the district court's determination that the collection and use of the 2014 DNA sample are not relevant to the suppression issues in this case. The record indicates that the DNA sample collected from Weathers in the 2014 investigation did not directly lead to the DNA evidence that was offered and admitted at his trial in the present case involving the 2002 and 2004 assaults. Instead, the evidence admitted in this case directly resulted from the DNA samples collected pursuant to the June 12, 2017, order, which in turn was supported by probable cause based on evidence generated by the collection of the DNA sample pursuant to the June 5, 2017, order. As we discuss below, the collection of the DNA sample pursuant to the June 5 order was properly based on the authority of § 29-4106 and Weathers' status as a convicted felon. Evidence generated from the DNA sample collected in 2014 was not directly used to support either of the collections of DNA samples in 2017. Therefore, even if the collection and the subsequent use of the DNA sample in 2014 were improper, the DNA evidence admitted in this case was collected in 2017 and was not dependent on the 2014 DNA sample, and therefore the DNA evidence at issue in the current appeal would not have been suppressed based on any error that occurred in 2014.

We therefore reject Weathers' argument that trial counsel was ineffective for failing to preserve a challenge to admission of the DNA evidence based on alleged errors in the collection or use of the 2014 DNA sample.

As noted above, the DNA evidence admitted in this case was the product of the DNA samples collected pursuant to the June 12, 2017, order and the probable cause which supported that order was based on evidence that resulted from the DNA sample collected pursuant to the June 5, 2017, order. Therefore, error in the collection of the DNA sample pursuant to the June 5 order could have required suppression of the DNA evidence in this case. However, we determine that the June 5 collection was proper based on § 29-4106.

Weathers argues that the district court did not have authority to issue the June 5, 2017, order and that therefore, the collection of a DNA sample pursuant to that order violated his Fourth Amendment rights. However, even if the district court had not issued the June 5 order, the State was authorized by § 29-4106 to collect the DNA sample and to use reasonable force to do so.

Section 29-4106 provides, in relevant part, as follows:

> (1) A person who is convicted of a felony offense or other specified offense on or after July 15, 2010, who does not have a DNA sample available for use in the State DNA Sample Bank, shall, at his or her own expense, have a DNA sample collected:
>
> (a) Upon intake to a prison, jail, or other detention facility or institution to which such person is sentenced. If the person is already confined at the time of sentencing, the person shall have a DNA sample collected immediately after the sentencing. Such DNA sample shall be collected at the place of incarceration or confinement. Such person shall not be released unless and until a DNA sample has been collected[.]

There is no dispute that Weathers was convicted of a felony offense in connection with the 2014 assaults. Therefore, under

§ 29-4106, Weathers was required to have a DNA sample collected for use in the State DNA Sample Bank.

Weathers argues, however, that he could not have been forced to supply a DNA sample on June 5, 2017. He notes the last sentence of § 29-4106(1)(a), which provides that a convicted felon "shall not be released unless and until a DNA sample has been collected," and he argues that this sentence provides the exclusive mechanism authorized to enforce the requirement for a convicted felon to provide a DNA sample. That is, the only way a convicted felon may be forced to provide a sample is at the completion of his or her sentence, at which time the State may coerce him or her to provide a sample by refusing to release him or her until the sample is provided. However, we do no read this sentence as providing an exclusive mechanism for enforcement or as prohibiting the State from using other means to obtain the DNA sample that a convicted felon is statutorily required to provide.

[18] We note in this regard that § 29-4106(1)(a) provides that the requirement for a convicted felon to provide a DNA sample becomes effective "[u]pon intake to a prison, jail, or other detention facility or institution to which such person is sentenced," or "[i]f the person is already confined at the time of sentencing, the person shall have a DNA sample collected immediately after the sentencing." The requirement therefore exists once the convicted felon begins serving his or her sentence. Although the convicted felon may not be released at the end of the sentence unless or until he or she has provided the DNA sample, the convicted felon's obligation to provide a DNA sample exists, and may be enforced, at the beginning of the sentence.

On June 5, 2017, Weathers had been sentenced for the 2014 felonies and was confined pursuant to such sentences. Therefore, on that day, he was legally required under § 29-4106(1)(a) to have a DNA sample collected. Even without the June 5 order, the State was authorized by § 29-4106(1)(a) to enforce the requirement that Weathers provide a DNA sample. Weathers

disagrees and instead contends that the collection of the DNA sample was an unreasonable seizure that violated his Fourth Amendment rights.

Courts have generally held that statutes such as § 29-4106 that require a convicted felon to provide a DNA sample for inclusion in a DNA database do not violate Fourth Amendment protections against unreasonable seizure. See *U.S. v. Kraklio*, 451 F.3d 922 (8th Cir. 2006), and cases cited therein. See, also, *Maryland v. King*, 569 U.S. 435, 481, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013) (collection of DNA sample pursuant to statute authorizing such collection from arrestee does not violate Fourth Amendment; in his dissent, Justice Scalia notes that "[a]ll parties concede that it would have been entirely permissible, as far as the Fourth Amendment is concerned, for [the plaintiff] to take a sample of [the defendant's] DNA as a consequence of his conviction for second-degree assault"). Therefore, to the extent Weathers might have challenged the collection of his DNA on June 5, 2017, on the basis that § 29-4106 violated the Fourth Amendment by authorizing collection of his DNA, such challenge would not have been successful and counsel was not ineffective for failing to preserve the challenge.

However, Weathers further argues that it was a Fourth Amendment violation for the district court to authorize the use of reasonable force to collect the DNA sample from him. We determine that § 29-4106 inherently authorizes the use of reasonable force to obtain a DNA sample. Other courts have reached a similar result.

In *State v. Banks*, 321 Conn. 821, 839, 146 A.3d 1, 10 (2016), the Connecticut Supreme Court affirmed a lower court's ruling interpreting a statute requiring that DNA samples be collected from all persons convicted of a felony and determining that the "ability to use reasonable force to obtain a DNA sample is implicit in the statute as its fundamental purpose would be subverted otherwise." The Connecticut Supreme Court agreed that "the use of reasonable force to obtain a DNA sample from

an unwilling individual was 'inherent' in" the statute and reasoned that "[t]o conclude otherwise would result in absolute frustration of the legislature's objective in establishing and maintaining a DNA data bank." *Id.* at 842, 146 A.3d at 12. See, also, *Rendelman v. Scott*, 378 Fed. Appx. 309, 313 (4th Cir. 2010) ("State's right to obtain [a] DNA sample from designated inmates must necessarily carry with it the right to use a reasonable degree of force that is sufficient to ensure compliance. Otherwise, the State's right can be rendered meaningless by an inmate who refuses to grant permission . . . ").

[19] We conclude that § 29-4106 inherently authorizes the use of reasonable force to collect a DNA sample from a convicted felon. We further conclude that use of reasonable force does not violate the Fourth Amendment. Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. *State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018). The ultimate touchstone is one of reasonableness. *Id*. We believe that the Fourth Amendment would not prohibit use of reasonable force to carry out an otherwise proper statutorily authorized seizure.

In the June 5, 2017, order, the district court specified that "reasonable" force could be used to obtain the DNA sample, and there is no indication in the record on direct appeal that anything more than reasonable force was used to collect the DNA sample; and, at least in connection with this claim, Weathers does not assert that unreasonable force was used. We note that in connection with his claim, discussed below, that trial counsel failed to adequately investigate and present several aspects of his defense, one of the specific failures Weathers asserts relates to evidence the State allegedly turned over during the trial, "including video of the forcible extraction of Weathers' DNA sample." Brief for appellant at 48. That alleged evidence is not in the record on appeal, and Weathers does not argue in connection with the present claim of ineffective assistance of counsel that counsel should have objected

to admission of the DNA evidence on the basis that excessive force was actually used to obtain the DNA sample on June 5. Instead, his argument is that the court could not authorize reasonable force, and we conclude that § 29-4106 authorizes reasonable force and that such authorization does not violate the Fourth Amendment.

In sum, we conclude that the record on appeal refutes Weathers' first two claims of ineffective assistance of trial counsel. Weathers could not show prejudice from counsel's failure to object to admission of the DNA evidence and to renew the motion to suppress, because the challenges asserted by Weathers related to the 2014 DNA sample and the June 5, 2017, DNA sample collected pursuant to the court's order would not have been successful. In addition, because the record refutes Weathers' claims that DNA evidence should have been excluded based on alleged Fourth Amendment violations, we further conclude that it was not plain error for the court to admit the evidence, and we reject Weathers' assignment of error to that effect.

Failure to Object to DNA Evidence Based on Chain of Custody Was Not Ineffective Assistance.

Weathers next claims that trial counsel provided ineffective assistance by failing to object to the DNA evidence on the basis that the State failed to establish a chain of custody for the DNA evidence collected in the investigations of three of the four assaults. We determine the record shows that this claim is without merit.

Weathers' arguments in this claim focus on three of the four victims in this case. Regarding one victim, he asserts that there was "no testimony in the record from the individual who purportedly swabbed [the victim] during the rape kit examination." Brief for appellant at 35. Regarding the second victim, Weathers asserts that the State's witness was a doctor who "could only say that he 'supervised' [the victim's] treatment,

but he did not personally perform or witness these tasks" and testified only that he assumed the samples taken from the victim were properly taken and sealed. *Id.* at 36. Regarding the third victim, Weathers similarly argues that the witness was a doctor who had testified regarding the examination he had given and testified regarding tasks performed by a nurse with respect to the collection, packaging, and sealing of the rape kit.

[20-23] In a case involving a foundational challenge regarding hair specimens submitted for testing and the admission of the results of the testing, we stated the following standards. Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. *Id*. It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading. *Id*. Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. *Id*. Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis. *Id*.

With regard to the first victim, the State notes that there was testimony by the nurse who participated in the examination of the victim and the collection of swabs and who testified that she had put the collected evidence into sealed envelopes and provided them to police. We agree with the State that this testimony belies Weathers' assertion that there was no testimony by the person who collected the swab used to collect the DNA sample.

Regarding the second and third victims, the State argues that the testimony of the physicians was sufficient to establish proper collection and handling of the samples even if the physicians did not perform all the steps personally. Each of the physicians testified regarding examinations they performed of the respective victims and the procedures performed by themselves and by nurses under their supervision to collect samples. We determine the doctors' testimony regarding their examination of the specific victims and the procedures which were followed in such examinations, when combined with other evidence including the testimony of police officers who collected packaged and sealed kits, was sufficient to establish the chain of custody. Weathers does not cite authority requiring that the specific person who physically collected and sealed the samples must testify, and we think testimony by the doctor who supervised the examination was sufficient to provide that step in the chain.

We do not think a challenge to the admission of the DNA evidence based on chain of custody would have been successful, and therefore the record refutes that there was prejudice from counsel's failure to object on such basis. We therefore conclude that this claim of ineffective assistance of counsel is without merit.

District Court Did Not Err When It Overruled Motion to Dismiss Counsel, and Counsel Did Not Provide Ineffective Assistance as Alleged in the Motion.

Weathers next claims that the district court abused its discretion when it overruled his motion to dismiss his counsel and appoint substitute counsel. He further claims that the reasons he set forth in his motion to dismiss counsel also constitute reasons that counsel provided ineffective assistance. We conclude that the court did not abuse its discretion when it refused to appoint substitute counsel and that the record refutes Weathers' claim of ineffective assistance of counsel.

[24-27] When a defendant becomes dissatisfied with court-appointed counsel, unless he or she can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if he or she is competent to do so. *State v. Williams*, 295 Neb. 575, 889 N.W.2d 99 (2017). An indigent defendant's right to have counsel does not give the defendant the right to choose his or her own counsel. *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007). Mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. *Id*. Appointed counsel must remain with an indigent accused unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

In this case, the court gave Weathers the option to proceed pro se, and he rejected that option. Weathers also did not choose to retain private counsel and instead sought appointment of substitute counsel. Therefore, under *State v. McGuire, supra*, in order to remove his counsel and obtain new appointed counsel, Weathers was required to establish not merely that he distrusted or was dissatisfied with his counsel but that trial counsel was incompetent.

[28] As a general matter, Weathers argues that the district court erred because it did not hold an evidentiary hearing on his motion to dismiss his counsel. We have said that once a defendant requesting substitute counsel has raised a seemingly substantial complaint about counsel, the court has a duty to thoroughly inquire into the complaint. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003). However, we have determined that when a defendant's asserted grounds for discharging counsel and appointing new counsel were insufficient, there was no reason for the court to conduct an evidentiary hearing. See *State v. Wabashaw, supra*. In this case, Weathers'

motion fully set forth his reasons for removing his counsel, and when the court took up the motion, it asked Weathers whether he had any reasons other than those set forth in his motion why counsel should be dismissed and Weathers replied that there were none. The court therefore had enough information from which to determine whether Weathers' assertions had merit, and, as we discuss below, the court in its discretion determined that Weathers' asserted reasons did not require removal of counsel and appointment of substitute counsel. Therefore, the court's failure to hold an evidentiary hearing was not in itself error.

Weathers argues on appeal that the "[m]ost pressing" reasons to dismiss counsel were that (1) counsel, who worked for the public defender's office, had a conflict of interest, because in a prior case, Weathers' counsel was a different attorney from the same office and Weathers, in a postconviction action, was currently challenging the effectiveness of that counsel's assistance in the prior case; (2) counsel had missed a pretrial conference; and (3) counsel had failed to meet with Weathers prior to trial to discuss the case or to review discovery. Brief for appellant at 37.

Regarding Weathers' assertion that counsel had a conflict of interest, we have held that appointed counsel may be removed because of a potential conflict of interest and that such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel. *State v. McGuire, supra*. The conflict alleged by Weathers was that in a postconviction action, he was alleging that another public defender had provided ineffective assistance in a separate criminal proceeding. Weathers argues that this created an actual conflict of interest with the other public defender and that such conflict should be imputed to his counsel, who was also a public defender. Weathers cites cases to the effect that if one attorney in a firm has an actual conflict of interest, the conflict is imputed to all attorneys in the firm.

However, in a case involving an assertion that an alleged conflict of interest for one attorney in a county attorney's office should be imputed to the other prosecutors in the office, we noted that rules regarding imputed conflicts of interest differ between attorneys employed by law firms and those employed by government agencies. In *State v. Kinkennon*, 275 Neb. 570, 577, 747 N.W.2d 437, 444 (2008), we described a "more flexible rule" provided in Neb. Ct. R. of Prof. Cond. 1.11(d) (rev. 2005) (now Neb. Ct. R. of Prof. Cond. § 3-501.11(d)), which addresses conflicts of interest for current government officers and employees. We noted:

> The official comment 2 to rule 1.11 explains that "[b]ecause of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers." This rule recognizes the distinction between lawyers engaged in the private practice of law, who have common financial interests, and lawyers in a prosecutor's office, who have a public duty to seek justice, not profits.

State v. Kinkennon, 275 Neb. at 577, 747 N.W.2d at 444. We think this reasoning applies as well to lawyers within a public defender's office, who also have a public duty to seek justice for the defendants they represent. As to whether Weathers' assertion of claims of ineffective assistance of counsel create a conflict of interest for the specific public defender who represented him in the underlying prior conviction, any such conflict would not be imputed to a different public defender who was representing him in the current proceeding. The district court therefore did not abuse its discretion when it refused to remove Weathers' counsel on the basis of the alleged conflict of interest.

Weathers also argues that counsel deprived him of his right to effective representation and therefore should have been

removed, because counsel missed a "pretrial conference" on January 10, 2018. The record indicates that counsel attended a "pretrial conference" that was held on November 28, 2017. At that conference, the court mentioned that time had been scheduled on January 10, 2018, to consider "pretrial motions." There is no transcript in the record on appeal for a proceeding held on January 10, but at a proceeding held on March 5, Weathers' counsel acknowledges missing a hearing on January 10 due to a misunderstanding that a hearing would not be held that day, because counsel did not have motions ready to be heard that day. The March 5 hearing then continued with, inter alia, defense counsel presenting certain motions. Although counsel missed the scheduled hearing on January 10, there is nothing in the record indicating that anything occurred at that hearing that materially affected Weathers' defense, and it appears that counsel presented motions at a later date. We do not think the record shows that counsel was incompetent in this respect, and therefore we do not think the court abused its discretion when it refused to remove counsel on this basis.

Weathers further argues counsel should have been removed for failing to meet with him prior to trial to discuss the case or to review discovery. The State notes that the record indicates that counsel had met with Weathers to discuss discovery, and Weathers in his motion acknowledged that counsel had met with him, although he alleged counsel did not provide him with "full discovery," which he asserted consisted of "3000 plus pages of discovery." The record also indicates that counsel had made motions to continue the trial in order to allow additional time to prepare with Weathers. These indicate that counsel was engaged in preparation with Weathers, and we do not think it shows that counsel was incompetent. We therefore do not think the court abused its discretion when it refused to remove counsel on this basis.

In addition to arguing that the three above-stated reasons required the court to remove counsel, Weathers also claims on direct appeal that each of the three reasons constituted

ineffective assistance of trial counsel. As discussed above, counsel did not have a conflict of interest based on Weathers' postconviction claims regarding a different public defender; because counsel had no such conflict of interest, it was not deficient performance for counsel to represent Weathers in this proceeding. With regard to the other two reasons, as discussed above, the record on direct appeal does not indicate that counsel was incompetent for either of the asserted reasons. We therefore conclude that on direct appeal, there is no merit to Weathers' claim that trial counsel provided ineffective assistance for the reasons set forth in his motion to remove counsel.

We note, however, that in his final claim of ineffective assistance, which we discuss below, Weathers asserts various claims that he argues cannot be reviewed on direct appeal but that he sets forth to preserve for postconviction review. In that claim, he sets forth various examples of how counsel could have better prepared for trial. Among his specific claims are that counsel was ineffective because counsel failed to investigate what occurred during the January 10, 2018, hearing counsel failed to attend and that if counsel had met with him to discuss discovery, he could have provided leads regarding defenses, including alibi defenses. Our conclusion herein that the record on direct appeal refutes the claim that counsel was ineffective in the ways alleged in the motion to remove counsel does not necessarily foreclose claims related to counsel's performance with respect to the January 10 hearing or to counsel's preparation of Weathers' defense to the extent such claims can be established based on information outside the record in this direct appeal.

Counsel Was Not Ineffective for Failing to Move for Continuance.

Weathers claims ineffective assistance of counsel when counsel failed to move for a continuance of the trial a few days before trial was scheduled to begin. Weathers asserts two

reasons counsel should have moved for a continuance: (1) Counsel had not adequately prepared with Weathers for trial, and (2) the court granted the State's motion to endorse a witness 3 days before trial was scheduled to start. We conclude the record on direct appeal refutes this claim.

First, Weathers argues that counsel should have moved for a continuance because counsel had not adequately prepared with Weathers for trial. Weathers' argument in this respect simply refers back to his argument to support his claim that the district court should have sustained his motion to remove counsel on the basis that counsel had failed to meet with him prior to trial to discuss the case or to review discovery. As discussed above, we determine that the record refutes Weathers' claim that the district court should have removed counsel for this reason. For the same reason, we conclude that the record refutes that counsel was ineffective for failing to move for a continuance on the basis of counsel's failure to adequately prepare with Weathers. In particular, we note that the record indicates that counsel made motions for continuance that were denied by the district court. In this respect, we also note that in Weathers' final claim of ineffective assistance of counsel on direct appeal, he asserts that he could have provided counsel leads to investigate defenses, including alibi defenses; such alleged information is obviously not in the record on direct appeal, and we consider below whether this aspect of the claim is refuted in the record.

Weathers further argues counsel was ineffective for failing to move for a continuance based on the court's endorsement of a State's witness a few days before trial was scheduled to begin. As discussed below, we determine that the record shows that Weathers could not show prejudice from counsel's failure to move to continue based on endorsement of the witness.

The record on direct appeal shows that on March 22, 2018, the State filed a motion for leave to endorse John Cress as a witness, and that on March 23, Weathers' counsel filed an

objection to the motion, noting that trial was set to begin on March 26. Weathers' counsel asserted that the motion should be denied because the State's request was filed after deadlines had passed for endorsing witnesses and for filing motions. The court heard the State's motion and Weathers' objection on March 23. The transcript of the hearing showed that Cress would testify regarding chain of custody for the DNA evidence, specifically "transporting evidence to the State crime lab." After hearing argument on the motion and Weathers' objection, which included discussion regarding prejudice to the preparation of the defense, the court sustained the State's motion to endorse the witness but "require[d] that the State make [Cress] available for a deposition for [Weathers] before he testifies." At trial, Cress testified as the last witness on March 27. He generally testified that he was an Omaha police officer and that on October 4, 2002, he was assigned to "pick up a rape kit at central station property room and transport it to the Nebraska State Patrol Crime Lab." He testified further regarding completing this assignment. Cress' testimony was relatively brief, and Weathers' counsel took the opportunity to cross-examine and re-cross-examine Cress regarding his testimony.

We conclude that Weathers could not show prejudice resulting from counsel's failure to move for a continuance based on the endorsement of the witness shortly before trial. We note that if counsel had moved for a continuance, the decision would have been left to the district court's discretion. See *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017) (stating that decision whether to grant continuance in criminal case is within discretion of trial court and will not be disturbed on appeal absent abuse of discretion). Also, we have said that a trial court, in the exercise of its discretion, may permit additional witnesses to be endorsed within the 30 days before trial and even after the trial has begun, provided doing so does not prejudice the rights of the defendant. *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016). In this case, at the hearing on the State's motion to endorse Cress as a witness, the court took

into consideration whether doing so a few days prior to trial would prejudice Weathers in the preparation of his defense. The court addressed any potential prejudice by requiring the State to make Cress available to Weathers for a deposition before he testified.

Considering the nature of Cress' testimony, basically establishing a link in the chain of custody, we do not think the court abused its discretion when it sustained the State's motion to endorse. Furthermore, the court addressed potential prejudice by requiring that Cress be made available for a deposition. Although it is not clear from the record whether Weathers took Cress' deposition, the record does show that Weathers thoroughly cross-examined Cress on the matters to which he testified and that Weathers re-cross-examined Cress after the State's redirect.

We note further that requiring Cress to be made available for a deposition adequately addressed the concerns that would have been considered if Weathers' counsel had moved for a continuance. Therefore, if counsel had moved for a continuance, the court likely would have denied a continuance and instead ordered the same remedy it gave in response to Weathers' objection to endorsement of the witness, and we do not think it would have been an abuse of discretion to deny such a motion to continue. Weathers cites *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013), in which we held that the trial court abused its discretion when it denied the defendant's request to continue trial based on a codefendant's plea agreement with the State, executed on the eve of trial, pursuant to which she agreed to testify against the defendant. By contrast to the testimony of a codefendant, Cress' testimony in this case was limited in scope and relatively minor given the entirety of the evidence in the case. Making Cress available for a deposition without granting a continuance of the trial was sufficient to protect against prejudice to Weathers' preparation of his defense. Therefore, the record refutes this claim of ineffective assistance of counsel.

Weathers' Claims of Failures by Counsel Relating to Investigation and Presentation of Defenses Are Either Refuted by the Record or Cannot Be Reviewed on Direct Appeal.

Weathers finally claims that counsel failed to adequately investigate and present several aspects of his defense. Weathers asserts that the record on direct appeal is not sufficient to review these claims but that he is setting them forth herein in order to preserve the claims for postconviction review. In each of these claims, Weathers asserts that counsel failed to discover or to pursue certain information that could have helped his defense. These claims therefore rely on evidence or information that is not included in the record on appeal, and we therefore agree with Weathers that the claims could not be resolved on direct appeal. However, we determine that two of the claims, which both relate to the alleged use of the 2014 DNA sample, are shown to be without merit because, as we discussed above, the DNA evidence admitted at trial was not dependent on the 2014 DNA sample.

In the argument section of his brief, Weathers sets forth the following claims:

- Trial counsel failed to consult with or call as a witness an expert in the field of DNA identification. A DNA identification expert would have evaluated all the testing done in this case, including the testing of other suspects' profiles done by investigators, and testified that another suspect, possibly an unknown relative of Weathers, matched the unknown suspect's profile, and that the lab technicians called by the State made mistakes in the testing and interpretation of DNA in this case.
- In relation to the ineffective assistance directly above, trial counsel failed to investigate or subpoena DNA analyst "Christine." This analyst would have testified that investigators were told the person who committed the sexual assaults could be a relative of Weathers because

they shared most of the DNA core loci, yet police did not use this information to further investigate other individuals who may have committed the sexual assaults.

- Trial counsel failed to investigate the circumstances of the 2014 case against Weathers. Had he done so, he would have discovered additional testimony by . . . Jaworski confirming not only that an investigative comparison was illegally done between Weathers' 2014 DNA sample and that of the unknown suspect, but that investigators did upload Weathers' DNA profile to CODIS. The trial court found no evidence that either an investigatory comparison or a CODIS search occurred in 2014. . . .
- Trial counsel similarly failed to investigate or call former crime lab director James Wisecarver regarding crime lab policies and procedures, which would have provided evidence in addition to that provided by . . . Jaworski that investigators both conducted an investigative comparison of Weathers' 2014 DNA sample to the unknown suspects in 2014.
- Trial counsel failed to request a continuance or mistrial when, during trial, the State turned over evidence including video of the forcible extraction of Weathers' DNA sample, evidence relevant not only to the motion to suppress the DNA evidence, but to . . . Weathers' defense that the State and the trial court targeted Weathers for malicious prosecution.
- Trial counsel failed to investigate *ex parte* communications that occurred between the trial court and the prosecutor that occurred during the January 10, 2018 pretrial conference missed by trial counsel. . . . These communications would have provided additional evidence relevant to Weathers' defense that the State and the trial court targeted Weathers for malicious prosecution, and would have supported a motion to recuse both the prosecutors and trial court prior to trial.

- Trial counsel failed to engage in meaningful discussions of the case with Weathers prior to trial. Had he done so and allowed Weathers to review all the discovery, Weathers would have had an opportunity to provide trial counsel with leads for possible defenses, including potential alibi defenses. Trial counsel was therefore ineffective in failing to further investigate these potential defenses.

Brief for appellant at 47-49.

The third and fourth claims above both relate to allegations that counsel failed to pursue evidence that could have shown that investigators in 2014 had made a comparison of the DNA evidence from the 2002 and 2004 unsolved cases to the DNA sample Weathers provided in connection with the investigation of the 2014 assaults. However, as we discussed above, the DNA evidence that was admitted at the trial in this case was the result of DNA samples that were collected in 2017, and such evidence was obtained independently of the collection or use of Weathers' DNA sample in 2014. Therefore, even if Weathers were able to show some impropriety in the collection or use of the 2014 DNA sample, it would not have required suppression of the DNA evidence that was admitted in the present case. We therefore conclude that the record on direct appeal refutes the third and fourth claims above.

Regarding the remaining claims above, each of the claims relies on alleged evidence or information that is not included in the record on direct appeal, and none of these claims are clearly refuted by anything in the record. Therefore, we cannot say on direct appeal that these claims are without merit. We agree with Weathers' assertion that these claims cannot be determined on direct appeal, because the record on appeal does not disclose what steps trial counsel took in regard to these avenues of investigation, what would have been found if the various actions had been taken by counsel, and whether the findings would have helped Weathers' defense. Weathers' brief on appeal did not specifically assign these claims as error,

as required by our recent decision in *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019), but his brief was filed prior to the release of our *Mrza* decision. Therefore, we include this listing so that a district court reviewing any petition for postconviction relief that Weathers might bring in the future will be able to recognize what specific claims were brought before this court on direct appeal.

[29,30] As we recently emphasized in *State v. Stelly, ante* p. 33, 932 N.W.2d. 857 (2019), when an appellate court finds, on direct appeal, that the record is not sufficient to resolve a claim of ineffective assistance, it should not be misunderstood as a finding that the claim will necessarily require an evidentiary hearing if raised in a motion for postconviction relief, because that determination is governed by an entirely different standard. Also, just because an appellate court finds the record on direct appeal is insufficient to resolve a claim of ineffective assistance, it does not mean that a postconviction court will necessarily be precluded from later finding the existing record affirmatively refutes the same claim. *Id.*

CONCLUSION

Regarding Weathers' assignments of error by the district court, we conclude that the court did not commit plain error when it admitted the DNA evidence in this case and that it did not abuse its discretion when it overruled Weathers' motion to remove counsel and appoint substitute counsel. Regarding Weathers' claims of ineffective assistance of trial counsel, we determine, as set forth above as to each specific claim, either that the record on direct appeal shows the claim is without merit or that the record on direct appeal is not sufficient to review the claim. We therefore affirm Weathers' convictions and sentences for four counts of first degree sexual assault.

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. Randy R. Harms, Jr., appellant.

934 N.W.2d 850

Filed November 8, 2019. No. S-18-1181.

1. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served and in what amount are questions of law. An appellate court reviews questions of law independently of the lower court.
2. ____: ____. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Sentences: Statutes.** The calculation and application of credit for time served is controlled by statute. Different statutes govern depending on whether the defendant is sentenced to jail or prison.
4. **Sentences.** Neb. Rev. Stat. § 47-503 (Reissue 2010) is intended to ensure that defendants receive all the credit against their jail sentence to which they are entitled—no less, and no more.
5. **Sentences: Prisoners: Time.** When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise. Thus, the applicable rule is that unless the court imposing a later independent sentence specifically states otherwise at the time of its pronouncement, the later sentence is to be served consecutively to any earlier imposed sentence or sentences.
6. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
7. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
8. **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.

9. **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.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Seward County: James C. Stecker, Judge. Affirmed.

Nicole J. Tegtmeier, Seward County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

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

Stacy, J.

Randy R. Harms, Jr., was convicted of attempted possession of burglar's tools, a Class I misdemeanor,[1] and was sentenced to 1 year in jail with credit for 23 days served. Harms appeals, arguing his sentence was excessive and claiming he was entitled to additional jail credit. Finding no error, we affirm.

FACTS

2015 Convictions in Dawson County

In 2015, Harms was convicted of multiple felony and misdemeanor charges in Dawson County, Nebraska, and was

[1] See Neb. Rev. Stat. §§ 28-201 and 28-508 (Reissue 2016).

sentenced to a total of 40 to 120 months in the custody of the Nebraska Department of Correctional Services (DCS). Harms was released on parole in March 2018.

2018 Conviction in Seward County

Approximately 2 months later, on May 28, 2018, Harms was arrested in Seward County, Nebraska, and charged with one count of possession of burglar's tools, a Class IV felony.[2] He was lodged in the Seward County jail, and his bond was set at "$10,000—10%."

A few weeks later, Harms sent a jail "kite" form to the district court asking to "put in for a PR Bond." Harms stated that his parole had been revoked and that he wanted to return to DCS custody, where he felt his access to medications and medical treatment would be better than in the Seward County jail. After a hearing on June 20, 2018, Harms was allowed to swear to a personal recognizance bond and was released from the Seward County jail directly into DCS custody.

Harms ultimately pled no contest to attempted possession of burglar's tools, a Class I misdemeanor.[3] On November 19, 2018, he was sentenced to 1 year in the Seward County jail and was ordered to pay $2,000 in restitution upon his release. Harms was given credit for 23 days served. Harms asked the court to give him additional credit against his jail sentence for the 150 days he spent in DCS custody after he was released on bond from the Seward County jail. The court denied his request.

Harms filed this timely appeal, which we moved to our docket on our own motion.

ASSIGNMENTS OF ERROR

Harms assigns, restated, that the district court erred by (1) awarding him insufficient credit for time served against his jail sentence and (2) imposing an excessive jail sentence.

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[2] § 28-508.

[3] See §§ 28-201 and 28-508.

STANDARD OF REVIEW

[1] Whether a defendant is entitled to credit for time served and in what amount are questions of law.[4] An appellate court reviews questions of law independently of the lower court.[5]

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[6]

ANALYSIS

Credit for Time Served

Harms contends the district court erred in granting him only 23 days of credit against his 1-year jail sentence. He argues he should have been given credit for 173 days—a figure he arrives at by adding together the 23 days he spent in the Seward County jail and the 150 days he spent in the custody of DCS before being sentenced in the instant case.

[3] In Nebraska, the calculation and application of credit for time served is controlled by statute.[7] Different statutes govern depending on whether the defendant is sentenced to jail or prison.[8] Neb. Rev. Stat. § 47-503 (Reissue 2010) governs the credit to be given against a city or county jail sentence and provides in relevant part:

> (1) Credit against a jail term shall be given to any person sentenced to a city or county jail for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based. Such credit shall include, but not be limited to, time spent in jail:
>
> (a) Prior to trial;
>
> (b) During trial;

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[4] *State v. Phillips*, 302 Neb. 686, 924 N.W.2d 699 (2019).

[5] *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

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

[7] *State v. Bree*, 285 Neb. 520, 827 N.W.2d 497 (2013).

[8] See *id*.

(c) Pending sentence;

(d) Pending resolution of an appeal; and

(e) Prior to delivery of such person to the county board of corrections or, in counties which do not have a county board of corrections, the county sheriff.

A different statute, Neb. Rev. Stat. § 83-1,106 (Reissue 2014), governs the credit to be given against a prison sentence ordered to be served in the custody of DCS. The statutes are similar in many respects, but because Harms was sentenced to a term of imprisonment in the county jail, and not DCS, the credit to which Harms is entitled is governed by § 47-503, not § 83-1,106.

Section 47-503(1) authorizes credit for "time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based." Here, the record confirms Harms spent a total of 23 days in jail on the criminal charge of possession of burglar's tools. The sentencing court gave Harms credit for those 23 days, but Harms contends he was entitled to more.

He asserts that after bonding out of jail on the Seward County charge, he returned immediately to DCS custody on the parole violation. He argues his parole on the Dawson County sentences was revoked "as a result of" the conduct upon which the Seward County charges were based, and he contends he is thus entitled to receive credit against his 1-year jail sentence for the time he spent in DCS custody. We disagree.

After Harms bonded out of jail on the Seward County charge of possession of burglar's tools, he was no longer "in jail as a result of the criminal charge for which the jail term [was] imposed or as a result of conduct upon which such charge [was] based." He was, instead, in DCS custody completing felony sentences on different convictions out of Dawson County. It may be true that his parole on the Dawson County sentences was revoked because his criminal conduct in Seward County also amounted to a violation of his parole, but Harms was in DCS custody on the Dawson County sentences, and he was

receiving credit against those sentences. Section 47-503 does not authorize presentence credit against a jail sentence for time spent in DCS custody serving a separate sentence.[9]

[4] Section 47-503 is intended to ensure that defendants receive all the credit against their jail sentence to which they are entitled—no less, and no more.[10] By giving Harms credit for the 23 days he spent in jail as a pretrial detainee on the Seward County charge, the sentencing court gave Harms all the jail credit to which he was entitled under § 47-503.

Further, we note that if Harms were given credit against both his DCS sentence and his jail sentence for the 150 days he spent in DCS custody, the result would be that some of his jail sentence on the Seward County conviction would be served concurrently with his prison sentences on the Dawson County convictions. But the sentencing court did not order the jail sentence to be served concurrently with any portion of the prison sentences Harms was already serving out of Dawson County.

[5] "'When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise.'"[11] Thus, the applicable rule is that unless the court imposing a later independent sentence specifically states otherwise at the time of its pronouncement, the later sentence is to be served consecutively to any earlier imposed sentence or sentences.[12] For the sake of completeness,

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[9] Accord *State v. Leahy*, 301 Neb. 228, 234-35, 917 N.W.2d 895, 900 (2018) (recognizing that "if a defendant is serving a sentence on a conviction for one offense while awaiting trial and sentencing on an unrelated offense, he or she is not entitled to credit for time served on the sentence for the unrelated offense").

[10] *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009).

[11] *State v. McNerny*, 239 Neb. 887, 889, 479 N.W.2d 454, 456 (1992), quoting *Harpster v. Benson*, 216 Neb. 776, 345 N.W.2d 335 (1984).

[12] *McNerny, supra* note 11.

we point out the rule is otherwise where multiple sentences are imposed at the same time. In such event, unless the court specifically states otherwise at the time the sentences are pronounced, they run concurrently with each other.[13]

Here, the district court sentenced Harms while he was still serving the prison sentences on his Dawson County convictions. Because the district court did not specifically state that Harms' jail sentence was to be served concurrently with his earlier prison sentences, it must be served consecutively. Harms may not use the jail credit statutes to accomplish indirectly what the district court did not order specifically.

Sentence Not Excessive

Attempted possession of burglar's tools is a Class I misdemeanor,[14] punishable by a maximum of 1 year's imprisonment, a $1,000 fine, or both.[15] Harms' 1-year jail sentence was thus within the statutory limits.

[6,7] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[16] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[17]

Harms argues the district court abused its discretion, because "a thorough examination of the record regarding the circumstances and background of [his] life fails to establish a basis" for imposing the maximum allowable sentence.[18] We disagree.

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[13] *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014); *McNerny, supra* note 11.

[14] §§ 28-201 and 28-508.

[15] Neb. Rev. Stat. § 28-106 (Reissue 2016).

[16] *Steele, supra* note 6.

[17] *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[18] Brief for appellant at 15.

When sentencing Harms, the court referenced his extensive criminal history, the circumstances of his crime, and his high risk to reoffend:

> I have reviewed the presentence investigation report. You're 41 years of age. You have a GED. At the current time, you have no employment due to your incarceration, other than the employment within the facility.
>
> You have an extensive prior record, including four DUIs, four assaults, two possession of controlled substances, four driving under revocation or driving under suspension, two criminal mischief, one terroristic threat, one violation of a protection order, theft. You've been to prison three times and to jail at least ten times.
>
> Your LS/CMI indicates a high risk to re-offend. The nature of this offense involved you being present where wire was stolen from a pivot, and there's over $35,000 in damage that was caused.
>
> The Court does not understand how you can claim to have no responsibility for what occurred when you're out there at the point where these thefts were taking place. Why would you be out there with burglar's tools if you weren't participating?
>
> The Court does not find that you're a fit candidate for probation. A lesser sentence would depreciate the seriousness of your crime or promote disrespect for the law. There is a substantial risk that during a period of probation you would engage in additional criminal conduct.
>
> For the conviction of attempted possession of burglar's tools, a Class I misdemeanor, you're sentenced to one year in the Seward County Jail.

[8-10] 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.[19] 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.[20] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[21]

Here, the record demonstrates the court considered all of the relevant sentencing factors and clearly articulated its rationale for imposing the 1-year jail sentence. We find no abuse of discretion in the sentence imposed.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the district court is affirmed.

Affirmed.

Freudenberg, J., not participating.

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[19] *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

[20] *Id.*

[21] *Id.*

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

Gerald C. Korth, appellee and cross-appellant, v. Laura Luther and Michael Luther, appellees and cross-appellees, Atelier Partners, intervenor-appellee and cross-appellant, David J. Koukol, appellant, and Kathryn J. Derr, appellee and cross-appellant.

Gerald C. Korth and Atelier Partners, appellees and cross-appellants, v. Laura Luther and Michael Luther, appellees and cross-appellees, David J. Koukol, appellant, and Kathryn J. Derr, appellee and cross-appellant.

935 N.W.2d 220

Filed November 15, 2019. Nos. S-18-670, S-18-671.

1. **Conveyances: Fraud: Equity: Appeal and Error.** An action under the Uniform Fraudulent Transfer Act is equitable in nature, and an appeal of a district court's determination that transfers of assets were in violation of the act is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.

4. **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.
5. **Attorney Fees: Appeal and Error.** On appeal, an appellate court will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.
6. **Conveyances: Fraud: Debtors and Creditors: Proof.** In an action to set aside an actually fraudulent transfer or obligation under Neb. Rev. Stat. § 36-705(a)(1) (Reissue 2016) of the Uniform Fraudulent Transfer Act, it is the plaintiff's burden to prove by clear and convincing evidence that (1) the debtor made a transfer or incurred an obligation, (2) the plaintiff was a creditor of the debtor, and (3) the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor.
7. **Conveyances: Fraud: Words and Phrases.** It is fundamental that before there can be a "fraudulent transfer" under the Uniform Fraudulent Transfer Act, there must be a "transfer."
8. **Actions: Parties: Appeal and Error.** An appellate court reviews a case on the theories pursued by the parties, not on a theory that the parties might have raised.
9. **Conveyances: Fraud: Property: Words and Phrases.** There are limits to how abstract an interest may be and still constitute "property" under the Uniform Fraudulent Transfer Act.
10. ____: ____: ____: ____. Whether under the Uniform Fraudulent Transfer Act there is a "subject of ownership" constituting "property" that can be an "asset" depends on a legitimate and identifiable claim of entitlement.
11. **Conveyances: Fraud: Debtors and Creditors.** A security agreement by the debtor in favor of an alleged transferee is the vehicle for disposing of or parting with an asset or an interest in an asset; for purposes of the Uniform Fraudulent Transfer Act, it is not the asset itself.
12. **Conveyances: Fraud: Property: Debtors and Creditors: Estates: Liens: Words and Phrases.** Only equity in property in excess of the amount of encumbering liens thereon is an "asset" reachable by creditors as a fraudulent transfer; encumbered property is not considered part of the debtor's estate.
13. **Conveyances: Fraud: Debtors and Creditors.** A blanket security agreement does not convey an asset under the Uniform Fraudulent Transfer Act if everything subject to ownership that is described as

collateral therein is fully encumbered by other creditors with superior claims at the time of the alleged transfer.

14. **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.
15. **Actions: Attorney Fees: Words and Phrases.** Frivolous for the purposes of Neb. Rev. Stat. § 25-824 (Reissue 2016) is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.
16. ____: ____: ____. Frivolous for purposes of Neb. Rev. Stat. § 25-824 (Reissue 2016) connotes an improper motive or legal position so wholly without merit as to be ridiculous.
17. **Actions.** Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeals from the District Court for Douglas County: W. Mark Ashford, Judge. Affirmed in part, and in part reversed.

Mark C. Laughlin and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellant.

Lisa M. Meyer, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Gerald C. Korth.

Kathryn J. Derr, of Berkshire & Burmeister, for intervenor-appellee.

Richard L. Anderson and David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee Laura Luther.

Maynard H. Weinberg, of Weinberg & Weinberg, P.C., for appellee Michael Luther.

Julie Jorgensen, of Morrow, Willnauer & Church, L.L.C., for appellee Kathryn J. Derr.

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

Freudenberg, J.

I. NATURE OF CASE

This consolidated appeal involves two actions brought under Nebraska's Uniform Fraudulent Transfer Act (UFTA)[1] by two creditors. The creditors alleged in both actions that a blanket security agreement guaranteeing repayment of a loan by a wife to her husband was a fraudulent transfer under the UFTA. The amount loaned to the husband was paid directly to the Internal Revenue Service (IRS) to satisfy a settlement agreement between the husband and the IRS relating to the husband's unpaid taxes. When the husband signed the blanket security agreement, the IRS liens were still outstanding and the husband made ownership claims to little other than contingent expectancy interests in past and future business ventures. After receipt of the funds, the IRS extinguished the liens and dismissed the lawsuit, which sought to foreclose against the marital home that was titled solely in the wife's name. Following a trial in one of the actions, the district court determined that there was no actual intent to hinder, delay, or defraud any creditor under the UFTA and, in any event, that the wife had proved good faith. The court ultimately granted the wife attorney fees as sanctions against the creditors and their attorneys on the grounds that both actions were frivolous. We affirm in part and in part reverse.

II. BACKGROUND

1. Prior Judgments in Favor of Creditors

In July 2001, Gerald C. Korth was awarded a judgment against Michael Luther and a company then owned by Michael, Aden Enterprises, Inc., in the amount of $1,392,328.50. The judgment was entered as a sanction for discovery violations. Korth subsequently sought orders in aid of execution, but was unsuccessful in securing any assets. On October 4, 2016, the

[1] Neb. Rev. Stat. §§ 36-701 to 36-712 (Reissue 2016) (subsequently repealed and replaced by Uniform Voidable Transactions Act, 2019 Neb. Laws, L.B. 70).

district court released Terra Nova Carbon Energy Company, LLC (Terra Nova); Terra Nova's chief executive officer; and other entities on the grounds that they had proved they possessed no money, property, or credits of Michael at the time garnishee interrogatories were served and should accordingly be discharged of any garnishee liability.

In an unrelated action in June 2007, Atelier Partners (Atelier) obtained a money judgment against Michael in the amount of $152,898. Atelier was unable to execute on its judgment to any degree until May 2013, when Michael's stock interests in several business entities, including Luther Capital Management, L.L.C. (Luther Capital), and Luther Corporation, were auctioned off at a sheriff's sale following public notice. Atelier purchased the interests for $1,000.

2. Other Lawsuits by Atelier or Korth

A prior action by Atelier (the 2012 Atelier action) against Laura Luther and Michael, her husband, had sought to set aside a $2 million cash conveyance to Laura from Michael and the acquisition of the marital home in Laura's name. The action was dismissed with prejudice as barred by the statute of limitations.

3. IRS Action to Enforce Tax Liens

Between 2007 and 2009, the IRS filed with the Nebraska Secretary of State notices of a federal tax lien against Michael in a total amount of approximately $1 million. On February 12, 2012, the IRS sued Laura and Michael for the collection of unpaid taxes owed by Michael (the IRS action). The IRS sought a judgment against Michael in the total amount of $1,266,227.20 for federal personal income taxes and penalties for the years 2004 through 2007 and trust fund recovery penalties for 2001 and 2002.

The IRS named Laura in the suit because it sought to foreclose its tax liens against the home that Laura and Michael lived in, which was titled only in Laura's name. The IRS alleged that Michael provided money to Laura to purchase

the home and that Michael had retained beneficial use and equitable ownership of the home. The IRS joined, as persons that may claim an interest in the property, Atelier, Korth, and several other creditors of Michael.

Michael reached a settlement agreement with the IRS in which he agreed to pay the IRS $450,000 to satisfy the tax debts owed by him as of March 24, 2014. In exchange, the IRS agreed to dismiss the case with prejudice as against Laura and Michael and not take further collection action against the home or certain transfers of property between Laura and Michael. The IRS also agreed to terminate the tax liens after receipt of the $450,000.

4. $450,000 Loan and Corresponding Security Agreement

Laura agreed to loan Michael $450,000 in order to pay the settlement, because Michael lacked the funds to do so. On March 20, 2014, Michael signed a security agreement to secure payment of the loan, which was reflected by a demand note also dated March 20, 2014, in the original face amount of $450,000.

The security agreement described that it was to secure payment of the "Obligations," which were defined as the March 20, 2014, demand note in the original face amount of $450,000. The security agreement then described the collateral for such obligations as follows:

> "Collateral" means the following personal property, assets, and rights, wherever located, whether now owned or hereafter acquired or arising, in which [Michael] now has or hereafter acquires an interest and all proceeds and products thereof: all personal and fixture property of every kind and nature including without limitation all goods (including inventory, equipment and any accessions thereto), instruments (including promissory notes), documents, accounts (including health-care-insurance receivables), chattel paper (whether tangible or electronic), deposit accounts, letter-of-credit rights (whether or not

> the letter of credit is evidenced by a writing), commercial tort claims, securities and all other investment property, supporting obligations, any other contract rights or rights to the payment of money, insurance claims and proceeds, and all general intangibles (including all payment intangibles). [Laura] acknowledges that the attachment of [her] security interest in any additional commercial tort claim as original collateral is subject to [Michael's] compliance with this agreement with respect to commercial tort claims.
>
> The Collateral shall also include, as applicable, all (i) products of the Collateral; (ii) substitutions and replacements for the Collateral; (iii) proceeds from the sale or disposition of the Collateral, including insurance proceeds and any rights of subrogation resulting from the damage or destruction of the Collateral; and (iv) for Collateral that is tangible, all additions, increases, improvements, accessories, attachments, parts, equipment and repairs now or in the future attached to or used in connection with such Collateral, and any warehouse receipts, bills of lading or other documents of title now or in the future evidencing [Michael's] ownership of the Collateral.

5. First UCC Filing

On March 20, 2014, a Uniform Commercial Code (UCC) financing statement was filed with the Secretary of State, describing Michael, at his mailing address, as the debtor and Laura as the secured party. It described the collateral in the same terms as those set forth in the security agreement.

6. Payment of IRS and Dismissal of Claims

The $450,000 was transferred from Laura's brokerage account to her attorney's trust account, from where it was transferred directly to the IRS on March 24, 2014. Subsequently, the IRS terminated the tax liens and the court dismissed with prejudice the IRS action as against Laura and Michael. The court thereafter dismissed any and all claims against the United

States with prejudice and any and all pending claims asserted by any defendant against any coparty without prejudice.

7. Collateral Control Agreement

On March 19, 2014, a collateral control agreement was signed by Michael, Laura, and Koch as chief executive officer of the "account debtor," Terra Nova. The agreement described that Terra Nova "may now or in the future hold accounts, general intangibles, or other elements of the Collateral for [Michael], and acknowledges [Laura's] security interest in the Collateral." Terra Nova further "acknowledges, without immediate verification, that it is not aware of and has not been given notice of any other security interest existing on the Collateral." Terra Nova subordinated in favor of Laura "any security interest or lien [Terra Nova] may have, now or in the future, against the Collateral, except that [Terra Nova] will retain its right of setoff in the account."

8. Korth Filed Complaint Alleging Security Agreement Was Fraudulent Transfer

On January 14, 2015, Korth, represented by attorney David Koukol, filed a complaint against Laura and Michael alleging that the security agreement and the financing statement that recorded that agreement reflected a fraudulent transfer. The complaint did not seek to void the collateral control agreement. Korth's complaint was filed under case No. CI 15-299 (CI 15-299).

9. Laura's and Michael's Answers to Complaint in CI 15-299

Laura and Michael, in their answers to the complaint, denied that Korth had a lien on Michael's personal property at the time of the collateral agreement, elaborating that he had not successfully seized in execution any of Michael's property pursuant to Neb. Rev. Stat. § 25-1504 (Reissue 2016). Further, they denied any intent to hinder, delay, or defraud. They alleged that a lien in favor of Laura in the sum of $450,000 replaced liens filed by the IRS against Michael's assets in the amount

of $1,266,227.20 plus interest and penalties and that the IRS liens were superior to Korth's interest in Michael's assets and would have had to have been satisfied before Korth could have executed upon Michael's assets. Thus, Laura and Michael argued, the loan and corresponding security agreement being challenged by Korth had placed Korth in a better position to collect against Michael's assets than Korth had been in before the loan transaction. Laura and Michael asserted that even without the security agreement and UCC financing statement that allegedly represented the fraudulent transfer, under the doctrine of equitable subrogation, Laura's interest in Michael's assets in the amount owed under the loan would still be superior to Korth's creditor interest.

Laura and Michael asserted that Korth's claims against them were frivolous and asked that sanctions be awarded pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2016). Michael's attorney filed an affidavit stating that he had notified Koukol of his intent to enforce sanctions under § 25-824 against both Korth and his attorneys.

10. Cross-Motions for Summary Judgment or Partial Summary Judgment in CI 15-299

Laura and Michael both moved for summary judgment in CI 15-299, asking that Korth's complaint be dismissed with prejudice. They asserted that no fraudulent transfer had been pled or could be proved. Korth filed a motion for partial summary judgment asking the court to declare that the UCC financing statement was ineffective as a matter of law, because the description in the agreement of the collateral was too broad and the filing failed to reflect Michael's middle initial, which is present on his driver's license.

At the hearing on the motions, the court received Laura's and Michael's deposition testimony.

(a) Michael's Deposition

Michael described that his work involves providing corporate finance services either individually or through Luther

Capital. Michael indicated that he was generally paid for his services by a percentage of project revenues, if they materialized, on a kind of contingency or equity ownership basis. He described that his equity and stock interests in several companies he had worked with had been subjected to execution.

Michael explained that at the time of the loan, he had anticipated receiving a payment from Terra Nova. Michael elaborated that he had a loose oral agreement with Terra Nova to receive approximately $100,000 for past services performed on a particular project, if and when Terra Nova realized sufficient profits. He had intended to give that payment to Laura as partial repayment of the loan. Michael testified that both at the time of the security agreement and as of the time of the deposition, he owned no real property and possessed personal property of only nominal value.

Michael admitted, over his counsel's objection, that he had given Laura $2 million in 1999 or 2000. This transfer was the subject of the 2012 Atelier action which was dismissed as barred by the statute of limitations. Michael did not know what Laura had done with the money or whether, approximately 14 years later, she used that money to effectuate the loan that enabled him to pay the IRS settlement.

Michael could not recall if he had made any interest payments to Laura on the loan. The evidence was undisputed that at the time of the summary judgment hearing, Michael had made no payments toward the principal. Michael described that Laura orally demanded payment on the note "every day." Michael testified that he owed Laura the money lent to him as reflected in the security agreement and that he intended to repay her.

(b) Laura's Deposition

In her deposition, Laura testified that she was the sole titled owner of the residence where she and Michael lived, which had been paid for in cash by Michael in 2000. Most of Laura's testimony concerned whether Michael had any assets. There were none that she could identify.

(c) Other Evidence

Korth submitted evidence that Michael had numerous unsatisfied judgments in favor of various entities against either Michael personally or Luther Capital in a total amount of approximately $9 million.

Other evidence demonstrated that on May 5, 2015, a second UCC financing statement was filed reflecting the collateral pledged to Laura under the security agreement—this time with Michael's middle initial. Evidence was submitted, and it was later stipulated, that the standard search logic used by the Secretary of State's office to search filings under the UCC changed on May 4, 2015. Before May 4, a search for "'Michael S. Luther,'" the name on Michael's driver's license, would not retrieve the financing statement reflecting the security agreement that was with "'Michael Luther.'" After May 4, it would.

11. Order Denying Motions for Summary Judgment in CI 15-299

On July 6, 2015, the court denied Korth's motion for partial summary judgment on the ground that he was making a premature claim for declaratory relief. The court explained that Korth was seeking through his motion a declaration of lien priority when there were no assets or funds that the parties were identifying as being subject to a lien priority contest. Further, the court reasoned that it would not rule on a motion for summary judgment dealing with lien priority and perfection issues when those issues were not presented in Korth's complaint.

Despite this conclusion that there were no assets that the parties were fighting over, the court also denied Laura's and Michael's motions for summary judgment. Citing *Matter of Holloway*,[2] the court first explained that it was rejecting any argument that the UFTA does not apply to the grant of security interests. The court did not otherwise address whether it mattered that the only identified interests transferred by the

[2] *Matter of Holloway*, 955 F.2d 1008 (5th Cir. 1992).

security agreement were future contingent expectancy interests. Nor did the court address whether there could be a "transfer" under the act if the debtor's assets at the time the security agreement was executed were subject to a lien superior to the creditor's rights.

Instead, the court focused on Laura and Michael's argument that because there was no genuine issue that the grant of the security interest was for a reasonably equivalent value and that Laura took the security interest in good faith, she had a complete defense as a matter of law under § 36-709(a). The court found there was no genuine issue that a reasonably equivalent value was exchanged for the assets transferred through the security agreement. However, the court found a genuine issue of material fact as to whether the transfer was made in good faith. For that reason, the court denied Laura's and Michael's motions for summary judgment.

12. Intervention in CI 15-299

Atelier filed a complaint in intervention in April 2015 as another creditor seeking to set aside the alleged transfer effectuated by the security agreement and UCC filing. Atelier was represented by Kathryn Derr. Michael opposed intervention on the ground that Atelier's claim was already litigated and decided in the 2012 Atelier action. The court allowed the intervention after it ruled on the motions for summary judgment. In his answer to the complaint in intervention, Michael pled that the Atelier action operated as claim preclusion.

13. Denial of Leave to Amend in CI 15-299

On May 2, 2016, the court denied Korth's motion for leave to file an amended complaint. The court explained that the motion was substantively identical to a prior motion for leave to file an amended complaint in May 2015, which had been denied because it was made in response to Laura's and Michael's motions for summary judgment. In addition to repeating the allegations of fraudulent transfer, the proposed amended complaint asked the court to declare that the UCC

financing statement reflecting the collateral agreement between Laura and Michael was ineffective as a matter of law and thus not perfected and not entitled to priority over Korth's lien.

14. New Action, CI 16-3789, Filed and Transferred

Two days after the court denied Korth leave to amend, Atelier and Korth filed a new complaint in district court. The complaint was similar to the prior proposed amended complaint in CI 15-299, but added that another UCC financing statement had been filed on or about May 5, 2015. This complaint was filed as No. CI 16-3789 (CI 16-3789). Pursuant to an agreement, the case was ultimately transferred to the judge assigned to CI 15-299. The court ultimately determined the cases should be tried separately.

In their answers to the joint complaint in CI 16-3789, Laura and Michael denied most of the allegations, including the premise that any "asset" was or has since been transferred by the security agreement or that any UCC filing can grant a security interest. Laura and Michael affirmatively alleged, among other things, that the claims were frivolous and made in bad faith. They also alleged law of the case, issue preclusion, and claim preclusion based on the orders of dismissal in the IRS action and the 2012 Atelier action, as well as the district court's prior orders in CI 15-299 denying summary judgment and leave to amend.

15. Motions for Judgment on Pleadings in CI 16-3789

Laura and Michael moved for judgment on the pleadings in CI 16-3789 on the grounds that the complaint failed to allege there was an "[a]sset" as defined by § 36-702(2), which, pursuant to § 36-707(4), was required for there to be a transfer subjecting the transaction to the UFTA. Laura pointed out that Atelier and Korth had not alleged that either of them had ever seized in execution any of Michael's personal property; thus, she alleged they had no lien pursuant to § 25-1504.

At the hearing on the motions for judgment on the pleadings, Koukol's cocounsel, Michael Milone, described that since the court had already decided in its prior order on summary judgment that the transaction was for a reasonably equivalent value, Korth considered the remaining issue before the court in both cases to be good faith. Milone explained, "[T]he issues [in the complaint in CI 16-3789] are almost identical" to those of the complaint in CI 15-299 "except for that in the second complaint we're alleging that the second UCC financing statement really should be treated and analyzed by the Court in the same way as in the first." Milone stated of Korth, "[W]e're . . . not attempting to expand the pleadings beyond what we determined before you last May in summary judgment." Beyond there being a "separate transfer" by virtue of the second UCC filing, Milone asserted, "the issues are substantively identical between the two cases."

The court stayed proceedings on CI 16-3789 pending the outcome in CI 15-299 and explained that it was also postponing ruling on the motions for judgment on the pleadings until after the outcome in CI 15-299.

16. Motion to Compel Identification of "Assets" and Property Subject to Superior Liens and Notice

After a motion to compel Atelier and Korth to identify what assets were at issue under the UFTA, Korth identified $8.11 garnished from a brokerage account. Laura responded that the garnishment was of Luther Capital's assets and not of Michael's assets. And Luther Capital had been owned by Atelier since 2013. Laura disclaimed any interest in the garnished assets.

Atelier and Korth conceded at a hearing that beyond such funds, there were really no concrete interests they had knowledge of that had been transferred to Laura. Instead, it was their assertion that "the giving of the security interest, not conveyance of specific assets," was the fraudulent "transfer" under the UFTA.

17. Bench Trial in CI 15-299

A 3-day bench trial was held on CI 15-299. Before trial, Laura and Michael argued that as a threshold matter, there was no "transfer" of any "asset" under the UFTA due to the superior lien by the IRS in the assets described by the security agreement. They also argued that Michael lacked actual intent to defraud, and Laura argued that she received the security agreement in good faith.

(a) Stipulated Facts

For purposes of the trial, the parties stipulated as to the five notices of federal tax liens between September 19, 2007, and June 12, 2009, and to the details of the IRS action claiming Michael owed a total of $1,266,227.20 as of January 15, 2012, for amounts assessed between September 20, 2003, and September 25, 2008. They stipulated to the details of the settlement between Michael and the IRS for $450,000. The parties also stipulated that on September 20, 2013, the IRS filed a notice of a federal tax lien against Michael in the amount of $234,064.71 for tax years 2008 through 2012, which was not the subject of the settlement and remained outstanding.

The parties stipulated that other than the disputed garnishment of $8.11 from the brokerage account in the name of Luther Capital, Korth has never seized in execution on the Korth judgment. They stipulated that Atelier had neither seized in execution on its judgment at the time the notice of the federal tax lien for $545,472.96 was filed nor possessed any personal property of Michael that it had seized in execution as of March 20, 2014. Between March 20, 2014, and May 4, 2015, neither Atelier nor Korth had successfully seized any assets of Michael or garnished any rights to payment of Michael in execution on the Atelier or Korth judgments.

(b) Testimony of Mitchell Murphy

Mitchell Murphy, a finance and accounting professional, testified at trial as Atelier's and Korth's expert witness. Murphy

had reviewed financial documents pertaining to Laura and Michael for the period of 2011 through 2017.

Murphy testified that he did not see evidence of any wages, salary, or personal disbursement earnings for Michael. He observed only what appeared to be business income flowing into and between Michael's business and personal accounts. Murphy observed that while over the years, the level of business income had risen, there was no corresponding increase in business revenue. In other words, there did not appear to be any retention of any funds from the increased level of business and the account balances remained zero. Murphy summarized that a combination of commingling accounts, frequent and systematic transfers of funds, a practice of authorizing debits that could not be honored, and withdrawal and deposits of cash did not "look like what [he] see[s] in normal business activity." Murphy admitted on cross-examination, however, that he could not determine from the information he had reviewed whether any of the inflows or outflows were actually improper.

Murphy found nothing noteworthy in his review of Laura's accounts. He testified on cross-examination that he did not find it unusual that a blanket security agreement would be given in exchange for a $450,000 loan. Also, Murphy could find no evidence that in March 2014, Michael had transferred any actual property or assets to Laura.

(c) Laura's Testimony

Laura testified largely consistently with her prior deposition testimony. She elaborated on matters surrounding the loan and security agreement. She testified that at the time of the loan and corresponding security agreement, she did not know anything about Michael's liabilities other than that Atelier and Korth were creditors joined in the IRS action. She did not discuss with anyone or even contemplate how the loan transaction would affect Atelier's or Korth's ability to collect. Laura explained that "there was no consideration of anything else except for myself and Michael and the IRS." Laura stated that

her only intention was to be paid back. The verbiage of the security agreement was crafted by her legal counsel.

(d) Michael's Testimony

Michael testified that he had entered into the loan transaction with Laura because he did not have the funds to pay the settlement with the IRS. At the time of the security agreement, Michael had few assets. Mirroring his prior deposition testimony, Michael described that he had only some personal possessions and small sums in bank accounts. Michael testified that it was not his idea to create a security agreement, but that he signed the agreement crafted by Laura's legal counsel because Laura asked him to as a requirement for the loan. Michael testified that he did not enter into the loan transaction and its accompanying security agreement in order to make it more difficult for creditors to collect from him.

18. Judgment of Dismissal of CI 15-299

The court issued an order in CI 15-299 on September 1, 2017, finding that the case lacked merit and accordingly dismissing it with prejudice. The court rejected Michael's argument that the IRS was a necessary party to the action.

The court considered whether Atelier and Korth had proved by clear and convincing evidence that there was a fraudulent transfer under § 36-705(a), explaining that under that statute, there is a fraudulent transfer only if either the debtor had actual intent to hinder, delay, or defraud any creditor or the transfer was made without a reasonably equivalent value in exchange for the transfer and the debtor thereby dissipated assets or intended to incur or reasonably should have believed he or she would incur debts beyond the ability to pay. The court explained that since it had already determined there was a reasonably equivalent value exchanged in the loan transaction, the transfer was fraudulent under § 36-705(a)(1) only if there was an actual intent to hinder, delay, or defraud a creditor.

The court considered the factors set forth by § 36-705(b), which, among other factors, may be given consideration when

determining whether there was actual intent to hinder, delay, or defraud. The court found that Michael did not have an actual intent to hinder, delay, or defraud a creditor. The court elaborated that "[w]hile there are some 'badges of fraud' present in the current case, the majority of the evidence indicate[s] the absence of fraud in the challenged transaction." The court recognized as indicia of fraud that the transfer was to an insider, Laura, and that Michael had the Atelier and Korth judgments outstanding against him before the transfer was made. However, the court found supportive of an absence of fraud that the judgments were obtained a number of years before the security agreement, only interests in personal property were transferred, the obligation was not concealed, Michael did not abscond, none of the assets were removed or concealed, and there was an equivalent value. The court also found that "there can be no intent to hinder where the estate was improved in position rather than diminished." The court explained that the loan was intended and used to pay a settlement that extinguished IRS liens of higher priority than either the Atelier or the Korth judgment. This settlement "exchanged over $1.2 million in debt for $450,000 in debt, improving [Michael's] estate by more than $750,000 and putting Korth and Atelier that much closer to collecting on their judgment leins [sic]."

Further, as to the claim against Laura, the court found merit to Laura's affirmative defense of good faith under § 36-709(a). The court stated that it was "clear from the evidence that there was no intent on the part of Laura to defraud the creditors of Michael." The court found that there was "absolutely no evidence of intent to defraud on the part of Laura and that the good faith defense would be applicable." The court did not specifically discuss whether it was utilizing a subjective or objective standard of intent in determining whether Laura received the transfer in good faith.

The court found no merit to the conspiracy claim because Laura and Michael did not engage in the underlying tort, there

was no evidence of agreement between Laura and Michael to engage in a tort, and Laura had acted in good faith.

The court ordered that both Korth's and Atelier's claims of fraudulent transfer and conspiracy were without merit as to both Laura and Michael, and those claims were dismissed with prejudice. The court noted in its order that the parties had raised the issue of attorney fees, which would be determined at a separate hearing.

19. Order of Judgment on Pleadings in CI 16-3789

Laura and Michael again moved for judgment on the pleadings in CI 16-3789, this time based on issue and claim preclusion stemming from the September 1, 2017, order in CI 15-299. They again sought sanctions pursuant to § 25-824.

At the hearing on the motions, Laura and Michael argued with regard to attorney fee sanctions that from the time the litigation was filed, Atelier and Korth both knew that they did not have a lien interest superior to the IRS' interest that was extinguished by the loan. Atelier and Korth responded that there was a sufficient factual dispute to take the case to trial.

The court agreed with Laura and Michael. The court stated that "during the course of the trial it became abundantly clear, at least in [the court's] mind, that the only truly credible witness[' testimony] in the entire testimony of all the witnesses was that of [Laura]." The court explained that while it perhaps should have resolved the good faith defense by way of summary judgment, once the court heard the evidence at trial, "it was absolutely clear to [the court] that there was no legal, possible factual, legal, a combination of the two facts of law, that would support an inference of fraud on the part of [Laura]." Laura engaged in the transaction to protect her interest and nothing more. That, the court believed, should have been discoverable at the time of the pleadings.

The court expounded:

> [T]otally frivolous. Without question, it was known early on; there was consideration; it was a protection of her

> interest; there was an IRS lien which would have been superior. I already made that clear. You people should have known that. You brought her to court, in my opinion, for no valid reason whatsoever.

On November 3, 2017, the court issued an order granting Laura's and Michael's motions for judgment on the pleadings. The court further found that the action was frivolous as to Laura. Although Michael had argued that one of the grounds for judgment on the pleadings and frivolousness was issue preclusion by virtue of Atelier's and Korth's failing to bring their claims in the IRS action, the court implicitly rejected that argument. The court's order referred to its prior findings pronounced at the hearing as the findings supporting its conclusion that the lawsuit was frivolous.

At a subsequent hearing, when Korth asserted that the court had failed to make specific findings relating to its frivolousness determination, the court responded that its statements in open court were sufficient:

> I did. I based it basically on credibility. Further, I think my order of findings [is] very, very thorough. . . .
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> . . . .
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> I made the findings in open court based upon the credibility, and also the fact that [Laura] acted in good faith, at the very least. Further, there was no evidence of a fraudulent transfer. And clearly, the IRS lien, which would have been superior to . . . [Michael], of course was the impetus for reducing that IRS obligation that could have adhered to not only her but possibly both.

At one point, the court expressed that it "may have been too rash" in rejecting Michael's claim for attorney fees, but the court did not change its mind on that issue.

The court dismissed CI 16-3789 with prejudice subject to fully resolving the amount of attorney fees under § 25-824.

In a second order issued the same day, the court amended the judgment in CI 15-299 so as to tax costs in Laura's favor and against Atelier and Korth jointly and severally in the

amount of $572. The court also stated in the amended order that CI 15-299 was frivolous as against Laura only and that she was entitled to attorney fees under § 25-824.

20. Attorney Fees

On February 2, 2018, the court issued two orders, one in CI 15-299 and one in CI 16-3789, determining the amount of and parties responsible for attorney fees under § 25-824. The orders were identical and awarded attorney fees to Laura due to the frivolous nature of the suits. The court again set forth its reasoning that the actions as against Laura were frivolous:

> This Court found that the actions against Laura . . . were totally without merit and without a rational argument based upon law and the evidence at trial. Korth and Atelier . . . failed to present evidence to prove their case against Laura . . . . Specifically: (i) there was no testimony from any parties contradicting [Laura's] testimony regarding the purpose of the $450,000.00 loan and security agreement; (ii) there was no evidence that the $450,000.00 was not regarded as a loan; and (iii) there was no evidence showing that [Laura's] bank accounts were used to hide assets from [Michael's] creditors. It is clear that Laura . . . made the loan to Michael . . . in order to protect against an IRS lean [sic] on the marital home. The $450,000.00 loan facilitated a settlement with the IRS and extinguished an outstanding tax obligation in excess of $1.2 million. . . . By acquiring the loan and settling with the IRS, Michael . . . exchanged over $1.2 million of debt to the IRS for $450,000.00 of debt to Laura . . . . This improved his estate by more than $750,000.00, putting Korth and Atelier . . . that much closer to collecting on their respective judgment liens. Clearly, Korth's and [Atelier's] junior lien positions were benefited by [Laura's] loan to Michael . . . . The $450,000.00 loan proceeds went directly from Laura . . . to the IRS. . . . There is no evidence to support the allegation that [Laura's] loan to Michael . . . was fraudulent or collusive.

> Furthermore, [Laura's] counsel (David Skalka) notified Korth's counsel (. . . Koukol) as far back as January 27, 2015, that Laura . . . considered the case to be frivolous. . . . Copies of the $450,000.00 loan documentation were included with the notice to . . . Koukol. The security agreement plainly states that the security interest was limited to the $450,000.00 loan which was used to pay the IRS settlement. The Court notes that Korth previously acknowledged receipt of the January 27, 2015, letter from . . . Skalka. Korth offered and this Court received a copy of the letter into evidence on the cross motions for summary judgment. . . . Despite receipt of the loan documentation, Korth and Atelier . . . persisted in their claims against Laura . . . .
>
> Korth and Atelier . . . point to an $8.00 garnishment on a brokerage account during the pendency of this litigation as evidence that an account had been executed upon despite the lien priority dispute. However, during the course of the trial it became abundantly clear that at least Atelier . . . had to have known that Michael . . . did not own said brokerage account. . . . It is also important to note that one of the necessary elements for the claims in CI 16-3789 required Korth and Atelier . . . to establish that a reasonable equivalent value was not given by Laura . . . to Michael . . . . Yet in its July 6, 2015, order on the cross motions for summary judgment in CI 15-299, this Court explicitly found that a reasonable equivalent value had been given. Korth and Atelier . . . maintained their claims against Laura . . . despite this clear signal that they would be unable to establish a necessary element.

The court noted that while it did not grant summary judgment,

> [t]he fact that the Court deferred to Korth's assertions and did not fully see then what later became apparent at trial—that based on facts which were known to Korth and Atelier . . . there was not a meritorious claim against [Laura]—does not ameliorate the frivolous nature of the

claims and does not preclude this Court from awarding attorney's fees.

The court rejected the notion that Atelier should not share equally in the sanction, finding that Atelier joined the suit with full knowledge and was fully aware of the unreasonableness of the litigation. And the court determined it was appropriate to award sanctions against Koukol and Derr as individuals in order to deter them and other members of the legal profession from future similarly frivolous actions.

The court awarded Laura a judgment of attorney fees in CI 15-299 in the amount of $75,000 and in CI 16-3789 in the amount of $7,000. The court ordered that one-third of the judgments ($27,333) was to be against Korth, one-third ($27,333) against Atelier, and the remaining one-third against Koukol and Derr to be split equally (each liable for $13,667).

21. Motion to Alter or Amend and Notices of Appeal

Koukol timely moved to alter or amend the judgment in CI 16-3789 as against him.[3] Koukol's attorney argued that Laura was a necessary party to Korth's action and that therefore, it could not be frivolous as against Laura when it was not frivolous as against Michael. Koukol's attorney also argued that the court's reliance on $1.2 million in superior liens by the IRS was misplaced, because the validity of those liens was contested by Michael in the IRS action. Further, according to Koukol's attorney, the transfer at issue did not include what Michael did with the money, i.e., pay the IRS. How Michael spent the money should not have been relevant to whether the transfer was fraudulent; rather, what was relevant was the fact that Laura loaned Michael the money in exchange for a promissory note that she knew or should have known would not be honored, given Michael's substantial outstanding debt obligations and history of avoiding them. Koukol's attorney also found it unnecessarily convoluted that Laura would loan

[3] See Neb. Rev. Stat. § 25-1329 (Reissue 2016).

the settlement money to Michael rather than simply pay the IRS directly, as she was also a defendant in the IRS action and the only person who was at risk in the lawsuit given that Michael was "judgment proof." Koukol's attorney argued that all of this, at a minimum, created issues of fact that rendered the lawsuits not frivolous.

Korth filed a motion styled as a motion to alter or amend in CI 16-3789 more than 10 days after the February 2, 2018, judgment, joining in Koukol's motion.

On June 15, 2018, the court denied the motions to alter or amend. The court did so on the merits and also, in the case of Korth's motion, because it was untimely.

Koukol filed his notice of appeal on July 6, 2018. Atelier, Derr, and Korth filed timely notices of appeal thereafter.

III. ASSIGNMENTS OF ERROR

Atelier and Korth assign as error, summarized, that the district court erred when it dismissed Korth's fraudulent transfer claim upon finding that Michael did not act with actual intent to hinder, delay, or defraud his creditors and that Laura acted in good faith.

Atelier, Korth, Koukol, and Derr all assign as error, summarized, that the district court erred by (1) finding that the fraudulent transfer claims were frivolous and that frivolous pleading sanctions, including attorney fees, were appropriate and (2) receiving in evidence allegedly altered summaries of Laura's attorney fees, which failed to fulfill the requirements of Neb. Rev. Stat. § 27-1006 (Reissue 2016).

Koukol additionally assigns that the court erred in overruling his motion to alter or amend.

Atelier and Derr additionally assign that the court erred by assessing the same percentage of attorney fee sanctions against them as it did against Korth and Koukol, when Atelier entered the case almost a year after it was commenced and Atelier and Derr were not part of the case when a large number of the fees were incurred.

IV. STANDARD OF REVIEW

[1,2] An action under the UFTA is equitable in nature, and an appeal of a district court's determination that transfers of assets were in violation of the UFTA is equitable in nature.[4] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[5]

[3] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[6]

[4] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.[7]

[5] On appeal, an appellate court will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.[8]

V. ANALYSIS

These appeals involve the merits of Atelier's and Korth's challenges under the UFTA to the security agreement. Atelier and Korth do not assign or argue that the district court erred in concluding that a lien priority contest under the UCC was premature, and they no longer assert that either UCC financing statement was a "transfer" under the UFTA. Atelier and

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[4] *Janice M. Hinrichsen, Inc. v. Messersmith Ventures*, 296 Neb. 712, 895 N.W.2d 683 (2017).

[5] *Id.*

[6] *Maloley v. Central Neb. Pub. Power & Irr. Dist.*, 303 Neb. 743, 931 N.W.2d 139 (2019).

[7] *Foundation One Bank v. Svoboda*, 303 Neb. 624, 931 N.W.2d 431 (2019).

[8] *Chicago Lumber Co. of Omaha v. Selvera*, 282 Neb. 12, 809 N.W.2d 469 (2011).

Korth argue the district court erred in finding that they had failed to prove the security agreement was a fraudulent transfer under § 36-705(a)(1), that Laura had proved a good faith defense, and that their fraudulent transfer actions as against Laura were frivolous. Atelier additionally argues that the court erred in assessing the same amount of sanctions against it as it did against Korth, while Koukol and Derr argue that the court should not have assessed any of the sanctions against them personally. We affirm the district court's judgment dismissing Atelier's and Korth's claims in CI 15-299 and CI 16-3789, but we reverse its determination that the claims were frivolous.

1. Merits of Dismissals of UFTA Claims

We first address the underlying merits of Atelier's and Korth's fraudulent transfer claims. An action under the UFTA is equitable in nature, and an appeal of a district court's determination that transfers of assets were in violation of the UFTA is equitable in nature.[9] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

[6] Under the UFTA, a creditor may reach assets transferred by a debtor if the transfer was fraudulent.[10] Atelier and Korth assign that the court erred in failing to find a fraudulent transfer under § 36-705(a)(1). In an action to set aside an actually fraudulent transfer or obligation under § 36-705(a)(1) of the UFTA, it is the plaintiff's burden to prove by clear and convincing evidence that (1) the debtor made a transfer or incurred

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[9] See *Janice M. Hinrichsen, Inc. v. Messersmith Ventures, supra* note 4.

[10] See §§ 36-705, 36-706, and 36-708.

an obligation, (2) the plaintiff was a creditor of the debtor, and (3) the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor.[11]

[7] Our analysis focuses on the first element. "It is fundamental that before there can be a 'fraudulent transfer' under the UFTA, there must be a 'transfer.'"[12] A "[t]ransfer" "means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes . . . release . . . and creation of a lien or other encumbrance."[13] An "[a]sset" is defined by the UFTA as "property of a debtor," but the UFTA specifically excludes as an "[a]sset" "property to the extent it is encumbered by a valid lien."[14] "Property" under the UFTA is "anything that may be the subject of ownership."[15]

Section 36-707(1) describes when such a "transfer" of an "asset" occurs. It states that with respect to an "asset" that is not real property, a transfer is made "when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under the act that is superior to the interest of the transferee."[16] If applicable law permits the "transfer" to be perfected, and it was not, then it "is deemed made immediately before the commencement of the action."[17] Finally, if applicable law does not permit the "transfer" to be perfected, it is made "when it becomes effective between the debtor and the transferee."[18] In all these circumstances,

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[11] See, *Janice M. Hinrichsen, Inc. v. Messersmith Ventures, supra* note 4; 55 Causes of Action 2d 467, § 4 (2012).

[12] *Essen v. Gilmore*, 259 Neb. 55, 60, 607 N.W.2d 829, 834 (2000).

[13] § 36-702(12).

[14] § 36-702(2).

[15] § 36-702(10).

[16] § 36-707(1)(ii).

[17] See § 36-707(2).

[18] See § 36-707(3).

however, there is no "transfer" "made until the debtor has acquired rights in the asset transferred."[19] Creditors are not entitled to avoid as fraudulent a conveyance of property to which the debtor had no title at all or no such title as they could have subjected to payment of their claims.[20]

[8] The district court never explicitly determined the threshold question of whether there was a "transfer" of any "asset" by virtue of the security agreement, but that does not preclude this court from doing so under the record presented.[21] In our de novo review, we find under the facts and the theories presented below that Atelier and Korth failed as a matter of law to prove there was any "asset" parted with through the security agreement. They thus failed to prove there was a "transfer" as defined by the UFTA. Atelier and Korth did not argue below or on appeal that the security agreement was an "obligation . . . incurred," and an appellate court reviews a case on the theories pursued by the parties, not on a theory that the parties might have raised.[22]

Throughout the litigation, Atelier and Korth asserted that the security agreement was the "asset" fraudulently transferred, while Laura and Michael insisted that Atelier and Korth identify with more specificity what "assets" Atelier and Korth believed were fraudulently transferred through the agreement. At trial, Murphy testified that he could find no evidence that Michael had transferred any actual property or assets to Laura, and the parties stipulated that they had not successfully seized in execution on their judgments or garnished any rights to payment. Atelier and Korth only ever identified the $8.11 garnished from the brokerage account in the name of Luther Capital as any more particular "asset" at

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[19] See § 36-707(4).

[20] 37 C.J.S. *Fraudulent Conveyances* § 9 (2017).

[21] See *In re Interest of Jordan B.*, 300 Neb. 355, 913 N.W.2d 477 (2018).

[22] See § 36-705(a). Accord *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014).

issue. The district court concluded the money did not belong to Michael, and Atelier and Korth do not challenge that finding on appeal.

Atelier and Korth concede on appeal that there has yet to be any identifiable property parted with via the security agreement. They continue to assert that the security agreement itself was the "asset."

Successful fraudulent transfer claims have been made in cases involving security agreements, but the courts in those cases have not held that the security agreements themselves were the "property" constituting the "asset" disposed of or parted with.[23] Instead, there were specifically identified "assets" that the creditors were attempting to reach, interests which had been disposed of or parted with through the security agreements.[24] In *Matter of Holloway*,[25] for example, the court referred to the transfer of a security "interest," not of the security agreement. Further, that security interest was *in something*. At issue in that case was the debtor's assignment of a substantial judgment, the funds from which had been deposited into the registry of the court.

In arguing that the security agreement was a "transfer," Atelier and Korth rely on the fact that under § 36-702(12), a "[t]ransfer" "includes . . . creation of a lien or other encumbrance." They fail, though, to suggest an object of the lien or encumbrance effectuated by the security agreement. Liens and encumbrances do not exist independently of the interests they attach to, and this reference to liens or other encumbrances does not modify the express requirement of the UFTA that there be an "asset" before there can be a "transfer."

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[23] See, *In re Fair Finance Co.*, 834 F.3d 651 (6th Cir. 2016); *Matter of Holloway, supra* note 2; *Webster Industries, Inc. v. Northwood Doors, Inc.*, 320 F. Supp. 2d 821 (N.D. Iowa 2004); *In re Afonica*, 174 B.R. 242 (N.D. Ohio 1994).

[24] See *id.*

[25] *Matter of Holloway, supra* note 2, 955 F.2d at 1015.

Intangible interests are not necessarily excluded from the UFTA, of course. The drafters of the model Uniform Fraudulent Transfer Act intended the definition of property to include "real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable."[26] They envisioned, for instance, that an "'asset'" could include "an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety."[27]

[9] But there are limits to how abstract an interest may be and still constitute "property." Usually, inchoate interests do not satisfy the requirements of a legitimate legal claim constituting "property" and, thus, of an "asset" that the debtor has "acquired rights in"[28]—though few cases explore this realm. The court in *State ex rel. ICA v. Wright*[29] held that the debtor's future wages were not too "speculative or ephemeral" to be "'property'" under Arizona's version of the model Uniform Fraudulent Transfer Act, reasoning that the right to wages was choate while only the amount of the debtor's future income was speculative. In contrast, the court in *In re Morehead* held that there can be no rights to future wages, and thus there is no "transfer," until wages are actually earned.[30] In *AirFlow Houston, Inc. v. Theriot*, the court held that a company logo, name, telephone number, and business records constituting

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[26] Uniform Fraudulent Transfer Act § 1, comment (10), 7A (part II) U.L.A. 257, 260-61 (2017).

[27] *Id.*, comment (2), 7A (part II) U.L.A. at 259.

[28] See, *Wornick v. Gaffney*, 544 F.3d 486 (2d Cir. 2008); *McGahee v. McGahee*, 204 Ga. 91, 48 S.E.2d 675 (1948); *First Wisconsin Nat. Bank v. Roehling*, 224 Wis. 316, 269 N.W. 677 (1936). See, also, *Allegaert v. Chemical Bank*, 418 F. Supp. 690 (E.D.N.Y. 1976); *Essen, supra* note 12; Robert M. Zinman et al., *Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits*, 39 Bus. Law. 977 (1984).

[29] *State ex rel. ICA v. Wright*, 202 Ariz. 255, 258, 43 P.3d 203, 206 (Ariz. App. 2002).

[30] *In re Morehead*, 249 F.3d 445, 449 (6th Cir. 2001).

corporate goodwill met the definition of "property" that could constitute "assets" under Texas' version of the model Uniform Fraudulent Transfer Act, because the lower court had found as a matter of fact that such goodwill existed.[31] In contrast, the court in *In re Bob Nicholas Enterprise, Inc.*,[32] rejected the contention that purchase orders and goodwill were property interests capable of being fraudulently transferred, where the creditor had failed to prove the business was reasonably profitable. The court explained that "[a] property interest consists of more than a unilateral expectation or abstract need[;] there must be a legitimate claim of entitlement.[33]

[10,11] We agree with the court in *In re Bob Nicholas Enterprise, Inc.* Whether under the UFTA there is a "'subject of ownership'" constituting "'property'" that can be an "'"[a]sset"'" depends on a legitimate and identifiable claim of entitlement.[34] Further, where the focus of a fraudulent transfer action is a security agreement by the debtor in favor of the alleged transferee, the question is what identifiable and legitimate claim of entitlement the debtor had, which the debtor transferred an interest in via the security agreement. A security agreement by the debtor in favor of an alleged transferee is the vehicle for "disposing of or parting with an asset or an interest in an asset."[35] For purposes of the UFTA, a security agreement by the debtor in favor of an alleged transferee is not the "asset" itself. It could not be otherwise, because whether there is an "asset" under the UFTA requires a specific inquiry into numerous statutory factors, such as whether the "property" was encumbered by a valid lien, whether the "property" was generally exempt under nonbankruptcy

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[31] *AirFlow Houston, Inc. v. Theriot*, 849 S.W.2d 928, 933 (Tex. App. 1993). See, also, *In re Fair Finance Co., supra* note 23.

[32] *In re Bob Nicholas Enterprise, Inc.*, 358 B.R. 693 (S.D. Tex. 2007).

[33] *Id.* at 701-02.

[34] *Id.* at 701.

[35] See § 36-702(12).

law,[36] and when the debtor acquired rights in the "asset."[37] A blanket security agreement without any reference to particular "property" that the agreement granted the transferee an interest in is not amenable to such inquiries.

[12] Atelier and Korth do not propose anything other than the security agreement as the "property" at issue in CI 15-299 and CI 16-3789. Further, whatever "property" could have been disposed of or parted with by the security agreement, it would have been fully encumbered by "valid lien[s]"[38] when the alleged "transfer" occurred. Only equity in property in excess of the amount of encumbering liens thereon is an "'asset'" reachable by creditors as a fraudulent transfer; encumbered property is not considered part of the debtor's estate.[39]

Though stated in relation to the predecessor of the UFTA, Nebraska's Uniform Fraudulent Conveyance Act,[40] we still find applicable our statement in *Holthaus v. Parsons*[41] that an action to set aside a conveyance cannot be maintained unless the conveyance put beyond the creditor's reach property that would have been subject to the payment of the debt. While "damages" are not an express element of a claim under the UFTA, the various provisions of the UFTA together operate to require that creditors show in a concrete way that they were injured by the transaction they are seeking to set aside. A transfer of property in which the debtor has no equity cannot be the subject of a fraudulent transfer action because the creditors cannot show

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[36] See § 36-702(2). Accord § 36-709.

[37] See § 36-707(4). Accord § 36-709.

[38] See § 36-702(2)(i).

[39] See *In re McFarland*, 170 B.R. 613, 622 (S.D. Ohio 1994). Accord, *Preferred Funding, Inc. v. Jackson*, 185 Or. App. 693, 61 P.3d 939 (2003); *Rich v. Rich*, 185 W. Va. 148, 405 S.E.2d 858 (1991); *National Loan Investors v. World Properties*, 79 Conn. App. 725, 830 A.2d 1178 (2003).

[40] Neb. Rev. Stat. §§ 36-601 to 36-613 (Reissue 1988) (repealed 1989).

[41] *Holthaus v. Parsons*, 238 Neb. 223, 469 N.W.2d 536 (1991).

they would have received anything by avoiding the transfer and were injured thereby.[42]

[13] A blanket security agreement does not convey an "'asset'" under the UFTA if everything subject to ownership that is described as collateral therein is fully encumbered by other creditors with superior claims at the time of the alleged "'transfer[].'"[43] As the district court repeatedly observed in the context of actual intent, "there was an IRS lien which would have been superior" to other creditors' claims.

Valid liens are defined under the UFTA as liens "effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings."[44] It was undisputed that Atelier and Korth never perfected choate liens, i.e., liens that identified with specificity the identity of the lienor, the property subject to the lien, and the amount of the lien.[45] There was no evidence that any other creditor had either. In order to defeat an IRS lien, a creditor must both be prior in time and have a perfected, choate lien.[46] An IRS lien is upon "all property and rights to property"[47] of the debtor, and the moment a prior inchoate interest of the debtor becomes choate, a prior perfected IRS lien in all the taxpayer's property immediately attaches.[48]

The total amount of the security pledged in the security agreement was not more than Michael was obligated to pay under the demand note in the principal amount of $450,000. The IRS action was ultimately settled when the IRS and

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[42] See 37 C.J.S., *supra* note 20.

[43] See *In re SMTC Mfg. of Texas*, 421 B.R. 251, 295 (W.D. Tex. 2009).

[44] See § 36-702(13). See, also, § 36-702(2)(i).

[45] See *United States v. New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954).

[46] See *id*.

[47] 26 U.S.C. § 6321 (2012).

[48] See *Citizens Nat. Trust & S. Bank of Los Angeles v. U.S.*, 135 F.2d 527 (9th Cir. 1943).

Michael agreed the lien could be satisfied by payment of $450,000. At that time, the IRS' claims under the lien were in a total amount of $1.2 million. Even if we were to give credence to Atelier and Korth's argument that Michael's estate was not at the time of the security agreement encumbered in the amount of $1.2 million, because Michael "disputed" the IRS' claims, the settlement determined that "valid lien[s]"[49] encumbering Michael's property were at a minimum equal to the value of the property parted with through the security agreement. Accordingly, if any property or interest in property were parted with through the security agreement, such property was fully encumbered and thus excluded as an "asset" under the UFTA.[50]

We acknowledge that the facts of this case may be unique inasmuch as the IRS liens were extinguished shortly after the agreement was made—although we note there are still IRS liens outstanding in the principal amount of $234,064.71. This case is also unique because the security agreement was an indirect part of the settlement transaction. We have not found a case addressing a similar factual scenario under the UFTA, let alone one that addresses within such context whether "valid liens" continue to exist through the doctrine of equitable subrogation.

But, again, we must review this case based on the theories presented below. Consistent with their theory that the security agreement itself was the "asset," Atelier and Korth asserted below that the "transfer" occurred at the time the security agreement was executed. Certainly, at no point did Atelier and Korth argue that the challenged "transfer" occurred after the IRS released its liens. Nor did Atelier and Korth seek to amend their pleadings to identify something other than the abstract security agreement as the "asset," the transfer of which they sought avoidance to the extent necessary to satisfy their

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[49] See § 36-702(2)(i).

[50] § 36-702(2)(i).

claims.[51] Even if we consider Atelier and Korth's oral argument that under § 36-707(2), there had been a "transfer" immediately before the commencement of the action, they have never identified what interest was sufficiently choate to be "property" "immediately before the commencement of the action," how it was capable under applicable law of perfection, or when Michael had "acquired rights in the asset transferred."[52]

In sum, Atelier and Korth failed to identify and prove there was any "property" at issue in these cases, let alone that any "property" transferred in relation to the security agreement was not excluded under § 36-702(2)(i) as a possible "asset" by virtue of the IRS liens. Atelier and Korth thus failed to prove by clear and convincing evidence that there was a "transfer" under the UFTA, which is a necessary hurdle to any fraudulent transfer claim. Because we conclude that Atelier and Korth failed to prove the threshold element of their fraudulent transfer claims that there was a "transfer," we do not address whether Michael committed actual fraud under § 36-705(a)(1) in making said "transfer" or Laura's good faith defense.

We agree with the district court's ultimate conclusion that Atelier's and Korth's fraudulent transfer actions lacked merit. Atelier and Korth do not assert on appeal that their claim in CI 16-3789 was meaningfully different from their claim in CI 15-299, and we agree with the district court that its judgment on the merits in CI 15-299 rendered judgment as a matter of law appropriate on the fraudulent transfer claim made in CI 16-3789. We affirm the orders of dismissal.

2. Merits of Frivolousness Determination

[14] We turn next to the merits of the district court's finding that the claims were frivolous and attorney fees were appropriate under § 25-824(2). On appeal, we will uphold a lower court's decision allowing or disallowing attorney fees for

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[51] See § 36-709(a).

[52] See § 36-707(4).

frivolous or bad faith litigation in the absence of an abuse of discretion.[53] 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.[54]

Section 25-824(2) provides that the court shall award reasonable attorney fees and costs against any attorney or party who has brought or defended a civil action that alleged a claim or defense which a court determines is frivolous or made in bad faith. Section 25-824(5) elaborates:

> No attorney's fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state or if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that he or she would not prevail on such claim or action.

[15-17] Frivolous for the purposes of § 25-824 is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.[55] It connotes an improper motive or legal position so wholly without merit as to be ridiculous.[56] Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[57]

We conclude that the district court's reasons and rulings on frivolousness were untenable. In finding the actions frivolous, the court reasoned that it should have been discoverable at the

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[53] *Chicago Lumber Co. of Omaha v. Selvera, supra* note 8.

[54] *State v. Ettleman*, 303 Neb. 581, 930 N.W.2d 538 (2019).

[55] *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995).

[56] See *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013).

[57] *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

time of the pleadings that there was no "possible factual, legal, a combination of the two" that would have led to any conclusion other than that Laura received the security agreement in good faith "to protect her interest." The court seemed to articulate a similar conclusion with regard to whether Michael had acted with actual intent to hinder, delay, or defraud any creditor or whether he had received a reasonably equivalent value in exchange for the security agreement. In concluding that Atelier and Korth should have known they would be unable to prove Michael acted with actual intent, or prove constructive fraud under a theory that Michael did not receive reasonably equivalent value for the transfer, the court indicated that Atelier and Korth should have known there could be no fraud when there was a superior IRS lien that was the impetus for the loan transaction.

We agree with Atelier, Korth, Koukol, and Derr that claims of actual intent are dependent upon credibility and, as such, would in only the rarest of circumstances be so wholly without merit as to be ridiculous. Likewise, even if we were to impose an objective standard on the good faith defense, an issue we do not decide here, it would have been difficult to predict with certainty what a reasonable person would think regarding the transaction at issue in this case. Further, it is not at all clear that an action can be frivolous under § 25-824 for the reason that a plaintiff should have predicted a defendant would prove an affirmative defense. While there is some logic to the district court's implicit position that as a matter of law, there can be no bad faith or actual fraudulent intent when the position of the debtor's creditors is improved by virtue of the transaction, there is no case law that squares with the facts of this case and directly supports that legal conclusion.

We have concluded that there was no "[a]sset," "[t]ransfer[red]" by the security agreement, primarily because there was no "[p]roperty."[58] But to the extent it could be appropriate

[58] See § 36-702. See, also, § 36-707.

to affirm the court's discretionary finding of frivolousness as a right result reached for the wrong reason,[59] we cannot say that it was ridiculous or with improper motive for Atelier and Korth to try the case under the theory that the "property" was the agreement itself. As already illustrated, there is little case law exploring inchoate interests in the context of proving the existence of "property" that was an "asset" "transferred." And we have not found a case where a court has explicitly addressed whether a security agreement, abstracted from any identified "property," is an "asset."

While Atelier's and Korth's legal positions were "perhaps strained and farfetched," that alone does not make them frivolous.[60] Again, all doubts as to whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[61] This case presented a unique factual scenario implicating questions of law that have never before been addressed by this court. The court abused its discretion in finding the actions frivolous under § 25-824. We find no merit to any suggestion that we should affirm the court's sanctions award under its inherent powers instead.

VI. CONCLUSION

We reverse the awards of sanctions but otherwise affirm the judgments of dismissal.

Affirmed in part, and in part reversed.

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[59] See *In re Interest of Jordan B., supra* note 21.

[60] *White v. Kohout, supra* note 56, 286 Neb. at 710, 839 N.W.2d at 261.

[61] *Sports Courts of Omaha v. Meginnis, supra* note 57.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Kim Hawley, appellant, v. John Skradski, appellee.

935 N.W.2d 212

Filed November 15, 2019. No. S-18-849.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional issue does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Actions: Parties: Standing.** Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.
3. **Jurisdiction: Standing.** Because the requirement of standing is fundamental to a court's exercise of subject matter jurisdiction, either a litigant or a court can raise the question of standing at any time.
4. **Standing.** The stage of the litigation in which a party claims that its opponent lacks standing affects how a court should dispose of the claim.
5. **Standing: Pleadings: Words and Phrases.** If a motion challenging standing is made at the pleadings stage, it is considered a "facial challenge" and a court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing.
6. **Standing: Jurisdiction: Pleadings: Evidence: Proof: Words and Phrases.** If a motion challenging standing, and thus the court's subject matter jurisdiction, is raised after the pleadings stage and the court holds an evidentiary hearing and reviews evidence outside the pleadings, it is considered a "factual challenge" and the party opposing the challenge must offer evidence to support its burden of establishing subject matter jurisdiction.
7. **Jurisdiction: Pleadings: Appeal and Error.** Where the trial court's decision on a question of subject matter jurisdiction is based on a factual

challenge, the court's factual findings are reviewed under the clearly erroneous standard. But aside from any factual findings, the trial court's ruling on subject matter jurisdiction is reviewed de novo, because it presents a question of law.

8. **Actions: Parties.** Neb. Rev. Stat. § 25-301 (Reissue 2016) establishes an absolute requirement that all actions be brought in the name of the real party in interest, and the only allowable exceptions to this rule are set forth in Neb. Rev. Stat. § 25-304 (Reissue 2016).
9. ____: ____. Construed together, Neb. Rev. Stat. § 25-304 (Reissue 2016) and Neb. Rev. Stat. § 25-302 (Reissue 2016) permit an assignee of a chose in action to maintain an action thereon in the assignee's own name when the assignment being sued upon is in writing.
10. **Jurisdiction.** Whether a court has subject matter jurisdiction is a threshold issue that should be resolved prior to an examination of the merits.
11. **Actions: Parties: Standing.** Because Neb. Rev. Stat. § 25-304 (Reissue 2016) allows assignees of choses in action to "sue on any claim assigned in writing," evidence of an oral assignment of a chose in action is insufficient as a matter of law to confer standing to sue on the assignee.
12. **Jurisdiction: Appeal and Error.** When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to review the merits of the claim.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Vacated and dismissed.

Scott A. Lautenbaugh, of Law Offices of Scott Lautenbaugh, for appellant.

Michael J. O'Bradovich, P.C., for appellee.

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

Stacy, J.

Kim Hawley brought this civil action against John Skradski for breach of contract, conversion, and tortious interference with a business relationship or expectation. A jury trial was held, and at the close of Hawley's case in chief, the district court granted Skradski's motion for a directed verdict. Hawley appeals. Because we find Hawley lacked standing to bring the action in his own name, we vacate the district court's judgment and dismiss the appeal.

BACKGROUND

Hawley's Complaint

Hawley filed this lawsuit against Skradski in the district court for Douglas County on October 28, 2015. Hawley is the only named plaintiff. Hawley's complaint alleged he purchased a heating and air conditioning (HVAC) business from an entity affiliated with Skradski in 2008 and operated that HVAC business on premises leased from Skradski. The complaint alleged that in July 2011, Hawley ceased operating the HVAC business and vacated the leased premises. It further alleged that thereafter, Skradski "took possession of the premises" and "[u]nbeknownst to [Hawley] and without his authorization, [Skradski] began operating the business he had sold to [Hawley]" using the same premises. Hawley alleged that Skradski converted "payments, work orders, business lists, contacts, contracts and the like, and converted various other assets of the business to his use" and that this "caused the value of the business to decrease." Hawley sought to recover damages in an unspecified amount, relying on theories of breach of contract, conversion, and tortious interference with a business relationship or expectation.

Skradski's Answer

Skradski's answer generally denied the allegations of the complaint and specifically denied having sold the HVAC business to Hawley individually. Instead, Skradski's answer alleged that in 2008, he sold the HVAC business to KNR Capital Corp. (KNR) and leased the business premises to the same corporate entity. In addition, Skradski's answer alleged that Hawley's complaint failed to state a claim upon which relief could be granted and that Hawley lacked standing to assert the claims.

Trial Evidence

A jury trial was held over a 2-day period in August 2018. Among the evidence offered and received was a copy of the 2008 asset purchase agreement pertaining to the sale of the

HVAC business. The asset purchase agreement showed the HVAC business was purchased by KNR, and not by Hawley individually.

During trial, Hawley testified that when the asset purchase agreement was signed, he and his wife each owned between 1 and 2 percent of KNR and the remainder was held by what Hawley described as a "401K rollover" holding company that was "part of [a] trust" that Hawley was "in charge of." Hawley later testified that when he and his wife subsequently divorced, her ownership share in KNR was "essentially nullif[ied]," although he did not fully explain how that occurred.

KNR operated the HVAC business from 2008 through July 2011. According to Hawley, he closed the HVAC business after learning the general manager had been "padding his numbers," resulting in a shortfall of several hundred thousand dollars. After closing the HVAC business, Hawley, as KNR's president and "sole" shareholder, entered into a contract to sell the HVAC business to McCarthy Heating & Air Conditioning Service, Inc. (McCarthy).

Hawley testified that before closing on the contract to sell the HVAC business to McCarthy, he and the president of McCarthy visited the HVAC business premises to examine the inventory. During that October 2011 visit, Hawley saw people who had been employed by the HVAC business during the time he operated it, and it appeared to Hawley they were operating an HVAC business from the premises. Hawley also testified that while he was on the premises, he saw a work chart, evidence of billings, an employee gathering materials to return to a vendor for credit, and a compact disc copy of the HVAC business' customer database. Skradski and other witnesses generally refuted Hawley's account of what he saw during the October visit to the business premises. And Skradski denied operating an HVAC business from the premises during October 2011.

Hawley testified that as a result of the October visit, McCarthy learned KNR had suffered a "substantial loss of the inventory" and the sale price for the HVAC business dropped from $100,000 to $50,000.

During his direct examination, Hawley was asked, "What eventually happened to [KNR]?" and he replied, "We eventually closed it down . . . and transferred the remaining assets to myself." He testified that the remaining assets were "the rights to pursue this case" against Skradski, and then reiterated that he "assigned that to myself." He offered no further details on how the alleged assignment from KNR to Hawley occurred.

Oral Motion to Amend Pleadings

On the morning of the second day of trial, after offering testimony about an assignment from KNR, Hawley made an oral motion to "amend the pleadings to comport with the evidence." Hawley sought to amend his complaint to add an allegation that KNR assigned its claim against Skradski to Hawley. Alternatively, Hawley sought to add KNR as a party plaintiff. Skradski opposed the requested amendments on grounds they were untimely.

The court refused Hawley's request to add KNR as a party plaintiff. It reasoned there was evidence that KNR made an "oral assignment" to Hawley of any claim it had against Skradski, and it found this evidence tended to show that Hawley, and not KNR, was the proper plaintiff. But the court granted Hawley's motion to conform the pleadings to the evidence for purposes of alleging an assignment from KNR to Hawley of any claim KNR had against Skradski. After indicating on the record that such an amendment would be allowed, the court instructed Hawley's counsel, "You may file an appropriate pleading," to which counsel replied, "Thank you, [y]our honor." No amended pleading appears in our record, but the parties thereafter treated the assignment from KNR to Hawley as having been raised in the operative pleading.[1]

Motion for Directed Verdict

After the close of Hawley's case in chief, Skradski moved for a directed verdict, arguing Hawley had failed to meet his

[1] See Neb. Ct. R. Pldg. § 6-1115.

burden of proof on all three theories of recovery: breach of contract, conversion, and tortious interference with a business relationship or expectation. The district court agreed, and without expressly ruling on whether Hawley had proved standing to bring suit in his own name, the court granted the directed verdict and dismissed the action. Hawley filed this timely appeal, which we moved to our docket on our own motion.

ASSIGNMENTS OF ERROR

Hawley assigns, restated, that the district court erred in (1) granting Skradski's motion for directed verdict, (2) finding there was insufficient evidence of conversion, and (3) finding there was insufficient evidence of tortious interference with a business relationship or expectation.

STANDARD OF REVIEW

[1] When a jurisdictional issue does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.[2]

ANALYSIS

Standing and Real Party in Interest

[2,3] Although neither party raises the issue on appeal, we must first determine whether Hawley has standing and is the real party in interest for purposes of bringing this action against Skradski. Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.[3] Because the requirement of standing is fundamental to a court's exercise of subject matter jurisdiction,

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

[3] *Id.*

either a litigant or a court can raise the question of standing at any time.[4]

[4-6] The stage of the litigation in which a party claims that its opponent lacks standing affects how a court should dispose of the claim.[5] If a motion challenging standing is made at the pleadings stage, it is considered a "facial challenge" and a court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing.[6] But if the challenge to standing, and thus the court's subject matter jurisdiction, is raised after the pleadings stage and the court holds an evidentiary hearing and reviews evidence outside the pleadings, it is considered a "factual challenge" and the party opposing the challenge must offer evidence to support its burden of establishing subject matter jurisdiction.[7]

[7] Where the trial court's decision on a question of subject matter jurisdiction is based on a factual challenge, the court's factual findings are reviewed under the clearly erroneous standard.[8] But aside from any factual findings, the trial court's ruling on subject matter jurisdiction is reviewed de novo, because it presents a question of law.[9]

Here, the district court heard evidence on the issue of Hawley's standing to bring suit in his own name. We therefore review its factual findings on this jurisdictional issue for clear error, and we review de novo the ultimate question of Hawley's standing.

Real Party in Interest Statutes

At trial, Hawley admitted it was KNR that purchased the HVAC business from Skradski and sold the HVAC business

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[4] *Id.*

[5] *Id.*

[6] See *id.*

[7] See *id.*

[8] See *id.*

[9] See *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

to McCarthy. Hawley testified that he was one of several shareholders of KNR when it purchased the HVAC business in 2008 and that he was the sole shareholder of KNR when it sold the HVAC business in 2011. But Hawley did not bring this action in his capacity as an officer of KNR—he brought it individually. And even where one person owns all the stock of a corporation, property belonging to the corporation does not become the property of such person.[10] On this record, any chose in action against Skradski belonged to KNR, not to Hawley individually. Hawley apparently recognized this and claimed to be prosecuting this action as the assignee of KNR's chose in action against Skradski.

[8] Nebraska's real party in interest statute provides that "[e]very action shall be prosecuted in the name of the real party in interest except as otherwise provided in section 25-304."[11] We have recognized that § 25-301 establishes an absolute requirement that all actions be brought in the name of the real party in interest and that the only allowable exceptions to this rule are set forth in Neb. Rev. Stat. § 25-304 (Reissue 2016).[12]

[9] Section 25-304 states in relevant part: "Assignees of choses in action assigned for the purpose of collection may sue on any claim assigned in writing." A related statute, Neb. Rev. Stat. § 25-302 (Reissue 2016), states: "The assignee of a thing in action may maintain an action thereon in the assignee's own name and behalf, without the name of the assignor." Construing these statutes together, Nebraska law permits an assignee of a chose in action to maintain an action thereon in the assignee's own name when the assignment being sued upon is in writing. As such, Hawley could establish standing to bring this action in his own name, and thus show the court

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[10] See *State ex rel. Sorensen v. Weston Bank*, 125 Neb. 612, 251 N.W. 164 (1933).

[11] Neb. Rev. Stat. § 25-301 (Reissue 2016).

[12] *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983).

had subject matter jurisdiction, if he proved by a preponderance of the evidence[13] the existence of a written assignment under § 25-304.[14]

Hawley Failed to Prove Written Assignment Under § 25-304

The only evidence of an assignment from KNR was Hawley's testimony, and it was sparse. During Hawley's direct examination, he was asked, "What eventually happened to [KNR]?" and he responded, "We eventually closed it down . . . and transferred the remaining assets to myself." Hawley then explained that the only assets that were transferred were "the rights to pursue this case," and again said he "assigned that" to himself. Hawley did not produce a written assignment from KNR, and his testimony did not expressly reference a written assignment.

[10] After hearing Hawley's testimony about the assignment, the district court found KNR had made an "oral assignment" to Hawley of any claim it had against Skradski. Although the court did not expressly rule on whether the oral assignment gave Hawley the requisite standing to support the exercise of subject matter jurisdiction, it found Hawley was the proper plaintiff, and it reached the merits of Hawley's claims and granted Skradski's motion for a directed verdict on those claims. Whether a court has subject matter jurisdiction is a threshold issue that should be resolved prior to an examination of the merits,[15] and we therefore conclude the court implicitly found it had subject matter jurisdiction.

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[13] See, *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010); *Pallas v. Dailey*, 169 Neb. 533, 100 N.W.2d 197 (1960).

[14] See *Archer v. Musick*, 147 Neb. 1018, 1027, 25 N.W.2d 908, 913 (1947) ("'assignees of choses in action assigned for the purpose of collection'" are considered real parties in interest and authorized to maintain actions thereon as such).

[15] See, generally, *Holmstedt v. York Cty. Jail Supervisor*, 275 Neb. 161, 745 N.W.2d 317 (2008).

As noted, we review factual findings related to the court's subject matter jurisdiction for clear error[16] and the court's ultimate determination as to subject matter jurisdiction de novo.[17] On this record, it was not clearly erroneous to find that KNR made an oral assignment to Hawley of its claim against Skradski.

[11] But because § 25-304 allows assignees of choses in action to "sue on any claim assigned in writing," we find on de novo review that evidence of an oral assignment of a chose in action is insufficient as a matter of law to confer standing to sue on the assignee. Because Hawley failed to prove he was the assignee under a written assignment from KNR of a chose in action against Skradski, Hawley failed to prove his standing to bring this suit in his own name under § 25-304. As such, the district court lacked subject matter jurisdiction over the cause.

CONCLUSION

[12] When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to review the merits of the claim.[18] We thus vacate the district court's judgment and dismiss the appeal for lack of subject matter jurisdiction.

Vacated and dismissed.

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[16] See *Jacobs Engr. Group, supra* note 2.

[17] See *Bohaboj, supra* note 9.

[18] *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 917 N.W.2d 903 (2018).

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

State of Nebraska, appellee, v.
Curtis R. Brye, Jr., appellant.
935 N.W.2d 438

Filed November 15, 2019. No. S-19-061.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law which an appellate court reviews independently of the lower court.
3. **Criminal Law: Motions to Suppress.** No evidence should be suppressed because of technical irregularities not affecting the substantial rights of the accused.
4. **Intercepted Communications.** Substantial but not strict compliance with the Nebraska wiretap statutes is required.
5. ____. Interception must be conducted in such a manner as not to violate substantive rights.
6. **Intercepted Communications: Time.** An application to intercept under Neb. Rev. Stat. § 86-291 (Reissue 2014) must be submitted to the Attorney General in close enough proximity to the submission to the court that the grounds upon which the application is based are equally applicable and the Attorney General could issue its recommendation with sufficient time so the court could timely consider it in making its determination.
7. **Intercepted Communications: Judgments.** Because interception under the Nebraska wiretap statutes occurs both at the origin or point of reception and where the communication is redirected and first heard, both of

these locations must be considered when deciding whether interception is within a court's territorial jurisdiction.

8. **Intercepted Communications: Words and Phrases.** A court can authorize interception of communications within its territorial jurisdiction, and this interception occurs both at the origin or point of reception and where the communication is redirected and first heard.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Stuart J. Dornan, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

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

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

Funke, J.

Curtis R. Brye, Jr., appeals his conviction of criminal conspiracy to distribute crack cocaine. In doing so, Brye challenges the district court's failure to suppress evidence obtained during and derived from an electronic interception of his cellular telephone communications. Brye claims the State failed to comply with Neb. Rev. Stat. § 86-291 (Reissue 2014) by submitting to the district court an application to intercept Brye's communications 2 days after submitting the application to the Attorney General. Brye also claims the interception of his communications while he was outside the State of Nebraska was impermissible and beyond the court's authority under Neb. Rev. Stat. § 86-293(3) (Reissue 2014). For the reasons set forth herein, we affirm.

BACKGROUND

From April 2017 to January 2018, an FBI task force conducted an investigation using a confidential informant (CI) to purchase controlled substances from David Gills. One such controlled buy occurred on August 24, 2017, when the CI

purchased crack cocaine from Gills. On that occasion, the CI contacted Gills by telephone to arrange the exchange. Before the exchange occurred, law enforcement observed Brye come from his residence and provide Gills crack cocaine which Gills then delivered to the CI.

Other purchases occurred on August 31, September 13, and September 25, 2017, wherein the CI bought crack cocaine from Gills. These purchases were also arranged through telephone calls between the CI and Gills. On November 8, the State received court authorization for an interception of Gills' telephone number which the CI had been utilizing to set up the buys.

A subsequent purchase occurred on November 15, 2017. On that date, the CI again contacted Gills' telephone number to solicit crack cocaine and arrange to meet. A few minutes after the CI arrived at the meeting, Gills talked to Brye on his telephone. Gills then left the meeting location and traveled to a second location where previous purchases had occurred. Gills had a second telephone conversation with Brye, wherein Brye said he would meet Gills in about 5 minutes. Seven minutes later, Brye arrived at the second location and met with Gills. Brye then left, went to his residence, returned to Gills' location, and then left again. About 1 minute later, Gills texted the CI to meet him at the second location. The CI met Gills, and Gills supplied the CI with the crack cocaine.

Thereafter, the State through the Douglas County Attorney submitted an application and affidavit for interception of Brye's telephone number to the Attorney General, who received it on December 20, 2017. Two days later, on December 22, the Attorney General issued a recommendation that the application be approved and the State submitted this recommendation and the application to the district court. On that same day, the State received court authorization for an interception of Brye's telephone number.

A final purchase was made on January 3, 2018. The CI again arranged for the buy with Gills. The CI met Gills to give

him money for the crack cocaine, and the CI and Gills agreed to meet later when Gills had the controlled substance. Gills then called Brye to obtain the requested drugs. At that point, Brye left his residence and delivered the crack cocaine to Gills. When Brye left Gills' residence, he was stopped by law enforcement and arrested. Money which the CI had given Gills was later found shoved under the back of the seat of the police cruiser Brye was placed in after his arrest. A subsequent search pursuant to a warrant of Brye's house uncovered additional crack cocaine as well as packaging material, a scale, and cash. Gills was also arrested after he provided the CI the drugs. A search pursuant to a warrant of Gills' residence and business identified more of the money the CI provided Gills, as well as other cash, handguns, and additional crack cocaine in multiple packages. Gills confirmed that Brye supplied him with crack cocaine on several occasions.

Pursuant to these events, Brye was charged with conspiracy to distribute crack cocaine, possession with intent to distribute crack cocaine, possession of a deadly weapon by a prohibited person, and failure to affix a drug tax stamp. Brye filed a motion to suppress all evidence obtained during and derived from the wiretap interception of communications authorized in the December 2017 order on the telephone number ascribed to him.

In his motion, Brye claimed the State, in applying for the interception, failed to comply with the statutory requirement under § 86-291 that an application to intercept with the court be made simultaneously with an application notifying the Attorney General. Brye argued that the State violated this requirement by submitting the application to intercept Brye's telephone number to the Attorney General 2 days before submitting the application to the court.

The court denied this claim, noting that Brye failed to allege how such an action constituted a material noncompliance with the statute or how the action prejudiced Brye to justify the suppression of part of or the entire interception. The court found

that suppression of any part of the intercepted communications was not warranted and determined that the 2-day delay "at most, if at all, is a technical violation" which "does not constitute a violation of a core statutory requirement."

Additionally, Brye claimed the State exceeded the permissible scope of the court order authorizing the interception when it intercepted communications while Brye was outside of Nebraska. On this claim, the parties agreed that the State, through its "listening post" in Douglas County, Nebraska, had intercepted some of Brye's communications when he was in Texas. However, the State noted that it did not use any evidence from the communications in Texas in its case.

The court also denied this claim. Specifically, the court determined that the interception was permissible because it was authorized by the order and because the listening post at which the State intercepted the communication was in Nebraska.

In November 2018, the State filed an amended information which retained only the charge of conspiracy to distribute crack cocaine, and the parties agreed to a bench trial on stipulated facts. In January 2019, the court found Brye guilty and sentenced him to 20 to 20 years' imprisonment.

ASSIGNMENTS OF ERROR

Brye assigns the district court erred in overruling his motion to suppress and in determining that (1) suppression was not warranted due to an alleged violation of § 86-291 in the State's submitting the application for interception with the court 2 days after submitting it to the Attorney General and (2) the interception of Brye's communications while he was in Texas was not beyond the permissible scope of the court order.

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]

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[1] *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019).

Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[2]

[2] Statutory interpretation presents a question of law which an appellate court reviews independently of the lower court.[3]

ANALYSIS

Timing of Application for Interception

Brye first argues that evidence extending from the December 2017 interception order should have been suppressed because the State failed to submit the application for interception with the Attorney General and court simultaneously.

Under Nebraska law, a county attorney may make application to any district court for an order authorizing the interception of wire, electronic, or oral communications.[4] Among other justifications, a reviewing court may grant such application when the interception may provide or has provided evidence of a conspiracy to deal narcotic or other dangerous drugs.[5] While an applying county attorney is not required to obtain preapproval from the Attorney General to submit the application with a district court, Nebraska law does require the county attorney to submit the application to the Attorney General in order to obtain a nonbinding recommendation. Specifically, § 86-291 provides, in relevant part:

> At the same time a county attorney first makes application to the district court for an initial order authorizing or approving the interception of wire, electronic, or oral communications, the county attorney shall submit the application to the Attorney General or his or

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[2] *Id.*

[3] See *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018).

[4] § 86-291.

[5] *Id.*

> her designated deputy or assistant. Within twenty-four hours of receipt by the office of the Attorney General of the application from the county attorney, the Attorney General or his or her designated deputy or assistant, as the case may be, shall state to the district court where the order is sought his or her recommendation as to whether the order should be granted. The court shall not issue the order until it has received the recommendation or until seventy-two hours after receipt of the application from the county attorney, whichever is sooner, unless the court finds exigent circumstances existing which necessitate the immediate issuance of the order. The court may issue the order and disregard the recommendation of the Attorney General or his or her designated deputy or assistant.

Additionally, § 86-293(11) provides, in relevant part:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court . . . of this state may move to suppress the contents of any intercepted wire, electronic, or oral communication or evidence derived therefrom on the grounds that the communication was unlawfully intercepted, the order of authorization or approval under which it was intercepted is insufficient on its face, or the interception was not made in conformity with the order of authorization or approval. . . . If the motion is granted, the contents of the intercepted wire, electronic, or oral communication or evidence derived therefrom shall be treated as having been obtained in violation of sections 86-271 to 86-295.

In the present case, the State submitted the application for interception to the Attorney General on December 20, 2017. The Attorney General recommended the application be granted, and the State submitted the application and recommendation to the district court on December 22.

Brye contends that by seeking the Attorney General's recommendation prior to submitting the application to the court, the State failed to adhere to the requirement under § 86-291 that

an application for interception be sent to the Attorney General "[a]t the same time a county attorney first makes application to the district court." We disagree and find the State's submissions of the application to the Attorney General and the court substantially complied with § 86-291.

[3-5] We have previously held that no evidence should be suppressed because of technical irregularities not affecting the substantial rights of the accused, and we have been reluctant to deem provisions mandatory if something less than strict compliance would not interfere with a statute's fundamental purpose.[6] As to Nebraska's wiretap statutes specifically, we have held substantial but not strict compliance with the statutes is required.[7] That is to say, the interceptions must be conducted in such a manner as not to violate substantive rights.[8]

Relatedly, in analyzing the admissibility of wiretap evidence under federal law, the Eighth Circuit has considered three factors when determining whether an alleged deficiency is a substantive violation or a mere technical irregularity, including (1) whether the statutory procedure is a central or functional safeguard of the statute, (2) whether the purpose which the statutory procedure was designed to accomplish has been satisfied in spite of the error, and (3) whether the statutory procedure was deliberately ignored and a tactical advantage was gained thereby.[9]

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[6] *D.I. v. Gibson*, 291 Neb. 554, 867 N.W.2d 284 (2015); *State v. Whitmore, White, and Henderson*, 215 Neb. 560, 340 N.W.2d 134 (1983) (motion to suppress resulting in one-judge opinion later adopted by full court in *State v. White*, 220 Neb. 527, 371 N.W.2d 262 (1985)).

[7] *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984).

[8] *Id.*

[9] *United States v. Civella*, 533 F.2d 1395 (8th Cir. 1976), *vacated sub nom. United States v. Barletta et al.*, 430 U.S. 902, 97 S. Ct. 1168, 51 L. Ed. 2d 578 (1977) (citing *United States v. Chavez*, 416 U.S. 562, 94 S. Ct. 1849, 40 L. Ed. 2d 380 (1974)). See, also, *U.S. v. Lomeli*, 676 F.3d 734 (8th Cir. 2012).

Under its plain language, § 86-291 requires the following: submission of the interception application to the Attorney General and the court, the Attorney General to provide a recommendation on the application to the court, and the court to make an independent determination on the application. Section 86-291 sets forth time constraints surrounding the Attorney General's recommendation and the court's approval of the application. Namely, within 24 hours of receipt by the Attorney General of the application from the county attorney, the Attorney General or his or her designated deputy or assistant, as the case may be, shall state to the district court where the order is sought his or her recommendation as to whether the order should be granted. Additionally, the court shall not issue the order until it has received the recommendation or until 72 hours after receipt of the application from the county attorney, whichever is sooner, unless the court finds exigent circumstances existing which necessitate the immediate issuance of the order.

[6] We read the requirement in § 86-291 that the submissions of these applications to the Attorney General and the court occur "[a]t the same time" to necessitate that the application be submitted to the Attorney General in close enough proximity to the submission to the court that the grounds upon which the application is based are equally applicable and the Attorney General could issue its recommendation with sufficient time so the court could timely consider it in making its determination.

In this case, the State's submission of the application to the Attorney General on December 20, 2017, ensured that the requirement of seeking the Attorney General's recommendation before consideration by the court was met. This timing satisfied the purpose of § 86-291 to provide additional safeguards to the interception of communications by requiring both the Attorney General and the court to consider the application prior to the court's making its independent determination. Accordingly, the submissions substantially complied with

§ 86-291 and any delay between the submissions was a mere technical irregularity.

In arguing the 2-day difference in the submissions of the application to the Attorney General and the court was more than a mere technical irregularity, Brye claims the timing of the submissions prejudiced him because there was no guarantee that the applications were the same version due to this time difference. However, there would have been no such guarantee even if the applications were sent on the same date. The difference in the timing of the submissions does not make it any more or less likely that the applications were different versions. Outside of arguing that the difference in the timing of the submissions created a greater implicit risk that the applications were different, Brye does not argue that the application upon which the Attorney General based its recommendation and the application approved by the court were impermissibly dissimilar. Brye also does not argue that the time difference affected the underlying grounds upon which the application was based.

Similarly, Brye's assertion that the court's receipt of the recommendation at the same time as the application prejudiced him due to the risk of the court's giving the recommendation greater weight is without merit. We find no reason to infer that a court would give additional weight to a recommendation when it is received along with the application instead of on its own. Under either scenario, the court would receive the application and the recommendation and make its determination on the appropriateness of the interception based upon both these documents.

Considering all of the above, the district court did not err in determining that there was no violation of Brye's substantive rights based upon the timing of the State's submissions of the application to the Attorney General and the court. As a result, the district court did not err in declining to suppress evidence extending from the December 2017 interception order.

Authority to Intercept Out-of-State Communications

Brye also argues evidence extending from the December 2017 interception order should have been suppressed because the State exceeded the permissible scope of the order in intercepting communications occurring outside of Nebraska. Brye contends § 86-293(3) limits a court's authority to grant an application for interception to only those communications occurring within its territorial jurisdiction. Because the parties acknowledge the State intercepted some of Brye's communications while he was in Texas, Brye argues this interception of out-of-state communication occurred beyond the territorial jurisdiction of the court.

We disagree with Brye's interpretation of this jurisdictional statutory requirement. Section 86-293(3) permits a court to approve an "interception of wire, electronic, or oral communications or mobile telephone communications within the territorial jurisdiction of the court." "Intercept" under this section is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."[10] "Aural transfer," in turn, is defined as "a transfer containing the human voice at any point between and including the point of origin and the point of reception."[11]

[7] Explicit in the definition of aural transfer is the proposition that aural communication occurs at the communication's origin or point of reception and any point in between. As such, the location of any interception of those communications must also be measured at the communication's origin or point of reception and any point along the transfer where the communication is redirected and first heard. Because the interception occurs both at the origin or point of reception and where the communication is redirected and first heard, both of these

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[10] Neb. Rev. Stat. § 86-280 (Reissue 2014).

[11] Neb. Rev. Stat. § 86-273 (Reissue 2014).

locations must be considered when deciding whether interception is within a court's territorial jurisdiction.

Other courts analyzing similar statutes have held that "interception" for the purpose of determining territorial jurisdiction occurs at both the location of the tapped telephone and the listening post location.[12] For instance, in *U.S. v. Henley*,[13] the Eighth Circuit found that a federal district court located in Missouri was authorized under the similarly worded federal wiretap statute to approve the interception of communications when the listening post was located in St. Louis, Missouri, even though some of the communications occurred in Illinois. In addition to interpreting territorial jurisdiction based upon statutory language, some of these outside courts have opined that this reading is supported by the mobile nature of cellular telephones and the complexity that mobility can bring in trying to determine the likely location of their use and in protecting individuals from intrusive interceptions.[14]

[8] In this case, the parties acknowledge that some of Brye's communications were acquired while he was in Texas but also agree that the State redirected and first heard these conversations at a listening post in Nebraska. Based upon the plain language of § 86-293(3) and the definitions under §§ 86-273 and 86-280 analyzed above, a court can authorize interception of communications within its territorial jurisdiction and this

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[12] See, *U.S. v. Jackson*, 849 F.3d 540 (3d Cir. 2017); *U.S. v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015); *U.S. v. Henley*, 766 F.3d 893 (8th Cir. 2014); *U.S. v. Luong*, 471 F.3d 1107 (9th Cir. 2006); *U.S. v. Wilson*, 237 F.3d 827 (7th Cir. 2001); *U.S. v. Jackson*, 207 F.3d 910 (7th Cir. 2000), *vacated on other grounds* 531 U.S. 953, 121 S. Ct. 376, 148 L. Ed. 2d 290 (2000); *U.S. v. Denman*, 100 F.3d 399 (5th Cir. 1996); *U.S. v. Tavarez*, 40 F.3d 1136 (10th Cir. 1994); *U.S. v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992); *State v. Ates*, 217 N.J. 253, 86 A.3d 710 (2014); *Davis v. State*, 426 Md. 211, 43 A.3d 1044 (2012).

[13] *Henley, supra* note 12.

[14] See, *Denman, supra* note 12; *Rodriguez, supra* note 12; *Ates, supra* note 12.

interception occurs both at the origin or point of reception and where the communication is redirected and first heard. Because the State redirected and first heard Brye's communications at a listening post in Nebraska, the interception occurred within the court's territorial jurisdiction. Accordingly, the district court did not err in declining to suppress evidence based on some of Brye's conversations' occurring in Texas.

V. CONCLUSION

The district court did not err in overruling Brye's motion to suppress. The court correctly determined that the State's submission of the application to intercept to the Attorney General 2 days prior to submitting it to the court did not violate the timing requirement of § 86-291 and that the interception of Brye's communications was within the territorial jurisdiction of the court because the communications were redirected and first listened to at a Nebraska listening post.

Affirmed.

Heavican, C.J., not participating.

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

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Janet L. Krotter Chvala, respondent.

935 N.W.2d 446

Filed November 22, 2019. No. S-17-773.

1. **Disciplinary Proceedings: Appeal and Error.** Attorney discipline cases are original proceedings before the Nebraska Supreme Court. As such, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. **Disciplinary Proceedings: Proof.** Violations of disciplinary rules must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline evaluated under the particular facts and circumstances of the case.
4. **Disciplinary Proceedings: Appeal and Error.** When a party takes exception to the referee's report in a disciplinary proceeding, the Nebraska Supreme Court conducts a trial de novo on the record, in which the court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
5. ____: ____. In a disciplinary proceeding, when a referee makes an express determination about the relative credibility of witnesses, the Nebraska Supreme Court gives weight to that determination in its de novo review, but it is not bound by it.
6. **Attorney and Client.** A lawyer is ultimately responsible for the conduct of his or her employees and associates in the course of the professional representation of the client.
7. ____. An attorney-client relationship with respect to a particular matter may be implied from the conduct of the parties.

8. **Attorney and Client: Proof.** Generally speaking, an attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. In appropriate cases the third element of an attorney-client relationship may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them, and the attorney, aware of such reliance, does nothing to negate it.
9. **Disciplinary Proceedings: Attorney and Client.** Generally speaking, any commercial activity engaged in for a profit will constitute a business transaction for purposes of the disciplinary provisions that prohibit an attorney from entering into a business transaction with a client.
10. **Disciplinary Proceedings: Attorney and Client: Real Estate: Words and Phrases.** For purposes of the disciplinary provisions that prohibit an attorney from entering into a business transaction with a client, "business transaction" is a broad term, and it plainly includes an agreement to purchase real property and an agreement to lease real property.
11. **Disciplinary Proceedings: Attorney and Client: Words and Phrases.** In the context of the disciplinary provisions governing business transactions with clients, a client is defined as one over whom the attorney has influence arising from a previous or current attorney-client relationship. Thus, a "client" in this context means not only one with whom the attorney has an existing attorney-client relationship, but also those who have relied on the attorney on an occasional and on-going basis.
12. **Disciplinary Proceedings: Attorney and Client: Conflict of Interest: Proof.** To establish a violation of Canon 5, DR 5-104(A), of the Code of Professional Responsibility, it is necessary to show that (1) the attorney and the client had differing interests in the transaction, (2) the client expected the lawyer to exercise his or her professional judgment for the protection of the client, and (3) the client consented to the transaction without full disclosure.
13. **Conflict of Interest: Words and Phrases.** Differing interests are interests that are conflicting, inconsistent, diverse, or otherwise discordant.
14. **Disciplinary Proceedings: Conflict of Interest: Words and Phrases.** In the attorney discipline context, the term "differing interests" has been broadly defined to include any interest adversely affecting either the lawyer's judgment on behalf of a client or the lawyer's loyalty to a client.
15. **Conflict of Interest.** It is fundamental that the interests of a purchaser in a transaction are directly contradictory to the interests of the seller in

the transaction. Similarly, the competing interests of lessor and lessee necessarily present differing interests.

16. **Attorney and Client.** The nature of the transaction itself can show that the client expected the lawyer to exercise professional judgment for his or her protection. So, too, can the prior relationship of the attorney and the client.
17. ____. As a general matter, it is natural and proper for a client with a longstanding business relationship with a lawyer to feel that the lawyer is to be trusted, will not act unfairly, and will protect him or her against danger.
18. **Disciplinary Proceedings: Conflict of Interest.** For purposes of Canon 5, DR 5-104(A), of the Code of Professional Responsibility, a full disclosure requires both that the client is advised there is a conflict of interest and that the client is informed of the possible areas this conflict of interest may affect.
19. ____: ____. A key part of a full disclosure under Canon 5, DR 5-104(A), of the Code of Professional Responsibility, is explaining to the client any effect the conflict may have on the exercise of the attorney's professional judgment. In other words, full disclosure means explaining the nature of the conflict presented by the attorney's role in the business transaction, and also explaining to the client why he or she would benefit from independent counsel.
20. ____: ____. When a full disclosure is required under Canon 5, DR 5-104(A), of the Code of Professional Responsibility, it must include a clear explanation of the differing interests between the attorney and the client, a detailed explanation of the risks and disadvantages to the client as a result of those differing interests, and an explanation of the advantages of seeking independent legal advice.
21. ____: ____. The full disclosure required by Canon 5, DR 5-104(A), of the Code of Professional Responsibility, is not satisfied by a mere disclaimer of an attorney-client relationship.
22. **Disciplinary Proceedings: Attorney and Client: Conflict of Interest.** Canon 5, DR 5-104(A), of the Code of Professional Responsibility, is designed to address the concern that an attorney's legal skill and training, together with the relationship of trust and confidence between the lawyer and client, create the possibility of overreaching when the lawyer participates in a business transaction with a client. This concern exists whether or not the attorney actually provides legal advice or services to the client in the business transaction.
23. ____: ____: ____. To be effective, the full disclosure required by Canon 5, DR 5-104(A), of the Code of Professional Responsibility, must be made before the client consents to the business transaction.

24. ____: ____: ____. Under Canon 5, DR 5-105, of the Code of Professional Responsibility, a lawyer may represent several clients whose interests are not actually or potentially differing, but should nevertheless explain any circumstances that might cause a client to question the lawyer's undivided loyalty.
25. **Attorney and Client: Conflict of Interest.** If a lawyer is asked to undertake or continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that his or her judgment may be impaired or his or her loyalty divided if he or she accepts or continues the employment.
26. **Disciplinary Proceedings: Attorney and Client: Conflict of Interest.** Under Canon 5, DR 5-105(C), of the Code of Professional Responsibility, a lawyer may represent multiple clients with differing interests if (1) it is obvious the lawyer can adequately represent the interest of each and (2) if each client consents to the representation after full disclosure of the possible effect of such representation on the exercise of his or her independent professional judgment on behalf of each.
27. **Attorney and Client: Conflict of Interest.** Even in those instances where a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his or her need for representation free from any potential conflict and to obtain other counsel if he or she so desires.
28. ____: ____. Before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and should accept or continue employment only if the client consents. And if there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he or she should also advise all of the clients of those circumstances.
29. **Disciplinary Proceedings: Attorney and Client: Conflict of Interest.** A full disclosure under Canon 5, DR 5-105, of the Code of Professional Responsibility, requires the attorney to not only inform the client of the attorney's relationship with other clients, but also to explain the pitfalls that may arise in the course of the transaction that would make it desirable for the client to have independent counsel.
30. ____: ____: ____. For purposes of Neb. Ct. R. of Prof. Cond. § 3-501.7 (rev. 2019), informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of

multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved.

31. **Attorneys at Law.** One of the essential eligibility requirements for admission to the practice of law in Nebraska is the ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations.
32. **Disciplinary Proceedings: Attorney and Client.** Attorneys who engage in dishonest or deceitful conduct in their communications with clients violate Neb. Ct. R. of Prof. Cond. § 3-508.4(c) (rev. 2016).
33. **Disciplinary Proceedings.** With respect to the imposition of attorney discipline, each attorney discipline case must be evaluated in light of its particular facts and circumstances.
34. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.
35. ____. In attorney discipline matters, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
36. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
37. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
38. **Attorney and Client.** Violations of client trust and loyalty, particularly when they result in personal financial gain to the attorney, harm the reputation of the entire legal profession by undermining public confidence and trust in attorneys, in the courts, and in the legal system generally.
39. **Disciplinary Proceedings: Attorney and Client.** There is a need to preserve the public trust and confidence in members of the bar. Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney-client relationship. As a profession, the bar continuously strives to build and safeguard such trust and confidence.
40. **Disciplinary Proceedings.** The goal of attorney discipline proceedings is not as much punishment as a determination of whether it is in the

public interest to allow an attorney to keep practicing law. Providing for the protection of the public requires the imposition of an adequate sanction to maintain public confidence in the bar.

41. ____. It is a very serious matter when attorney misconduct brings doubt into the minds of many as to the competence of the legal profession to represent a client's best interest.

42. ____. The Nebraska Supreme Court does not look kindly upon acts which call into question an attorney's honesty and trustworthiness. The essential eligibility requirements for admission to the practice of law in Nebraska include the ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations. With or without misappropriation, acts of dishonesty can result in disbarment.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

David A. Domina, of Domina Law Group, P.C., L.L.O., for respondent.

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

Per Curiam.

This is an original action brought by the Counsel for Discipline of the Nebraska Supreme Court against attorney Janet L. Krotter Chvala, alleging she violated several disciplinary provisions and her oath as an attorney by, among other things, entering into business transactions with clients without providing the full disclosure mandated by the disciplinary rules and engaging in conduct involving deceit and dishonesty. Chvala denied the allegations. A referee was appointed, and an evidentiary hearing was held. The referee found clear and convincing evidence of multiple disciplinary violations and recommended that Chvala be disbarred. Chvala filed an exception to the referee's report, challenging both the findings and the recommended sanction.

On de novo review, we find clear and convincing evidence that Chvala violated several disciplinary provisions and her

attorney oath. And given the seriousness of the violations, we agree with the referee that the appropriate sanction for Chvala's misconduct is disbarment.

I. BACKGROUND

Chvala has been licensed to practice law in Nebraska since 1984. She is an experienced, well-respected lawyer with a busy law practice focused primarily on business formation, real estate, and probate in the area of O'Neill and Atkinson, Nebraska. Chvala has not been the subject of any prior disciplinary action.

II. FACTS

Brothers Wayne Kaup and Kurt Kaup operate several farming-related businesses in the O'Neill and Atkinson area. In the 7 years before the 2003 real estate transaction at the heart of this disciplinary action, Chvala regularly provided legal services to Wayne and Kurt and represented them in a variety of matters, including the purchase of farmland, the handling of crop liens, and the organization of business entities for hay operations, livestock operations, and hauling grain. Chvala also performed a variety of legal services for Wayne and Kurt's mother, Diane Kaup, during this time period.

1. Morrison Land

On January 2, 2003, Wayne and Kurt signed a contract to purchase a section of prime farmland in Holt County, Nebraska, known as the Morrison Land. The purchase price was $996,880.50. They put 5 percent down and sought private financing for the remainder of the purchase price.

Their mother, Diane, agreed to finance a quarter section of the land, and their aunt, Rita Olberding (Rita), agreed to finance another quarter section. Wayne and Kurt contacted Chvala at her law office and asked if she would be interested in hearing about an investment proposal regarding the Morrison Land. She said she was, and on January 12, 2003, Wayne and Kurt met with Chvala and her husband, Gary Chvala (Gary), at Chvala and Gary's home.

(a) January 12, 2003, Meeting

It is undisputed that during the January 12, 2003, meeting at Chvala and Gary's home, Wayne and Kurt discussed their need to finance the Morrison Land purchase. But Chvala and the Kaup brothers disagree as to what specifically was said during the meeting.

According to Chvala, the meeting was primarily between Gary and the Kaup brothers. Chvala testified she merely introduced Wayne and Kurt to Gary, and then explained: "He's buying the property if he decides to do this. And I have done work for you in the past. And I cannot represent you in any capacity because God willing, he's always going to be my husband." According to Chvala, she was not otherwise involved in the January 12, 2003, meeting.

Wayne and Kurt testified that Chvala actively participated in the meeting and that she was the one with whom they negotiated. They denied that Chvala made any statement about it being only Gary's deal. Wayne testified that Chvala did most of the talking during the meeting and that Gary remained mostly silent. Wayne explained that although he and Kurt had approached Chvala about financing a quarter section, Chvala told them she was interested in two quarter sections (which total a half section) and did not want to loan them money. Instead, Chvala offered to purchase a half section of the Morrison Land and then lease it back to Wayne and Kurt with an option to purchase the land at the end of the lease term.

The parties discussed several ways to structure the arrangement. One proposal, made by the Kaup brothers, was that Chvala and Gary would receive a guaranteed 5-percent rate of return and the Kaup brothers would have an option to purchase for the fair market value of the land at the end of the lease term. However, they ultimately agreed Chvala and Gary would purchase the half section of the Morrison Land and lease it back to Wayne and Kurt pursuant to a 10-year triple-net lease that would guarantee a 7-percent rate of return to Chvala and Gary, with an option for the Kaup brothers to purchase the land

at the end of the lease term for the original purchase price. Both Wayne and Kurt testified that near the end of the meeting, Chvala told them the half section of land would be titled in Gary's name for estate planning purposes.

A few days after the January 12, 2003, meeting, and in reliance on the agreement reached with Chvala and Gary, Wayne and Kurt assigned their rights under the purchase agreement to Gary so he could purchase the half section of the Morrison Land. Wayne and Kurt executed similar assignments in favor of Diane and Rita for the respective quarter sections of the Morrison Land they planned to purchase.

Gary was a high school teacher and coach, and a respected member of the community. Prior to January 2003, he had not been involved in purchasing or leasing farmland. Gary died unexpectedly before the evidentiary hearing in this disciplinary case. But his deposition was taken in a related civil case filed by Wayne and Kurt against Chvala and Gary, and a transcript of that deposition was received as an exhibit during the disciplinary hearing. In his deposition, Gary testified he did not remember how the Morrison Land deal was first presented to him, but he consistently described it as "my land" and insisted that "[i]t has nothing to do with [Chvala], she's got her own situation."

Gary testified he and Chvala decided the Morrison Land would be titled in his name, but admitted that their "joint funds" were used to purchase the land and that Chvala was obligated on a promissory note for a substantial portion of the purchase price. Gary's deposition testimony also showed he was unfamiliar with virtually all the details of the deal. When asked whose idea it was to lease the property back to Wayne and Kurt, Gary said, "Well, I'm not really sure." Gary did not understand and could not explain the triple-net lease provisions, and when asked why he chose such a lease arrangement for the deal, Gary testified he got the idea from forms he had seen around Chvala's law office. Gary was not able to explain how he planned to make a profit on the investment as it was

structured. When pressed, he testified, "Well, my intent was that eventually I thought with a lease option that with the price of land going the way it was that eventually that I was going to make a profit on the whole situation. I wasn't going to run the thing just to break even."

The referee found, based on Gary's testimony, that it was

> hard to believe that Gary, who had no experience in buying and leasing farm ground, initiated the idea of not loaning the Kaups the money, but rather buying the land and then leasing it to the Kaups on a 10-year triple net lease with an Option to Purchase at the end of 10 years.

The referee further found that Wayne and Kurt's testimony about the discussions and agreements reached during the January 12, 2003, meeting was credible, and he expressly found that Chvala's testimony was not credible.

(b) Closing on Morrison Land

Closing on the Morrison Land occurred in February 2003. Gary became the titled owner of a half section of the Morrison Land, which he purchased for $497,637. To finance the purchase, Gary used approximately $240,000 from Chvala's personal savings account, and he and Chvala jointly borrowed the balance of the purchase price. Both Gary and Chvala signed the promissory notes and loan agreements.

Rita became the titled owner of a quarter section of the Morrison Land, and Diane took title to the other quarter section through Sandyland, LLC, an entity formed by Chvala expressly for that purpose.

Chvala prepared the deeds, transfer statements, and bills of sale for Gary, Sandyland, and Rita.

(c) Termination of Prior Leases

After the closings, Chvala drafted lease termination notices on behalf of all of the new owners of the Morrison Land—Gary, Sandyland, and Rita. In the notices, Chvala represented herself as the attorney for each Morrison Land owner. In a subsequent letter dated February 28, 2003, and addressed

collectively to "Diane, Rita, Wayne and Kurt," Chvala provided copies of the lease termination notices she had sent to the former tenants, explaining:

> I felt like the owner needed to terminate the lease in order to prevent an argument by a tenant that we as owners could only terminate if the property was sold to another third party. Therefore, I think we are covered in that both Morrisons and us have forwarded notices of termination of the existing lease to the current tenants and sub-tenant.
>
> If you have any questions regarding this matter, please let me know.

Chvala testified that she prepared the termination notices "for all of the parties to ensure that the previous tenants were not going to show up and try to farm this property."

(d) Lease and Option Agreements on Morrison Land

At the time of closing, the leases and option agreements governing the Morrison Land had not yet been prepared. Wayne testified that he and Kurt were not concerned by the delay because "[w]e trusted that what we talked about [with Chvala] is what was going to happen." Eventually, Chvala prepared all of the lease and option agreements that governed Wayne and Kurt's relationship with the three Morrison Land owners. The agreements were similar, but we focus primarily on the terms of the agreements that governed the half section of the Morrison Land titled in Gary's name.

(i) Lease Agreement

Chvala prepared a 10-year triple-net lease agreement which Gary signed as the lessor, and Wayne and Kurt signed as the lessees. Paragraph 3 of the lease agreement provided that base rent was "a sum that constitutes a net net net seven percent (7%) annual return on the total cost to LESSOR of the land," which amounted to "an annual rental of $34,835.00 per year." The lease agreement also contained paragraph 21, which provided:

> 21. REPRESENTATION. The law firm of STROPE, KROTTER & GOTSCHALL, P.C. has prepared this Lease Agreement. The law firm of STROPE, KROTTER & GOTSCHALL, P.C. has in the past and presently performs legal services for both LESSOR and LESSEE in unrelated matters. LESSOR AND LESSEE, by signing this document, hereby acknowledge and agree that STROPE, KROTTER & GOTSCHALL, P.C. is not acting as an attorney for either party to this contract. LESSOR and LESSEE expressly acknowledge and agree that they have had an opportunity to have an attorney of their choosing review this Lease Agreement and freely and voluntarily sign this Agreement without reliance upon any representations or advice from STROPE, KROTTER & GOTSCHALL, P.C. All parties agree that they have not relied on the legal representation or advice of . . . CHVALA in this matter and that they have had an opportunity to have any attorney of their choosing review this Agreement and sign the same voluntarily and without reliance upon any representation or advice from . . . CHVALA.

Despite the representation in paragraph 21 that Chvala "[was] not acting as an attorney for either party to this contract," she admitted during the evidentiary hearing that she was advising Gary in the transaction "as his spouse." None of the other lease agreements on the Morrison Land indicated on whose behalf the agreement was prepared.

(ii) Option Agreements

Chvala prepared separate option agreements for Wayne and Kurt to sign with all three Morrison Land owners. None of the option agreements indicated whether they were prepared on behalf of the respective Morrison Land owner, or Wayne and Kurt, or both. Again, we focus primarily on the terms of the option agreement involving the half section of the Morrison Land titled in Gary's name.

That option agreement identified Gary as the "seller" and identified Wayne and Kurt as the "purchasers" of the half section of the Morrison Land. It gave Wayne and Kurt an exclusive option to purchase the half section of land for $497,637. They could exercise the option any time after November 1, 2010, until 5 p.m. on March 1, 2013, by providing written notice thereof to Gary either in person or by registered mail at the Atkinson address where Chvala and Gary resided at the time the option agreement was executed. The option agreement contained no disclaimer similar to that in paragraph 21 of the lease agreement.

At the time the option agreement was signed, the assessed value of the Morrison Land was $528 per acre. Ten years later, due to a significant rise in land values, the assessed value was $2,167 per acre, and the market value was significantly higher.

(e) Modification of Rents

Bill Gaines is a certified public accountant who, at all relevant times, represented Wayne and Kurt and their various businesses, Diane and her businesses, and Chvala and Gary and their businesses. Chvala's files indicate that in July and November 2003, she talked with Gaines about the Morrison Land leases and the impact of the "passive activity rules" governing related parties. After meeting with Gaines in November 2003, Chvala learned that modifying the Morrison Land lease agreements to a modified crop-share arrangement would result in more favorable tax treatment for the landowners.

On November 25, 2003, Chvala sent a letter to Wayne and Kurt on her firm letterhead. The other Morrison Land owners were copied on the letter. Chvala reported that Gaines had suggested "on all of the leases we use a modified crop share arrangement and have you pay a dollar amount for the crops produced on the real estate and then reimburse you for fertilizer, chemicals, seed and machine hire to arrive at the same net." Chvala's letter advised, "This income will still not be subject to social security tax but then would be considered as

active income or loss and not subject to the passive activity rules." Her letter also advised Wayne and Kurt, "Before we go any further, please check with the FSA Office to insure the two of you can still receive all government payments if a crop share arrangement is in place." She added, "If you would rather I contact them, please let me know."

Kurt testified that he understood this change in rents was designed to provide a tax benefit to the owners of the Morrison Land. He and Wayne did not object to the change, because they had "trust and confidence" in Chvala. According to Kurt, because Chvala had asked for the change, they were "willing to do it."

Regarding the rent modification, the referee found:

> [Chvala] determined that for income tax purposes it would be advantageous if the Kaups' cash lease was changed to a modified crop share. However, there was no benefit to Wayne and Kurt to make this change if it meant that their annual rental amount could increase. To address that concern, [Chvala] told Wayne and Kurt that even though they would call the arrangement a modified crop share, the annual cash rental amount would not change. All Wayne and Kurt had to do was manipulate the input expense numbers and crop sale numbers to arrive at the same net rental amount.

The record shows that after November 2003, Wayne and Kurt, doing business as K & W Farms, paid rent using the modified crop-share arrangement suggested in Chvala's letter. To facilitate the modified rents, Chvala instructed Wayne and Kurt to complete an annual "[r]ent [w]orksheet," which they did. No written changes or addenda were made to the previously executed lease agreement.

2. Transfer of Ownership to TTC Enterprises

In December 2003, Chvala and Gary formed TTC Enterprises, LLC, and Gary transferred title of the half section of the Morrison Land to TTC Enterprises. Chvala prepared the legal

documents necessary to both create TTC Enterprises and to effectuate the title transfer of the Morrison Land. Gary owned 99 percent of the shares in TTC Enterprises, and Chvala owned the remaining 1 percent. Chvala notified Wayne and Kurt that ownership of the half section of the Morrison Land had been transferred to TTC Enterprises, but she did not advise them of her ownership interest in the entity.

Throughout the 10-year lease term, Wayne and Kurt farmed the Morrison Land as part of their farming operation, K & W Farms, which Chvala reorganized as a partnership in 2006. Wayne and Kurt delivered to Chvala at her law office rent checks for the half section of the Morrison Land owned by TTC Enterprise. The first year the rent was made payable to Gary, and thereafter, the checks were made payable to TTC Enterprises. When the Kaup brothers received checks from TTC Enterprises regarding the Morrison Land, they were signed by Chvala and made payable to "K & W Farms."

3. Premier Pork, LLC, Builds Hog Facility

Premier Pork, LLC, is an entity Chvala created for Wayne and Kurt in 1998. At all relevant times, Chvala was the attorney for Premier Pork. Wayne, Kurt, Diane, and Rita were all members of Premier Pork when it was organized. In late 2004, Wayne and Kurt met with Chvala to discuss plans for Premier Pork to construct a hog finishing facility on nonirrigated portions of the Morrison Land.

Their plan was to construct the facility on a 5-acre triangle of the Morrison Land owned by TTC Enterprises and an adjacent 5-acre triangle of the Morrison Land owned by Rita. Because it was essential to the hog finishing business that manure generated by the hogs could be spread across the entire section of the Morrison Land, Premier Pork also needed to obtain manure easements from all of the owners of the Morrison Land. Wayne testified they would never have proposed building the hog confinement facility on the Morrison Land if there was any question they were not going to "own

the land later." He testified that Chvala and Gary were "[v]ery accommodating" of their plan.

Wayne and Kurt asked Chvala to assist them with the land transfers and easements needed to start the hog finishing operation on the Morrison Land. Wayne testified that he and Kurt obtained the necessary measurements of the 5-acre tracts and provided the information to Chvala so she could prepare legal descriptions and warranty deeds conveying the tracts from TTC Enterprises and Rita to Premier Pork. Chvala admitted she communicated with Wayne about these transactions, and she further admitted that Wayne asked her office to prepare the necessary warranty deeds, real estate transfer statements, and manure easements. But Chvala denied preparing the necessary legal documents, testifying instead that her legal assistant prepared the documents under her supervision.

TTC Enterprises transferred the 5 acres from its half section of the Morrison Land to Premier Pork on April 19, 2005. Wayne and Kurt's annual rent on the remaining half section of the Morrison Land owned by TTC Enterprises did not change after the transfer. As part of the TTC Enterprises transaction, Chvala also prepared a "Real Estate Transfer Statement Form 521." This form stated TTC Enterprises was the grantor, and Chvala signed the form as the representative for the grantee, Premier Pork.

After acquiring the 5 acres from both TTC Enterprises and Rita and obtaining manure easements from all owners of the Morrison Land, the Kaup brothers spent nearly $1 million dollars to build the hog finishing facility on the Morrison Land.

4. Legal Representation of Kaup Brothers

The referee found that throughout the 10-year term of the leases on the Morrison Land, Chvala continued to represent Wayne and Kurt in their personal and business matters. We summarize just a fraction of the evidence of that representation:

- From 2002 to 2009, Chvala provided ongoing representation to K & W Trucking, Inc., an entity owned by Wayne and Kurt and used to haul grain;
- From 2003 to 2011, Chvala provided ongoing representation to Green Valley Hay & Mulch, LLC, a hay brokerage business owned by Wayne;
- From 2004 to 2006, Chvala provided ongoing representation to Wayne and Kurt regarding their various business and farming operations, including K & W Farms;
- From 2006 through 2011, Chvala provided ongoing representation to K & W Farms after it was reorganized as a partnership;
- From 2004 through 2007, Chvala provided ongoing representation to Premier Pork, the hog finishing business owned by Wayne and Kurt and others;
- From 2004 through 2009, Chvala provided estate planning services to Wayne;
- In 2005 and 2006, Chvala provided estate planning services to Kurt; and
- In 2007, Chvala and her law partner represented Wayne in his divorce.

Moreover, during the 10-year term of the Morrison Land leases, Chvala regularly communicated with Wayne and Kurt regarding a variety of legal matters, including some relating to the Morrison Land. For instance, in October 2004, Chvala met with Wayne and Kurt to discuss and coordinate their various land, farming, and livestock matters. Chvala's notes from that meeting show they discussed the Morrison Land, including the Kaup brothers' plan to construct the hog finishing facility on that land. In July 2006, Chvala met again with Wayne and Kurt to discuss their business planning needs, and Chvala's notes from that meeting included reference to K & W Farms' farming operation on the Morrison Land and Premier Pork's new hog finishing facility on the Morrison Land.

5. February 23, 2010, Meeting

On February 23, 2010, Wayne and Kurt met with Chvala and discussed at least three matters: certain buy-sell arrangements involving their businesses, the operating structure of their businesses, and the option to purchase the half section of the Morrison Land owned by TTC Enterprises. With respect to the option to purchase, Chvala's notes from that meeting say "R/E / Lease - documents control, their option - OK to continue lease."

Chvala kept a personal file titled "Chvala/Kaup Option and Lease," and during the evidentiary hearing, she offered a memorandum to that file dated February 25, 2010, which she prepared concerning the February 23 meeting. This memorandum stated in part:

> We discussed the Lease Agreement and Purchase Option that Gary/TTC have with Wayne and Kurt. I told them that Gary had no problem continuing the lease arrangement for the time being. We also discussed the fact that I do their work on other legal matters and we have differing interests on this matter and that I cannot represent them on this issue, as I will be protecting Gary and my interests, and they should feel free to obtain separate, other representation on this arrangement. They said they understood that and then asked if we intended to honor the agreements and I responded "certainly, they are legally binding documents, we made the deal and we intend to follow the terms of the agreements."

Wayne testified that the statements described by Chvala in this memorandum never happened. Specifically, he testified Chvala "[n]ever" discussed that her interest in the lease and option agreements differed from theirs and "[n]ever" told them to consult other legal counsel regarding the Morrison Land. According to Wayne, when they discussed the option agreement during the February 23, 2010, meeting, the focus was on whether Chvala and Gary were interested in selling at least a portion of the half section of the Morrison Land owned by

TTC Enterprises early, before the option opened. Wayne testified that Chvala told them they were not interested in splitting the land, but did want to find other land to invest in when the time came to exercise the option. The referee's report indicates he found Wayne's testimony on this issue more credible than Chvala's.

6. April 15, 2011, Letter

In January 2011, during a time when the option period was open, Kurt contacted Chvala's office and asked for signed copies of the agreements he and Wayne had with the Morrison Land owners. Approximately 3 months later, on April 15, Chvala responded to this request in a letter to Kurt, enclosing a copy of the option agreement between Gary and the Kaup brothers. Her letter advised that she checked her files but could not find signed copies of the option agreements with either Rita or Sandyland. The April 15 letter also stated:

> As you know, I perform various legal work for you and your entities as needed or directed by you. We have previously discussed the Lease Agreement and Purchase Option and I have informed you that we have differing interests and I cannot represent you on those matters, and you should feel free to obtain separate, other representation on that arrangement. It is our intention to continue the lease arrangement this year as in the past.
>
> If you wish to discuss further, please feel free to contact me.

7. November 12, 2012, Telephone Call

On November 12, 2012, Kurt telephoned Chvala at her office. He knew the option was open at this time, and he testified that he called to "relay[] to her again that we were wanting to buy their ground." During the call, Kurt told Chvala they were "ready and willing" to purchase the half section of the Morrison Land. He testified that Chvala responded by saying that she was busy, that she and Gary were looking for other land to invest in, and that she was looking "to do something

more towards the end of the year." Kurt testified Chvala did not tell him they needed to do anything else to exercise the option, and after the November 12 telephone conversation, Kurt expected they would be able to purchase the half section of the Morrison Land from TTC Enterprises at the end of 2012. When asked whether he relied on that telephone conversation with Chvala, Kurt testified, "Very much so." He also testified that because he always dealt with Chvala with respect to the Morrison Land, he never even thought about communicating directly with Gary.

Chvala agreed that Kurt telephoned her office on November 12, 2012, but she testified it was to discuss settling up the modified rent amounts for that year. She admitted that during the call Kurt mentioned they were working on financing for the option, but she denied that Kurt said, "I want to exercise the option." She also denied telling Kurt that she and Gary were looking for other investment property. The day after this telephone call, Wayne and Kurt wrote a check to TTC Enterprises for the 10th and final annual rent payment due under the lease agreement. The referee found that, at this point, Chvala and Gary had "received the 7% annual return on their investment as agreed to in January 2003."

Kurt subsequently learned of some land for sale known as the Waldo Quarters. On or about December 12, 2012, Kurt called Chvala to inform her the Waldo Quarters land was available. Chvala responded in a text message to Kurt the same day: "Not interested in Waldo Qtrs . . . probably nothing this year . . . ."

8. Communication With Bank and Title Company

On or about December 13, 2012, 1 day after Chvala told Kurt she was not interested in buying the Waldo Quarters, Kurt contacted Jon Schmaderer, president of the local bank, to arrange financing to purchase the half section of the Morrison Land owned by TTC Enterprises. Kurt told Schmaderer the deal would be done by the end of the year. That same day,

Schmaderer asked bank employee Nicole Cadwallader to "order a $500,000 title commitment on K&W Farms" and provided a legal description of the half section of the Morrison Land owned by TTC Enterprises. Schmaderer told Cadwallader he thought Chvala would do the closing. Cadwallader replied that she would contact the title company to find out the relevant information.

Cadwallader did so on December 18, 2012, and the title company told her it needed the seller's name, sale price, and the legal description of the property or a copy of the purchase agreement to order the title insurance. During this conversation, Cadwallader told the title company that Chvala was handling the closing.

On December 19, 2012, the owner of the title company called Chvala and left a message with her secretary asking Chvala to call him "ASAP." Chvala knew the owner and had done business with him in the past. The secretary told Chvala that the owner of the title company had received "a note from [Cadwallader] . . . something about K&W Farms. He doesn't have any info to go on. [Cadwallader] said you were handling!" Chvala testified that she read the message, but did not understand it to be referencing the purchase option with Wayne and Kurt. She did not respond to the message.

9. December 19, 2012, Telephone Call

Also on December 19, 2012, Cadwallader telephoned Chvala to discuss the information she needed to order the title insurance. Cadwallader testified that the conversation lasted 1 minute or less and that she "asked if [Chvala] was handling the [K & W Farms] closing." According to Cadwallader, Chvala seemed to recognize what she was talking about and did not seem confused. Chvala told Cadwallader the closing was not going to happen before the end of the year, but was "'[l]ooking more towards March.'"

Chvala recalled Cadwallader asking whether she had a purchase agreement and saying Wayne and Kurt needed to close by the end of the year. But according to Chvala, she did

not realize Cadwallader was referencing the Morrison Land and instead thought she was referring to the Waldo Quarters, which Chvala understood Wayne and Kurt were interested in buying.

10. Title Commitment Email

After the telephone call with Chvala on December 19, 2012, Cadwallader sent an email to the bank stating:

> I just talked to [Chvala] and the deal between her and K&W is not happening this year. She said she cannot get it done and is looking more toward March for a closing date. I have talked to [the loan officer] and he was going to let Kurt know. McCarthy is working on the title insurance and will have that to us but no closing for now.

A title commitment was sent via email from the title company to both Cadwallader and Chvala on December 21. The title commitment clearly showed the land to be purchased by Wayne and Kurt was the half section of the Morrison Land owned by TTC Enterprises. Chvala testified she did not open this email until sometime in January 2013. Once she opened the email and saw the title commitment, she admits she knew Wayne and Kurt were trying to move forward with closing on the half section of the Morrison Land owned by TTC Enterprises. Despite this knowledge, Chvala did nothing. Instead, she waited until after the option period closed to contact Wayne and Kurt. When asked why, Chvala testified, "I thought having communication with them would have been a violation of the ethical rules. I distanced, advised I could not represent them, and I did not want to give them any communication or advice at all."

Wayne testified that he and Kurt both knew Chvala was aware they wanted to buy the half section of the Morrison Land, so when the closing did not occur at the end of 2012 they simply "trusted it was going to happen" based on "how [Chvala's] schedule" worked. Wayne was not concerned when the option period closed on March 1, 2013, because he had "an immense amount of trust" in Chvala.

11. March 2013 Communications

By its terms, the option terminated at 5 p.m. on March 1, 2013. Kurt called Chvala's office on March 6, but Chvala did not take his call, even though she was in the office. On March 8, Kurt sent an email to Chvala which stated:

> I know I have talked to you about our intent to purchase the S ½ of Section 6-31-14 a couple of times back in the spring of 2011 and again in December of 2012. . . . Schmaderer told me he was going to order the Title Commitment back in December. I believe that has been delivered to the bank and they are just waiting for a Purchase Agreement. I was wondering if we could get together with you hopefully this week and get this finished up or if that won't work at least get something done here in the month of March.

The same day this email was received by Chvala, it was faxed by Gary to an attorney he had retained to represent him in the matter. Gary's attorney then sent Wayne and Kurt a letter by certified mail advising that the purchase option and lease had expired, but that Gary was willing to enter into a new lease agreement with them. After receiving this certified letter, Kurt telephoned Gary because he was "confused about why we were getting [the letter] after everything I had been doing towards the end . . . of 2012." According to Kurt, Gary told him, "'That's [Chvala's] deal.' . . . 'You'll have to talk to her about that.'"

On March 12, 2013, Chvala wrote a letter to Wayne and Kurt. She acknowledged they had been attempting to reach her for several days, and then stated:

> Years ago, when the leases were drafted, I handled those matters and included disclosure and obtained your consents to my doing so.
>
> Now, I think changes in the law make it prudent that I refrain from providing services to you in connection with new contracts or legal matters with my husband or our company. I prefer not to continue to provide service even with consents and waivers of possible conflicts.

In response, Wayne and Kurt hired another attorney who, on March 15, 2013, sent Gary a letter via registered mail to the address listed in the option agreement, notifying him that Wayne and Kurt were exercising their option to purchase the half section of the Morrison Land. Gary's attorney rejected this as a "nonconforming attempt to exercise the option at issue." On April 2, Wayne and Kurt tendered a cashier's check for the option purchase price to Gary and TTC Enterprises. This too was rejected.

12. Civil Suit and Settlement

On April 8, 2013, Wayne and Kurt filed a civil lawsuit in the district court for Holt County against Gary, Chvala, and TTC Enterprises. Gary died unexpectedly in July, and the civil suit was revived with Chvala as Gary's personal representative. The parties eventually settled the civil suit, and as a result of the settlement, Wayne and Kurt purchased the half section of the Morrison Land owned by TTC Enterprises for $1.8 million—more than 3½ times the purchase price of $497,637 set out in the option agreement.

13. Procedural History of Disciplinary Action

While the civil lawsuit was pending, Chvala contacted the Counsel for Discipline to self-report that there had been "some suggestion" her actions with respect to the Morrison Land may have violated the disciplinary rules. Wayne and Kurt subsequently filed a grievance against Chvala with the Counsel for Discipline, also regarding the Morrison Land. The Committee on Inquiry of the Third Judicial District reviewed the matter and determined there were reasonable grounds for discipline against Chvala. Formal charges were filed on July 26, 2017, and amended formal charges were filed on January 29, 2018.

Prior to September 1, 2005, the conduct of Nebraska attorneys was governed by Nebraska's Code of Professional

Responsibility. Since that date, the conduct of Nebraska attorneys has been governed by the Nebraska Rules of Professional Conduct. Because the alleged disciplinary violations against Chvala span from 2003 through 2013, Chvala was charged with violations of various provisions under both the code and the rules. Some of the sections of the Nebraska Rules of Professional Conduct have been amended after 2013, but for purposes of this opinion, the current version of the rules will be referenced, because the amendments do not impact the applicability of the rules to Chvala's alleged disciplinary violations. Chvala denied all charges.

Retired Judge Paul W. Korslund was appointed as referee, and a 4-day evidentiary hearing was held. The referee issued a 99-page report and recommendation finding multiple violations of the disciplinary provisions and recommending Chvala be disbarred. Chvala timely filed exceptions to the referee's report and recommendation.

III. STANDARD OF REVIEW

[1,2] Attorney discipline cases are original proceedings before the Nebraska Supreme Court. As such, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[1] Violations of disciplinary rules must be established by clear and convincing evidence.[2]

IV. ANALYSIS

[3-5] The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline evaluated under the particular facts and circumstances of the case.[3] In this appeal, Chvala

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[1] See *State ex rel. Counsel for Dis. v. Nimmer*, 300 Neb. 906, 916 N.W.2d 732 (2018).

[2] See *id.*

[3] *State ex rel. Counsel for Dis. v. Jorgenson*, 302 Neb. 188, 922 N.W.2d 753 (2019).

contends the referee erred in finding she committed any violation of a disciplinary provision and further erred in recommending disbarment. Where, as here, a party takes exception to the referee's report, this court conducts a trial de novo on the record in which we reach a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[4] Here, the referee made express determinations regarding the relative credibility of the testimony of Chvala and Wayne and Kurt on certain matters. When a referee makes an express determination about the relative credibility of witnesses, we give weight to that determination in our de novo review, but we are not bound by it.[5]

We have conducted a trial de novo on the record, and we address below those disciplinary violations alleged in the amended formal charges which we find were proved by clear and convincing evidence.

1. Preliminary Issues

In defending against these disciplinary charges, Chvala emphatically denies that she (1) played any role whatsoever in the Morrison Land deal or (2) provided any legal representation regarding the Morrison Land. We soundly reject both arguments. Instead, we find clear and convincing evidence that Chvala played a central role in negotiating the purchase of the half section of the Morrison Land, that Chvala was an owner of that land, and that Chvala provided simultaneous legal advice and representation to both the lessors and the lessees of the Morrison Land.

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[4] *Nimmer, supra* note 1.

[5] See *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012).

(a) Chvala Negotiated Morrison Land Deal

Chvala flatly denies any direct involvement in the January 12, 2003, meeting with the Kaup brothers. She claims the decision to purchase the Morrison Land, and all the decisions regarding that investment, were made by Gary. In arguing that no disciplinary provisions are implicated by her conduct, Chvala's brief to this court states, "[She] did not buy the Morrison Ventures land or lease it to Kaups; her husband did. So the [disciplinary] Rule does not apply."[6]

The referee expressly found that, to the extent Chvala testified she was not involved in either the January 12, 2003, meeting or in decisions regarding how to structure the Morrison Land investment, her testimony was "implausible and not credible." Having reviewed the record de novo, we agree.

There is clear and convincing evidence that once Wayne and Kurt approached Chvala about investing in the Morrison Land, she became the primary negotiator of the resulting deal. The record fully supports the referee's findings that (1) Chvala was the one who decided to purchase a half section of the Morrison Land and lease it back with an option to purchase rather than loan Wayne and Kurt money to purchase a quarter section of the land outright, (2) Chvala was the one who negotiated the terms of the lease agreement with Wayne and Kurt, and (3) Chvala was the one who decided the half section of the Morrison Land would be titled in Gary's name for estate planning purposes.

(b) Chvala Was Investor and Owner

The record also refutes Chvala's claim that she had no ownership interest in the Morrison Land. It is true that the half section of the Morrison Land was initially titled in only Gary's name, but roughly half the funds used to purchase the land came from Chvala's personal bank account and she was obligated on the promissory note that secured the remaining portion of the

[6] Brief for respondent at 30.

purchase funds. She therefore had a personal financial interest as an investor in the half section of the Morrison Land from the date of purchase forward. Moreover, Chvala obtained an ownership interest in the Morrison Land once Gary transferred title of his half section to TTC Enterprises, an entity in which Chvala was a shareholder. On this record, we find Chvala was as much an investor and owner in the half section of the Morrison Land as was her husband, and we soundly reject her claims to the contrary.

(c) Chvala Acted as Attorney Regarding Morrison Land

Chvala generally denies acting as an attorney regarding the Morrison Land. She specifically denies either (1) preparing the legal documents related to the Morrison Land transactions or (2) representing any client in matters relating to the Morrison Land. We address each argument in turn, and we reject both.

(i) Chvala Prepared All Relevant Legal Documents

Throughout her testimony, Chvala resisted being characterized as the attorney who prepared the legal documents relating to the Morrison Land. The following exchange is one such example from her testimony:

> [Counsel for Discipline:] [Y]ou participated in the transfer of approximately 4.7 acres of land from TTC Enterprises to Premier Pork in April of 2005; correct?
>
> [Chvala:] No.
>
> Q: No. You didn't participate in that?
>
> A: No.
>
> Q: You didn't draft any of the documents?
>
> A: My office did.
>
> Q: Who in your office?
>
> A: Barb.
>
> Q: Is she a lawyer?
>
> A: No.

Q: No. Did Barb on her own create these documents?

A: Yes.

Q: Without any input from you? Is that what you're testifying?

A: I prepared the deed forms. I had the deed forms in my office available. I oversee my staff. When this transaction came up, I communicated with Wayne. He said what he wanted. He wanted a deed from Gary and an easement.

Q: Okay. And you prepared those in your office?

A: No. I told him to deliver the documents, and I would get them to Gary.

Q: Deliver what documents?

A: The deed and the easement.

Q: Who prepared those?

A: He didn't have time to go have them done somewhere else, so asked Barb to prepare those documents.

Q: Who asked Barb?

A: Wayne.

Q: Wayne came to your office and asked Barb to prepare documents regarding a transaction with TTC Enterprises?

A: Yes. And said that his mother[, Diane,] would be sending the legal descriptions.

Q: And so Barb was providing legal representation to Wayne . . . ?

A: No. Our office was the scrivener on those deeds with the legal description that Diane with Wayne provided by fax to Barb.

Consistent with the above testimony, Chvala generally took the position that the legal documents pertaining to the Morrison Land, including warranty deeds in 2003 and 2005, the lease agreements, the option agreements, and the manure easements, were all prepared by nonattorney staff in her office using standard forms she had prepared previously. In her testimony, Chvala repeatedly described her role in preparing those legal

documents as that of a "scrivener." In her brief to this court, she repeats this general argument, urging us to find that when a lawyer acts as a "scrivener" they are not acting as an attorney for any party.[7] We firmly reject her invitation.

[6] Even assuming without deciding that an attorney may, consistent with the ethical rules, enter into a limited scope agreement[8] for the sole purpose of reducing to writing an agreement separately negotiated by parties with differing interests, there was no limited scope agreement here with respect to any of the Morrison Land documents Chvala prepared. Chvala's argument that she should be treated only as a scrivener appears to be an attempt to minimize the role she played as an attorney by suggesting she had no meaningful role in preparing essential legal documents that related to the Morrison Land. But it hardly needs saying that a lawyer is ultimately responsible for the conduct of his or her employees and associates in the course of the professional representation of the client.[9]

Only lawyers may engage in the practice of law in Nebraska, and that includes "[s]election, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person."[10] Nonlawyer assistants in a law office act under the supervision of a lawyer,[11] and they "act for the lawyer in rendition of the lawyer's professional services."[12] A lawyer may not avoid responsibility for misconduct by hiding behind an employee's behavior, nor may the lawyer avoid a charge of unprofessional conduct by contending the legal work was performed by an employee.[13] And as

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[7] *Id.* at 21.

[8] See Neb. Ct. R. of Prof. Cond. § 3-501.2 (rev. 2016).

[9] *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

[10] Neb. Ct. R. § 3-1001(B).

[11] Neb. Ct. R. § 3-1005.

[12] Neb. Ct. R. of Prof. Cond. § 3-505.3, comment 1.

[13] See *Kirshen, supra* note 9.

previously stated, a lawyer is ultimately responsible for the conduct of his or her employees and associates in representing clients.[14]

It is thus immaterial, for purposes of this disciplinary action, whether Chvala personally prepared the legal documents relating to the Morrison Land or had her office staff prepare them for her review and approval. The evidence is clear and convincing that Chvala was the attorney responsible for preparing most, if not all, of the essential legal documents related to the Morrison Land. We reject, as both factually and legally unsound, Chvala's attempts to distance herself from the preparation of the essential legal documents in an effort to avoid the disciplinary provisions governing attorneys.

(ii) Chvala Represented Lessors and Lessees of Morrison Land

Despite preparing all of the pertinent legal documents relating to the Morrison Land, Chvala denies representing any of the Morrison Land lessors (Gary, TTC Enterprises, Sandyland, and Rita) or lessees (Wayne and Kurt) in any matter related to the Morrison Land. Chvala does not deny that during the term of the Morrison Land lease agreements all these parties were her existing clients in other matters, but she argues that she did not represent any of these parties in matters related to the Morrison Land. We find her position in this regard somewhat astonishing.

[7] Although Chvala did not have a discreet engagement agreement with any of the lessors or lessees with respect to the Morrison Land, that does not end our inquiry. An attorney-client relationship with respect to a particular matter may be implied from the conduct of the parties.[15] And here, we find clear and convincing evidence, particularly when viewed from the standpoint of the lessors and lessees of the Morrison Land,

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[14] See *id.*

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

the conduct of the parties shows that Chvala was the attorney everyone looked to for legal advice related to the Morrison Land and that she was the attorney who prepared all of the legal documents necessary to achieve their goals and protect their interests regarding that land.

[8] Generally speaking, an attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.[16] In appropriate cases the third element of an attorney-client relationship may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them, and the attorney, aware of such reliance, does nothing to negate it.[17]

Here, the record shows that from January 12, 2003, until at least March 12, 2013, all those involved with the Morrison Land, including the Kaup brothers, sought and relied upon Chvala's assistance in transactions related to the Morrison Land. Sometimes Chvala's assistance was specifically requested on a Morrison Land matter—like when she was asked to form Sandyland for Diane to hold and manage the Morrison Land, when she was asked to prepare the warranty deeds and transfer statements on behalf of all three Morrison Land purchasers, and when she was asked by Wayne to prepare the warranty deeds so Premier Pork could obtain title to portions of the Morrison Land from TTC Enterprises and Rita. But in most instances, Chvala provided legal advice and assistance regarding the Morrison Land without a specific request. It appears she did so on her own initiative, performing the legal work she felt was necessary.

For instance, shortly after closing on the Morrison Land occurred, Chvala prepared and sent lease terminations to all of

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[16] *Id.*

[17] *Id.*

the prior tenants, representing herself as the attorney for each of the three Morrison Land owners. There is no evidence the Kaup brothers or any of the three landowners asked Chvala to take this action on their behalf, but Chvala admits that she prepared and sent the lease terminations on behalf of "all the parties" and that she did so "to ensure that the previous tenants were not going to show up and try to farm" any of the Morrison Land. Chvala forwarded copies of the lease termination notices in a letter she collectively addressed to "Diane, Rita, Wayne and Kurt" explaining to all that she felt the notices were necessary to protect against an argument by the prior tenants and subtenants that they still had rights to farm the Morrison Land. Chvala's actions in this regard would reasonably lead Diane, Rita, Wayne, and Kurt to believe she was protecting and representing their collective interests in the matter, and Chvala did nothing to negate that belief.

Chvala prepared all of the lease agreements and all of the option agreements that governed the relationships between the owners of the Morrison Land as lessors and Wayne and Kurt as lessees. In the lease agreement between Gary and the Kaup brothers, Chvala included language stating that she was "not acting as an attorney for either party to this contract." But no such language appears in any of the other lease agreements, or in any of the three option agreements. Instead, it is not apparent from the face of those agreements, or from the testimony of the parties, whether Chvala prepared those agreements on behalf of the lessors, the lessees, or both. What is apparent is that even absent evidence that a particular client directed Chvala to prepare the lease and option agreements on their behalf, the agreements were necessary to accomplish the investment goals and to protect the financial interests of all those involved in the Morrison Land transactions, whether as lessors or lessees. We therefore conclude that, on this record, with the exception of the lease agreement Chvala prepared for Gary and the Kaup brothers, her conduct in preparing all the necessary lease and option agreements for all involved parties would reasonably lead those parties to believe Chvala was

protecting and representing their interests in the matter. Chvala did nothing to negate that belief.

In November 2003, Chvala sent a letter to Wayne and Kurt on her firm letterhead, with copies to all Morrison Land owners, reporting that Gaines, their mutual accountant, had suggested "all of the leases" should use a modified crop-share arrangement rather than a triple-net arrangement. There is no evidence that any lessor or lessee specifically asked Chvala to modify the rental arrangement, but Chvala presented the arrangement as benefiting all of the Morrison Land owners, and the record shows that after Chvala sent the letter, Wayne and Kurt began paying rent under the modified arrangement. In the same letter, Chvala offered to contact the "FSA Office" on behalf of Wayne and Kurt to ensure they would still be able to receive government payments if a modified crop-share arrangement was in place. This is yet another example that would lead the parties, whether they be lessors or lessees, to believe Chvala was representing their collective interests regarding the Morrison Land.

We further note that even Chvala's own words support a finding that she considered herself to have an attorney-client relationship with Wayne and Kurt on matters related to the Morrison Land. In the letter she sent them on March 13, 2013, she stated that in the future she would "refrain from providing services" to them "in connection with new contracts or legal matters with my husband or our company." We read this as an implied admission that she had been providing legal services to Wayne and Kurt in connection with Gary and TTC Enterprises, and thus the Morrison Land, and the record bears that out.

The evidence demonstrates that all those involved with the Morrison Land, whether as lessors or lessees, were existing clients of Chvala's in other matters and the legal issues involved in the Morrison Land transactions were within Chvala's professional competence and were similar to legal services Chvala had provided previously to these same clients. Everyone involved with the Morrison Land relied on Chvala

to prepare the legal documents that established and governed all their legal interests regarding the Morrison Land. And everyone involved with the Morrison Land reasonably relied on Chvala's legal advice and expertise to protect their interests and accomplish their goals.

Given the collective approach Chvala took to handling all of the legal matters that arose in connection with the Morrison Land—whether asked to or not—and the reasonable expectations that conduct created in her existing clients, it should come as no surprise that we find Chvala represented, either expressly or impliedly, all of the individuals and entities involved in the transactions related to the Morrison Land.

(iii) Disclaimers of Attorney-Client Relationship

In reaching this conclusion, we do not ignore Chvala's testimony that she orally advised Wayne and Kurt, first during the meeting of January 12, 2003, and later during a meeting on February 23, 2010, that even though she was their lawyer in other legal matters, she could not represent them in matters related to the Morrison Land because Gary was involved. Nor do we ignore evidence of the disclaimer contained in paragraph 21 of the lease agreement between Gary and the Kaup brothers or the letter Chvala sent the Kaup brothers in April 2011 referencing prior oral disclaimers. But as we explain below, none of this evidence changes our conclusion that Chvala had an attorney-client relationship with Wayne and Kurt on matters related to the Morrison Land.

As for any oral disclaimers of an attorney-client relationship regarding the Morrison Land, we have already discussed the referee's credibility finding that Chvala made no such disclaimers. Given that finding, Chvala's April 2011 letter purporting to reference back to earlier oral disclaimers can fare no better. But even if we were to find Chvala's testimony credible, and conclude she expressly told Wayne and Kurt as early as 2003 that she would not represent them in matters related to the Morrison Land, we would nevertheless find that

Chvala's subsequent conduct in actually representing the Kaup brothers concerning the Morrison Land speaks louder than her words.

Despite Chvala's claim that she would be representing only Gary's interests with respect to the Morrison Land, Chvala consistently prepared legal documents for, and offered legal advice to, all those involved with the Morrison Land, including Wayne and Kurt. When Chvala met periodically with Wayne and Kurt to discuss their various business ventures and do business planning, the Morrison Land, including the option, was discussed to the extent it impacted K & W Farms and Premier Pork. When Wayne asked Chvala to prepare the necessary documents so Premier Pork could obtain title to portions of the Morrison Land from TTC Enterprises and Rita, she did so, and identified herself as the attorney for Premier Pork in the transaction. When Wayne asked Chvala to prepare manure easements so Premier Pork could spread manure across the entire section of the Morrison Land, she did so. Given Chvala's conduct in actually providing legal advice and representation to Wayne and Kurt in the Morrison Land matter, we cannot give more weight to an oral disclaimer than we do to Chvala's subsequent actions.

We reach a similar conclusion regarding the limited disclaimer language contained in paragraph 21 of the lease agreement. That language purported to disclaim any attorney-client relationship between Chvala and all parties to the lease agreement for purposes of reviewing and signing the lease agreement. But "[e]ven the use of a disclaimer may not prevent the formation of attorney-client relationships if the parties' subsequent conduct is inconsistent with the disclaimer."[18] And here, because there was clear and convincing evidence that Chvala's subsequent conduct was sufficiently inconsistent with the limited disclaimer set forth in paragraph 21 of the lease agreement, Chvala cannot rely on the disclaimer to argue she had no

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[18] See S.C. Bar Ethics Adv. Comm. 12-03, 2012 WL 1142185 at *4 (Jan. 1, 2012).

attorney-client relationship with the Kaup brothers regarding the Morrison Land.

We now consider the various disciplinary charges against Chvala, and we do so in light of our preliminary findings that she (1) played a central role in negotiating the purchase of a half section of the Morrison Land, and had an ownership interest in that half section of land, and (2) provided legal advice and representation to both the lessors and lessees of the Morrison Land on matters related to the Morrison Land.

2. Business Transactions With Clients

Chvala was charged with violating the rules prohibiting lawyers from entering into business transactions with clients under Canon 5, DR 5-104(A), of the Code of Professional Responsibility, which governed her conduct before September 1, 2005, and Neb. Ct. R. of Prof. Cond. § 3-501.8 (rev. 2016), which governed her conduct after September 1, 2005.

DR 5-104 is entitled "Limiting Business Relations with a Client," and provides:

> (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his or her professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Section 3-501.8 is entitled "Conflict of interest; current clients: specific rules," and provides in part:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek

> the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
>
> (b) A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Before directly addressing the application of either disciplinary provision, we examine two threshold questions that arise under both: (1) whether the Morrison Land deal was a "business transaction" and (2) whether Wayne and Kurt were Chvala's clients at the time she entered into the Morrison Land deal.

(a) Business Transaction

[9,10] Generally speaking, any "'commercial activity engaged in for a profit'" will constitute a business transaction for purposes of the disciplinary provisions that prohibit an attorney from entering into a business transaction with a client.[19] A "business transaction" is a broad term, and it plainly includes an agreement to purchase real property and an agreement to lease real property.[20]

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[19] See *Sup. Ct. Bd. of Prof'l Ethics v. Fay*, 619 N.W.2d 321, 325 (Iowa 2000).

[20] See, e.g., *Id.* (arrangement where client leased premises owned by attorney's daughter, in which attorney held life estate, was business transaction with client); *In re Baer*, 298 Or. 29, 688 P.2d 1324 (1984) (real estate purchase agreement between attorney's wife and his clients was business transaction where purchase price was reduced in exchange for attorney's services); *Matter of James*, 452 A.2d 163 (D.C. App. 1982) (real estate purchase agreement between attorney and clients was business transaction).

It is beyond dispute that the Morrison Land purchase, the lease and option agreements, and the various related transactions were all business transactions within the meaning of DR 5-104(A) and § 3-501.8.

(b) Clients

We have already determined that Chvala actually represented Wayne and Kurt and Premier Pork with respect to the Morrison Land, but it is important to point out that, for purposes of DR 5-104(A) and § 3-501.8, the term "client" has an even broader meaning.

[11] In the context of the disciplinary provisions governing business transactions with clients, a client is defined as one over whom the attorney has influence arising from a previous or current attorney-client relationship.[21] Thus, a "client" in this context means not only one with whom the attorney has an existing attorney-client relationship, but also those who have relied on the attorney on "'an occasional and on-going basis.'"[22] In other words, an attorney need not have an open active case with a client in order to be subject to the restrictions of DR 5-104(A) and § 3-501.8, because otherwise "'the attorney would be free to use the rapport and confidence . . . developed with [the] client to persuade the . . . client to do things that would otherwise be prohibited by [the rules].'"[23] As the Supreme Court of Arizona has explained:

> [I]n attorney-client business ventures, an attorney is deemed to be dealing with a client when "it may fairly be said that because of other transactions an ordinary person would look to the lawyer as a protector rather than as an adversary." . . . We recognize[] that in applying

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[21] *Bd. of Prof. Ethics and Cond. v. Sikma*, 533 N.W.2d 532 (Iowa 1995). See, also, *Matter of Discipline of Martin*, 506 N.W.2d 101 (S.D. 1993); *Matter of Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985); *Matter of Nichols*, 95 N.J. 126, 469 A.2d 494 (1984).

[22] See *Fay, supra* note 19, 619 N.W.2d at 325.

[23] *In re Schenck*, 345 Or. 350, 363, 194 P.3d 804, 812 (2008).

> the disciplinary rules we define[] "client" in very broad terms, but we conclude[] that our obligation to police the profession and protect the public interest permit[s] no less.[24]

We agree with this reasoning and emphasize that it applies whether one is defining a "client" for purposes of DR 5-104(A) or its successor, § 3-501.8.

Here, the record shows that when the purchase of and lease of the half section of the Morrison Land was negotiated in January 2003, Chvala had already established an ongoing attorney-client relationship with Wayne and Kurt. She had regularly been advising them on legal matters, including land and business transactions, for approximately 7 years, and it is clear from their conduct that the Kaup brothers viewed Chvala as a protector rather than an adversary.

We thus conclude that, at the inception of the Morrison Land deal in January 2003, Wayne and Kurt were Chvala's clients for purposes of both DR 5-104(A) and its successor, § 3-501.8.

(c) DR 5-104(A)

The disciplinary rules governing business transactions with clients are designed to address the concern that an attorney's legal skill and training, together with the relationship of trust and confidence between lawyer and client, may create the possibility of overreaching when the lawyer participates in a business transaction with a client.[25] Stated differently, the concern is that "the lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain."[26]

[12] To establish a violation of DR 5-104(A), it is necessary to show that (1) the attorney and the client had differing interests in the transaction, (2) the client expected the lawyer to exercise his or her professional judgment for the protection

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[24] *Matter of Pappas*, 159 Ariz. 516, 522, 768 P.2d 1161, 1167 (1988).

[25] See § 3-501.8, comment 1.

[26] Canon 5, EC 5-4, of the Code of Professional Responsibility.

of the client, and (3) the client consented to the transaction without full disclosure.[27]

(i) Differing Interests

[13-15] Differing interests are interests that are conflicting, inconsistent, diverse, or otherwise discordant.[28] Historically, in the disciplinary context, the term "'differing interests'" has been broadly defined to include any interest adversely affecting either the lawyer's judgment on behalf of a client or the lawyer's loyalty to a client.[29] In this respect, it is fundamental that the interests of a purchaser in a transaction are directly contradictory to the interests of the seller in the transaction.[30] Similarly, the competing interests of lessor and lessee necessarily present differing interests under DR 5-104(A).[31]

Regarding the Morrison Land, Chvala's interests clearly differed from the Kaup brothers' interests. Because Chvala and Gary purchased the Morrison Land as an investment, Chvala's financial interest in the property, like Gary's, was that of an owner and lessor. Because Wayne and Kurt's interest in the Morrison Land was that of lessees with an exclusive option to purchase the land at the end of the lease term, Chvala's interests directly conflicted with the interests of Wayne and Kurt.

(ii) Professional Judgment Expected

[16,17] The nature of the transaction itself can show that the client expected the lawyer to exercise professional judgment for his or her protection.[32] So, too, can the prior relationship of the attorney and the client.[33] As a general matter, "'it is natural

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[27] *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991).

[28] *Id*., citing Canon 5, EC 5-14, of the Code of Professional Responsibility.

[29] David J. Beck, *Transactions with Clients*, 43 Baylor L. Rev. 149, 152 (1991).

[30] See *Fay, supra* note 19.

[31] See *id*.

[32] See *id*. See, also, *Thor, supra* note 27.

[33] *Matter of Pappas, supra* note 24.

and proper for a client with a longstanding business relationship with a lawyer to feel that the lawyer is to be trusted, will not act unfairly, and will protect him against danger.'"[34]

Here, Wayne and Kurt had been Chvala's clients for approximately 7 years at the time the Morrison Land deal was entered into, and the record shows they trusted and respected her. The record also shows Wayne and Kurt expected Chvala to treat them fairly in the Morrison Land deal based on their established attorney-client relationship and her familiarity with their business goals. They approached her as an investor in the Morrison Land, and they relied on her advice as to the best way to structure the deal and the rent arrangements. They also relied on her to draft the necessary legal documents to help them accomplish their business goal of ultimately owning the Morrison Land. The Kaup brothers later expressed their gratitude for Chvala's investment on their behalf in a 2005 letter:

> It has been a great pleasure working with you. Words can not explain how proud we are of this property and THANK YOU will never be adequate for investing your money in this real estate for us. The acquisition of this property has provided a solid income base to our operation.

We find clear and convincing evidence that Wayne and Kurt expected Chvala to exercise her professional judgment for their protection when they entered into the Morrison Land deal.

(iii) No Full Disclosure

[18] Because Chvala entered into a business deal with clients when her interests differed from theirs and the clients expected her to exercise her professional judgment for their protection, the ultimate question is whether she provided the full disclosure required by DR 5-104(A). A full disclosure

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[34] *Id.*, 159 Ariz. at 523, 768 P.2d at 1168. Accord *In re Montgomery*, 292 Or. 796, 802, 643 P.2d 338, 341 (1982) (recognizing "[i]n many situations the client would not be dealing with the lawyer but for the client's trust and confidence in the lawyer born of past associations").

requires both that the client is advised there is a conflict of interest and that the client is informed of the possible areas this conflict of interest may affect.[35]

[19] A key part of a full disclosure is explaining to the client any effect the conflict may have on the exercise of the attorney's professional judgment.[36] In other words, full disclosure means explaining the nature of the conflict presented by the attorney's role in the business transaction, and also explaining to the client why he or she would benefit from independent counsel.[37] This is so because a client must be able to expect "unfettered independence of professional judgment of a lawyer whose loyalty to that person is total."[38]

[20] Thus, when a full disclosure is required under DR 5-104(A), it must include a clear explanation of the differing interests between the attorney and the client, a detailed explanation of the risks and disadvantages to the client as a result of those differing interests, and an explanation of the advantages of seeking independent legal advice.[39]

For the sake of completeness, we note the nature of the required disclosure is similar under both DR 5-104(A) and the successor rule, § 3-501.8, even though, as we discuss later, § 3-501.8(2) contains the additional requirement that the client's informed consent must be in writing. The comments to § 3-501.8 explain when a disclosure is required:

> [T]he lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client.[40]

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[35] *Thor, supra* note 27.

[36] See *id*.

[37] See *Fay, supra* note 19.

[38] *Id*., 619 N.W.2d at 326.

[39] See Beck, *Transactions with Clients, supra* note 29.

[40] § 3-501.8, comment 3.

Chvala's conduct was governed by DR 5-104(A) at the time she entered into the Morrison Land deal with the Kaup brothers, and on this record, we find she failed to provide the full disclosure required by that rule before entering into the business transaction, or at any time thereafter.

a. Disclaimer Is Not Full Disclosure

Chvala claims that during the January 12, 2003, meeting when the key details of the Morrison Land deal were negotiated, she told Wayne and Kurt she "[could not] represent [them] in any capacity" because her husband was going to buy the Morrison Land and "God willing, he's always going to be my husband." Chvala contends this statement satisfied her ethical obligation under DR 5-104(A). We disagree, for two reasons.

[21] First, the referee did not find Chvala's testimony about this statement to be credible, and instead, the referee concluded Chvala made no such statement during the January 12, 2003, meeting. But even if we were to accept Chvala's testimony that she expressly told the Kaup brothers she could not represent them because her husband was going to be involved, such a statement, without more, would have been inadequate as a matter of law to satisfy DR 5-104(A). At best, Chvala's statement was an attempt to disclaim an attorney-client relationship with the Kaup brothers. But the full disclosure required by DR 5-104(A) is not satisfied by a mere disclaimer of an attorney-client relationship.

[22] When a lawyer enters into a business transaction with a client that falls within DR 5-104(A), it is not enough for the lawyer to merely tell the client "I cannot represent you in this transaction." DR 5-104(A) is designed to address the concern that an attorney's legal skill and training, together with the relationship of trust and confidence between the lawyer and client, create the possibility of overreaching when the lawyer participates in a business transaction with a client. This concern exists whether or not the attorney actually provides legal

advice or services to the client in the business transaction.[41] And because of this concern, the full disclosure required by DR 5-104(A) is substantial. It generally requires the attorney to give the client the kind of advice the client would have received if the transaction were with a stranger.[42]

The record shows that at no time during the January 12, 2003, meeting did Chvala advise Wayne and Kurt of the significant financial investment she would be making in the business transaction. Nor did she explain how that conflict of interest might affect the exercise of her professional judgment on their behalf in terms of structuring the deal, preparing the legal documents to facilitate the deal, or assisting them in accomplishing their business goals with respect to the Morrison Land. Nor did Chvala expressly advise her clients to seek independent legal advice before they agreed to the terms of the deal or explain to them why that would be advantageous to them. As such, even if we were to find credible Chvala's testimony that she made a disclaimer during the negotiations on January 12, the disclaimer she claims to have made was not sufficient to comply with DR 5-104(A). Because the Kaup brothers consented to the Morrison Land deal without the full disclosure required by DR 5-104(A), Chvala violated this disciplinary provision.

And for the sake of completeness, we also find that Chvala did not, at any time after entering into the Morrison Land deal, make the full disclosure required by DR 5-104(A). One of Chvala's primary arguments is that language in paragraph 21

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[41] See, e.g., *Sikma, supra* note 21 (DR 5-104(A) not limited to situations where attorney formally acting as counsel in business transaction); *In re Neville, supra* note 21 (applicability of DR 5-104(A) not limited to situations in which lawyer represents client in same transaction in which interests differ).

[42] *Id.* See, also, 7A C.J.S. *Attorney & Client* § 354 at 398 (2015) ("[w]here an attorney enters into a business arrangement with a client, he or she must make it manifest that he or she gave to his or her client all that reasonable advice against himself or herself that he or she would have given him or her against a third person").

of the lease agreement satisfied DR 5-104(A). We address that argument next, and we find it meritless.

b. Paragraph 21 in Lease Agreement

Paragraph 21 contained language stating that Chvala represented both Gary and the Kaup brothers in unrelated matters "in the past and presently" and was "not acting as an attorney for either party to this contract." There was also language stating that by signing the agreement, both parties acknowledged they "had an opportunity to have an attorney of their choosing review [the] Lease" and they were signing it voluntarily without relying on advice from Chvala. Chvala claims this language satisfied DR 5-104(A), but we disagree. The disclaimer in paragraph 21 came too late, and said too little, to satisfy the rule.

[23] To be effective, the full disclosure required by DR 5-104(A) must be made *before* the client consents to the business transaction.[43] The lease agreement containing paragraph 21 was not executed until approximately April 7, 2003. By that point, several months had passed since the Kaup brothers had consented to the material terms of the Morrison Land deal and significant portions of that business transaction had already been completed.

The full disclosure required by DR 5-104(A) needed to occur before the essential terms of the Morrison Land deal were agreed to, before Wayne and Kurt assigned their rights under the purchase agreement to Gary, and before the half section of the Morrison Land was sold to Gary. There is no question on this record that Wayne and Kurt's consent to the Morrison Land deal was given without the benefit of the full disclosure required by DR 5-104(A).

Moreover, even if the disclaimer in paragraph 21 had been given to the Kaup brothers before they consented to the

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[43] See *Attorney Disciplinary Board v. Hamer*, 915 N.W.2d 302 (Iowa 2018) (because record did not show attorney made full disclosure to client before client consented to transaction, violation of DR 5-104(A) established).

Morrison Land deal, the language of that disclaimer would have been insufficient as a matter of law to comply with DR 5-104(A). The language purported to disclaim an attorney-client relationship, but it did not advise Wayne and Kurt of the nature of Chvala's financial interest in the Morrison Land or explain the role she would play in the business deal. Nor did it explain how Chvala's conflict of interest might affect the exercise of her professional judgment in drafting the terms of the lease and option agreements, or in the decisions she may make as the lessor during the term of the lease. And nothing in paragraph 21 advised the clients to seek independent legal advice or explained why that would be advantageous. Because of this, paragraph 21 was insufficient to provide the "full disclosure" required by DR 5-104(A).

We find clear and convincing evidence that Chvala violated DR 5-104(A) by entering into the Morrison Land deal with Wayne and Kurt without first obtaining their consent after a full disclosure. Because Chvala violated DR 5-104(A), she also violated her oath as an attorney.[44]

(iv) Additional Violations of DR 5-104(A)

The referee found three additional violations of DR 5-104(A). Specifically, he found Chvala committed additional violations: (1) in November 2003, when she modified the rent arrangement from a triple-net arrangement to a modified crop-share arrangement; (2) in December 2003, when ownership of the Morrison Land was transferred from Gary to TTC Enterprises; and (3) in April 2005, when TTC Enterprises transferred ownership of 5 acres of Morrison Land and granted a 10-year manure easement to Premier Pork, all without providing full disclosure.

From a disciplinary standpoint, it is immaterial whether Chvala's conduct in modifying the Morrison Land deal is analyzed as four separate business transactions with clients or

[44] See Neb. Rev. Stat. § 7-104 (Reissue 2012).

whether her conduct is instead characterized as ongoing evidence of an impermissible business transaction to which the clients never consented after full disclosure. Either way, the record contains clear and convincing evidence that from and after January 12, 2003, when Chvala entered into the Morrison Land deal with Wayne and Kurt, she and her clients had differing interests in the deal, her clients expected her to exercise her professional judgment for their protection, and her clients consented to the original business transaction, and to all subsequent modifications of that business transaction, without the full disclosure required by DR 5-104(A).

(d) § 3-501.8

Chvala was also charged with violating § 3-501.8, the successor to DR 5-104(A). The referee found Chvala did not violate § 3-501.8(a), but did violate § 3-501.8(b). We reach the same conclusion on de novo review.

(i) § 3-501.8(a)

Section 3-501.8(a) provides: "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client," unless certain conditions are met. The referee found that Chvala did not "enter into" any new business transactions with the Kaup brothers after September 1, 2005, and thus concluded that § 3-501.8(a) was not violated. Counsel for Discipline has not taken exception to this finding, and we agree the record does not show that Chvala entered into any new or additional business transactions with clients after September 1, 2005. However, as we discuss below, her continued participation in an impermissible business transaction with clients resulted in other disciplinary violations.

(ii) § 3-501.8(b)

Section 3-501.8(b) provides: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Comments

to the rule explain its underpinnings and provide some practical examples:

> Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. [Section 3-501.8(b)] applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase.[45]

The referee found Chvala violated § 3-501.8(b) by "intentionally lull[ing] the Kaups into believing they had exercised the option so that the option deadline would pass." Specifically, the referee found:

> [Chvala] knew everything about the Kaups' farming and hog finishing operations. She knew as a result of her prior representation that the Kaups had structured their businesses around their ultimate ownership of the entire section of the Morrison Land. She knew they had borrowed substantial sums to build and develop the hog finishing buildings and were dependent on her half-section to make the entire operation financially feasible. She knew that the Kaups would have to meet her financial demands or risk losing their entire farming and livestock business. [Chvala] used information relating to her representation of the Kaups to their disadvantage, and the Kaups never gave her informed consent to do so.

On de novo review, we agree there is clear and convincing evidence that in 2012, Chvala used information acquired during her representation of the Kaup brothers and their entity Premier Pork in a way that disadvantaged those clients. She knew the Kaup brothers had invested significant sums in

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[45] § 3-501.8, comment 5.

developing the 10 acres of Morrison Land they already owned, and she knew that ownership of the remaining half section of Morrison Land owned by TTC Enterprises was integral to the success of their business model. She also knew the Kaup brothers had the ability to pay a premium for the property and likely would do so rather than risk losing their investment. And she used this information to secure a personal financial benefit for herself, her husband, and their corporation. In doing so, she violated § 3-501.8(b), and because she violated that rule, she also violated her oath as an attorney as set out in § 7-104.

3. Chvala Represented Clients With Differing Interests

Chvala was also charged with violating both Canon 5, DR 5-105, of the Code of Professional Responsibility, and Neb. Ct. R. of Prof. Cond. § 3-501.7 (rev. 2019) by representing clients with differing or conflicting interests without obtaining informed consent. We have already determined that Chvala simultaneously represented the owners-lessors and the lessees of the Morrison Land. And we agree with the referee that this representation violated both DR 5-105 and § 3-501.7. We address each violation in turn.

(a) DR 5-105

DR 5-105 is entitled "Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer." DR 5-105 governed Chvala's conduct before September 1, 2005, and provides in part:

> (A) A lawyer shall decline proffered employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

> (B) A lawyer shall not continue multiple employment if the exercise of his or her independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his or her independent professional judgment on behalf of each.

(i) Chvala's Clients Had Differing Interests

[24,25] Under DR 5-105, a lawyer may represent several clients whose interests are not actually or potentially differing, but should nevertheless explain any circumstances that might cause a client to question the lawyer's undivided loyalty.[46] And if a lawyer is asked to undertake or continue representation of multiple clients having potentially differing interests, "the lawyer must weigh carefully the possibility that his or her judgment may be impaired or his or her loyalty divided if he or she accepts or continues the employment."[47]

Here, for the same reasons we previously found that Chvala's interests as an owner-lessor actually differed from the interests of Wayne and Kurt as lessees and prospective purchasers, we now find that the interests of all the other owners-lessors differed from those of Wayne and Kurt, and their entity Premier Pork. Because of these differing interests, Chvala's simultaneous representation of all the owners-lessors of the Morrison

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[46] Canon 5, EC 5-19, of the Code of Professional Responsibility.

[47] Canon 5, EC 5-15, of the Code of Professional Responsibility.

Land, and all the lessees of the Morrison Land, was likely to involve her in representing differing interests in the same transaction. Moreover, even among the lessors there were differing interests, because one of the lessors was an entity that Chvala owned and her husband managed, and that personal relationship could adversely affect her independent professional judgment on behalf of other clients. As such, Chvala was required to comply with DR 5-105(C) and obtain informed consent from all clients.

(ii) Chvala Did Not Obtain Her Clients' Informed Consent

[26] A lawyer may represent multiple clients with differing interests if (1) it is obvious the lawyer can adequately represent the interest of each and (2) if each client consents to the representation after full disclosure of the possible effect of such representation on the exercise of his or her independent professional judgment on behalf of each.[48] Here, we do not address the first of these two elements, because on this record we find no evidence whatsoever that Chvala provided any client in the Morrison Land transactions with the full disclosure required by DR 5-105(C).

[27-29] Even in those instances where a lawyer is justified in representing two or more clients having differing interests, "it is nevertheless essential that each client be given the opportunity to evaluate his or her need for representation free from any potential conflict and to obtain other counsel if he or she so desires."[49] Thus, "before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."[50] And "[i]f there are present other circumstances that might cause any of

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[48] DR 5-105(C).

[49] Canon 5, EC 5-16, of the Code of Professional Responsibility.

[50] *Id.*

the multiple clients to question the undivided loyalty of the lawyer, he or she should also advise all of the clients of those circumstances."[51] A full disclosure under DR 5-105 requires the attorney to not only inform the client of the attorney's relationship with other clients, but also to explain the pitfalls that may arise in the course of the transaction that would make it desirable for the client to have independent counsel.[52]

There is no evidence that Chvala provided any client in the Morrison Land transactions with the full disclosure required by DR 5-105(C). We therefore agree with the referee that Chvala violated DR 5-105. And because she violated DR 5-105, she also violated her oath as an attorney as set out in § 7-104.

(b) § 3-501.7

Section 3-501.7 is entitled "Conflict of interest; current clients." Section 3-501.7 governed Chvala's conduct after September 1, 2005, and provides:

> (a) Except as provided in paragraph (b) . . . , a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

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[51] *Id.*

[52] *Supreme Court Atty. Disc. Bd. v. Clauss*, 711 N.W.2d 1 (Iowa 2006).

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

We find clear and convincing evidence that from September 1, 2005, until Chvala terminated her attorney-client relationship with Wayne and Kurt on March 12, 2013, she continued to simultaneously represent all of the owners-lessors of the Morrison Land and all of the lessees-prospective purchasers of that land. This simultaneous representation continued even though there was no evidence Chvala prepared additional legal documents or offered specific legal advice pertaining to the Morrison Land transactions after September 1, 2005.

During this time, the parties continued operating under the lease and option agreements Chvala had prepared, and at all relevant times, and particularly after the option period opened in 2010, the competing and conflicting interests of Chvala's clients remained directly adverse to one another, amounting to a concurrent conflict of interest under § 3-501.7(a).

[30] There is no need to analyze whether, notwithstanding this concurrent conflict of interest, it may have been permissible for Chvala to represent these competing interests under § 3-501.7(b)(1) through (3), because it is clear from the record that no client was provided informed consent, confirmed in writing, as required by § 3-501.7(b)(4). For purposes of § 3-501.7:

> Informed consent requires that *each affected client* be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. . . . The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the

> information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.[53]

Here, there is no evidence that after September 1, 2005, Chvala discussed, with any of the affected Morrison Land clients, the ways in which her common representation of their conflicting interests could have adverse effects on the interest of that client, including possible effects on loyalty and confidentiality. Nor is there any evidence Chvala obtained informed consent, in writing, from any Morrison Land client. She thus violated § 3-501.7, and because she violated that rule, she also violated her oath as an attorney as set out in § 7-104.

4. Chvala's Dishonesty and Deceit

(a) § 3-508.4

Chvala was charged with violating Neb. Ct. R. of Prof. Cond. § 3-508.4 (rev. 2016). Section 3-508.4 is entitled "Misconduct" and provides in relevant part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct[,] knowingly assist or induce another to do so or do so through the acts of another;
>
> . . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

[31,32] One of the essential eligibility requirements for admission to the practice of law in Nebraska is the ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations.[54] As such, this court "'does not look kindly upon acts which call into question an attorney's

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[53] § 3-501.7, comment 18 (emphasis supplied).

[54] *State ex rel. Counsel for Dis. v. Council*, 289 Neb. 33, 853 N.W.2d 844 (2014).

honesty and trustworthiness.'"[55] Attorneys who engage in dishonest or deceitful conduct in their communications with clients violate § 3-508.4(c).[56]

The referee found that Chvala engaged in a pattern of dishonest and deceitful conduct regarding the Kaup brothers' attempts to close on the sale of the half section of Morrison Land and that she did so "for the sole purpose of enriching herself at their expense." Specifically, the referee found:

> From at least November 2012, it was [Chvala's] plan to delay the Kaups from providing written notice of their exercise of the option until after March 1, 2013. She knew that this was her only chance of getting any of the appreciated value of the land. [Chvala] intentionally misled Kurt in November 2012, when she told him that she would close the sale in December. Instead of telling Kurt that his oral exercise of the option was insufficient, she implied that she had no objection to closing, but only that she couldn't get to it until December. By her statement, [Chvala] was able to put Kurt off for at least a month.
>
> . . . .
>
> When [Chvala] was informed by [the bank] that the Kaups wanted to close the deal with her, [Chvala said] she couldn't get it done in December and it is looking more toward March for a closing date. This was [Chvala's] critical delay tactic. Without having to talk to Wayne or Kurt she was able to convey to them that she

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[55] *Id.* at 43, 853 N.W.2d at 852.

[56] See, *State ex rel. Counsel for Dis. v. Thomas*, 281 Neb. 336, 799 N.W.2d 661 (2011) (attorney engaged in conduct involving dishonesty and deceit by avoiding client calls and falsely reassuring clients to avoid admitting client's case had been dismissed); *State ex rel. Counsel for Dis. v. Simmons*, 270 Neb. 429, 703 N.W.2d 598 (2005) (attorney engaged in conduct involving dishonesty and deceit as result of deceptive communications with client and law enforcement about whether and where attorney was holding client's money).

> would get to the closing, but it wouldn't be until March. [The Kaup brothers] relied on [Chvala's] statement and thus were lulled into believing that there was no need to contact [Chvala] in January or February because she wasn't going to get to it until March.

On de novo review, we agree with the referee that Chvala was fully aware of Wayne and Kurt's efforts to close on the half section of the Morrison Land beginning in November 2012 and that she deliberately misrepresented her intentions regarding such a closing. She did so in an effort to delay the closing without alerting the Kaup brothers to the fact they had not strictly complied with the terms of the option agreement.

It is clear from the record that Chvala and Gary intended to strictly enforce the option terms and did not believe the Kaup brothers had correctly exercised the option. In fact, before the option expired, Chvala sought a legal opinion from a colleague on whether the option was enforceable and whether it could be exercised through oral notice rather than written notice. But when it became clear that Wayne and Kurt were trying to proceed with a closing on the half section of the Morrison Land, Chvala instead made statements that were designed to mislead her clients and others into believing that she and Gary intended to proceed with the closing, but could not do so until later. Chvala's statements in this regard were dishonest, deceptive, and misrepresented her true intentions.

We note Chvala argues throughout her brief that decisions regarding the Morrison Land, including the decision whether to require strict compliance with the option terms, were Gary's decisions, not hers. In this respect, her brief contends, "Chvala stood by her husband. His decision was to hold the Kaups to their written Agreements. She had no right to 'overrule' Gary and no right to contradict him."[57] But this argument is premised on her claim, which we have found lacks merit, that she played no role in the negotiation and lease of the half section

[57] Brief for respondent at 39.

of the Morrison Land. And in any event, even if the decision was Gary's, the misrepresentations and deceitful responses were hers.

We find clear and convincing evidence that Chvala violated § 3-508.4(c) by engaging in conduct involving dishonesty, deceit, and misrepresentation regarding her intentions to close on the sale of the Morrison Land. And because we find she violated other Nebraska Rules of Professional Conduct, we also find clear and convincing evidence she violated § 3-508.4(a). Further, by violating these rules, she also violated her oath as an attorney as set out in § 7-104.

(b) § 3-501.4

Neb. Ct. R. of Prof. Cond. § 3-501.4 is entitled "Communications" and provides in relevant part:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> . . . .
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The referee found that Chvala violated § 3-501.4 in 2012 and 2013 for largely the same reasons she was found to have engaged in deceitful and dishonest conduct under § 3-501.8, i.e., because she "failed to communicate with Wayne and Kurt about the limits of her representation" when she knew they were attempting to exercise the option and proceed with the closing.

Chvala takes exception to this finding and generally argues that she had no ethical duty to communicate with the Kaup

brothers regarding the sale of the half section of the Morrison Land, because she had no attorney-client relationship with them in that matter. We have already rejected this argument as factually and legally incorrect. For the same reasons we previously found that Wayne and Kurt were Chvala's clients in matters related to the Morrison Land for purposes of DR 5-105 and § 3-501.7, we similarly find they were Chvala's clients for purposes of § 3-501.4. As such, from and after September 1, 2005, Chvala was obligated to promptly inform Wayne and Kurt of any circumstance with respect to which their informed consent was required under the disciplinary rules, to consult with them about any relevant limitation on Chvala's conduct when she knew they expected her assistance, and to explain matters to the extent reasonably necessary to permit them to make informed decisions regarding the representation.

As previously stated, Chvala was aware the Kaup brothers were actively trying to close on the half section of the Morrison Land, and she knew Wayne and Kurt expected her assistance to complete the closing. Despite this knowledge, Chvala did not contact the Kaup brothers to provide the full disclosure she should have provided earlier, to explain the limitations on her conduct, or to encourage them to seek independent counsel on the matter before the option expired. Instead, Chvala actively avoided their attempts to communicate with her and deliberately frustrated their efforts to schedule a closing before the option period expired. For these reasons, we find clear and convincing evidence that Chvala violated § 3-501.4, and because she violated this rule, she also violated her oath as an attorney as set out in § 7-104.

V. SANCTION

Having found by clear and convincing evidence that Chvala violated DR 5-104(A) and DR 5-105 of the former Code of Professional Responsibility, and §§ 3-501.4, 3-501.7, 3-501.8, and 3-508.4 of the Nebraska Rules of Professional Conduct, as well as her oath as an attorney as set out in § 7-104, we turn to the question of the appropriate sanction. The referee

recommended disbarment. Chvala takes exception to that recommendation. She argues that dismissal of the charges is the proper outcome and that "Even A Public Reprimand Is Too Harsh."[58]

[33-35] With respect to the imposition of attorney discipline, each attorney discipline case must be evaluated in light of its particular facts and circumstances.[59] For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.[60] The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[61]

1. Relevant Factors

[36] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[62]

(a) Nature of Offense

In this case, Chvala committed multiple, serious violations, all of which implicate the foundational principles of client loyalty and trust. The relationship of attorney and client has always been recognized as one of special trust and confidence.[63] While the law does not strictly prohibit business

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[58] Brief for respondent at 39.

[59] See *Jorgenson, supra* note 3.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *State, ex rel. Nebraska State Bar Ass'n, v. Basye*, 138 Neb. 806, 295 N.W. 816 (1941).

transactions between an attorney and a client, it does impose the requirement that they be characterized by full disclosure and honesty.[64] Here, Chvala completely disregarded those requirements, and her clients suffered as a result.[65]

Chvala entered into the deal to purchase the half section of the Morrison Land, a transaction in which her interests clearly differed from her clients' interests, without obtaining her clients' consent after full disclosure. Chvala also impermissibly represented multiple clients with directly competing interests in multiple transactions related to the Morrison Land, without providing full disclosure. But most egregious of all, Chvala took advantage of her clients' trust, misrepresented her intentions in the business deal, and engaged in conduct that was dishonest and deceitful in order to realize personal financial gain at the expense of her clients.

[37] Moreover, although all of the violations stemmed from the same prohibited business transaction with clients, the violations were neither technical nor isolated. Instead, the prohibited business transaction continued for a period of 10 years and the resulting ethical violations were serious and ongoing. Chvala's failure to carefully follow the disciplinary rules when entering into that business transaction, and her decision to remain in that business transaction for the next 10 years and provide legal services to all participants in that matter, resulted in cumulative acts of misconduct under the Nebraska disciplinary code and rules. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[66]

(b) Need for Deterring Others

This case provides a textbook example of the ethical minefield that is laid when an attorney enters into a business

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[64] See *id.*

[65] See *id.*

[66] *State ex rel. Counsel for Dis. v. Trembly*, 300 Neb. 195, 912 N.W.2d 764 (2018).

transaction with clients whose interests are adverse, without providing the full disclosure required by the ethical rules. When considering the deterrence factor, the referee observed:

> This is a case in which long-standing clients relied on their attorney to treat them fairly and honestly. Many lawyers, especially in rural areas, can relate to [the] type of practice [Chvala] had where there are close professional and personal relationships with clients. [Chvala] had a casual attitude toward her clients who trusted her in all respects. Others, especially those in similar types of practice, must be deterred from the kind of misconduct [Chvala] engaged in.

We agree there is a strong need to deter other attorneys from taking a casual approach to compliance with the disciplinary rules that govern business transactions with clients. Similarly, there is a strong need to deter lawyers from taking a relaxed approach to representing multiple clients with differing interests in the same transaction. Chvala argues that "'[c]onflicts of interest are a routine part of practice in rural Nebraska,'"[67] and we do not doubt that reality. But it underscores, rather than excuses, a lawyer's responsibility to carefully monitor and fully disclose any conflicts of interest before proceeding further. Here, Chvala paid only lip service to some conflicts of interest and ignored others altogether.

Finally, we must send a strong message that taking advantage of a client's trust for personal gain is an egregious violation of the disciplinary rules and one that must be strongly deterred.

(c) Reputation of Bar

[38,39] Violations of client trust and loyalty, particularly when they result in personal financial gain to the attorney, harm the reputation of the entire legal profession by undermining public confidence and trust in attorneys, in the courts, and

[67] Brief for respondent at 33.

in the legal system generally.[68] There is a need to preserve the public trust and confidence in members of the bar.[69] Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney-client relationship.[70] As a profession, the bar continuously strives to build and safeguard such trust and confidence.[71]

Despite the fact that Chvala has been a highly respected member of the bar for more than 30 years, her misconduct in this case was egregious and ongoing, and her violations of client trust and loyalty resulted in significant financial consequences and served to undermine confidence in the legal profession.

(d) Protection of Public

[40] The goal of attorney discipline proceedings is not as much punishment as a determination of whether it is in the public interest to allow an attorney to keep practicing law.[72] Providing for the protection of the public requires the imposition of an adequate sanction to maintain public confidence in the bar.[73]

When considering this factor, the referee remarked:

> Part of what makes this case particularly tragic, in addition to the great loss to Wayne and Kurt . . . , is that [Chvala] enjoyed a sterling public reputation as reflected by the letters of reference and commendation from a wide variety of people, including fellow lawyers, members of the community, students, philanthropists and people who benefitted from [Chvala's] charitable giving and

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[68] See *Nimmer, supra* note 1.

[69] *State ex rel. Counsel for Dis. v. Cording*, 285 Neb. 146, 825 N.W.2d 792 (2013).

[70] *Id.*

[71] *Id.*

[72] *Nimmer, supra* note 1.

[73] *Id.*

> civic involvement. Those positives are outweighed by the need to protect the public from being harmed by the most skilled and talented of lawyers who are held in high esteem by the public and completely trusted by their clients.

The record confirms that Chvala is held in high regard as both a skilled lawyer and a community leader. We agree that her reputation and contributions to the legal profession are mitigating factors in this disciplinary action. But they do not outweigh the aggravating factor that, in the Morrison Land matter, Chvala ultimately used her legal skills and reputation to take advantage of the loyalty and trust of her clients for her personal gain. As a result, her moral fitness to engage in the practice of law is implicated.[74]

(e) Attitude of Respondent

Chvala initially self-reported to the Counsel for Discipline, and this is a mitigating factor we consider. But we cannot overlook the aggravating factor that during the evidentiary hearing, Chvala displayed an attitude of defiance and avoidance and showed no remorse for her misconduct. We also find very troubling the fact that the referee found some of Chvala's testimony to be "implausible and not credible" and expressly stated that "[t]hroughout these proceedings" Chvala "testified falsely, and refused to accept responsibility for her actions." Our de novo review of the record supports these findings, and we see no reason to discount the referee's finding that Chvala's "lack of credibility in these proceedings [was] egregious."

(f) Present or Future Fitness to Practice Law

The record shows Chvala is a highly capable and successful lawyer. It also shows that she consistently either disregarded or materially misconstrued the ethical rules that govern entering into a business transaction with clients and representing

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[74] See *Basye, supra* note 63.

multiple clients in the same transaction. Chvala adamantly denied having an attorney-client relationship with any of the people or entities involved in the Morrison Land transactions, despite overwhelming evidence to the contrary.

We are particularly troubled by Chvala's repeated efforts to deny involvement in and avoid responsibility for preparing the deeds, leases, option agreements, and easements that governed the various Morrison Land transactions. Her testimony in that regard was evasive, and it evolved to meet the exigency of the questioning. It may have been an inconvenient truth that she was the lawyer who prepared all of the relevant legal documents for all of the parties involved in the Morrison Land transactions, but her reluctance to admit that truth and take full responsibility as a supervising lawyer demonstrates an inability and an unwillingness to comply with disciplinary rules governing attorneys and calls into question her fitness to practice law.

2. Comparison of Similar Cases

Each attorney disciplinary proceeding is unique, but the propriety of a sanction must be considered with reference to the sanctions this court has imposed in prior similar cases.[75] We have reviewed our case law and have found no prior cases that involve disciplinary violations relating to entering into business transactions with clients and representing multiple clients with differing interests in that transaction, as well as conduct involving deceit and dishonesty and failure to communicate. In that respect, this case stands alone. But we find guidance in several prior cases where lawyers have entered into improper business transactions with clients and/or have engaged in misconduct involving deceit and dishonesty.

[41] In *State ex rel. NSBA v. Thor*,[76] clients in financial difficulty hired an attorney. The attorney advised them to file

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[75] *Jorgenson, supra* note 3.

[76] *Thor, supra* note 27.

bankruptcy, and he encouraged them to list their only major asset, some farmland, with a realty company that was both a client of the attorney and was owned by the attorney's father. The attorney then used information he learned during his representation of those clients to purchase the farmland for less than an offer made by a disinterested third party. In the course of doing so, he actively mislead his clients and failed to disclose his conflict of interest in the land purchase. We found the attorney had entered into a business relationship with his clients without making full disclosure and had engaged in misconduct and deceit. In considering the appropriate discipline, we noted the conduct had "brought doubt into the minds of many as to the competence of the legal profession to represent a client's best interests,"[77] and we concluded the violation was therefore very serious. We noted, however, that the attorney had otherwise performed competently, even for these clients, and had exhibited great remorse for his conduct. We ultimately ordered the attorney suspended for 1 year.

In *State ex rel. NSBA v. Miller*,[78] an attorney was hired by a woman who was both a former employee and a former client to obtain a refund of an excess insurance payment. The attorney orally agreed to charge a 20-percent contingent fee, but the written fee arrangement subsequently executed by the client stated the attorney would be paid one-third of the amount obtained if settlement was reached before filing suit and 40 percent of the amount obtained after suit was filed. Despite this express language in the written agreement, the attorney assured his client that the oral agreement of a 20-percent contingent fee was binding.

The attorney spent approximately 6 hours attempting to recover the overpayment. Then, the party holding the funds contacted the attorney and notified him it intended to return the overpayment. Despite this assurance, the attorney filed suit

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[77] *Id.*, 237 Neb. at 752, 467 N.W.2d at 678.

[78] *State ex rel. NSBA v. Miller*, 258 Neb. 181, 602 N.W.2d 486 (1999).

against that party approximately 2 hours later. And after the suit was settled and the overpayment was returned, the attorney attempted to collect 40 percent of the settlement from his client, relying on the written fee agreement. The total fee charged was $96,000.

We found the attorney, among other things, had engaged in conduct involving fraud and deceit, both with respect to his client and throughout the disciplinary proceedings. We noted that he had previously represented the client and that thus, she had significant trust in him. We emphasized that although the evidence was to the contrary, the attorney continued to insist he had done nothing wrong. We also noted this was the attorney's second disciplinary proceeding. In the prior proceeding, the attorney had been suspended from the practice of law for a period of 2 years. Because of the cumulative acts of attorney misconduct and the inexcusable and egregious nature of the charges, we concluded disbarment was the appropriate sanction.

[42] In *State ex rel. Counsel for Dis. v. Crawford*,[79] the alleged disciplinary violations were not analogous to the instant case, as the attorney was being charged with client neglect. The case is notable, however, for the fact that counsel was "antagonistic, evasive, and untruthful throughout the investigation and the disciplinary proceeding."[80] We were particularly concerned with counsel's lack of veracity during the proceedings, noting:

> This court does not look kindly upon acts which call into question an attorney's honesty and trustworthiness. The essential eligibility requirements for admission to the practice of law in Nebraska include "[t]he ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships

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[79] *State ex rel. Counsel for Dis. v. Crawford*, 285 Neb. 321, 827 N.W.2d 214 (2013).

[80] *Id*. at 329, 827 N.W.2d at 223.

and with respect to all legal obligations." With or without misappropriation, acts of dishonesty can result in disbarment.[81]

3. Sanction of Disbarment

Here, Chvala entered into a business transaction with established clients without providing the full disclosure required by the disciplinary rules. Thereafter, she stayed in the business deal as an investor, while simultaneously providing legal advice and services to all of the lessors and lessees of the Morrison Land, despite their differing interests. Chvala paid only passing lip service to the full disclosure requirements, and she never provided the full disclosure required by the disciplinary rules. Finally, and most egregiously, Chvala capitalized on her clients' trust by deliberately deceiving and misleading them into believing a closing would take place without any further action on their part, in order to obtain personal financial gain.

When confronted with her wrongdoing, Chvala insisted she had not entered into the business transaction at all, insisted the Kaup brothers were not clients, and denied providing any legal representation regarding the Morrison Land. She has refused to acknowledge any misconduct whatsoever, has shown no remorse for her conduct, and has presented testimony that was at best implausible and, according to the referee, patently false.

Despite an otherwise unblemished legal career, Chvala's misconduct was egregious and requires a strong disciplinary response from this court. It is therefore the judgment of this court that the appropriate sanction for Chvala's violations is disbarment.

VI. CONCLUSION

Given clear and convincing evidence that Chvala violated Nebraska's Code of Professional Responsibility and the

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[81] *Id*. at 367, 827 N.W.2d at 246-47.

Nebraska Rules of Professional Conduct, as well as her oath of office, it is the judgment of this court that she be disbarred from the practice of law in the State of Nebraska, effective immediately. She is directed to 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. She may not apply for reinstatement for a period of at least 5 years[82] and must successfully complete the Multistate Professional Responsibility Examination prior to submitting any application for reinstatement.

Judgment of disbarment.

Cassel, J., not participating.

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[82] See Neb. Ct. R. § 3-310(T) (rev. 2019).

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

In re Interest of Giavonni P., a child under 18 years of age. State of Nebraska, appellee, v. Nebraska Department of Health and Human Services, appellant.

935 N.W.2d 631

Filed November 22, 2019. Nos. S-18-1130, S-18-1135.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.
3. **Judgments: Final Orders.** Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not necessarily operate as "judgments" and may be wholly ineffective and void as such.
4. ____: ____. A conditional judgment may be wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
5. ____: ____. While conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, they can operate in conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made.
6. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.

7. **Juvenile Courts: Words and Phrases.** Juvenile court proceedings are special proceedings.
8. **Moot Question: Jurisdiction.** Mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction.
9. **Moot Question: Jurisdiction: Courts: Judgments: Dismissal and Nonsuit.** An actual case or controversy is necessary for the exercise of judicial power. 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. Therefore, as a general rule, a moot case is subject to summary dismissal.
10. **Moot Question: Records: Appeal and Error.** 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 as to the issue or issues claimed to be moot.
11. **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.
12. **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.
13. **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.
14. **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.
15. **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.
16. **Moot Question: Words and Phrases.** In determining whether the public interest exception should be invoked, a 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 Separate Juvenile Court of Douglas County: Christopher E. Kelly, Judge. Affirmed.

Neleigh N. Boyer and Marcie Bergquist, Special Assistant Attorneys General, of Nebraska Department of Health and Human Services, for appellant.

Jeffrey A. Wagner and Kyle J. Flentje, of Wagner, Meehan & Watson, L.L.P., for appellee.

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

Heavican, C.J.

I. INTRODUCTION

Following orders of the Douglas County Separate Juvenile Court, Giavonni P. was placed at the Lincoln Regional Center (LRC). The Nebraska Department of Health and Human Services (Department) appeals. We affirm.

II. BACKGROUND

Giavonni was adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) in April 2010 and placed with the Department. He has been in a variety of placements since that time. In October 2017, Giavonni was adjudicated under § 43-247(1) and placed at Capstone, a psychiatric residential treatment facility (PRTF) in Detroit, Michigan. In late 2017, Giavonni was also placed on probation with the office of juvenile probation following adjudication and disposition on a charge of theft by unlawful taking.

On October 9, 2018, Giavonni's guardian ad litem filed a motion alleging that placement in the Capstone program was no longer in Giavonni's best interests. The guardian ad litem requested that Giavonni be returned to Nebraska and placed at the LRC.

A hearing was held on that motion on October 22, 2018. The juvenile court ordered Giavonni returned to Nebraska and placed at the Douglas County Youth Center (DCYC) for secure detention. The juvenile court scheduled further placement review for November 9.

At the November 9, 2018, hearing, Giavonni was represented individually and also by a guardian ad litem. Giavonni's father appeared with counsel, and Douglas County and the Department appeared with separate representation. On appeal,

only the Department and the guardian ad litem filed briefs. The State (represented by Douglas County) waived oral argument. No other party has entered an appearance.

At the placement review hearing, Giavonni's family permanency specialist reviewed Giavonni's recent history. That history included flight from Capstone, the PRTF in Detroit; violent behavior toward other residents and staff at Capstone; and property destruction. In addition, while in Detroit, Giavonni refused to engage in therapy or take his medications. Another witness testified that Capstone was more like jail than a treatment center and reinforced Giavonni's refusal to leave his room or to interact with others in any setting. The witness also reiterated that Giavonni was not taking his medications while at Capstone.

Upon his return to Nebraska and placement at the DCYC, Giavonni was again involved with acts of aggression. He had not met with a therapist, but was apparently taking his medication.

Other evidence presented showed that there were concerns with placing Giavonni at any facility which was not secure and which would require him to have a roommate, due to the fact that he was a flight risk and was aggressive. A psychiatrist testified that Giavonni needed treatment in a locked facility such as an adolescent PRTF, medical stabilization, and placement in a community setting. There was evidence that there were only approximately 20 facilities in the United States that met Giavonni's treatment criteria. Of the facilities that responded to an inquiry, none was able to admit Giavonni, either because of his violent history or because of space constraints.

Following the hearing, the juvenile court entered an order in each case stating that if Giavonni was not placed in a PRTF by November 26, 2018, the Douglas County sheriff should deliver him to the LRC, where he was to remain until a PRTF placement could be found. On November 27, the court was advised at a placement check hearing that Giavonni had been placed at the LRC.

The Department filed a notice of appeal in each case on December 3, 2018, indicating that it appealed from the juvenile court's November 9 order (the notice of appeal is dated November 28, 2018). On May 6, 2019, Giavonni was moved from the LRC into a new placement. Prior to oral arguments, the guardian ad litem filed a suggestion of mootness, which we denied.

III. ASSIGNMENTS OF ERROR

The Department assigns that the juvenile court erred in ordering that Giavonni (1)(a) be placed at the LRC (b) on a specific date and (2) remain at the LRC until further order of the court or until a placement was unanimously agreed upon by the parties.

IV. STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[1] The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.[2]

V. ANALYSIS

The Department appeals from the orders of the juvenile court placing Giavonni at the LRC. While its argument varies slightly based on the underlying adjudication (law violation versus neglect), the crux of the Department's assertion is that the placement orders usurped the LRC's statutory authority to administer and manage its patient admission and discharge process.

1. Final Order

In each case, the guardian ad litem argues that this court lacks a final order, both because the juvenile court's order was

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[1] *In re Interest of Reality W.*, 302 Neb. 878, 925 N.W.2d 355 (2019).

[2] *Id.*

conditional and because that order did not affect a substantial right. We conclude that the order in each case is final.

(a) Conditional Order

The guardian ad litem first argues that the juvenile court's order in each case was not final because it was conditional: at the time the order was entered, no one knew "when or even whether Giavonni would be accepted by a [PRTF] and if no such facility arose, there is no direction given by the court, creating speculation and conjecture, making such order a conditional judgment."[3]

[3-5] Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not necessarily operate as "judgments" and may be wholly ineffective and void as such.[4] We have explained that a conditional judgment may be wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.[5] We have also explained that while conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, they can operate in conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made.[6]

The juvenile court's order in each case stated that the Department and Giavonni's probation officer should seek "appropriate secure [PRTF] placement" and that "if . . . Giavonni . . . is not accepted for placement by November 26, 2018[,] . . . then [he] shall be . . . delivered by the Douglas County Sheriff to the [LRC] in Lincoln, Nebraska." The court went on to order that Giavonni "remain in the [LRC] . . . until . . . accepted for placement at an accredited, secure [PRTF],

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[3] Brief for appellee guardian ad litem in case No. S-18-1130 at 14.

[4] *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).

[5] *Id.*

[6] *Id.*

contingent on written approval" of the guardian ad litem, the Department, and Giavonni's probation officer, attorney, and treatment team, or, "lacking such unanimous approval, until further Order of the Court." And on November 27, 2018, the day after Giavonni was moved to the LRC, a placement check hearing was held, at which time an order acknowledging Giavonni's placement and the setting of the next hearing date were entered in each case.

In each case, when considering the November 27, 2018, order in light of the November 9 order, it is clear that the juvenile court's order is not conditional. There is no merit to this argument.

(b) Order Affecting Substantial Right

The guardian ad litem also argues that the juvenile court's order in each case was not final because it did not affect a substantial right of the Department.

[6] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders that may be reviewed on appeal are (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.

[7] Juvenile court proceedings are special proceedings.[7] Thus, to have a final order a juvenile court's order must affect a substantial right. We conclude herein that the juvenile court's order in each case does affect a substantial right in that it affects the Department's ability, through its role of directing behavioral services, to administer admissions and care at the LRC.[8] As such, the order in each case is final.

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[7] *In re Interest of Michael N.*, 302 Neb. 652, 925 N.W.2d 51 (2019).

[8] See Neb. Rev. Stat. §§ 71-806 and 83-109 (Cum. Supp. 2018).

2. Mootness

Since the Department filed its appeals, Giavonni has been moved out of the LRC and into an out-of-state PRTF. As such, Giavonni's guardian ad litem filed in each appeal a motion to dismiss on the ground of mootness. The Department agrees that Giavonni's appeals may be moot but, in its response, directed us to a list of other juveniles who have been ordered to the LRC. The Department asked that we utilize the public interest exception to the mootness doctrine to address the question presented by these appeals.

[8-10] Mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction.[9] An actual case or controversy is necessary for the exercise of judicial power.[10] 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.[11] Therefore, as a general rule, a moot case is subject to summary dismissal.[12] 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.[13]

[11-14] 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.[14] An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack

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[9] *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 930 N.W.2d 551 (2019).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

a legally cognizable interest in the outcome of the action.[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] 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.

[15,16] 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.[17] 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.[18]

Following the filing of these appeals, the guardian ad litem filed a suggestion of mootness and motion to dismiss in each appeal, noting that Giavonni had been moved from the LRC to a PRTF located outside of the state. Because the purpose of the Department's appeals was to challenge Giavonni's placement at the LRC, and because Giavonni was no longer placed at the LRC, we agree that the appeals are moot.

But we also agree with the Department that given that other juveniles are being placed at the LRC (or indeed that Giavonni could be returned to the LRC) due to a lack of other adequate programming, we should reach the merits of these appeals under the public interest exception to the mootness doctrine.

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

3. Authority of Juvenile Court

The primary issue on appeal in each case is whether the juvenile court had the authority to place Giavonni at the LRC, on a date certain or otherwise. We find two particular statutes dispositive in reaching this conclusion.

Most relevant to this inquiry is Neb. Rev. Stat. § 43-285(1) (Cum. Supp. 2018). We have interpreted § 43-285(1) to give juvenile courts the power to assent to and dissent from the decisions of the Department; the purpose of § 43-285(1) was to remove from the Department's complete control a minor whose care was given to the Department under the juvenile code. The juvenile court has the power to assent to or dissent from the "care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it."[19]

Also of note is Neb. Rev. Stat. § 43-289 (Reissue 2016), which provides:

> The court may, when the health or condition of any juvenile adjudged to be within the terms of such code shall require it, cause the juvenile to be placed in a public hospital or institution for treatment or special care or in an accredited and suitable private hospital or institution which will receive the juvenile for like purposes. Whenever any juvenile has been committed to the Department . . . , the [D]epartment shall follow the court's orders, if any, concerning the juvenile's specific needs for treatment or special care for his or her physical well-being and healthy personality.

So, § 43-285(1) gives a juvenile court the power to assent to, among other things, "care, placement, [and] psychiatric services," and § 43-289 takes this one step further in allowing a court to order that a juvenile be placed in a "public hospital or institution for treatment or special care." In the circumstances presented by Giavonni's cases, the juvenile court did not agree

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[19] § 43-285(1).

with the Department's decisions with respect to Giavonni's care and placement. At the time of the hearing, Giavonni was placed at the DCYC. The juvenile court concluded that Giavonni would best be served with a placement in a PRTF, but that failing that, the best placement for the safety of both Giavonni and others was at the LRC. The juvenile court had the authority to order this placement.

(a) Authority of LRC to House and Treat Juveniles

We turn next to the Department's contention that the juvenile court's placement was outside its authority because the juvenile code prohibits juveniles from being placed in a detention facility—whether juvenile or adult.

We reject this contention because it assumes that the LRC is a detention facility, when Neb. Rev. Stat. § 71-911 (Reissue 2018) defines it as a hospital.[20] We also observe that in contrast to the Department's argument regarding this on appeal, the Department suggested at oral arguments that the DCYC, a juvenile detention facility, might be a placement choice for Giavonni.

The Department's arguments are without merit.

(b) Authority of LRC to Admit and Discharge Patients

The Department next argues that the juvenile court has interfered with the authority of the Department and the LRC to prioritize admissions and decide upon patient discharges from the LRC. The Department also notes that even if the juvenile court has the general authority to place a juvenile at the LRC, it does not have the ability to do so on a date certain.

Section 71-806(1) directs the Department's division of behavioral health to "act as the chief behavioral health authority for the State of Nebraska, and [to] direct the administration

[20] See, also, Neb. Rev. Stat. § 83-305 (Reissue 2014).

and coordination of the public behavioral health system, including, but not limited to . . . [a]dministration and management of the division, regional centers, and any other facilities and programs operated by the division." Section 83-109 states:

> The Department . . . shall have general control over the admission of patients and residents to all institutions over which it has jurisdiction. . . . Transfers of patients or residents from one institution to another shall be within the exclusive jurisdiction of the [D]epartment and shall be recorded in the office of the [D]epartment, with the reasons for such transfers.

Neb. Rev. Stat. § 83-338 (Reissue 2014) sets priorities for admission to hospitals for the mentally ill. The last paragraph of § 43-289 notes that "[a] juvenile committed to any such institution shall be subject to the control of the superintendent thereof . . . ."

We concluded above that the juvenile court has the authority to place an individual at the LRC. These statutes do not change that result. Contrary to the Department's contention, we do not read the juvenile court's order in each case to place Giavonni at the LRC on a date certain. Rather, the juvenile court ordered Giavonni placed in an appropriate PRTF by November 26, 2018; failing that, Giavonni was to be placed at the LRC. There is no merit to the Department's arguments. We emphasize, however, that our opinion should not be read to allow courts to prioritize some individuals over others in the admissions and placement process for the LRC.

(c) Best Interests

Finally, the Department argues that Giavonni's best interests are not being served by his placement at the LRC, observing that such a placement was similar to the jail-like conditions at Capstone. At the placement review hearing, the Department suggested that placement at a youth rehabilitation and treatment center would be appropriate, but it did not renew that

argument on appeal. At oral arguments, the Department suggested that Giavonni should remain at the DCYC until a bed at an appropriate PRTF could be located.

There was evidence at the hearing that the LRC was a secure facility with the ability to provide Giavonni with the psychiatric treatment he needed while allowing him to stay in a single room, keeping himself and others safe. While we agree that an adult facility is not the optimal choice for a juvenile offender, given the lack of other options and Giavonni's needs, placement at the LRC was in his best interests at the time of his placement.

VI. CONCLUSION

The decision of the juvenile court in each case is affirmed.

Affirmed.

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

Amie L. Rutledge, appellant, v. City of Kimball, a political subdivision of the State of Nebraska, appellee.

935 N.W.2d 746

Filed December 6, 2019. No. S-18-924.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Political Subdivisions Tort Claims Act.** Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act is a question of law.
3. **Political Subdivisions Tort Claims Act: Appeal and Error.** An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act independent from the conclusion reached by the trial court.
4. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act governs claims made against a political subdivision when the claim is based upon acts or omissions of an employee occurring within the scope of employment.
5. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act allows a limited waiver of a political subdivision's sovereign immunity with respect to certain, but not all, types of tort actions.
6. **Political Subdivisions Tort Claims Act: Immunity: Waiver: Intent: Words and Phrases.** Neb. Rev. Stat. § 13-910 (Reissue 2012) sets forth specific claims that are exempt from the waiver of sovereign immunity, including any claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. This is sometimes referred to as the "intentional torts exception."

7. **Tort Claims Act: Public Officers and Employees: Immunity: Intent: Tort-feasors.** Under the intentional torts exception, the State is immune from suit when the tort claim is based on the mere fact of government employment (such as a respondeat superior claim) or on the employment relationship between the intentional tort-feasor and the government (such as a negligent supervision or negligent hiring claim).
8. **Political Subdivisions Tort Claims Act: Negligence: Liability: Damages.** When conduct arises out of a battery, it falls within the exception of Neb. Rev. Stat. § 13-910(7) (Reissue 2012), and the political subdivision is not liable for damages resulting from the battery, even when the pleaded conduct is characterized or framed as negligence.
9. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
10. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
11. **Negligence: Liability.** There is no duty to control the conduct of a third person so as to prevent him or her from causing physical harm to another, unless a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.
12. ____: ____. When a special relationship exists, an actor in that relationship owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship.
13. **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.

Appeal from the District Court for Kimball County: Derek C. Weimer, Judge. Affirmed.

James R. Korth, of Reynolds, Korth & Samuelson, P.C., L.L.O., for appellant.

Steven W. Olsen and Paul W. Snyder, of Simmons Olsen Law Firm, P.C., for appellee.

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

Heavican, C.J.

INTRODUCTION

This case arose out of an alleged assault and battery perpetrated by David Ford, an employee of appellee, the City of Kimball, Nebraska (City). Appellant, Amie L. Rutledge, filed a complaint alleging the City was negligent for failing to supervise Ford and for failing to protect the general public and Rutledge from Ford when the City knew or should have known of Ford's past violent behavior, violent propensities, and prior assaults. The district court granted the City's motion to dismiss on the grounds that the claim was barred by the intentional torts exception to the Political Subdivisions Tort Claims Act (PSTCA). We affirm.

BACKGROUND

On July 26, 2013, Rutledge filed a claim with the City for damages incurred after its then employee, Ford, allegedly attacked and choked her in the Kimball City Building. On August 2, Rutledge also filed a complaint in the district court for Kimball County against Ford for assault and battery.

After her claim was denied by the City, Rutledge amended her complaint against Ford to add the City as an additional party. As noted above, Rutledge alleged the City was negligent for failing to take proper measures to supervise Ford and protect the general public and Rutledge when the City knew or should have known of Ford's past violent behavior, violent propensities, and prior assaults.

The City filed a motion to dismiss, claiming Rutledge failed to state a claim upon which relief could be granted. On July 8, 2014, the district court granted the City's motion after finding the allegations against the City arose out of Ford's alleged assault and battery and, thus, were exempt from application of the PSTCA. On September 14, 2018, Rutledge filed a motion to dismiss her complaint against Ford with prejudice, which was granted by the district court the same day.

ASSIGNMENT OF ERROR

Rutledge's sole assignment of error is that the trial court erred in granting the City's motion to dismiss for failure to state a claim upon which relief may be granted.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[1]

[2,3] Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the PSTCA is a question of law.[2] An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the PSTCA independent from the conclusion reached by the trial court.[3]

ANALYSIS

Rutledge argues her claims are not barred by the intentional torts exception to the PSTCA, because they did not arise from Ford's assault and battery, but from the City's "independent duty to protect [her] from [Ford's] foreseeable acts of violence."[4] The City maintains that Rutledge's claims are barred by the intentional torts exception because they arise from an assault and battery and that Rutledge "is simply re-framing an injury . . . as negligence" in an attempt to avoid the City's sovereign immunity.[5]

[4-6] The PSTCA governs claims made against a political subdivision when the claim is based upon acts or omissions of

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

[2] *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015).

[3] *Id.*

[4] Brief for appellant at 8.

[5] Brief for appellee at 6.

an employee occurring within the scope of employment.[6] The PSTCA allows a limited waiver of a political subdivision's sovereign immunity with respect to certain, but not all, types of tort actions.[7] Section 13-910 sets forth specific claims that are exempt from the waiver of sovereign immunity, including "[a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[8] This is sometimes referred to as the "'intentional torts exception.'"[9]

In *Johnson v. State*,[10] this court analyzed the intentional torts exception contained in the State Tort Claims Act, which contains language identical to the PSTCA.[11] In that case, an inmate filed a negligence claim against the State of Nebraska, the Omaha Correctional Center, and the Nebraska Department of Correctional Services, alleging she was sexually assaulted by an employee of the Department of Correctional Services while the employee was acting within the scope of his employment. The plaintiff alleged the defendants were negligent in (1) violating Nebraska jail standards with respect to the housing of female inmates, (2) failing to properly supervise their employees, (3) failing to properly hire employees, (4) failing to properly maintain the Omaha Correctional Center, and (5) failing to discipline the employee who allegedly perpetrated the sexual assault. The district court dismissed the plaintiff's petition after finding her claims were barred by the intentional torts exception because they arose out of an assault. This court

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[6] See Neb. Rev. Stat. § 13-910(1) to (12) (Reissue 2012).

[7] *City of Lincoln v. County of Lancaster*, 297 Neb. 256, 898 N.W.2d 374 (2017).

[8] See, *id*; § 13-910(7).

[9] See *City of Lincoln v. County of Lancaster, supra* note 7, 297 Neb. at 260, 898 N.W.2d at 378.

[10] *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

[11] See Neb. Rev. Stat. § 81-8,219(4) (Reissue 2014).

affirmed the judgment of the district court. In doing so, we adopted Justice Kennedy's concurrence in the U.S. Supreme Court case *Sheridan v. United States*.[12]

When addressing the intentional torts exception to the Federal Tort Claims Act, Justice Kennedy's concurrence recognized that an injury could arise from more than one cause and stated:

> "To determine whether a claim arises from an intentional assault or battery and is therefore barred by the exception, a court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tortfeasor or the breach of some separate duty independent from the employment relation. . . . If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception . . . bars the claim. Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors. To allow such claims would frustrate the purposes of the exception."[13]

[7] To summarize, *Johnson* held that under the intentional torts exception, the State is immune from suit when the tort claim "is based on the mere fact of government employment (such as a respondeat superior claim) or on the employment relationship between the intentional tort-feasor and the government (such as a negligent supervision or negligent hiring claim)."[14]

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[12] *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988).

[13] *Johnson v. State, supra* note 10, 270 Neb. at 322, 700 N.W.2d at 625 (quoting *Sheridan v. United States, supra* note 12 (Kennedy, J., concurring in judgment)).

[14] *Johnson v. State, supra* note 10, 270 Neb. at 323, 700 N.W.2d at 625.

[8] Similarly, in *Britton v. City of Crawford*,[15] this court held that when conduct "'aris[es] out of' a battery," it falls within the exception of § 13-910(7) and the political subdivision is not liable for damages resulting from the battery, even when the pleaded conduct is characterized or framed as negligence. In *Britton*, the personal representative of the estate of a deceased police shooting victim sued the City of Crawford under the PSTCA, alleging it was negligent in handling a standoff where the victim had barricaded himself. The City of Crawford filed a motion to dismiss the complaint on the grounds that it failed to state a cause of action upon which relief could be granted, and it argued the City of Crawford could not be held liable under the PSTCA, because the complaint alleged assault and battery. The district court granted the City of Crawford's motion to dismiss. This court affirmed and held the claim was barred by the intentional torts exception because the alleged negligence was "inextricably linked" to a battery.[16] We reasoned that "[w]hile other factors may have contributed to the situation which resulted in [the victim's] death, but for the battery, there would have been no claim."[17]

Here, Rutledge's claim clearly arises out of a battery. Rutledge alleges Ford attacked and strangled her, without her consent, intending to cause a harmful or offensive contact with her.[18] She further alleges the City was negligent because it "knew or should have known that FORD had displayed past violent behavior and violent propensities, including prior

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[15] *Britton v. City of Crawford*, 282 Neb. 374, 383, 803 N.W.2d 508, 516 (2011).

[16] *Id.* at 386, 803 N.W.2d at 518.

[17] *Id.*

[18] See *Britton v. City of Crawford, supra* note 15, 282 Neb. at 382, 803 N.W.2d at 515 (defining intentional tort of battery as "'"an actual infliction" of an unconsented injury upon or unconsented contact with another'" or "'any intentional, unlawful physical violence or contact inflicted on a human being without his consent'").

assaults upon citizens[,] while on duty with [the] CITY" and "in failing to take proper measures to supervise FORD and protect the general public, specifically RUTLEDGE." In her brief, Rutledge asserts her claim is not barred by the intentional torts exception, because it is not based on "vicarious liability, or for negligent supervision or negligent hiring."[19] She contends that "Ford's employment status is immaterial," yet she argues the City "was uniquely positioned as his employer, with full knowledge of the facts and circumstances of that prior violent act and subsequent control over Ford, to protect [her]."[20] Rutledge further argues her negligence claim is "wholly independent" of Ford's employment status, because it alleges the City was negligent for "failing to protect [her] and the public in general."[21]

[9-12] We hold that Rutledge's negligence claim is barred by the PSTCA because she cannot allege any potential source of duty other than Ford's employment status. In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.[22] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.[23] This court has held that there is no duty to control the conduct of a third person so as to prevent him or her from causing physical harm to another, unless "'a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.'"[24]

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[19] Brief for appellant at 5.

[20] *Id.* at 8.

[21] *Id.* at 5,7.

[22] *Eadie v. Leise Properties*, 300 Neb. 141, 912 N.W.2d 715 (2018).

[23] *Id.*

[24] *Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, 11, 899 N.W.2d 227, 235 (2017).

When a special relationship exists, an actor in that relationship "'owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship.'"[25] Here, there is no special relationship between Ford and the City—other than his employment relationship—that could give rise to an affirmative duty to protect Rutledge from Ford.

At oral argument, Rutledge raised for the first time the theory of premises liability. She did not specifically plead premises liability in her complaint; however, she cited to this court's holding in *Doe v. Omaha Pub. Sch. Dist.*[26] in support of her argument that the City was negligent in failing to protect Rutledge and the general public from Ford.

In *Doe*, a student had been sexually assaulted by another student during school and the plaintiff alleged the school district breached its duty to take reasonable steps to prevent foreseeable violence from occurring on its premises. We held that the intentional torts exception did not clearly indicate the claim was barred, because the alleged breach was of an independent legal duty unrelated to any possible employment relationship between the assailant and the school district.

The present case is easily distinguished from our holding in *Doe*. Specifically, in *Doe*, there was no allegation that the assailant was an agent or employee of the political subdivision. Further, the school district had an existing duty, based on its relationship with the student victim, to protect against harm when the conduct was sufficiently foreseeable.[27] Here, the only relationship that existed was the employment relationship

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[25] *Id.* at 12, 899 N.W.2d at 235 (quoting 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41(a) (2012)). See, also, *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012); *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003).

[26] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[27] See *id*. See, also, *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

between Ford and the City; therefore, the intentional torts exception preserves sovereign immunity.[28]

[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 waiver.[29] While Rutledge's claim is characterized as one of negligence, no claim would exist but for Ford's alleged battery. At oral argument, Rutledge conceded that there never would have been a lawsuit had she not been assaulted. Thus, regardless of how the claim is pled, Rutledge's claim is inextricably linked to a battery. Accordingly, the alleged negligence falls within the intentional torts exception to the PSTCA and the City has not waived its sovereign immunity.

CONCLUSION

We conclude that Rutledge's negligence claim arises out of a battery and thus is barred by the intentional torts exception to the PSTCA. We affirm the judgment of the district court.

Affirmed.

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[28] See *Johnson v. State, supra* note 10.

[29] *Patterson v. Metropolitan Util. Dist., supra* note 1.

Papik, J., concurring.

I agree with the court's determination that the City of Kimball is immune from Rutledge's suit under Neb. Rev. Stat. § 13-910(7) (Reissue 2012) because it arises out of a battery. I write separately to express concern regarding the soundness of the primary case upon which the plaintiff relies, *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

As the court notes, we held in *Doe* that a claim that a school district negligently failed to protect one student from being sexually assaulted by another did not "arise out of" an assault and thus could proceed under the Political Subdivisions Tort Claims Act (PSTCA). We held that the claim did not arise out of an assault, because the plaintiff alleged that the school

district breached a legal duty independent of any employment relationship between it and the assailant. We said that the claim was "not based upon the assault itself" and that the plaintiff "could not prevail merely by proving that it occurred." *Doe*, 273 Neb. at 88, 727 N.W.2d at 456. I do not believe, however, that this analysis is consistent with our general principles of statutory interpretation, the particular way in which we have said that the PSTCA should be interpreted, or our case law.

We generally interpret statutes according to their plain and ordinary meaning. See *State ex rel. Peterson v. Creative Comm. Promotions*, 302 Neb. 606, 924 N.W.2d 664 (2019). As we have observed, the use of the phrase "arising out of" in § 13-910(7) means that more than just claims for the listed intentional torts are exempted and that plaintiffs may not reframe claims that arise out of those intentional torts to escape the exemption. See *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011). So when does a claim "arise out of" one of the listed intentional torts? In a case involving identical language in the Federal Tort Claims Act, Justice O'Connor explained that if the phrase "arising out of an assault or battery" is given its ordinary meaning, it would cover any case in which a battery is essential to the claim. *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988) (O'Connor, J., dissenting; Rehnquist, C.J., and Scalia, J., join). In my view, this is correct. A claim may arise out of more than just a battery, but if the claim would not exist without a battery, as a matter of plain language, it arises out of a battery.

Even if I were not persuaded that the plain language of § 13-910(7) can only be read to exempt any claim that would not exist without one of the intentional torts enumerated therein, I believe that reading should still control under our principles for interpreting the PSTCA. We have said that because statutes that waive sovereign immunity are to be strictly construed against waiver, exemptions from a waiver of sovereign immunity must be read broadly. See *Stick v. City of Omaha*,

289 Neb. 752, 857 N.W.2d 561 (2015). If § 13-910(7) is read broadly, it would certainly seem to exempt cases in which an assault, battery, or one of the other listed intentional torts was essential to the claim.

Not only is this interpretation of § 13-910(7) consistent with its language and our rules for interpreting the PSTCA, we have previously relied on this interpretation to hold that a claim is barred. In *Britton*, we held that a claim of negligence was barred, explaining that "but for the battery, there would have been no claim." 282 Neb. at 386, 803 N.W.2d at 518. The court relies on similar reasoning in this case, concluding that Rutledge would have no claim but for the alleged battery.

It is difficult for me to reconcile the result in *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007), with the foregoing. The plaintiff in *Doe* clearly would not have had a claim if not for the assault. That, it seems to me, should have been the end of the matter for all the reasons discussed above. And yet, the plaintiff was allowed to proceed because there was a breach of an "independent legal duty, unrelated to any possible employment relationship." *Id.* at 88, 727 N.W.2d at 456.

In this case, Rutledge attempts to argue that, as in *Doe*, the defendant breached a legal duty independent of an employment relationship. I think that the court reasonably explains why Rutledge did not identify and certainly did not plead facts demonstrating such a duty and that it is thus not necessary to confront the viability of *Doe* today. Before we rely on *Doe* again, however, I believe we should consider whether it is consistent with our general approach and specific decisions in this area.

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

Sheryl A. Rogers, appellee, v. Jack's Supper Club and Continental Western Group, appellants.

935 N.W.2d 754

Filed December 6, 2019. No. S-18-1018.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. ____: ____. Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
4. **Workers' Compensation: Witnesses: Testimony.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
5. **Statutes: Intent.** When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.
6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Statutes.** It is not within the province of the courts to read meaning into a statute that is not there or to read anything direct and plain out of a statute.
8. **Statutes: Legislature: Intent.** When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or

lead to some manifest absurdity or to some consequences which a court sees plainly could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then the court may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.

9. **Statutes: Legislature: Public Policy.** It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.
10. **Workers' Compensation: Liability.** Voluntary payments of workers' compensation benefits do not constitute an admission of liability by an employer.

Appeal from the Workers' Compensation Court: J. Michael Fitzgerald, Judge. Reversed and remanded with directions.

Caroline M. Westerhold and Eric J. Sutton, of Baylor Evnen, L.L.P., for appellants.

Margaret R. Jackson, Todd R. McWha, and Tyler Volkmer, of Waite, McWha & Heng, for appellee.

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

Papik, J.

The Workers' Compensation Court ordered Jack's Supper Club and Continental Western Group, its workers' compensation carrier (collectively JSC), to reimburse Sheryl A. Rogers for various medical expenses she incurred. In the same decision, the compensation court stated that Rogers could continue to receive treatment from certain providers. We agree with JSC, however, that it is not responsible to reimburse Rogers, because she selected the physicians who provided the treatment at issue in disregard of provisions of the Nebraska Workers' Compensation Act. We also agree with JSC that the compensation court failed to adequately explain the basis for its order that Rogers could continue to receive treatment from the specified providers. We thus reverse the order and remand the cause with directions.

BACKGROUND

Injury, Selection of Physician in Form 50, and Settlement.

Rogers injured her back while working for Jack's Supper Club in 2001. Shortly after the injury, she filled out a form indicating that she was choosing a "Dr. Beyers" at the Dundy County Hospital in Benkelman, Nebraska, to treat her for her work-related injury. The parties appear to agree that the form was a "Form 50" promulgated by the Workers' Compensation Court.

Rogers later filed a petition in the compensation court against JSC. After some litigation regarding Rogers' claim, the compensation court approved a lump-sum settlement in 2010. The settlement resolved JSC's liability for indemnity benefits. JSC remained responsible to pay Rogers for reasonable and necessary medical care for her work-related injury.

Dispute Regarding Reimbursement for Medical Expenses.

At some point not clear from our record, Dr. Beyers, the physician that Rogers selected in the Form 50, died. Rogers then received treatment from Dr. Lori Stonehocker, one of Dr. Beyers' colleagues. JSC apparently reimbursed Rogers for treatment provided by Dr. Stonehocker.

In 2010, Rogers moved to Florida and the parties' counsel engaged in a series of communications regarding Rogers' treating physician. JSC initially expressed concern about Rogers' receiving treatment from a provider in Nebraska while living in Florida. It proposed that the parties agree to a pain management specialist in Florida. Rogers' counsel responded that she would not agree with JSC to a pain management specialist. Rogers' counsel later informed JSC's counsel that Rogers had selected Dr. Jonathan Daitch, a pain management specialist in Florida. After Rogers' counsel informed JSC's counsel that there was no Form 50 and that Rogers was free to select her own doctor, JSC's counsel responded that there was a Form 50

and that as a result, it was not clear what basis existed for Rogers to unilaterally choose her own doctor.

Rogers later filed a motion in which she alleged that JSC was refusing to reimburse her for treatment provided by Dr. Daitch. She asked that the compensation court order JSC to reimburse her for such treatment.

Hearing on Motion to Compel Payment for Medical Expenses.

At the hearing on Rogers' motion, she testified that she had received treatment from both Dr. Daitch and Dr. Mark Means, a chiropractor in Florida. No evidence was presented that JSC agreed that Rogers could receive treatment from Dr. Daitch or Dr. Means. Rogers testified that while she discussed seeing Dr. Daitch with Dr. Stonehocker, Dr. Stonehocker did not refer her to Dr. Daitch. Rogers offered into evidence a number of medical bills for treatment provided by Drs. Daitch and Means. The majority of the treatment provided by Dr. Daitch was pharmacological, and Rogers offered Dr. Daitch's opinion that due to the work-related injury, Rogers would require a lifelong medication regimen of fentanyl, Norco, Lyrica, and Valium.

JSC offered the Form 50 and the communications between its counsel and Rogers' counsel regarding the selection of a pain management specialist in Florida. JSC also offered medical reports setting forth opinions regarding Rogers' injury and treatment. In one such report, Dr. John Massey stated that Rogers' complaints were "disproportionate with what would be expected from the back injury which was sustained and the surgical intervention that was undertaken." He expressed concern about possible adverse effects from Rogers' medication regimen and recommended weaning her from oral opiates. In a subsequent report, Dr. Massey expressed concern that Rogers was taking fentanyl, Norco, Lyrica, Valium, and Flexeril. He stated that patients often believe that such a combination of opioids, benzodiazepines, and muscle relaxants is more beneficial than it is. JSC also offered a report of Dr. Phillip Essay,

who reviewed Rogers' records and examined her. He stated that Rogers' complaints of pain were disproportionate with what would be expected and that there "is no evidence to support the long-term use of opioids for [Rogers'] condition related to the work injury." Dr. Essay also recommended weaning Rogers from the opioid portion of the medication regimen.

Compensation Court Order on Motion to Compel.

Following the hearing, the compensation court issued a written order. It rejected JSC's argument that it was not responsible for the medical expenses because Rogers failed to comply with Neb. Rev. Stat. § 48-120(2) (Cum. Supp. 2018), a statute governing selection of treating physicians. It concluded that the provisions of § 48-120(2) should not apply under the circumstances because Rogers had moved to Florida and could not be expected to obtain a referral from her Nebraska doctor for a physician in Florida. It also stated that the alleged failure to obtain a referral from a physician is an affirmative defense which JSC failed to plead.

The compensation court went on to summarize the medical opinions of Drs. Daitch, Massey, and Essay. It concluded that the treatment provided by Dr. Daitch was reasonable and related to Rogers' injury at work. The compensation court ordered JSC to pay certain bills offered by Rogers. It also stated that Rogers was allowed to continue treatment with Dr. Daitch's office.

JSC filed a timely appeal of this decision.

ASSIGNMENTS OF ERROR

JSC assigns, summarized, that the compensation court erred in three respects: (1) by rejecting JSC's argument that it was not responsible to reimburse Rogers for medical bills she incurred from providers in Florida, (2) by finding that the medical treatment provided to Rogers in Florida was reasonable and necessary, and (3) by failing to provide a basis for meaningful appellate review.

STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Martinez v. CMR Constr. & Roofing of Texas*, 302 Neb. 618, 924 N.W.2d 326 (2019).

[2,3] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.* Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Id.*

[4] As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Id.*

ANALYSIS

Compliance With § 48-120(2) and Rule 50.

We begin our analysis with JSC's argument that the compensation court erred by ordering it to pay for medical bills Rogers incurred from providers in Florida. JSC argues that Rogers incurred these charges in violation of § 48-120(2)(a) and Workers' Comp. Ct. R. of Proc. 50 (2018) and that therefore, it is not responsible to reimburse Rogers. Rogers' injury occurred in 2001. In the intervening years, the relevant statutory provisions and rules have remained the same or substantially similar. Therefore, we will refer to the current versions of the applicable statutes and rules. See *Allen v. Immanuel Med. Ctr.*, 278 Neb. 41, 767 N.W.2d 502 (2009).

Section 48-120 contains rules that govern from whom an injured employee may obtain medical treatment for a compensable injury. Those rules allow an employee, in some

circumstances, to select a physician to provide such treatment. There is no dispute that Rogers made such a selection by designating Dr. Beyers on the Form 50. Both parties refer to a physician selected by the employee under § 48-120(2)(a) as a "Form 50 Physician," a term we will use in our analysis as well.

JSC's argument relies on the following portions of § 48-120:

> (2)(a) The employee has the right to select a physician who [meets particular criteria]. . . . If selection of the initial physician is made by the employee or employer pursuant to this subsection following notice by the employer pursuant to this subsection, the employee or employer shall not change the initial selection of physician made pursuant to this subsection unless such change is agreed to by the employee and employer or is ordered by the compensation court pursuant to subsection (6) of this section. . . .
>
> . . . .
>
> (e) The physician selected may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature of the injury requires.
>
> (f) The employer is not responsible for medical services furnished or ordered by any physician or other person selected by the employee in disregard of this section. . . .
>
> . . . .
>
> (6) The compensation court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished and shall have authority to order a change of physician, hospital, rehabilitation facility, or other medical services when it deems such change is desirable or necessary.

JSC also invokes rule 50 of the Workers' Compensation Court rules of procedure. Portions of rule 50 address the same subject, providing as follows:

> A. . . .
>
> . . . .

> 4. The employee may not change the primary treating physician chosen . . . unless the employer agrees or the compensation court orders the change. . . .
>
> . . . .
>
> C. . . . [T]here can be no change in the primary treating physician unless the employee and the employer agree or the compensation court orders a change.
>
> D. The primary treating physician may arrange for specialized medical services the employee needs. A referral by the primary treating physician is not a change.

(Emphasis omitted.)

Rule 50 appears to impose the same requirements as the provisions of § 48-120(2) quoted above. We thus limit our analysis to interpreting § 48-120(2). We will do so by applying our familiar rules of statutory interpretation, which we briefly recount below.

[5-7] When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context. *State v. Garcia*, 301 Neb. 912, 920 N.W.2d 708 (2018). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Wal*, 302 Neb. 308, 923 N.W.2d 367 (2019). It is not within the province of the courts to read meaning into a statute that is not there or to read anything direct and plain out of a statute. *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

The plain language of § 48-120(2) supports JSC's position that it is not responsible to pay for medical treatment unless it was provided by the Form 50 Physician or by a provider to whom the patient was referred by the Form 50 Physician. Section 48-120(2)(a) permits the employee to select a physician, and § 48-120(2)(e) allows the selected physician to make referrals to other providers. Section 48-120(2)(a) also allows the Form 50 Physician to be changed, but only if "agreed to

by the employee and employer" or if "ordered by the compensation court pursuant to [§ 48-120(6)]." And an employee may unilaterally select a new physician if the employer denies compensability for treatment provided by physicians within the rule 50(A)(4) chain of referrals. See *Clark v. Alegent Health Neb.*, 285 Neb. 60, 825 N.W.2d 195 (2013). Section 48-120(2)(f), however, provides that "[t]he employer is not responsible for medical services furnished or ordered by any physician or other person selected by the employee in disregard of this section."

Rogers does not even attempt to argue that the plain language of § 48-120(2)(a) entitles her to reimbursement for treatment from a provider that was not her Form 50 Physician or a person to whom she was referred by her Form 50 Physician. Instead, she argues that we should not follow the plain language in this case. Alternatively, she contends that JSC cannot rely on § 48-120(2) because of certain actions and omissions on its part. We discuss each of these arguments below.

[8] Rogers primarily argues that the plain language of § 48-120(2) should not be followed because it would lead to an absurd result in this case. She argues we may deviate from the plain language of the statute and specifically points us to language in *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 887-88, 813 N.W.2d 467, 482 (2012), where we said the following:

> When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or lead to some manifest absurdity or to some consequences which we see plainly could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then we may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.

We disagree with Rogers that application of the plain language of § 48-120(2)(a) in these circumstances would lead to "manifest absurdity." Rogers argues that in circumstances in

which a Form 50 Physician dies or the employee moves out of state, the employee can no longer be treated by or receive referrals from the Form 50 Physician and thus should be able to unilaterally choose a new physician. The language of the statute, however, does not leave employees in such situations without remedies. A new Form 50 Physician can be selected either with agreement of the employer or by bringing the matter to the attention of the compensation court and asking it to approve a new Form 50 Physician. We cannot say that it would be manifestly absurd for the Legislature to require persons whose Form 50 Physician is no longer able to provide treatment or make referrals to obtain a new Form 50 Physician through the procedures explicitly set out in the statute.

[9] Rogers is essentially making a policy argument that persons in her position *should* not be limited to seeking agreement with the employer or asking the compensation court to appoint a new Form 50 Physician. But we are not tasked with selecting what we believe is the best policy. It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state. *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

Neither are we persuaded by Rogers' alternative arguments that even if JSC's statutory position is correct, it was nonetheless responsible to pay for the medical treatment she received outside the Form 50 process. Rogers contends that JSC was responsible to pay for treatment provided by doctors in Florida because after Dr. Beyers died, it reimbursed her for treatment she received from his colleague, Dr. Stonehocker. She also contends that JSC is responsible because it failed to plead her failure to obtain a written referral for treatment as an affirmative defense.

[10] Rogers appears to take the position that by making payments for treatment provided by Dr. Stonehocker, JSC effectively gave Rogers the right to unilaterally obtain treatment from anyone notwithstanding the limitations of § 48-120(2). Rogers has not identified any statutory language that would

support this argument. Moreover, it is inconsistent with both general principles of workers' compensation law and § 48-120(2)(a). Voluntary payments of workers' compensation benefits do not constitute an admission of liability by the employer. *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). Furthermore, § 48-120(2)(a) contemplates that the employer may agree to a change in the Form 50 Physician. By providing reimbursement for treatment provided by Dr. Stonehocker, JSC was not admitting it was liable to make payments to *anyone* from whom Rogers obtained treatment.

Rogers fares no better with her argument that JSC cannot rely on a failure to obtain a referral because it did not plead it as an affirmative defense. The issue of whether JSC should reimburse Rogers for her past medical bills was decided in the context of a motion filed by Rogers. The Nebraska Workers' Compensation Act allows for disputes to be presented by motion. See Neb. Rev. Stat. § 48-162.03 (Cum. Supp. 2018). We are aware of no authority, however, that requires (or even allows) the nonmoving party in a workers' compensation proceeding to make a filing in response to a motion. Thus, even if the failure to obtain a referral is an affirmative defense, we see no basis to conclude that JSC waived it by failing to plead it.

Having determined that the plain text of § 48-120(2) governs and that JSC did not somehow waive the right to rely on that statute, it becomes clear that the compensation court should not have ordered JSC to reimburse Rogers for medical treatment obtained from providers in Florida. These providers were not Rogers' initial Form 50 Physician, they did not become the Form 50 Physician by way of either agreement or court order, and Rogers was not referred to them by her Form 50 Physician. The services they provided were thus "medical services furnished or ordered by [a] physician or other person selected by the employee in disregard of this section." § 48-120(2)(f). JSC is not responsible to pay for

such services, and the compensation court erred by holding to the contrary.

Rule 11.

We now turn to JSC's contention that the compensation court's decision did not comply with Workers' Comp. Ct. R. of Proc. 11 (2011). Among other things, rule 11 requires that a "decision[] of the court shall provide the basis for a meaningful appellate review." JSC argues that the portion of the compensation court's order stating that Rogers may continue to receive treatment from Dr. Daitch's office did not provide a basis for meaningful appellate review. We agree.

While the compensation court clearly explained the reasoning supporting its conclusion that JSC was responsible for medical bills Rogers already incurred, it went on to discuss whether JSC should be responsible for medical treatment provided by Dr. Daitch and his colleague, Dr. Michael Frey, going forward. It stated:

> It appears that the only argument in this case, as far as treatment, is whether or not it is appropriate to use narcotics or opioids for an extended period of time. When [Rogers] first began treatment with Dr. Daitch and Dr. Frey, the use of opioids for pain was well accepted. It is only recently that the use of opioids has been questioned because of potential issues or problems with addiction. This being the case, it is time for both Dr. Daitch and Dr. Frey to review the plan of treatment and review alternatives to opioids such has been proposed by Dr. Massey and Dr. Essay.
>
> If [JSC] desire[s] Dr. Daitch to review his plan and prepare a new plan, and explain why there cannot be a change in medications, it must do so at its own cost. The parties should agree on a method to ask Dr. Daitch to review his old plan and prepare a new plan, and explain why alternatives to the use of opioids are not utilized. This is something for the parties to work out as far as how

> it gets done, but it may be in the best interest of [Rogers] to have the plan, which has been in effect for a number of years, reviewed and a new plan prepared. A new plan may be the old plan, but some statements should be made on why [Rogers] is not weaned off of some of her narcotics. The parties should know this court has no jurisdiction over Dr. Daitch.

At the conclusion of its order, the compensation court stated that Rogers "is allowed to continue treatment with Dr. Frey and Dr. Daitch."

We cannot determine what the compensation court meant by ordering that Rogers is allowed to continue treatment with Dr. Daitch's office. It is not clear if the compensation court intended to make Dr. Daitch Rogers' Form 50 Physician going forward or if it made the necessary findings to do so. We have previously alluded to the compensation court's authority to order a change of the Form 50 Physician, but it can do so when it "deems such change is desirable or necessary." § 48-120(6). We read the compensation court's order, however, to equivocate about whether it is "desirable or necessary" for Rogers to continue to be treated by Dr. Daitch. While the order stated that Rogers could continue to receive treatment from Dr. Daitch, it expressed concern about the opioids he continues to prescribe for Rogers.

In addition, the compensation court appeared to believe that some type of review of the opioid regimen prescribed by Dr. Daitch was necessary. We do not understand from its order, however, whether the court was ordering such a review or what effect the results of that review might have on whether the compensation court believes it is necessary or desirable for Rogers to have Dr. Daitch as her Form 50 Physician.

We have previously reversed orders and remanded causes under rule 11 when it was not possible to determine whether the compensation court made the findings necessary to support the relief awarded. See, e.g., *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998); *Hale v. Standard Meat*

Co., 251 Neb. 37, 554 N.W.2d 424 (1996). We believe it is appropriate to do so for the same reason here. Upon remand, the compensation court shall enter an order regarding Rogers' right to reimbursement for ongoing medical treatment that complies with rule 11. Such order shall address whether it is changing Rogers' Form 50 Physician under § 48-120(6) and clarify the ambiguity about any review of Rogers' treatment regimen that is to take place.

CONCLUSION

Because we find that the compensation court erred by ordering JSC to reimburse Rogers for treatment from providers selected in disregard of § 48-120(2) and by issuing a decision that did not comply with rule 11, we reverse the order and remand the cause with directions to enter an order in compliance with rule 11.

Reversed and remanded with directions.

Stacy, J., not participating.

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

Suzy Fentress, formerly known as Suzy Schlick, appellee, v. Westin, Inc., and its workers' compensation insurer, LM Insurance Corporation, appellants.

935 N.W.2d 911

Filed December 6, 2019. No. S-19-128.

1. **Appeal and Error.** As a threshold matter, an appellate court must determine what assignments of error were properly raised and argued on appeal.
2. **Rules of the Supreme Court: Appeal and Error.** The cross-appeal section of an appellate brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of the facts.
3. ____: ____. When a brief of an appellee fails to present a proper cross-appeal pursuant to Neb. Ct. R. App. P. § 2-109 (rev. 2014), an appellate court declines to consider its merits.
4. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside by an appellate court only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
5. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
6. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.

7. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
8. **Workers' Compensation.** Whether a worker in a Nebraska workers' compensation case is totally disabled is a question of fact.
9. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
10. **Workers' Compensation: Pretrial Procedure.** Neb. Rev. Stat. § 48-177 (Cum. Supp. 2018) is a voluntary dismissal of a case which removes the case from the compensation court's docket.
11. **Workers' Compensation.** Neb. Rev. Stat. § 48-162.03(1) (Cum. Supp. 2018) grants a compensation court broad authority to rule on any motion except motions for new trial and motions for reconsideration.
12. **Workers' Compensation: Evidence.** Given the beneficent purposes of workers' compensation law, a compensation court can admit evidence in order to investigate cases in the manner it judges is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act.
13. **Workers' Compensation: Rules of the Supreme Court.** If an employer denies compensability for an injury, the employee can avoid the chain of referral and has a right pursuant to Neb. Rev. Stat. § 48-120(2)(a) (Cum. Supp. 2018) and Workers' Comp. Ct. R. of Proc. 50(A)(6) (2018) to select his or her own physicians for treatment and later seek compensation.
14. **Workers' Compensation: Proximate Cause: Proof.** In workers' compensation cases, an independent intervening cause, as the proximate cause of an injury, is, generally, a matter of defense and, as such, must be proved by the party asserting that defense.
15. **Workers' Compensation.** The mere possibility of an independent intervening cause does not relieve an employer from liability for an employee's otherwise compensable claim for workers' compensation and benefits.
16. **Workers' Compensation: Proof.** A defendant asserting a break in causation by an independent intervening cause must prove the break in causation by competent medical testimony if the claimed injuries are of such a character that scientific testimony is required to prove their validity.

17. **Workers' Compensation: Attorney Fees.** A determination of an award of attorney fees under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2018) must be calculated on a case-by-case basis.

Appeal from the Workers' Compensation Court: J. Michael Fitzgerald, Judge. Affirmed.

Robert Kinney-Walker, of Law Offices of James W. Nubel, for appellants.

Brynne Holsten Puhl, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Suzy Fentress, plaintiff-appellee, suffered a work-related injury in October 2014 while working for Westin, Inc. In October 2017, the Workers' Compensation Court entered an award under which she received temporary partial workers' compensation benefits. In 2018, Westin and LM Insurance Corporation (collectively Westin), defendants-appellants, filed a motion to terminate these temporary indemnity benefits and a motion to determine maximum medical improvement (MMI) and permanency. On October 22, 2018, the compensation court held an evidentiary hearing on Westin's motion to determine MMI. The compensation court admitted significant medical evidence, depositions, and testimony. On October 25, after the hearing, Westin moved to withdraw its motion to determine MMI, but the compensation court disallowed the withdrawal of the motion. A subsequent hearing was held on November 19, on Fentress' motion for attorney fees.

In a written order filed January 15, 2019, the compensation court made detailed factual findings and, inter alia, awarded temporary total disability and attorney fees to Fentress. Westin filed an appeal, and Fentress filed a purported cross-appeal.

As explained below, we determine that the compensation court did not err when it overruled Westin's motion to withdraw its motion to determine MMI; admitted recordings of Fentress' consultation with her physician; found that Fentress had achieved MMI with respect to mental health issues but not physical health issues; and awarded Fentress medical treatment, temporary total disability, and attorney fees. Accordingly, we affirm. Further, as indicated below, we do not consider Fentress' purported cross-appeal.

STATEMENT OF FACTS

On October 4, 2014, Fentress suffered compensable work-related injuries to her hip and mental health in the course of her employment with Westin, Inc., and she was awarded temporary partial benefits by the Nebraska Workers' Compensation Court in an October 6, 2017, award. The fact of the initial injury and initial award are not challenged in this appeal. Following the 2017 award, Fentress continued treatment, including hip surgery and pain management treatment targeted to avoid substance abuse relapse. Westin eventually filed motions to terminate indemnity benefits and to determine MMI and permanency, and in response, Fentress filed a motion requesting payment of medical expenses and attorney fees. The compensation court's January 15, 2019, order on these motions generally in favor of Fentress is the subject of this appeal.

The compensation court held a hearing on October 22, 2018, limited to the issue of whether Fentress had reached MMI. The parties submitted evidence and testimony, and the court took judicial notice of the October 6, 2017, award. On November 19, 2018, the court held a hearing on medical expenses to date and Fentress' request for attorney fees. The compensation court dictated its reasoning regarding the award of attorney fees to Fentress at the November 19 hearing. Neither hearing addressed permanency benefits.

At the October 22, 2018, hearing, the compensation court admitted exhibit 85, which included a recording taken by Fentress on May 2, 2018, of her consultation with her treating

physician, Dr. Steven Aviles. Fentress testified in her deposition and at trial that she took her cell phone to the appointments with Dr. Aviles and recorded what they said to each other, because she did not want to forget what he said. She testified that sometimes when she visited Dr. Aviles, she could not remember later what he said to do, so she recorded the conversation with her cell phone. At the point the recording was made, Fentress had been denying any improvement from surgery and Dr. Aviles placed Fentress at MMI and ordered a functional capacity evaluation (FCE). The recording includes the following exchange:

> Dr. Aviles: How does it feel?
>
> Fentress: [inaudible.]
>
> Dr. Aviles: Ok, well. At this point we'll say the surgery failed. Okay. It didn't work. We tried.
>
> Dr. Aviles: I'll give you [an FCE] to assess where you're at. Those are going to be permanent restrictions. Okay?
>
> Fentress: Okay.
>
> Dr. Aviles: There is no interpretation of the data. Whatever they say, is what it is.
>
> Fentress: Right.
>
> Dr. Aviles: Okay. Unless you fail what is called the reliability testing. Okay. So if for some reason they think that you're faking it, then it is unreliable, at that point you return to work without restrictions. So you have to give good effort. Okay? I'm sorry it didn't work for you.

The comments regarding failed surgery were consistent with a prior medical record from March 2018, in which Dr. Aviles had opined that "[u]nfortunately it is possible that the surgery may not have worked for her." At the hearing, Westin objected to receipt of exhibit 85 and stated the recordings were surreptitious and made without the permission of Dr. Aviles. Westin objected on the basis of foundation, hearsay, and late disclosure. The compensation court overruled these objections and admitted exhibit 85.

The clinic where Fentress had completed physical therapy conducted an FCE on May 22, 2018, approximately 3 weeks after the recordings of the consultation with Dr. Aviles. The FCE was found to be valid, based on Fentress' consistent performance and acceptable effort, and recommended a 41-pound lifting restriction. The FCE found that Fentress had a loss of motion, extension, abduction, adduction, internal rotation, and external rotation when the left hip is compared to the right hip, as well as decreased strength of the left hip. Prior to her hip surgery, Fentress had been working at a position requiring her to lift up to 50 pounds.

With regard to work restrictions, Westin disputed the restrictions recommended by the FCE and put on evidence that Fentress was released to full-duty work both by Westin's psychologist and by Dr. Aviles. Dr. Aviles opined that Fentress was able to return "to work full duty" and that she did not require "any future medical treatment/medications as a result of any hip injury." He wrote, "I normally do not recommend restrictions after hip arthroscopy. Previous repair has healed." Subsequently, Westin's counsel supplied Dr. Aviles with the recordings made by Fentress, and Dr. Aviles signed an October 18, 2018, statement that stated Fentress was a "malingerer" who was "simply exaggerating her disability."

Westin also submitted evidence that Fentress suffered some type of fall on June 30, 2018, subsequent to her FCE, which was documented in medical records. Westin contends that the fall eliminates its liability for the work-related injury. Fentress testified that the incident occurred when she was walking in a park. She testified, "I caught my left foot on — which is my bad leg, on that cement slab. And I basically stumbled. I caught myself with that bad leg out of reflex, and it initially hurt right away. It wasn't like super alarming, but it continued to hurt for a week." On July 6, Fentress was evaluated for her left hip pain and diagnosed with a left hip strain and referred to physical therapy, which she attended from July 31 through September 9. The compensation court noted that there are no

records showing a further examination related to the incident at the park.

Fentress testified that her left hip pain continually got worse and that she attempted to return to her pain management physician for an appointment in September 2018. Westin did not authorize the visit or medications. Fentress was referred by her family care physician to a different pain management specialist, Dr. Christopher D. Nelson.

Fentress consulted with Dr. Nelson of Des Moines Orthopedic Surgeons. Westin denied coverage for Dr. Nelson's care of Fentress. Dr. Nelson evaluated Fentress and reviewed her treatment records. Fentress reported that she had muscle pain localized to the "IT band, groin, hip flexor, quadriceps, bursa, glute, [sacroiliac joint], and low back," that she had difficulty standing for long periods of time, and that she was "depressed, miserable, and angry" as a result of her pain. Dr. Nelson's examination showed a decrease in motion of the left hip.

Dr. Nelson diagnosed intra-articular left hip pain that was confirmed by a diagnostic injection. After the injection, Fentress had no groin pain from walking and walked without a limp. Dr. Nelson opined that Fentress' "current pain dates back to her original injury" and that "[i]f we do not seek alternative treatment options, she would have continued lifelong pain with severe limitations." Because of the relief after the pain injection, Dr. Nelson recommended a revision hip surgery because the injection indicated a clear source of intra-articular pain.

Following the October 22, 2018, hearing on MMI, the compensation court gave the parties until October 29 to submit written closing arguments. On October 25, Westin, identifying itself as "Defendants" filed pleadings entitled "Withdrawal of Motion to Terminate" and "Withdrawal of Motion to Determine," the substance of which had been the subject of the hearing.

The compensation court ruled that Westin would not be permitted to withdraw the issue of whether Fentress had reached

MMI. In its ruling, the compensation court referred to Neb. Rev. Stat. § 48-177(2) (Cum. Supp. 2018). The court ordered the parties to submit briefs. Westin filed a written objection to the court's decision disallowing withdrawal of its motions. As noted, on November 19, 2018, the compensation court held a hearing on Fentress' motion for attorney fees.

On January 15, 2019, the compensation court filed an order in which it made detailed factual findings and awarded temporary total disability and attorney fees to Fentress. With regard to injuries to her mental health, the court found Fentress had reached MMI but needed future medical treatment and medical care to maintain this level. See Neb. Rev. Stat. § 48-120 (Cum. Supp. 2018). With regard to the hip injury, the court found Fentress had not reached MMI and was entitled to future medical care. See *id*.

The compensation court explicitly rejected Dr. Aviles' opinion that Fentress was lying and malingering, because it found this later opinion contradicted earlier office notes documenting failed surgery. In its order, the court noted, "As you can tell from the statements signed by Dr. Aviles on October 18, 2018[,] he was very unhappy that someone would record conversations during an examination."

The compensation court found that Fentress was still in pain and that the intra-articular injection Dr. Nelson had given Fentress gave her relief and had not been previously attempted. The order found Fentress' treatment with Dr. Nelson was compensable and ordered Westin to compensate Fentress for continued future treatment with Dr. Nelson.

Finally, the court ordered Westin to pay Fentress' attorney fees in the amount of $2,500 incurred, because Westin failed to timely make required medical payments. See Neb. Rev. Stat. § 48-125 (Cum. Supp. 2018). The order incorporated the "reason for the determination . . . and the amount due [Fentress] for attorney's fees [as] dictated to the court reporter at the time of the hearing on November 19, 2018."

Westin appeals, and Fentress filed a purported cross-appeal challenging the accuracy of certain calculations regarding benefits.

ASSIGNMENTS OF ERROR

On appeal, Westin claims that the compensation court erred when it (1) denied Westin's motions to withdraw its previously filed motions, (2) admitted recordings taken by Fentress of her consultation with her physician, (3) found Fentress' treatment with Dr. Nelson compensable, (4) awarded Fentress temporary total disability, (5) failed to analyze whether Fentress suffered an independent intervening event, and (6) failed to specifically discuss the reasons supporting its award of attorney fees to Fentress.

[1] Fentress attempts to raise a cross-appeal related to the calculation of certain temporary benefits and penalties, but failed to separately assign errors as the basis of her purported cross-appeal. As a threshold matter, we must determine what assignments of error were properly raised and argued on appeal. *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018). Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014) of our court rules of appellate practice provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

[2,3] Thus, the cross-appeal section of an appellate brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of the facts. *In re Estate of Graham, supra*. Although a subheading in Fentress' brief states that the compensation court erred in not ordering payment of underpaid temporary indemnity benefits and a waiting-time penalty, this is not an acceptable substitute for a proper assignment of error. See

In re Interest of Samantha L. & Jasmine L., 286 Neb. 778, 839 N.W.2d 265 (2013). When a brief of an appellee fails to present a proper cross-appeal pursuant to § 2-109, as in this case, we decline to consider its merits. See *In re Estate of Graham, supra*.

STANDARDS OF REVIEW

[4,5] A judgment, order, or award of the compensation court may be modified, reversed, or set aside by an appellate court only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018). Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence. *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016).

[6] The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id*.

[7] Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016).

[8,9] Whether a worker in a Nebraska workers' compensation case is totally disabled is a question of fact. *Id*. In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Id*.

ANALYSIS

Denial of Westin's Motion to Withdraw Motion to Determine MMI Was Not Error.

Central to Westin's appeal is its contention that it was improper for the compensation court to rule on a motion after Westin had attempted to withdraw that motion; Westin specifically refers to its attempted withdrawal of its previously filed motion to determine MMI. As noted above, Westin moved to withdraw its motion to determine MMI following the evidentiary hearing on this very issue. As explained below, we conclude that Westin's motion to withdraw was subject to the ordinary procedure pertaining to motion practice, see Neb. Rev. Stat. § 48-162.03(1) (Cum. Supp. 2018), and we review the compensation court's ruling thereon under the standards of review recited above. Although our reasoning differs from that of the compensation court, we find no error with respect to the compensation court's ruling which denied Westin's motion to withdraw. Accordingly, we find no merit to this assignment of error.

In its ruling in which it denied Westin's motion to withdraw its previously filed motion to determine MMI, the compensation court relied on § 48-177. Westin contends that § 48-177 is the controlling statute, but maintains that the compensation court misapplied it.

Section 48-177 is entitled "dismissal." Section 48-177(1) refers to the filing of "a petition or motion," sometimes referred to as "the cause," and § 48-177(2) provides that a "cause may be dismissed . . . (a) by the plaintiff . . . or (b) by the compensation court upon a stipulation."

Fentress has been denominated "plaintiff" throughout the years this case has been pending. And because permanency has not been determined, the matter is not closed or dismissed. Notwithstanding these facts, the compensation court reasoned that for purposes of § 48-177, the "defendants" were "'the plaintiff'" and their "withdrawal of motion" sought a dismissal.

[10] The compensation court's strained interpretation of the words of § 48-177 demonstrates that the statute is not applicable to the motion at issue, which was filed in an ongoing case. We have viewed § 48-177 as a voluntary dismissal of a case which "removes the case from the [compensation] court's docket." *Knapp v. Village of Beaver City*, 273 Neb. 156, 162, 728 N.W.2d 96, 100 (2007). Westin's motion did not seek dismissal, nor did the compensation court's ruling thereon dismiss the matter. Given the above, we conclude that § 48-177 does not control the analysis.

[11] The motions filed by Westin in this case related to a pending case in which a petition had already been filed by Fentress. Westin's motion to determine MMI was encompassed by the motion practice under the broad language of § 48-162.03(1), which allows any party to a suit or proceeding to make "any motion" to the compensation court, "including, but not limited to, motions for summary judgment or other motions for judgment on the pleadings but not including motions for new trial." We have stated that this language "grants the court broad authority to rule on any motion except motions for new trial and motions for reconsideration." *Cruz-Morales v. Swift Beef Co.*, 275 Neb. 407, 413, 746 N.W.2d 698, 703-04 (2008). Withdrawal of a motion under § 48-162.03(1) would not remove the case from the compensation court's docket. Compare *Knapp, supra* (interpreting § 48-177). Instead of relying on § 48-177, we believe the ruling denying Westin's motion to withdraw its motion to determine MMI is controlled by reference to § 48-162.03(1).

Because Westin's motion to withdraw its motion for a determination of MMI is governed by ordinary motion practice, we apply the standard of review required by § 48-185. We may modify, reverse, or set aside such an order only on the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award;

or (4) the findings of fact by the compensation court do not support the order or award. *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016). In the present circumstance, we apply the standard of review numbered "(3)" above; that is, we must determine whether the record is sufficient to warrant the order.

Westin contends that it needed additional time for discovery after the hearing was held on its motion to determine MMI. The record shows that despite a prior award in favor of Fentress, Westin was denying compensability and Fentress would have been prejudiced by a further delay in receipt of medical and disability benefits if Westin's efforts to postpone a ruling on MMI had been successful. Fentress notes that the issue of MMI was unresolved by the award which resulted from her initial petition. Fentress contends that allowing Westin to withdraw its motion would postpone an inevitable determination of MMI and require additional court resources and litigation by the parties. We observe that although not controlling, Westin's motion to withdraw its motion to determine MMI after the evidentiary hearing on MMI would tend to defeat the prohibition against motions for new trials. See § 48-162.03(1). We find sufficient evidence in the record to support the compensation court's order which denied Westin's request to withdraw its motion to determine MMI.

Admission of Audio Recording Was Not Error.

Westin claims that the compensation court erred when it admitted exhibit 85, a recording of the consultation Fentress had with her orthopedic doctor, Dr. Aviles, on May 2, 2018. Westin contends that this recording is not the best evidence of Dr. Aviles' opinions and that allowing "surreptitious" recordings of health care providers can have a chilling effect on physicians treating workers' compensation patients, because "[i]t is probably safe to assume most physicians don't appreciate being secretly recorded . . . ." Brief for appellants at 15.

[12] The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence. Neb. Rev. Stat. § 48-168 (Reissue 2010); *Bower v. Eaton Corp.*, 301 Neb. 311, 918 N.W.2d 249 (2018). Given the beneficent purposes of workers' compensation law, a compensation court can admit evidence in order to investigate cases in the manner it judges is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act. See *Bower, supra*. As noted above, we review the admission of evidence by the Workers' Compensation Court for abuse of discretion. See *Tchikobava v. Albatross Express*, 293 Neb. 223, 876 N.W.2d 610 (2016). And, as related to the current appeal, we recognize that we have long approved the admission of surveillance videotapes in workers' compensation cases. *Brock v. Dunning*, 288 Neb. 909, 854 N.W.2d 275 (2014). See, e.g., *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989).

Here, Fentress laid foundation for exhibit 85 by testifying in her deposition and at trial that she took her cell phone to the appointments with Dr. Aviles and recorded their exchange, because she did not want to forget the content of the visit. Fentress explained that she sometimes could not remember physicians' instructions, so she used her cell phone to record these conversations and make it easier to remember and, in addition, because of a prior substance abuse issue, to share with her sponsor. Fentress stated that she set her cell phone on a desk, in the open. Westin and Dr. Aviles were able to review these recordings, and thus, Westin had the opportunity to respond to Fentress' recording and place responsive contrary evidence before the court. In fact, Westin's evidence, including the October 18, 2018, statement of Dr. Aviles, referred to the recording in exhibit 85. Thus, exhibit 85 served to establish a foundation for subsequent exhibits. Admission of exhibit 85 was not an abuse of discretion.

Compensability of Dr. Nelson's Fees Was Not Error.

Westin claims the compensation court erred when it ordered Westin to pay for past and future medical visits with Dr. Nelson, an orthopedic specialist not selected by the employer or referred by a physician initially designated under the Nebraska Workers' Compensation Court rules of procedure. See Workers' Comp. Ct. R. of Proc. 50(A)(6) (2018). Westin contends that this aspect of the order was an impermissible rule 50 physician change and not compensable. We do not agree.

[13] Under § 48-120(2)(e) and rule 50(A)(6), an employee must generally follow a chain of referral and provide notice to the employer before changing primary treating physicians. However, if an employer denies compensability for an injury, the employee can avoid the chain of referral and has a right pursuant to § 48-120(2)(a) and rule 50(A)(6) to select his or her own physicians for treatment and later seek compensation. In *Clark v. Alegent Health Neb.*, 285 Neb. 60, 68, 825 N.W.2d 195, 202 (2013), we considered the consequences of denial of compensability and stated:

> Larson's Workers' Compensation Law discusses the circumstances which effectuate an employer's "denial of compensation" under statutory workers' compensation provisions similar to those of Nebraska: "The central rule defining the circumstances under which a claimant may on his or her own initiative incur compensable medical expense may be put as follows: If the employer has sufficient knowledge of the injury to be aware that medical treatment is necessary, it has the affirmative and continuing duty to supply medical treatment that is prompt, in compliance with the statutory prescription on choice of doctors, and adequate; if the employer fails to do so, the claimant may make suitable independent arrangements at the employer's expense."

Although Fentress had a prior award finding she had compensable injuries and was entitled to reasonable and necessary future medical care, Westin discontinued additional medical care in 2018. Fentress testified that she attempted to return to a previously authorized treating physician's office for an appointment in September 2018, but Westin did not authorize the visit. There was evidence in the record that Westin had denied compensability to physicians within the rule 50(A)(6) chain of referral, and thus Fentress could seek potentially compensable treatment with a physician of her choosing. This subsequent treatment was, as we discuss below, properly deemed compensable by the compensation court, and therefore, Westin was duly found liable for Dr. Nelson's medical treatment of Fentress. The compensation court's order permitting Fentress to continue treatment with Dr. Nelson was not in error.

Award of Temporary Total Disability Was Not Error.

Westin claims that the compensation court erred when it found Fentress was totally disabled and awarded Fentress temporary total disability benefits. On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Krause v. Five Star Quality Care*, 301 Neb. 612, 919 N.W.2d 514 (2018). Because we determine that the findings of the compensation court were not clearly wrong, we reject this assignment of error.

Westin contends that the record lacks adequate evidence of work restrictions. However, we find support in the record for the compensation court's determination pertaining to work restrictions, including the valid FCE performed by a medical clinic on May 22, 2018, to which the compensation court referred in its order. The FCE showed Fentress had the ability to work in the medium physical demand level but with specific restrictions. Fentress testified that her condition had worsened in the time between the FCE and the hearing. Additionally,

Dr. Nelson had recommended that Fentress have further pain injections and surgery and that Fentress use a cane to assist her when walking to minimize limping and prevent the development of other issues. We are aware that Westin presented the contrary opinion of Dr. Aviles, who stated that Fentress could work full duty without restrictions. The compensation court specifically disregarded this opinion.

Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court. *Hintz v. Farmers Co-op Assn.*, 297 Neb. 903, 902 N.W.2d 131 (2017). Viewed in the light most favorable to Fentress, the compensation court's factual determination that Fentress was temporarily totally disabled under § 48-185 is supported by the record and not clearly wrong.

Independent Intervening Event Did Not Relieve Westin of Liability.

Westin claims that the compensation court reversibly erred when it failed to find that Fentress suffered an independent intervening event that relieved Westin from further liability. The compensation court's factual findings on causation implicitly disagree with this contention, and we reject this assignment of error.

[14-16] In workers' compensation cases, an independent intervening cause, as the proximate cause of an injury, is, generally, a matter of defense and, as such, must be proved by the party asserting that defense. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). The mere possibility of an independent intervening cause does not relieve an employer from liability for an employee's otherwise compensable claim for workers' compensation and benefits. *Id*. A defendant asserting a break in causation by an independent intervening cause must prove the break in causation by competent medical testimony if the claimed

injuries are of such a character that scientific testimony is required to prove their validity. See *Mendoza, supra*.

Although an incident was documented in Fentress' medical reports to the effect that Fentress "tripped . . . but did not fall all the way," Westin did not produce expert opinions showing permanent damage caused by Fentress' June 30, 2018, stumble in the park. The compensation court order noted treatment given on July 6, discussing the new pain from Fentress' stumble, and elsewhere, the compensation court found that "[t]here are no records submitted showing a further examination related to the fall at the park." Fentress testified that the pain from the stumble was of a different nature and "continued to hurt for a week."

By virtue of its findings, the compensation court implicitly found against Westin on its defense that Fentress suffered an independent intervening cause, when it noted the lack of evidence related thereto and expressly agreed with opinions of Dr. Nelson regarding causation and the necessity of continuing medical treatment occasioned by the work-related injury. We cannot say that the compensation court's order authorizing temporary total disability benefits was error.

Award of $2,500 Attorney Fees to Fentress Was Not Error.

Westin argues that the award of attorney fees to Fentress in the requested amount of $2,500 was unreasonable because the compensation court did not detail how it arrived at that figure. We find no merit to this assignment of error.

The compensation court found that Westin failed to promptly pay certain medical payments ordered by the court within 30 days and that Westin became liable for attorney fees under § 48-125(4)(a). Westin's claim of error is with regard to the amount of the fees.

[17] A determination of an award of attorney fees under § 48-125 must be calculated on a case-by-case basis. *Simmons v. Precast Haulers*, 288 Neb. 480, 849 N.W.2d 117 (2014).

Determining the amount for the fees is necessarily a question of fact that requires a factual determination on several factors. *Id*.

The record shows that Fentress presented evidence of her counsel's efforts to seek payment of the past-due bills, including at least five requests to Westin and counsel's participation in motion practice and a hearing. At the hearing on attorney fees, the compensation court stated that "if [the attorney] wants $2,500, I really don't see why she doesn't get the 2,500 because of the detail that they give me. I mean, this is unbelievable detail that we receive from this office regularly." We give deference to the factual findings of the compensation court. *Id.* Although it would be the better practice for the written order to recite the factors on which it relied, given its recitals at the attorney fees hearing in this case, we find that the compensation court did not err when it awarded the full amount of attorney fees requested by Fentress.

CONCLUSION

For the reasons recited above, the compensation court did not err when it denied Westin's motion to withdraw its previously filed motion to determine MMI after the hearing on MMI; admitted Fentress' recording of the consultation with a physician; and awarded Fentress medical treatment, temporary total disability, and attorney fees. Accordingly, we affirm.

Affirmed.

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

Wheatland Industries, LLC/Mid America Agri Products, appellee, v. Perkins County Board of Equalization, appellant.

935 N.W.2d 764

Filed December 6, 2019. No. S-19-305.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Judgments: Words and Phrases.** Agency action is arbitrary, capricious, and unreasonable if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
4. **Taxation: Valuation: Presumptions: Evidence.** A presumption exists that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary.
5. ____: ____: ____: ____. Once the challenging party overcomes the presumption of validity by competent evidence, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all of the evidence presented.
6. **Taxation: Valuation: Proof: Appeal and Error.** The burden of showing a valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board of equalization.
7. **Taxation: Valuation: Proof.** The burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of

opinion unless it is established by clear and convincing evidence that the valuation placed upon the property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Richard H. Roberts, Perkins County Attorney, and Gary F. Burke for appellant.

Frederick D. Stehlik and Zachary W. Lutz-Priefert, of Gross & Welch, P.C., L.L.O., for appellee.

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

Cassel, J.

INTRODUCTION

This review proceeding addresses the taxable valuation of commercial real estate used as an ethanol plant. The taxpayer unsuccessfully protested the county's $16.3 million valuation—a valuation based upon mass appraisal techniques—and then appealed to the Tax Equalization and Review Commission (TERC), which reduced the value to $7.3 million based upon the taxpayer's appraisal. Here, because the county's valuation relied upon admittedly incorrect information and lacked evidentiary support regarding applicable depreciation, the evidence showed more than a mere difference of opinion. Finding no error appearing on the record, we affirm TERC's ruling. But our decision should not be read to categorically reject mass appraisal as a proper valuation methodology for an ethanol plant.

BACKGROUND

Wheatland Industries, LLC/Mid America Agri Products (Wheatland) owned an ethanol plant on commercial real estate in Madrid, Perkins County, Nebraska (Madrid property). The

Perkins County assessor, Peggy Burton, assessed the value of the Madrid property at $16,364,768 for the 2017 tax year.

Wheatland protested the assessment to the Perkins County Board of Equalization (Board). At the protest hearing, Wheatland did not present evidence. The Board affirmed Burton's valuation of the Madrid property.

Wheatland appealed to TERC. A hearing was held and both parties presented evidence. We first summarize the evidence regarding the county's assessment, then the evidence of the taxpayer's appraisal, and finally TERC's decision.

County Assessment

For the county, Darrell Stanard conducted an appraisal of the Madrid property using the mass appraisal method. He had appraised five other ethanol plants in different counties using the mass appraisal approach. He agreed with the $16 million value of the Madrid property.

In order to aid the mass appraisal assessment, Burton prepared a spreadsheet of the values of all ethanol plants in Nebraska. She obtained the values directly from the other counties' assessors but she was unaware how those counties assessed their ethanol plants. She maintained that the $16 million value was the proper value for the Madrid property.

Wheatland elicited evidence about the value shown on Burton's spreadsheet for the Furnas County ethanol plant. Stanard agreed with Wheatland that the Furnas County plant's nameplate capacity shown on the spreadsheet was incorrect. Its nameplate capacity was actually 44 million gallons, not 22 million gallons as shown on the spreadsheet. He explained that the nameplate capacity is critical to determining the value of the plant. Before this court, the Board in effect concedes the error. And Burton agreed that if the spreadsheet contained incorrect information about the nameplate capacity of the Furnas County plant, it would change her opinion about the value of the Madrid property. But she did not quantify how her opinion would change.

Wheatland's appraiser, Joseph Calvanico, had valued the Furnas County plant twice. He stated that the Furnas County plant was "almost a mirror copy" of the Madrid property—both were constructed at the same time, used the same technology, and are about the same size. When appraising the Furnas County plant, he used the same methodology as he did for the Madrid plant. Wheatland's chief executive officer stated that he owned the Furnas County plant and that it was identical to the Madrid property, except there were 200 more acres of land for the Furnas County plant. The Furnas County plant was assessed at $8,943,575. Stanard agreed that if Calvanico was correct that the Furnas County plant was a "sister" plant to the Madrid property, he would have no disagreement with Calvanico's appraisal of the Madrid property.

Wheatland Appraisal

At the time of TERC's hearing, Calvanico had been a real property appraiser for 35 years. Wheatland hired him to appraise the Madrid property. He testified that his appraisal conformed with the Uniform Standards of Professional Appraisal Practice.

Calvanico utilized the cost approach method to appraise the property. He stated that the income approach would not be useful, because the income stream associated with the property came from the separately assessed equipment rather than from the real estate. He opined that the sales comparison approach was useful to underscore the information from the cost approach. He explained that the sales comparison approach would not be effective as a stand-alone method of appraisal for the Madrid property, because most sales of ethanol plants were older and not from the area.

Calvanico explained his application of the cost approach method. He began by determining the value of the underlying land. He examined land sales of dry farmland and concluded that the price per acre was $1,600. He appraised the value of the underlying land at $277,000. He then appraised the

buildings and improvements on the land. He classified the buildings and improvements and used the Marshall Valuation Service to estimate the replacement cost. He estimated the base actual value of the buildings at $9,387,529 and improvements at $5,641,172.

He then discussed depreciation. He concluded that the physical depreciation of the buildings that were 10 years old would depreciate 20 to 22 percent, the structures built within the past few years would depreciate 4 to 6 percent, and the improvements would depreciate 25 percent.

Burton stated that when performing mass appraisal, she did not apply depreciation to any property and did not believe that depreciation was applied to the Madrid property. Stanard agreed that physical depreciation should be factored into the value of the Madrid property.

Calvanico discussed the functional depreciation attributed to the buildings. He stated that if the fermentation and main process buildings were put to an alternative use, those buildings would be the most difficult to repurpose, because their function is to house the equipment. He applied a 20-percent functional depreciation to those buildings. Stanard stated that functional depreciation should not be applied.

Calvanico discussed the economic depreciation attributed to the buildings and improvements. He examined the ethanol industry in Nebraska and nationwide. He discussed the decrease in the price per bushel of corn and the diminished number of ethanol plants in Nebraska. He emphasized that in 2011, there were 39 ethanol plants in Nebraska, and that at the time of appraisal, there were 26 ethanol plants. He articulated that this was a 40-percent decrease in the ethanol industry in Nebraska and concluded that the economic value of the Madrid property would depreciate 40 percent. Stanard agreed that "some" economic depreciation should be applied but did not quantify how much that should be.

Ultimately, Calvanico appraised the actual value of the Madrid property at $6.8 million.

TERC's Decision

TERC found that because Calvanico performed the appraisal according to professionally approved standards, his appraisal report was competent evidence sufficient to rebut the presumption in favor of the Board's determination.

TERC then found that, for two reasons, it was unreasonable and arbitrary for the Board to rely upon Burton and Stanard's valuation. First, TERC agreed with Burton, Stanard, and Calvanico that physical depreciation should be applied to the Madrid property. It characterized Burton's and Stanard's testimony as to whether physical depreciation had been applied as "inconsistent," and it determined that they had provided no evidence of the amount of physical depreciation. Second, TERC pointed to the incorrect information Burton's spreadsheet contained and the absence of a revised opinion based upon the correct information.

TERC then discussed Calvanico's appraisal and focused on his analysis of depreciation. First, TERC agreed with Calvanico's assessment of physical depreciation. Second, it reasoned that the Madrid property was still operating as an ethanol plant with the "Delta-T technology" at the time of the assessment and that therefore, it did not suffer from functional depreciation. Finally, it agreed that

> due to the state of the ethanol industry, including a reduction in the price per gallon paid for ethanol, a reduction if not contraction of the rate of ethanol plant construction and other factors the depreciation to be applied to the [Madrid property] for economic obsolescence should be 40 [percent].

Except regarding functional depreciation, TERC found Calvanico's appraisal persuasive and assessed the value of the Madrid property for 2017 at $7,336,042.

The Board timely petitioned for review of TERC's decision.[1] We moved the review proceeding to our docket.[2]

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[1] See Neb. Rev. Stat. § 77-5019(2)(a)(i) (Reissue 2018).

[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

ASSIGNMENTS OF ERROR

The Board assigns that (1) there was insufficient evidence for TERC to find that the Board's determination was unreasonable and arbitrary, (2) TERC erred when it allowed a 40-percent economic depreciation, and (3) it erred when it found the value of the Madrid property to be $7,336,042.

STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4] Agency action is arbitrary, capricious, and unreasonable if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.[5]

ANALYSIS

[4] We begin by noting that the presumption of validity does not apply at this stage. A presumption exists that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary.[6] Neither party disputes that Wheatland presented competent evidence through Calvanico's appraisal and thereby overcame the presumption of validity of the Board's valuation.

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

[4] *Id.*

[5] *Id.*

[6] *Id.*

[5-7] This leads to the principles governing TERC's decision. Once the challenging party overcomes the presumption of validity by competent evidence, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all of the evidence presented.[7] That applies here. The burden of showing a valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board of equalization.[8] The burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon the property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.[9]

The Board makes three arguments that there was insufficient evidence to support TERC's determination. First, it argues that once the presumption of the Board was rebutted, there was sufficient evidence to support that the Board's valuation of the Madrid property, when compared to a similar property, was not grossly excessive. Second, it argues that there was insufficient evidence to support the 40-percent economic depreciation, because the Madrid property had been profitable and the ethanol plant numbers Calvanico relied upon were proposed plants not completed plants. Third, it argues that if we determine the economic depreciation percentage was incorrect, then we should value the Madrid property without economic depreciation or remand the matter to TERC with instruction to determine the correct amount of economic depreciation, if any.

Wheatland presented evidence of the Furnas County plant as a comparable property. Calvanico stated that he had appraised

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[7] See *id.*

[8] *Id.*

[9] *Id.*

the Furnas County plant twice and that it was nearly identical to the Madrid property in blueprint, technology, and capacity. He referred to the Furnas County plant as a "sister" plant. Wheatland owned the Furnas County plant, and its chief executive officer affirmed that they were identical.

Stanard explained that Burton's spreadsheet contained incorrect information about the Furnas County plant. The Furnas County plant was not a 22-million-gallon plant, but, rather, it was a 44-million-gallon plant. This affirmed Wheatland's evidence that the plants were identical in capacity. Stanard's statement—that the nameplate capacity of a plant was critical to determining its value—emphasized the importance of the relationship in value between the Furnas County plant and the Madrid property. Although Burton did not state how her opinion of the Madrid property value would change from the incorrect spreadsheet, she did not dispute the $8.9 million value of the Furnas County plant. Stanard did state that if the Furnas County plant was a "sister" plant, he would have no disagreement with Calvanico's appraisal of the Madrid property. Clearly, the evidence presented showed that the Furnas County plant was a "sister" plant. Calvanico's opinion purported to show that the Board had overvalued the Madrid property by well over $6 million—hardly a mere difference of opinion. Stanard's acceptance of Calvanico's appraisal undermines the Board's argument attempting to characterize it as such.

As part of Wheatland's evidence intended to show a grossly excessive value, it focused on the failure to apply depreciation. Burton, Stanard, and Calvanico all agreed that physical depreciation should be applied to the Madrid property. Burton and Stanard were unaware if physical depreciation was applied, and there was no evidence that it was. Additionally, Stanard agreed with Calvanico that "some" economic depreciation should be applied to the Madrid property but the Board did not present evidence as to an appropriate amount. This evidence showed that the Board's valuation was unreliable, because it failed to

take into account any depreciation, which in turn resulted in an excessively high valuation.

Because the evidence showed that the Furnas County plant was comparable and that the Board's valuation was unreliable, there was competent evidence to show that the Board's valuation was grossly excessive. Accordingly, TERC's determination that it was arbitrary and unreasonable to rely on the Board's determination of value was supported by competent evidence and was not arbitrary, capricious, or unreasonable.

The Board argues that there was insufficient evidence to support economic depreciation of 40 percent. "Based upon the applicable law, the Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary."[10] Because Wheatland established that the Board's valuation was unreasonable and arbitrary, TERC did not err in relying upon Calvanico's appraisal.

"Economic depreciation results from external economic forces which depress the value of the property."[11] Calvanico observed the state of the ethanol industry, the decrease in the price per gallon of ethanol, and the reduction of the rate of ethanol plant construction. He emphasized that Nebraska had 39 ethanol plants in 2010 and 26 ethanol plants in 2017. From his observations, he opined that economic depreciation of 40 percent was appropriate.

We cannot say that TERC's reliance on Calvanico's opinion was arbitrary, capricious, or unreasonable. Stanard asserted that the numbers that Calvanico relied upon were not all constructed and operational ethanol plants—that is, some were proposed plants that never came to fruition. But he did not expound why proposed plants versus operational plants makes a difference

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[10] *Bottorf v. Clay Cty. Bd. of Equal.*, 7 Neb. App. 162, 168, 580 N.W.2d 561, 566 (1998).

[11] *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 414, 445 N.W.2d 880, 882 (1989).

to the state of the Nebraska ethanol industry or how it would affect economic depreciation. Moreover, Stanard admitted that "some" economic depreciation was appropriate, but failed to quantify his opinion. TERC was left with the choice between "some" and 40 percent. Further, the Board failed to present evidence as to how the profitability of the ethanol plant would affect economic depreciation of the property and quantify that amount. Accordingly, TERC's determination of economic depreciation was based on competent evidence and was not arbitrary, capricious, or unreasonable.

CONCLUSION

We reiterate that our decision does not mean that mass appraisal valuation techniques do not apply to ethanol plants. Here, because evidence was presented to show that a similar property was valued comparably to Wheatland's appraisal and the Board's valuation was unreliable, we conclude that TERC's determination that the Board's valuation was unreasonable and arbitrary was supported by competent evidence and was not arbitrary, capricious, or unreasonable. Additionally, we conclude that TERC's determination of economic depreciation was supported by competent evidence and was not arbitrary, capricious, or unreasonable. We affirm its decision.

Affirmed.

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

State of Nebraska, appellee, v. Joshua Dady, appellant.

936 N.W.2d 486

Filed December 13, 2019. No. S-18-948.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
3. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
5. **Criminal Law: Evidence: Appeal and Error.** When examining a sufficiency of the evidence claim, 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.
6. **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 whether the

court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.

7. **Judgments: Appeal and Error.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
8. **Sexual Assault.** Under Neb. Rev. Stat. § 28-319(1)(b) (Reissue 2016), whether the victim was incapable of consent depends upon a specific inquiry into the victim's capacity, i.e., whether the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct.
9. ____. Neb. Rev. Stat. § 28-319(1)(b) (Reissue 2016) applies to a wide array of situations that affect a victim's capacity, including age.
10. **Jury Instructions: Evidence: Appeal and Error.** When examining for harmless error, the court may look at a variety of factors including the jury instructions as a whole, the evidence presented at trial, and the closing arguments.
11. **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.
12. **Rules of Evidence: Hearsay: Proof.** Evidence is admissible under Neb. Rev. Stat. § 27-803(3) (Reissue 2016) when the party seeking to introduce the evidence demonstrates (1) that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.
13. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
14. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the crime. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Timothy F. Shanahan, and Abbi R. Romshek for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appelllee.

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

Freudenberg, J.

NATURE OF CASE

Appellant was convicted of first degree sexual assault under Neb. Rev. Stat. § 28-319(1)(b) (Reissue 2016). Appellant was 18 years old at the time, and the victim was 10 years old. Appellant was found guilty, and he now assigns several errors on appeal. These errors focus on several rulings by the district court related to the knowledge element of the crime charged and whether age can be a factor in a jury's determination of capacity under § 28-319(1)(b). For the reasons set forth below, we affirm the judgment of the district court.

FACTS

Joshua Dady was charged with first degree sexual assault after he admitted to police that he had sex with M.J., a 10-year-old girl. While Dady was 18 years old and within 4 days of their meeting, Dady engaged in vaginal intercourse with M.J. Dady was charged under § 28-319(1)(b). Section 28-319(1) makes it a crime for "[a]ny person [to subject] another person to sexual penetration . . . (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct[.]" Following a jury trial, Dady was convicted and sentenced to 20 to 25 years' imprisonment. Dady appeals.

Dady first met and talked with M.J. for approximately an hour after she exited a schoolbus a few blocks from her home

on a Thursday or Friday afternoon. M.J. testified that Dady told her he was 16 years old and that she told Dady she was 10 years old.

M.J.'s stepfather saw M.J. and Dady talking and introduced himself and then walked M.J. into the house. When M.J.'s stepfather noticed Dady following everyone into the home, he told Dady to leave. M.J.'s stepfather also asked Dady if he knew how old M.J. was, and Dady said no. He then told Dady that M.J. was 10 years old. M.J. later encountered Dady while she was walking her dog. M.J. testified that they discussed "YouTubers" for an unknown length of time. M.J. testified she thought that she and Dady "hung out" again later in the day on a Saturday. M.J.'s mother testified that M.J. came to her on that Saturday and asked to go to a mall with Dady. M.J.'s mother told M.J. she could not go to the mall with Dady because she did not know him.

On the morning of Sunday, August 20, 2017, M.J. met up with Dady for about an hour, then went home for lunch and to clean her room. After lunch, M.J. returned to Dady's house and sat on the curb. After approximately 5 minutes, Dady invited M.J. to sit by a fence in the yard. Dady asked M.J. if she had a boyfriend and then suggested to M.J. that they should have sex. M.J. testified that she had originally said no, but then agreed after Dady offered to give her an "MP3 player." M.J. and Dady began kissing. Dady then pulled down his shorts and put a condom on. M.J. testified that she knew what a condom was but had not seen one before and did not know what Dady meant when he said, "'We can't let this go to waste now.'" Dady then pulled down M.J.'s pants and pulled M.J. on top of him. M.J. testified that Dady's pulling her on top of him was not forced. M.J.'s statements to medical personnel and her testimony at trial were that she knew what sex was and that she willingly engaged in sex with Dady.

Neighbors saw M.J. pull down her pants and attempt to sit on Dady's lap. They ran outside and confronted M.J. and Dady. M.J. and Dady both stood up and pulled their pants up as the neighbors approached. M.J. testified that she asked Dady to

"'[p]romise not to tell'" what happened. The neighbors told M.J.'s stepfather and then informed Dady's foster father of what they had seen. The neighbors testified they had seen Dady and M.J. "hanging out" earlier in the day when M.J. was riding around the neighborhood on a "bike [with] flowers on it."

M.J.'s stepfather called M.J. home. When M.J. arrived home, she went to her room and would not speak with either her stepfather or her mother. M.J.'s mother then called the 911 emergency dispatch service. M.J. was taken to a child advocacy center and then to a hospital to be examined by a sexual assault nurse.

Police, responding to the 911 call, interviewed M.J.'s mother and then went to Dady's foster home. Dady and his foster father came outside and spoke with the police. Dady admitted to police that he had sexually penetrated M.J.'s vagina and that he was 18 years old. The police placed Dady under arrest, and he was taken to a police station for an interview. Police obtained consent from Dady's foster father to search the yard and the home. Police found a condom wrapper in the yard and a used condom in a trash can in Dady's bedroom.

During the interview with police, Dady claimed M.J. told him that she was 16 or 17 years old and that she was going to be a freshman in high school. Dady initially denied that his penis penetrated M.J.'s vagina, but later stated that a small portion of his penis went inside M.J.'s vagina. Dady also told police that he put his finger in M.J.'s vagina, but that she told him to stop because it was hurting her. Dady also told police that he put his penis in M.J.'s mouth for a "millisecond."

Dady said M.J. told him on the day of the incident that her mother says she is 10 years old, but that she is a freshman in high school and was about to turn 16 years old. At the end of the interview, when asked how old he thought M.J. looked, Dady admitted she looked 10 or 11 years old.

Susan Kelly, an emergency room pediatrician, testified concerning M.J.'s visit to the emergency room on the night of the incident. Kelly testified that M.J. or M.J.'s mother relayed that M.J. had been diagnosed with attention deficit hyperactivity

disorder (ADHD), oppositional defiant disorder (ODD), and disruptive mood dysregulation disorder (DMDD). This was done while Kelly was ascertaining M.J.'s medical history for the purpose of treating her in the emergency room. Dady objected on the ground of hearsay and was overruled.

Kelly explained the various stages of cognitive development of children and testified that a normal 10-year-old's brain has not fully developed the ability to assess risk and control impulses. Kelly further testified as to how diagnoses of ADHD and ODD can affect a person's ability to control impulses. On cross-examination, Kelly testified that her impressions of M.J.'s ability to understand the nature of sex were based upon her time spent with M.J., M.J.'s past diagnoses, and the general categorization of a 10-year-old's capacity. When asked to give further support for her conclusion that M.J. was not capable of appraising the nature of sex, Kelly testified that M.J. did not know when her last period occurred. Further, Kelly testified that when she asked M.J. if a condom was used in the incident, M.J. responded, "'I think so.'"

Additional evidence of M.J.'s mental health diagnoses was presented through the testimony of the forensic interviewer who saw M.J. at the child advocacy center. She testified that ADHD, ODD, and DMDD can affect emotional stability and impulse control. She indicated the severity of each of these conditions can vary based on the individual. She admitted that she is not licensed to diagnose these conditions; however, she stated that it is important for an interviewer to know a child's mental health diagnoses in order to tailor the interview to the child. She testified that M.J. appeared to be a developmentally normal 10-year-old and indicated that no formal testing of cognitive ability was done.

M.J.'s mother testified that M.J. has had behavioral and mental health issues since she was approximately 4 years old. M.J.'s mother testified that M.J. had been diagnosed with ADHD, ODD, and DMDD. Dady objected on grounds of foundation and hearsay and was overruled. On cross-examination,

Dady elicited testimony from M.J.'s mother that the diagnoses had come from M.J.'s doctor. Dady made a motion to strike M.J.'s mother's testimony on hearsay and Confrontation Clause grounds. M.J.'s mother also testified that M.J.'s mental health problems have resulted in M.J.'s hospitalization more than 10 times. M.J.'s mother testified these hospitalizations normally occur after M.J. becomes physically and emotionally escalated or when M.J. threatens to harm herself.

M.J.'s mother testified that she had age-appropriate conversations about sex with M.J. M.J.'s mother expressed that prior to the incident, M.J. understood the physical aspects of what sex is. M.J.'s mother explained that some of the conversations were prompted by M.J.'s being accused of inappropriate sexual touching of her half sister. The incidents with her half sister resulted in M.J.'s being hospitalized and then receiving treatment at a residential treatment facility for approximately 5 months.

At the close of the State's case, Dady made a motion to dismiss. Dady claimed the State failed to prove that M.J. lacked capacity and that Dady knew or had reason to know M.J. lacked capacity under the statute. The court denied the motion.

At the conclusion of evidence, Dady objected to jury instruction No. 6 proposed by the court. Dady submitted an alternate instruction based on the definition of mental impairment taken from *In re Interest of K.M.*[1] Instruction No. 6 provided in part: "'Mentally Incapable' means that because of the victim's age or mental impairment, the victim was incapable of resisting or appraising the nature of her sexual conduct. 'Mental Impairment' means the victim's impairment was so severe that she lacked the capacity to consent to sexual conduct with the Defendant."

Dady's proposed jury instruction stated in relevant part:

> "Mentally or physically incapable of resisting or appraising the nature of her conduct" shall mean a significant abnormality on the part of the victim such as

[1] *In re Interest of K.M.*, 299 Neb. 636, 910 N.W.2d 82 (2018).

> severe intoxication or other substantial mental or physical impairment. In order for a mental impairment to be substantial, it must be severe; a person in this category is treated as equivalent to a severely intoxicated or an unconscious person. Not every mental challenge or impairment is so severe that the person lacks the capacity to resist or appraise the nature of her conduct.

The court gave its proposed instruction No. 6. Other instructions, given without objection, provided that the jury must apply the law in the instructions and that no one instruction contains all of the law applicable to this case. A further instruction provided the specific elements of the charge using the language of § 28-319(1)(b).

After the jury returned a guilty verdict, Dady made a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Dady provided several arguments in support of the motion, only two of which were assigned on appeal. First, Dady argued that the jury instructions were incorrect and prejudicial. Second, Dady argued that there were irregularities in the proceedings of the court, the prosecuting attorney, and the witnesses for the State prejudicial to his rights. The alleged trial irregularities related to the court's change in its ruling on whether Dady could present evidence under Neb. Rev. Stat. § 27-412 (Reissue 2016) of three sexual encounters M.J. had with other people.

Dady had provided notice before trial that he intended to use evidence under § 27-412 to demonstrate M.J.'s prior knowledge and sexual activities. Specifically, Dady wanted to question M.J. concerning certain episodes of sexual conduct between M.J. and her half sister, between M.J. and her cousin, and between M.J. and her brother. The encounters with the half sister occurred before the events with Dady, the encounter with her cousin occurred after the incident with Dady, and the timing of the encounter with her brother was unknown. The State filed a motion in limine to exclude evidence of the encounters, asserting that the encounters were not relevant.

The court initially determined that Dady would not be allowed to question M.J. concerning the three encounters. However, the court did allow Dady to question M.J.'s mother about one hospitalization and whether it occurred because of an incident between M.J. and her half sister.

As the trial progressed and the court learned more about the nature of the case, the court reconsidered its initial ruling on the motion in limine. Before cross-examination of M.J. began, the court reversed its prior decision and indicated to both parties that it was going to allow some questioning about M.J.'s previous sexual encounters because such evidence could demonstrate M.J.'s ability to appraise the nature of her conduct. After the cross-examination of M.J. began, the court took a recess, dismissed the jury, and reversed its decision again, back to its original position. The court specified that it would allow questioning which could tend to prove M.J. knew what vaginal intercourse is or what sexual arousal is, but would not allow the further questioning of M.J. about the past sexual encounters. The court reasoned that the information to be obtained from questioning about the encounters and the subsequent hospitalizations was not relevant.

The court denied Dady's posttrial motion for judgment notwithstanding the verdict or for a new trial. At the sentencing hearing, the judge took into account Dady's unfortunate upbringing, his maturity level, and his previous criminal history. The court noted that Dady had already received counseling and education concerning appropriate sexual conduct before the incident in this case occurred. The court noted that probation and education did not deter Dady. The court explained the serious nature of the offense and took into consideration the likelihood that Dady would reoffend. The court sentenced Dady to 20 to 25 years' imprisonment.

ASSIGNMENTS OF ERROR

Dady asserts, renumbered and rephrased, that the trial court erred by (1) giving a jury instruction that incorrectly stated the law; (2) failing to give Dady's proposed jury instruction;

(3) failing to find the evidence presented at trial was insufficient to sustain a guilty verdict; (4) admitting evidence that M.J. was diagnosed with ADHD, ODD, and DMDD; (5) excluding evidence of M.J.'s other sexual conduct; (6) denying Dady's motion for a new trial; and (7) imposing an excessive sentence.

STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[2]

[2] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.[3]

[3] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[4]

[4] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[5]

[5] When examining a sufficiency of the evidence claim, the relevant question for an appellate court is whether, after

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[2] *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

[3] *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018).

[4] *State v. Huerta*, 26 Neb. App. 170, 917 N.W.2d 175 (2018).

[5] *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018), *modified on denial of rehearing* 302 Neb. 51, 921 N.W.2d 584 (2019).

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.[6]

[6] 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 whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.[7]

[7] Evidentiary questions committed to the discretion of the trial judge,[8] orders denying a motion for new trial,[9] and claims of excessive sentencing[10] are all reviewed for 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.[11]

ANALYSIS

Dady asserts it was reversible error for the district court to give instruction No. 6 and fail to give his proposed instruction. Dady asserts the evidence presented at trial failed to prove that M.J. suffered from a mental impairment and that Dady knew of M.J.'s mental impairment. Dady also asserts that the testimony of M.J.'s mental health diagnoses was inadmissible hearsay. Dady argues that he was deprived of a fundamentally fair trial when the court refused to allow him to elicit testimony of M.J.'s previous hospitalizations and to link the hospitalizations to M.J.'s previous sexual encounters. Lastly, Dady asserts that the trial court did not properly

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[6] See *State v. McCurdy*, 301 Neb. 343, 918 N.W.2d 292 (2018).

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

[8] See *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019).

[9] *Briggs, supra* note 8.

[10] See *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[11] *State v. Gibson*, 302 Neb. 833, 925 N.W.2d 678 (2019).

weigh several factors, including Dady's social background and desire for rehabilitation, when imposing his sentence. As will be explained below, we find the court erred in including the ambiguous phrase "because of the victim's age" in instruction No. 6 and in overruling Dady's hearsay objection to the testimony of M.J.'s mother about M.J.'s mental health diagnoses. However, we find both errors to be harmless. M.J.'s mother's testimony was cumulative to Kelly's testimony, and the ambiguity of instruction No. 6 was clarified by a combination of the jury instructions' being taken as a whole and the manner of the State's presentation of its case and closing arguments.

Jury Instructions

Dady asserts that instruction No. 6 misstates the law because age is not a permissible consideration under § 28-319(1)(b) in determining whether a victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct. Alternatively, Dady asserts that if age is a permissible consideration under § 28-319(1)(b), instruction No. 6 was misleading because it indicated that based upon a simple determination that M.J. was 10 years old, the jury could find M.J. mentally or physically incapable of resisting or appraising the nature of her conduct. Dady argues that his proposed instruction should have been given instead because it would have properly informed the jury that "mentally or physically incapable of resisting or appraising the nature of . . . her conduct" under § 28-319(1)(b) requires the jury to find that M.J. had a significant abnormality.

We disagree with Dady's argument that by omitting any explicit reference to age in § 28-319(1)(b), while specifying age in the statutory rape provision of subsection (1)(c), the Legislature clearly indicated that age is not a permissible consideration in determining whether subsection (1)(b) was violated. We recognize that other states have statutory rape laws directed at persons near the age of majority who

sexually prey on younger children.[12] Nebraska does not. The only statute relevant to such scenario is § 28-319(1)(b). The statutory rape provisions of § 28-319(1)(c), and of other jurisdictions addressing older individuals' preying upon children, are distinguishable from § 28-319(1)(b) insofar as the victim of the specified age is conclusively regarded under such statutes as incapable of giving consent to the sexual act.[13] By specifying age in subsection (1)(c) and not in subsection (1)(b) of § 28-319, the Legislature was making a distinction between statutory rape under subsection (1)(c) and a violation of subsection (1)(b) requiring an individualized inquiry into the victim's capacity. Section 28-319(1)(b) does not create a statutory presumption based on age that the victim is incapable of consent.

[8,9] It does not follow, however, that age is irrelevant to determining a victim's capacity for purposes of § 28-319(1)(b). Under § 28-319(1)(b), whether the victim was incapable of consent depends upon a specific inquiry into the victim's capacity, i.e., whether the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct. We have long held that § 28-319(1)(b) applies to a wide array of situations that affect a victim's capacity, including age.[14]

Thus, while we would agree with Dady's contention that in charges brought under § 28-319(1)(b), a jury cannot find inability to consent in a manner similar to such a finding under statutory rape provisions based exclusively on age, we disagree with Dady's contention that a victim's age is an irrelevant consideration in determining whether a specific victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct. The jury is permitted to conclude

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[12] See, e.g., Colo. Rev. Stat. Ann. § 18-3-402(1)(d) (West Cum. Supp. 2018) (victim less than 15 years old with 4-year age gap between victim and perpetrator).

[13] See *George v. State*, 61 Neb. 669, 85 N.W. 840 (1901).

[14] See *State v. Collins*, 7 Neb. App. 187, 583 N.W.2d 341 (1998).

the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct based upon evidence that a child of the victim's age ordinarily lacks sufficient brain development to have such capacity and that the victim was developmentally normal for his or her age.

But we agree with Dady that instruction No. 6 was potentially misleading as to whether the jury could find inability to consent in a manner similar to such a finding under statutory rape provisions based on age. Instruction No. 6 explained to the jury the respective definitions of the terms "mentally incapable" and "mental impairment." "Mentally incapable" was correctly defined inasmuch as it described a victim "incapable of resisting or appraising the nature of her sexual conduct." "Mental impairment" was correctly defined as a "victim's impairment . . . so severe that she lacked the capacity to consent to sexual conduct with the Defendant." The problem is that the definition of "mentally incapable" was prefaced with the phrase "because of the victim's age or mental impairment."

We disapprove of this broad "because of the victim's age" phrasing. The phrase "because of the victim's age" is ambiguous as to whether age can be the sole basis for a finding that the victim was mentally incapable, without an individualized assessment of the victim's maturity. The definition of "mentally incapable" could have been excluded from the court's instructions, as the language of § 28-319(1)(b) is sufficiently clear that a definitional instruction would not normally be necessary. Because instruction No. 6 was ambiguous and capable of misleading the jury, it was erroneous.

[10] But this does not end our inquiry. Alleged errors in a jury instruction are examined using a two-step process.[15] First, the court reviews the case based on the errors assigned and argued, or it may find plain error. Second, when an error is

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[15] See, *Rodriguez, supra* note 3; *State v. Botts*, 26 Neb. App. 544, 921 N.W.2d 151 (2018).

identified, the court considers whether the error was harmless or prejudicial.[16] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.[17] When examining for harmless error, the court may look at a variety of factors including the jury instructions as a whole, the evidence presented at trial, and the closing arguments.[18]

We conclude that the potentially misleading ambiguity of the phrase "because of the victim's age" in instruction No. 6 did not in fact mislead the jury. The jury's verdict was surely unattributable to this erroneous instruction, because the instructions taken as a whole, combined with the evidence and arguments presented at trial, clarified the ambiguity of "because of the victim's age" such that the jury understood "age" in this context to be a subjective review of M.J.'s developmental age.

Other instructions correctly provided that the jury must apply the law in the instructions and that no one instruction contains all of the law applicable to this case. One correctly provided the specific elements of the charge using the language of § 28-319(1)(b), instructing the jury that it could not find Dady guilty without determining beyond a reasonable doubt that he knew or should have known that M.J. was mentally or physically incapable of resisting or appraising the nature of her conduct. Instruction No. 6 also correctly indicated that the inquiry was victim specific.

To the extent that the ambiguity of the "because of the victim's age" phrasing was not fully clarified by the surrounding

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[16] See, *Rodriguez, supra* note 3; *Botts, supra* note 15.

[17] *Rodriguez, supra* note 3.

[18] See, *State v. Smith*, 302 Neb. 154, 922 N.W.2d 444 (2019); *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999); *Huerta, supra* note 4; *State v. Beamon*, 336 Wis. 2d 438, 804 N.W.2d 706 (Wis. App. 2011); *Johnson v. State*, 94 So. 3d 1209 (Miss. App. 2011).

instructions alone, it was clarified by the State's theory of the case, the evidence, and the closing arguments. The State presented extensive evidence linking age and normal brain development to M.J.'s specific cognitive abilities. Kelly, the treating emergency room physician, opined that M.J. was incapable of appraising the nature of sexual conduct. Kelly based this opinion on her understanding of normal child cognitive development and on the time she spent with M.J. The State thus presented unrefuted evidence that a normal 10-year-old child's level of cognitive development renders the child unable to appraise the nature of sexual conduct and that M.J. appeared to be a normal 10-year-old. Furthermore, the jurors were able to see M.J. testify and draw their own conclusions about M.J.'s mental capabilities. The court may consider the facts of the case when determining whether a jury instruction was confusing or misleading.[19]

Where a potential ambiguity in an instruction exists, the prosecutor may assist the jury in resolving such ambiguity during closing arguments.[20] The State went step by step during closing arguments through the elements of the crime charged, explaining what "age" in instruction No. 6 meant. The prosecution asked the jury when determining mental and physical capacity to consider the evidence presented at trial that M.J. appeared to be a normal 10-year-old and that a normally developed 10-year-old brain does not have the capacity to appraise the nature of sexual conduct. The State made it clear that the reference "because of the victim's age" in instruction No. 6 was a case-specific inquiry based on the evidence presented.

Viewing instruction No. 6 in context, the jury had a clear and correct understanding of how age related to the question of M.J.'s mental capability of resisting or appraising the nature

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[19] See *Nguyen, supra* note 18.

[20] See, *Middleton v. McNeil*, 541 U.S. 433, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004); *Huerta, supra* note 4.

of her conduct. When the instructions as a whole are combined with the body of evidence on the record and the clarification provided by the prosecution in the closing arguments, the jury was not misled by the ambiguous phrasing of instruction No. 6. Rather, the jury properly understood that age was a consideration in determining M.J.'s level of mental development or developmental age. When considering the instructions as a whole, the evidence presented, and the clarification provided in closing arguments, we find the erroneous jury instruction to be harmless.

Dady also contends that his proposed instruction should have been given instead of instruction No. 6.

> To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction."[21]

Dady's proposed jury instruction provided in relevant part:

> "Mentally or physically incapable of resisting or appraising the nature of her conduct" shall mean a significant abnormality on the part of the victim such as severe intoxication or other substantial mental or physical impairment. In order for a mental impairment to be substantial, it must be severe; a person in this category is treated as equivalent to a severely intoxicated or an unconscious person. Not every mental challenge or impairment is so severe that the person lacks the capacity to resist or appraise the nature of her conduct.

Dady's proposed instruction was based on *In re Interest of K.M.*, where we said:

> To render an individual incapable to consent to sexual conduct, a *mental impairment* must be severe. A person in this category is treated as equivalent to a severely

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[21] *Mueller, supra* note 5, 301 Neb. at 789, 920 N.W.2d at 434.

> intoxicated or an unconscious person. Thus, not every mental challenge or impairment is so severe that the person lacks the capacity to consent. We have said lack-of-capacity sexual assault under § 28-319(1)(b) requires on the part of the victim "a significant abnormality, such as severe intoxication or other substantial mental or physical impairment."[22]

This passage from *In re Interest of K.M.* is one way of explaining the concept of mental incapacity as warranted from the facts in that case, which involved an alleged mental impairment. However, as we have already illustrated, *In re Interest of K.M.* should not be construed as exhaustively defining every situation to which § 28-319(1)(b) could be applied. A victim can be incapable of consent without suffering from a "mental impairment."[23]

Dady's proposed instruction was not a correct recitation of our holding from *In re Interest of K.M.*, because it incorrectly indicated that "[m]entally or physically incapable" is limited to a "significant abnormality" constituting a "substantial mental or physical impairment." A child can be incapable of resisting or appraising the nature of his or her conduct without suffering from an "abnormality" or "substantial mental or physical impairment." The court did not err in denying Dady's proposed instruction, because, as applied to the facts of this matter, it was not a correct statement of the law.

Sufficiency of Evidence

In his challenge to the sufficiency of the evidence, Dady argues that there was insufficient evidence to support a finding that M.J. suffered from a "mental impairment."[24] He does not contest the sufficiency of the evidence to support M.J.'s

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[22] *In re Interest of K.M., supra* note 1, 299 Neb. at 645, 910 N.W.2d at 89 (emphasis supplied).

[23] See *id.*

[24] Brief for appellant at 22.

inability to consent by virtue of being mentally or physically incapable of resisting or appraising the nature of her conduct for any other reason. Dady also challenges the sufficiency of the evidence to support the necessary element that he knew or should have known that M.J., for whatever reason, was mentally or physically incapable of resisting or appraising the nature of her conduct.

[11] 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.[25] 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.[26] And when there are alternative theories of guilt presented to the jury, we will affirm the verdict if the evidence is sufficient to support any alternative theory presented.[27]

Because we find the evidence sufficient to support a determination that M.J. was incapable of consent by virtue of her stage of development, we need not consider whether the evidence was sufficient to support the State's alternative theory that by virtue of M.J.'s diagnoses, she suffered a "mental impairment."[28] As stated, expert testimony explained the brain capacities and reasoning capabilities of a normal 10-year-old. Kelly testified that a normal 10-year-old does not have the capacity to appraise the nature of sexual conduct. Kelly then drew on her understanding of child brain development and

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[25] *State v. Thomas*, 303 Neb. 964, 932 N.W.2d 713 (2019).

[26] *Id.*

[27] See *McCurdy, supra* note 6.

[28] See *In re Interest of K.M., supra* note 1, 299 Neb. at 645, 910 N.W.2d at 89. Accord *McCurdy, supra* note 6.

her direct interactions with M.J. when she opined that M.J. could not appraise the nature of sex. The jury was also able to observe M.J. and draw its own conclusions about M.J.'s capabilities, when she testified approximately 9 months after the incident.

We also find the evidence sufficient for the jury to conclude that Dady knew M.J. was incapable of resisting or appraising the nature of her conduct when she agreed to have sex with someone nearly twice her age in exchange for an "MP3 player." There was evidence presented that M.J. acted as a normal child when she and Dady spent time together. Prior to the incident, M.J.'s stepfather had a specific conversation with Dady explaining that M.J. was 10 years old. M.J. rode around the neighborhood on a "bike [with] flowers on it." When Dady wanted M.J. to come to the mall with him, M.J. said she would have to go ask her mother. On another occasion, M.J. had to cut short her visit with Dady in order to go home to eat lunch and to clean her room. Such facts indicate Dady had sufficient time to interact with M.J. and observe M.J.'s level of maturity and understanding. And when Dady was interviewed by law enforcement, he repeatedly emphasized that M.J. claimed to be older, thereby indicating he had some knowledge that M.J.'s age was a factor for whether she had the capacity to appraise the nature of her conduct. By the end of the police interview, Dady admitted M.J. appeared to be around 10 or 11 years old.

When viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[29] A rational jury could conclude that M.J. was incapable of appraising the nature of her conduct and that Dady knew or should have known that. We find no merit to Dady's arguments that the evidence was insufficient to support the jury's verdict.

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[29] *McCurdy, supra* note 6.

Hearsay

[12] Dady contends that the testimony by M.J.'s mother and by Kelly concerning M.J.'s diagnoses was hearsay. However, the discussion between M.J., M.J.'s mother, and Kelly concerning M.J.'s past diagnoses falls squarely within Neb. Rev. Stat. § 27-803(3) (Reissue 2016) as a statement describing medical history. Evidence is admissible under § 27-803(3) when the party seeking to introduce the evidence demonstrates

> (1) that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional."[30]

Although Kelly did not personally diagnose M.J., she testified that she learned of the diagnoses while doing a patient interview for the purpose of treating M.J. during her visit to the emergency room. She further testified that obtaining a patient history is an important part of her job and that she attempts to get a medical history from every patient she treats. The testimony of Kelly satisfies the requirements for evidence to be admissible under § 27-803(3).

[13] Although a Confrontation Clause objection was made during the motion to strike, the objection was not asserted or argued on appeal. 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.[31] Furthermore, the motion to strike was made only in relation to M.J.'s mother's testimony, and no Confrontation Clause objection was raised as to Kelly's testimony. The court did not err in admitting Kelly's testimony of M.J.'s mental health diagnoses over Dady's hearsay objection. M.J's mother's testimony regarding M.J.'s diagnoses was also hearsay, but did not fall

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[30] *Mora, supra* note 7, 298 Neb. at 193-94, 903 N.W.2d at 253.

[31] *Anderson v. Babbe, ante* p. 186, 933 N.W.2d 813 (2019).

into a hearsay exception. However, the testimony of M.J.'s mother was cumulative of Kelly's admissible statements and thus qualifies as harmless error.[32]

Exclusion of § 27-412 Evidence

Dady asserts that his Sixth Amendment rights were violated by his being prevented from cross-examining M.J. concerning her other sexual encounters. Dady asserts that M.J.'s previous sexual behavior is relevant to show that she comprehended the nature of her sexual conduct. Evidence under § 27-412 should be admitted if it is of sufficient relevance to establish that the victim had prior knowledge of the same kind of sexual activities of which the defendant is accused.[33] 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.[34]

In its motion in limine, the State argued that the evidence put forward by Dady was not relevant to the case at hand because the other encounters did not involve sexual intercourse. Furthermore, one of the encounters occurred after the incident with Dady, and the timing of one of the other two encounters was also disputed. The State argued that to the extent the other encounters did not involve intercourse and occurred after the incident with Dady, they were not relevant to show that M.J. could appraise the nature of sexual conduct at the time of the incident.

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[32] See *State v. Hood*, 301 Neb. 207, 917 N.W.2d 880 (2018).

[33] See *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

[34] See *Briggs, supra* note 8.

We have previously held such differences to be enough to warrant the exclusion of prior encounters.[35] In *State v. Earl*,[36] the defendant wanted to enter evidence of the 6-year-old victim's previous sexual conduct to show that the victim had an alternate source for knowledge about sex acts. The victim had had an encounter with two of his similarly aged cousins. During that encounter, the victim and his female cousins played house and lay on each other naked. The encounter between the victim and the defendant in *State v. Earl* involved a male-on-male assault that included fellatio. In considering the defendant's request under the previous rape shield statute, Neb. Rev. Stat. § 28-321 (Reissue 1995), the court concluded the incident involving the victim and his cousins was too different to be relevant in the defendant's case.[37]

In the present case, one of the encounters clearly occurred after the incident with Dady and the second encounter's timing is undetermined. This supports the ruling that the proffered evidence was irrelevant to showing that M.J. could appraise the nature of sexual intercourse at the time of the incident with Dady. Similarly to the comparison in *State v. Earl*, the proffered evidence of M.J.'s past encounters is categorically different from the encounter with Dady. M.J.'s previous encounters involved sexual touching of similarly aged children. M.J.'s encounter with Dady was a 10-year-old having sexual intercourse with an 18-year-old.

The trial court's ruling did not prevent Dady from presenting an effective defense; nor did it violate Dady's constitutional rights. Dady was allowed to cross-examine M.J.'s mother concerning the hospitalization related to the one encounter that occurred before the events of the present case. On these facts,

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[35] See, *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *Earl, supra* note 33.

[36] *Earl, supra* note 33.

[37] See *id.*

we cannot say that the trial court's ruling was unreasonable or untenable, nor that it was clearly against justice or conscience, reason, and evidence. The district court's ruling on the admissibility of M.J.'s other sexual encounters was not an abuse of discretion.

Having addressed the propriety of the court's final ruling regarding the admissibility of M.J.'s other sexual encounters, we address Dady's assertion that there was an irregularity in the proceedings of the court which prevented him from having a fair trial.[38] Dady argues that when the district court reversed its decision and informed defense counsel it would allow some of the § 27-412 evidence initially excluded, the defense adjusted its trial strategy to make use of this evidence.

Dady began questioning M.J. about certain events and was stopped during the cross-examination. The district court then declared it was reversing its decision again. Dady contends that the adjustment of trial strategy resulted in defense counsel's eliciting testimony about the hospitalizations in order to attribute the hospitalizations to M.J.'s previous sexual encounters rather than the mental-health-related reasons given by M.J.'s mother at trial.

The evidence proposed in the offer of proof was intended to provide the jury with an alternate explanation for two hospitalizations. Dady had already been able to offer such an explanation for one of those hospitalizations through the cross-examination of M.J.'s mother. The other sexual encounter that resulted in a hospitalization occurred after the incident with Dady. As explained above, such evidence is not relevant in establishing what M.J. knew about sex at the time of the incident. Nor is it relevant to show the state of M.J.'s mental health at the time of the incident.

The initial ruling on the evidence was based on Dady's pretrial notice under § 27-412 and the State's corresponding motion in limine. A motion in limine is a procedural step by

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[38] See Neb. Rev. Stat. § 29-2101 (Reissue 2016).

which a court makes a preliminary determination; it is not a final order.[39] A change in a ruling on admissibility is not de facto unfair, and the alleged change in trial strategy is not supported in the record. Defense counsel began questioning M.J.'s mother about the hospitalizations before any change from the pretrial ruling occurred. Therefore, no irregularity which could be considered unfair is demonstrable on these facts.

Having addressed all of the grounds for Dady's motion for a new trial, we affirm the district court's denial of the motion for a new trial.

Excessive Sentence

[14] The sentence ordered is within the statutory guidelines and will not be altered unless there was an abuse of discretion.[40]

> When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the crime. 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.[41]

Dady asserts that the district court abused its discretion by not considering all of the required factors. The record shows, however, that the district court weighed the correct factors related to Dady's age, family background, mentality, criminal history, unsuccessful discharge from probation related to juvenile

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[39] See *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015).

[40] See *State v. Erickson, supra* note 10.

[41] *State v. Chairez*, 302 Neb. 731, 740, 924 N.W.2d 725, 732 (2019).

charges, lack of effort in pursuing education and treatment while on probation, and potential to reoffend. Such consideration is not an abuse of discretion. Consequently, we affirm the district court's sentence.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellant, v. Rudy Stanko, appellee.

936 N.W.2d 353

Filed December 20, 2019. No. S-18-543.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable; an appellate court independently reviews questions of law.
3. **Statutes.** The interpretation of a statute presents a question of law.
4. **Criminal Law: Intent: Appeal and Error.** The purpose of a prosecutorial appeal brought under Neb. Rev. Stat. § 29-2315.01 (Reissue 2016) is to provide an authoritative exposition of the law to serve as precedent in future cases.
5. **Appeal and Error.** Neb. Rev. Stat. § 29-2316 (Reissue 2016) limits the relief an appellate court can afford, even if the exception taken by the State is sustained.
6. **Criminal Law: Courts: Judgments: Appeal and Error.** A judgment of acquittal in the county court shall not be reversed by either the district court acting as an intermediate appellate court or upon further consideration in an appeal to the Nebraska Supreme Court or the Nebraska Court of Appeals, since the defendant has been placed legally in jeopardy in the trial court.
7. **Criminal Law: Directed Verdict.** In a criminal case, the court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.

8. **Criminal Law: Directed Verdict: Appeal and Error.** In an appellate court's consideration of a criminal defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence.
9. **Criminal Law: Proof.** The burden is on the State to prove all essential elements of the crime charged.
10. **Invitor-Invitee.** As a general matter, when a business holds a portion of its property open to the public, a person who enters the open area at a reasonable time and in a reasonable manner has the implied consent of the owner to enter the premises under a limited privilege.
11. ____. Business property owners have a common-law right to exclude from their premises those whose actions disrupt the regular and essential operations of the premises or threaten the security of the premises and its occupants.
12. **Criminal Law: Statutes: Words and Phrases.** The meaning of the word "know" or the word "knowingly" in a penal statute varies in the context in which it is used.
13. **Trespass: Words and Phrases.** The plain language of "knowing" in Neb. Rev. Stat. § 28-521(1) (Reissue 2016), in the context of entering any building or occupied structure "knowing that he or she is not licensed or privileged to do so," imposes a subjective standard focused on the accused's actual knowledge.
14. **Intent: Circumstantial Evidence.** Knowledge, like intent, may be inferred from the circumstances surrounding the act.
15. **Trial.** An affirmative defense is established as a matter of law only if there are no factual issues remaining to be resolved by the trier of fact.
16. **Trespass.** A person entering premises open to the public has not "complied with all lawful conditions imposed on access to or remaining in the premises" pursuant to Neb. Rev. Stat. § 28-522(2) (Reissue 2016) if he or she has been lawfully barred from the premises and the business has not reinstated its implied consent to entry.

Appeal from the District Court for Sheridan County, Travis P. O'Gorman, Judge, on appeal thereto from the County Court for Sheridan County, Paul G. Wess, Judge. Exception sustained.

Aaron J. Conn, Sheridan County Attorney, for appellant.

Andrew M. Pope, of Crites, Shaffer, Connealy, Watson, Patras & Watson, P.C., L.L.O., for appellee.

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

Freudenberg, J.

NATURE OF CASE

In this exception proceeding, the question presented is whether the county court erred in directing a verdict in favor of the defendant at the close of the State's case in chief under a complaint for first degree trespass in violation of Neb. Rev. Stat. § 28-520(1)(a) (Reissue 2016). The defendant had received a "stay away" letter intended to apply to all businesses owned by the parent company issuing the letter, including two adjoining businesses owned by the same company and located in the same building, where the defendant entered during business hours and exited without incident when told to leave. The county court appeared to conclude the affirmative defense to criminal trespass described by Neb. Rev. Stat. § 28-522(2) (Reissue 2016), that compliance with "all lawful conditions imposed on access to or remaining in" the premises "at the time open to members of the public," did not encompass compliance with a "stay away" letter directed toward the defendant.

BACKGROUND

The State filed a complaint in county court against Rudy Stanko for first degree trespass in violation of § 28-520(1)(a). The complaint related to Stanko's presence on April 3, 2017, at a Subway sandwich shop located in the same physical structure as a Pump & Pantry convenience store in Gordon, Nebraska. Bosselman Enterprises (Bosselman) owns both the Pump & Pantry and the Subway franchise at that location and had previously sent Stanko a "stay away" letter.

Section 28-520(1)(a) provides that a person commits first degree criminal trespass if he or she (1) enters or secretly remains (2) in any building or occupied structure, or any separately secured or occupied portion thereof, (3) knowing that he

or she is not licensed or privileged to do so. In contrast, Neb. Rev. Stat. § 28-521(1) (Reissue 2016) provides:

> (1) A person commits second degree criminal trespass if, knowing that he or she is not licensed or privileged to do so, he or she enters or remains in any place as to which notice against trespass is given by:
>
> (a) Actual communication to the actor; or
>
> (b) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
>
> (c) Fencing or other enclosure manifestly designed to exclude intruders except as otherwise provided in section 28-520.

Section 28-522 provides that "[i]t is an affirmative defense to prosecution under sections 28-520 and 28-521 that . . . (2) [t]he premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises[.]"

Trial

The evidence at trial adduced during the State's case in chief demonstrated that Stanko originally distributed a free newspaper at the Pump & Pantry in Gordon. After complaints from customers, Bosselman informed Stanko that it would no longer carry the newspaper at its stores and that Stanko could pick up the undistributed issues.

When retrieving the undistributed issues of his newspaper, Stanko was "[a]ggressive" in a verbal exchange between Stanko and the Pump & Pantry store manager. The district manager for the Bosselman properties in the area explained that the aggression was such that "people working didn't feel comfortable with [Stanko's] coming into the store by the things he was saying."

In an effort to provide a safe environment for its customers and employees, Bosselman decided to send Stanko a "stay away" letter. On February 20, 2017, an attorney for Bosselman sent the certified "stay away" letter to Stanko. It was described "RE: STAY AWAY LETTER" and advised:

> Bosselman Pump & Pantry, Inc. and any of its parent, sister, or subsidiary companies are requesting that you do not come onto any of its properties.
>
> This notice follows the verbal request that you are specifically not welcome at the Bosselman property:
>
> Pump & Pantry #34
> 101 W Hwy 20
> Gordon, NE 69343
>
> Furthermore, you are prohibited from telephoning any Bosselman business including Pump & Pantry # 34, 101 W Hwy 20, Gordon, Nebraska.
>
> If you are found on this property or if you telephone this business or any Bosselman business, law enforcement will be called and you will be charged with trespassing and/or harassment.
>
> A copy of this letter has been sent to the Gordon Police Department.

The letterhead listed all of the Bosselman businesses, including Subway. The district manager testified that the letter followed standard procedure for the company and that it could be rescinded under certain circumstances.

A copy of the letter was sent to the Gordon Police Department. Bosselman management verbally communicated to an officer of the police department that Stanko was not allowed on Bosselman's property. The officer testified that Stanko later told him that he had received the letter.

The Pump & Pantry and the Subway each have their own signage and operating hours, but they share the same building with the same address. There are separate entries for the Pump & Pantry and the Subway. Once in the building, however, people can move freely between one side and the other, unless the Subway side is closed. When the Subway side is closed and the Pump & Pantry side is open, there is a "little gate" blocking internal access. The larger entry is on the Pump & Pantry side but opens into the hallway that adjoins the Pump & Pantry and the Subway. Stanko's newspaper had been distributed in that hallway.

On April 3, 2017, Stanko entered directly into the Subway side of the building in Gordon. It was undisputed that the Subway was open to the public at that time. Stanko was immediately informed by Subway staff that he was not allowed to be there. Stanko asked why he could not order a sandwich. The manager replied that Stanko was not allowed on the property. Stanko left the building without further incident.

At the close of the State's case in chief, Stanko moved for a directed verdict. Stanko argued that the State had failed to prove the elements of first degree trespass because (1) first degree trespass involves a dwelling or other place designed for overnight accommodation; (2) unlike second degree trespass, notice is not an element of first degree trespass; and (3) the "stay away" letter warned that Stanko was not welcome at the Pump & Pantry and was prohibited from telephoning any Bosselman business, but merely "request[ed]" that Stanko not come onto any of Bosselman's properties. Further, Stanko asserted that a directed verdict should be granted because the evidence was undisputed that under the affirmative defense set forth in § 28-522(2), the building was open to members of the public and Stanko had complied with all lawful conditions.

Before ruling on the motion, the court rejected from the bench Stanko's argument that first degree trespass required a dwelling or overnight accommodation. But the court appeared to view Stanko's other arguments favorably, focusing on the affirmative defense and the absence of any dispute concerning the facts that Stanko did not create a disturbance or otherwise violate any lawful condition imposed upon the public at large and that the Subway was open to the public at the time in question. The court articulated the following:

> [I]t looks to me like, given the testimony that we have had thus far, Subsection 2, for example, the premises were at the time open to members of the public, and the actor, . . . Stanko, complied with all lawful conditions imposed upon access to or remaining in the premises . . . .

> So what I am thinking is the real issue is whether or not [the Subway staff member's] testimony that . . . Stanko had come in through the entry door of Subway, walked around until she informed him he was to leave. The manager came and said . . . Stanko was to leave, and he left. And so it seems like her testimony — and she testified specifically that at the time Subway was open to members of the public. And when asked to leave, he left. He didn't do anything, you know, unlawful as far as, you know, breaking anything or disturbing anyone coming in the door or leaving when he left.
>
> So the issue is whether or not that affirmative defense, given all the evidence that we have, is sufficient to grant a directed verdict, or does that issue go to the jury for their decision? There isn't any contrary evidence that . . . Stanko, you know, was unruly while he was in there or failed to comply with the request to leave.

The court continued with its discussion of the affirmative defense by focusing on which party has the burden of proof, stating:

> [T]he burden of proof does not shift to the defendant. It stays with the prosecution to prove that either the premises [were] not open to members of the public, or that . . . Stanko failed to comply with all lawful conditions, et cetera, et cetera. And so given that, given what I believe the instruction would be, it seems as though the State has failed to prove what in the proposed instructions is instrument or element No. 6, and, therefore, a directed verdict would be proper.

Instruction No. 6 is not in the record. The court asked the parties whether they disagreed with "the proposition that it's still the State's burden." The court elaborated:

> The defendant has the burden to prove that it was open to members of the public and that he failed to — or, excuse me, abided by all lawful conditions imposed on access to or remaining on the premises and, therefore, the

> defendant must put on evidence and then the jury would decide that issue.

The court later continued: "[O]ne of the elements is knowing that one is not licensed or privileged to do so presupposes the defense. So, in other words, there would be no affirmative defense if a person not given notice, not to come in, didn't come in." The court asked whether a person entering a business open to the public, by virtue of entering that business, is precluded from the affirmative defense that "it was open and I didn't do anything wrong while I was in there."

In response, the State argued that Stanko was not lawfully following the conditions imposed upon him because he failed to follow the "stay away" letter.

Stanko's counsel argued that it was the State's burden to show that the Subway was not open to members of the public and to put on some evidence suggesting that Stanko may have done "anything other than lawfully comply with all conditions that were imposed on him at that moment."

After a short recess, the court granted Stanko's motion for a directed verdict and dismissed the case. The court did not further articulate its reasons for reaching that conclusion.

Exception Proceeding

The State appealed the county court's decision to the district court pursuant to Neb. Rev. Stat. § 29-2317 (Reissue 2016). The State alleged, among other things, that the county court had erred in directing a verdict in favor of Stanko.

The district court dismissed the appeal. Noting that jeopardy had already attached, the district court concluded that an opinion on appeal would result in an advisory opinion with at most "marginal precedential value" because the issues presented were limited to the unique facts of this particular case.

The State appealed to the Nebraska Court of Appeals pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2016). The Court of Appeals granted leave to docket the appeal. Though the State had assigned several errors, the Court of Appeals granted leave to appeal only as to the error alleged regarding the

county court's issuance of a directed verdict based on its interpretation of criminal trespass statutes and affirmative defenses. We subsequently moved the case to our docket.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in finding that the errors alleged by the county attorney in the appeal from the county court were limited to the facts of this particular case, that no issue of statutory interpretation was presented nor any other issue upon which a decision would be helpful in future cases, and that the application did not present an opportunity to provide an authoritative exposition of the law that would be sufficiently useful as precedent.

STANDARD OF REVIEW

[1-3] In an appeal of a criminal case from the county court, both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[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; we independently review questions of law.[2] The interpretation of a statute presents a question of law.[3]

ANALYSIS

[4-6] The purpose of a prosecutorial appeal brought under § 29-2315.01 is to provide an authoritative exposition of the law to serve as precedent in future cases.[4] Neb. Rev. Stat. § 29-2316 (Reissue 2016) limits the relief we can afford, even if the exception taken by the State is sustained.[5] A judgment

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

[2] See *id.*

[3] *State v. Thalken, supra* note 1.

[4] *State v. Larkins*, 276 Neb. 603, 755 N.W.2d 813 (2008).

[5] See *State v. Thalken, supra* note 1.

of acquittal in the county court "shall not be reversed"[6] by either the district court acting as an intermediate appellate court or upon further consideration in an appeal to this court or the Court of Appeals,[7] since the defendant has been "placed legally in jeopardy"[8] in the trial court. The relief in an appeal by the State under § 29-2316 in such circumstances is limited to determining the law to govern in any similar case that may be pending or that may thereafter arise.[9]

The Court of Appeals sustained the State's application in this case as to the error alleged regarding the county court's issuance of a directed verdict based on its interpretation of criminal trespass statutes and affirmative defenses. We agree that because these are issues of first impression concerning the meaning of §§ 28-520 and 28-522, an authoritative exposition of the law is needed. The district court erred in determining otherwise.

[7,8] This exception proceeding addresses the meaning of §§ 28-520 and 28-522 within the context of whether the county court erred by granting Stanko's motion for a directed verdict. In a criminal case, the court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.[10] In our consideration of a criminal defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence.[11]

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[6] § 29-2316.

[7] *Id.* See, also, *State v. Thalken, supra* note 1.

[8] § 29-2316.

[9] See *id.*

[10] *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

[11] *Id.*

In light of the county court's comments from the bench before its ruling, the court appeared to grant Stanko's motion for a directed verdict because it believed that under the affirmative defense to criminal trespass described by § 28-522(2), compliance with "all lawful conditions imposed on access to or remaining in" the premises "at the time open to members of the public," did not encompass compliance with a "stay away" letter directed toward the defendant. The court also appeared to consider the affirmative defense and the element of "knowing that he or she is not licensed or privileged" to be interwoven. We will begin our analysis with the elements of the crime charged.

[9] The burden is on the State to prove all essential elements of the crime charged.[12] In the charges against Stanko under § 28-520(1)(a), it was the State's burden to prove beyond a reasonable doubt that Stanko (1) entered or secretly remained in a building or occupied structure (2) with knowledge that he was not licensed or privileged to do so.[13]

The evidence demonstrated that the Subway was located in a building or occupied structure and that Stanko entered that building or occupied structure. Section 28-520 applies to "any building or occupied structure, or any separately secured or occupied portion thereof." Section 28-520 is not specifically crafted for, but encompasses, buildings or structures hosting business operations open to the public.

[10,11] As a general matter, when a business holds a portion of its property open to the public, a person who enters the open area at a reasonable time and in a reasonable manner has the implied consent of the owner to enter the premises under a limited privilege.[14] Nevertheless, such implied consent can be revoked.[15] Business property owners have a common-law right

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[12] *State v. Wright*, 235 Neb. 564, 456 N.W.2d 288 (1990).

[13] See *id.*

[14] 87 C.J.S. *Trespass* § 151 (2018). See 75 Am. Jur. 2d *Trespass* § 40 (2018).

[15] See *id.*

to exclude from their premises those whose actions disrupt the regular and essential operations of the premises or threaten the security of the premises and its occupants.[16]

Stanko has never contended that Bosselman did not properly exercise its right to exclude him; the evidence at trial was that the exclusion stemmed from an incident of disruptive and threatening behavior. Instead, Stanko asserted in his motion for a directed verdict that the State's evidence was lacking in sufficient probative value to demonstrate that he entered the Subway "knowing" that the exclusion communicated to him by the "stay away" letter included the Subway.

[12] We have never before directly addressed the knowledge element of § 28-520(1)(a). We have said that the meaning of the word "know" or the word "knowingly" in a penal statute varies in the context in which it is used.[17] In other contexts, we have synonymized "knowingly" with "willfully" and distinguished it from "accidentally" or "involuntarily," stating that to commit an act knowingly, the defendant must be aware of what he or she is doing.[18] In *State v. Almasaudi*, we held that the phrase "receives, retains, or disposes of stolen movable property of another *knowing that* it has been stolen"[19] imposes a subjective standard.[20] We find that standard likewise applicable to § 28-520(1)(a).

Section 28-520 is patterned after § 2.02 of the Model Penal Code.[21] The comments to the Model Penal Code explain that the knowledge requirement excludes from criminal liability both the inadvertent trespasser and the trespasser who believes

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[16] See *Uston v. Resorts International Hotel, Inc.*, 89 N.J. 163, 445 A.2d 370 (1982).

[17] See *Hancock v. State ex. rel. Real Estate Comm.*, 213 Neb. 807, 331 N.W.2d 526 (1983).

[18] See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

[19] Neb. Rev. Stat. § 28-517 (Reissue 2016) (emphasis supplied).

[20] *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011).

[21] Model Penal Code, § 2.02, 10A U.L.A. 94 (2001).

that he has received express or implied permission to enter or remain on the premises.[22] The majority of states have statutory provisions adopting the "knowing" language of the Model Penal Code or similar language, which is generally considered to impose a subjective standard.[23] Most courts with similar statutes hold that "knowing that he [or she] is not licensed or privileged" establishes a subjective standard knowledge of legal authority or the consent of the person in lawful possession.[24] Thus, it is not sufficient for the State to show that a defendant should have known he was not licensed or privileged to enter the dwelling;[25] the fact finder must determine whether the facts and circumstances would have caused the particular defendant to "know" the requisite facts.[26]

[13,14] We agree with the majority of other jurisdictions and find that the plain language of "knowing" in § 28-521(1), in the context of entering any building or occupied structure "knowing that he or she is not licensed or privileged to do so," imposes a subjective standard focused on the accused's actual knowledge. That said, knowledge, like intent, may be inferred from the circumstances surrounding the act.[27] In fact, it is seldom capable of direct proof.[28]

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[22] A.L.I., Model Penal Code and Commentaries § 2.02(2)(b)(i), comment 2 (1985).

[23] See 3 Wayne R. LaFave, Substantive Criminal Law § 21.2(c) (3d ed. 2018).

[24] See *State v. Dansinger*, 521 A.2d 685, 689 (Me. 1987). See, also, *State v. Santiago*, 218 N.J. Super. 427, 527 A.2d 963 (1986); *State v. Bertram*, 708 N.W.2d 913 (N.D. 2006); *Com. v. Namack*, 444 Pa. Super. 9, 663 A.2d 191 (1995); *State v. Cram*, 184 Vt. 531, 955 A.2d 528 (2008).

[25] See, *Hancock v. State ex rel. Real Estate Comm., supra* note 17; Model Penal Code, *supra* note 21 § 2.02(7). See, also, *State v. Dansinger, supra* note 24; *State v. Santiago, supra* note 24; *State v. Bertram, supra* note 24; *Com. v. Namack, supra* note 24; *State v. Fanger*, 164 Vt. 48, 665 A.2d 36 (1995).

[26] See *State v. Bernstein*, 697 N.W.2d 371 (N.D. App. 2005).

[27] *State v. Almasaudi, supra* note 20.

[28] See *Callies v. State*, 157 Neb. 640, 61 N.W.2d 370 (1953).

The "stay away" letter listed Subway on its letterhead as one of Bosselman's businesses, and Bosselman's attorney requested in the letter that Stanko "not come onto any of its properties." The letter referred to the incident in which Stanko was verbally told he was "not welcome" at the Pump & Pantry, which shares the same address and is in the same building as the Subway, with open access through a hallway between the two businesses unless the Subway is closed. Stanko acknowledged to the officer of the police department that he had received the "stay away" letter. The State presented more than sufficient evidence for a trier of fact to find that Stanko knew he was not licensed or privileged to enter the Subway on the date in question. Thus, a directed verdict for a failure of proof on the elements of the offense charged was inappropriate.

[15] Stanko's motion for a directed verdict was also based on his contention that it was undisputed he had complied with "all lawful conditions imposed on access" and thus was entitled to a directed verdict on the affirmative defense set forth by § 28-522. An affirmative defense is established as a matter of law only if there are no factual issues remaining to be resolved by the trier of fact.[29]

The propriety of a directed verdict on the affirmative defense set forth by § 28-522(2) depends on statutory interpretation of "complied with all lawful conditions imposed on access." We have never addressed the meaning of this phrase. The county court appeared to conclude that such conditions encompassed only those imposed upon the public at large to enter an open area at a reasonable time and in a reasonable manner, and it concluded that because the evidence was undisputed Stanko entered the Subway during normal business hours and was not acting in a disruptive manner, this affirmative defense could be decided as a matter of law. The State asserts in this exception

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[29] See *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007). See, also, *Hill v. State*, 261 Ga. 377, 405 S.E.2d 258 (1991).

proceeding that "all lawful conditions imposed" includes the condition that a particular person for whom implied consent has been indefinitely and lawfully revoked cannot enter the premises until consent to enter is reinstated. We agree with the State.

The affirmative defense found in § 28-522, like § 28-520, derives from the Model Penal Code. The comments to the Model Penal Code explain that the "primary objective of the defense is to exclude criminal prosecution for mere presence of a person in a place where the public generally is invited," but the affirmative defense would not foreclose prosecution of persons "who become undesirable due to disorderly conduct or other misbehavior [which] itself amounts to another criminal offense."[30]

Only a few states have adopted this part of the Model Penal Code.[31] One case from one of those states appears at first glance to support the county court's reading of the statute. In *State v. Morse*,[32] the court held as a matter of law that the defendant should be acquitted of criminal trespass under the "open to the public" affirmative defense, despite the fact that the defendant had been indefinitely evicted from the casino in question for allegedly cheating at blackjack. The defendant had not exhibited cheating or disorderly conduct on the date he was alleged to have trespassed. The court reasoned that, as a place of public business, the casino could lawfully exclude patrons for cause only, and it stated that "fairness mandates that when the patron attempts to return to the casino and acts in accordance with all lawful conditions imposed, the patron

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[30] A.L.I., Model Penal Code and Commentaries § 221.2, comment 2 at 90 (1980).

[31] Conn. Gen. Stat. Ann. § 53a-110 (West 2012); § 28-522; N.J. Stat. Ann. § 2C:18-3 (West 2015); 18 Pa. Stat. Ann. § 3503 (West 2015); S.D. Codified Laws § 22-35-7 (2017); Wash. Rev. Code Ann. § 9A.52.090 (West 2015).

[32] *State v. Morse*, 276 N.J. Super. 129, 647 A.2d 495 (1994).

cannot be excluded, as he is not interfering with any legitimate business interests."[33]

But, in *State v. Slobin*,[34] a case from the same jurisdiction also involving blackjack at a casino, the court rejected as dicta any contention that an exclusion by a business open to the public can last for no more than 24 hours. The court then affirmed criminal trespass convictions of patrons who were indefinitely barred from the blackjack table for repeated disorderly conduct, despite the fact that they were not disorderly on the date they were alleged to have trespassed.[35] Other courts in jurisdictions with statutes adopting the language of the Model Penal Code have similarly affirmed convictions of criminal trespass when the defendants were lawfully barred from the business premises, despite otherwise behaving reasonably at the time for which they were charged for trespassing.[36]

[16] We hold that a person entering premises open to the public has not "complied with all lawful conditions imposed on access to or remaining in the premises" pursuant to § 28-522(2) if he or she has been lawfully barred from the premises and the business has not reinstated its implied consent to entry. While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.[37] And in the absence of anything indicating otherwise, statutory language is to be given its plain and ordinary meaning.[38]

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[33] *Id.* at 134, 647 A.2d at 497.

[34] *State v. Slobin*, 294 N.J. Super. 154, 682 A.2d 1205 (1996).

[35] *Id.*

[36] See, *Com. v. White*, 342 Pa. Super. 1, 492 A.2d 32 (1985); *State v. Finley*, 97 Wash. App. 129, 982 P.2d 681 (1999). See, also, *Alexis v. McDonald's Restaurants of Massachusetts*, 67 F.3d 341 (1st Cir. 1995).

[37] *In re Interest of W.D.*, 232 Neb. 581, 441 N.W.2d 608 (1989).

[38] *Id.*

Unlike that portion of § 28-522(2) describing the element that "[t]he premises were at the time open to members of the public," § 28-522(2) does not limit "all lawful conditions imposed" to those imposed on "members of the public." Rather, § 28-522(2) designates that "*the actor* complied with all lawful conditions imposed on access to or remaining in the premises." (Emphasis supplied.)

Thus, the plain language of § 28-522(2) encompasses conditions specific to a specific patron, and we will not read into the statute "all lawful conditions imposed [*on the general public*]." It is not sensible to conclude that the Legislature wished to shield lawfully barred former business patrons from criminal trespass liability so long as they comply with the conditions of the limited privilege granted by the business to the public at large.

The county court was correct that "one of the elements is knowing that one is not licensed or privileged to do so presupposes the defense," inasmuch as the "open to the public" affirmative defense is one of privilege and negates the unlawful entry element of criminal trespass.[39] The county court was incorrect, however, in its understanding of what "all lawful conditions" under the "open to the public" affirmative defense entails.

Under the facts presented, there was no legal basis for granting a directed verdict in Stanko's favor. The State presented evidence from which the trier of fact could have determined that Stanko was lawfully barred from the Subway, knew he was barred from the Subway, and did not comply with the condition that he not enter the Subway until his privilege was reinstated. Stanko's acquittal stands, pursuant to the limits of relief we can afford under a prosecutorial appeal brought under § 29-2315.01, but the State's exception is sustained. When the business revokes and has not reinstated its limited implied privilege to enter at a reasonable time and in a reasonable

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[39] See *State v. R.H.*, 86 Wash. App. 807, 939 P.2d 217 (1997).

manner, the defendant has not complied with all lawful conditions imposed on access to or remaining in the premises, for purposes of the "open to the public" affirmative defense set forth in § 28-522.

CONCLUSION

For the foregoing reasons, we sustain the State's exception to the district court's order, which should have sustained the exception to the county court's judgment.

Exception sustained.

Heavican, C.J., not participating.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Timothy L. Becker, appellant.

936 N.W.2d 505

Filed December 20, 2019. No. S-19-008.

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. **Constitutional Law: Sentences.** Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law.
5. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
6. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
7. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
8. **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.

9. **Constitutional Law: Sentences.** The Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. The U.S. Supreme Court has characterized this as a "narrow proportionality principle" which does not require strict proportionality between crime and sentence, but, rather, forbids only extreme sentences that are grossly disproportionate to the crime.
10. ____: ____. Under ordinary Eighth Amendment analysis, each sentence is considered separately, not cumulatively, for purposes of determining whether it is cruel and unusual.
11. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether 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.
12. **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.
13. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
14. ____. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.

Appeal from the District Court for Scotts Bluff County, Andrea D. Miller, Judge, on appeal thereto from the County Court for Scotts Bluff County, James M. Worden, Judge. Judgment of District Court affirmed.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Timothy L. Becker, appellant, was convicted in the county court for Scotts Bluff County of 21 misdemeanor counts of violating a protection order and sentenced to county jail for 180 days on each count, to be served consecutively. On appeal to the district court, Becker claimed that the sentences imposed were (1) excessive, (2) disproportionate in violation of the Eighth Amendment, and (3) invalid because when the county court orally pronounced his sentences in open court, it failed to state where the sentences were to be served. The district court rejected each of these claims and affirmed Becker's convictions and sentences. On appeal to this court, Becker claims the district court erred when it rejected each of his contentions regarding his sentences. Because we find no merit to Becker's claims of error, we affirm the order of the district court, which affirmed Becker's convictions and sentences.

STATEMENT OF FACTS

On May 29, 2018, the State charged Becker in the Scotts Bluff County Court with 21 counts of violating a protection order under Neb. Rev. Stat. § 42-924(4) (Cum. Supp. 2018). Each count involved a violation of the same protection order and the same victim, but each count was alleged to have occurred on a different date from May 3 through May 23, 2018. Each count was charged as a second offense based on a prior conviction for violation of a protection order involving the same victim. The complaint alleged that the prior offense had occurred on January 3, 2018, and that Becker had been convicted of the prior offense on May 3.

Pursuant to a plea agreement, the State reduced each of the charges to a first offense and Becker pled no contest to all 21 counts on June 5, 2018. Under § 42-924(4), a first offense of violating a protection order is a Class I misdemeanor, whereas a second or subsequent offense is a Class IV felony.

In its factual basis for the pleas, the State asserted that a protection order had been entered against Becker on October

19, 2017, and had remained in effect since issued and that the protection order prohibited Becker from, inter alia, telephoning or otherwise communicating with the victim. The State further asserted that on the dates alleged, Becker was incarcerated in the Scotts Bluff County jail and that jail records showed that Becker had telephoned the victim's number on each of the charged dates, "often multiple times a day." The State asserted that in the timeframe alleged, Becker had made over 300 calls to the victim's number and that "over 150 of those were completed phone calls."

At the July 31, 2018, sentencing hearing, the county court received evidence, including the victim's impact statement. After hearing arguments from the State and from Becker, the county court sentenced Becker to imprisonment for 180 days for each of the 21 convictions and ordered that the sentences be served consecutively to one another. In connection with the imposition of sentences, the county court stated that it had considered the victim impact statement, Becker's criminal history, the nature of the offenses, public safety, and the need for punishment. The county court further stated that it considered Becker's comments at the sentencing hearing, which "very much went to blame other people rather than to take personal responsibility and make any promises not to do that in the future."

Before pronouncing the sentence, the county court had a discussion with counsel regarding where Becker would serve his sentences "if he is given over a year sentence." In that discussion, the court made reference to Neb. Rev. Stat. § 28-106(2) (Reissue 2016), which provides in part:

> Sentences of imprisonment in misdemeanor cases shall be served in the county jail, except that such sentences may be served in institutions under the jurisdiction of the Department of Correctional Services if the sentence is to be served concurrently or consecutively with a term for conviction of a felony and the combined sentences total a term of one year or more.

At the end of the discussion, the court stated that it was "going to issue the sentence, and then I am going to look at that [location issue] before I issue the commitment order showing where the commitment will take place. . . . [H]opefully I can still get that figured out yet today, but, if not, first thing in the morning." See Neb. Rev. Stat. § 29-2403 (Reissue 2016) (providing for warrant of commitment). While counsel and Becker were present in the courtroom, the court pronounced a sentence of 180 days for each count. The written sentencing order, signed and dated by the county court on July 31, 2018, stated that Becker was "sentenced to the Scotts Bluff County Jail" for consecutive sentences of 180 days for each of the 21 misdemeanor convictions, for a total of 3,780 days. The sentencing order was filed on August 1.

Becker appealed his convictions and sentences to the district court. After briefing and argument, the district court filed an order which affirmed the county court's judgment. The district court stated that Becker argued that (1) the sentences imposed by the county court were excessive, (2) the sentences violated the Eighth Amendment because they were disproportionate to the crimes committed, and (3) the sentences were invalid because the county court did not announce in open court where Becker would serve his sentences. Regarding excessive sentences, the district court determined that the sentences were within statutory limits, were supported by competent evidence, and did not constitute an abuse of discretion. Regarding disproportionate sentencing, the district court again noted that the sentences were within statutory limits and that Becker's criminal history included a violation of the same protection order. The district court also rejected Becker's argument that the sentences were disproportionate because they would be served in county jail "with little services offered and with little opportunity to be outside." The district court noted that the Legislature provided in § 28-106 that sentences for misdemeanors were to be served in county jails unless served concurrently with or consecutively to a sentence for a felony. Based on § 28-106,

the district court determined that because the sentences in this case were for misdemeanors and there was no felony involved, the statutorily required location for the sentences was the county jail. Finally, regarding the failure to announce in open court the location where the sentences would be served, the district court noted that the county court had engaged in a discussion of the issue with counsel and that Becker did not object to the county court's statement that it would research the location issue and issue a commitment order identifying the location following the hearing. The district court noted that the county court sentencing order filed the day after the sentencing hearing provided that the sentences would be served in the county jail. The district court concluded that there was no error regarding sentencing and affirmed.

Becker appeals the district court's order which affirmed his convictions and sentences.

ASSIGNMENTS OF ERROR

Becker generally claims that the district court erred when it affirmed his convictions and sentences. Becker claims, restated and reordered, that (1) there was plain error and the sentences were not valid, because he was not present in court "when the commitment portion of his sentences [was] imposed"; (2) the sentences imposed violated the Eighth Amendment because they were disproportionate to his criminal history and the severity of the crimes; and (3) the sentences imposed were excessive and an abuse of discretion.

STANDARDS OF REVIEW

[1-3] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. Hatfield, ante* p. 66, 933 N.W.2d 78 (2019). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id*. When reviewing a judgment for errors appearing on the record, an appellate court's inquiry

is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

[4,5] Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law. *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id*.

[6,7] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Montoya, ante* p. 96, 933 N.W.2d 558 (2019). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

ANALYSIS

Each of Becker's three assignments of error relates to the propriety of his sentences. Thus, we make some initial comments which relate to our analysis of each assignment of error. We initially note that Becker pled no contest to and was convicted of 21 counts of first offense violation of a protection order. Under § 42-924(4), a first offense of violating a protection order is a Class I misdemeanor. The sentencing range for a Class I misdemeanor is found in § 28-106, which provides no minimum and a maximum of 1 year's imprisonment, a $1,000 fine, or both. As noted in the facts above, § 28-106(2) provides in part:

> Sentences of imprisonment in misdemeanor cases shall be served in the county jail, except that such sentences may be served in institutions under the jurisdiction of the Department of Correctional Services if the sentence is to be served concurrently or consecutively with a term for conviction of a felony and the combined sentences total a term of one year or more.

The county court sentenced Becker "to the Scotts Bluff County Jail" for consecutive sentences of 180 days for each of the 21 misdemeanor convictions, for a total of 3,780 days. The individual sentences were within the range allowed under § 28-106, and because the sentences were not ordered to be served concurrently with or consecutively to a sentence for a felony conviction, the sentences were required under the current version of § 28-106(2) to be served "in the county jail."

Court's Failure to Announce in Court Where Sentences Would Be Served Was Not Plain Error.

We first address Becker's claim that his sentences were invalid because the county court did not announce in open court the location where his sentences would be served. We find no plain error in this respect.

[8] Becker frames this claim as an instance of plain error. As noted in the fact section above, at the July 31, 2018, sentencing hearing, the court had a discussion regarding the location where the sentences would be required to be served and stated that it was first "going to issue the sentence, and then I am going to look at that [location issue] before I issue the commitment order showing where the commitment will take place. . . . [H]opefully I can still get that figured out yet today, but, if not, first thing in the morning." Becker did not object to the sentencing procedure expressed by the court, and therefore he has presented this claim on appeal as a claim of plain 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. *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019).

Becker relies on *State v. Temple*, 230 Neb. 624, 628, 432 N.W.2d 818, 821 (1988), in which we stated: "The pronouncement of the sentence in open court in the presence of the defendant is an important part of the sentencing procedure in

most criminal cases. In imposing sentence, the court should state with care the precise terms of the sentence which is imposed." We have cited *Temple* for the proposition that "where there is a conflict between the record of a judgment and a verbatim record of the proceedings in open court, the latter prevails." *State v. Salyers*, 239 Neb. 1002, 1005, 480 N.W.2d 173, 176 (1992). Becker also relies on *State v. Ernest*, 200 Neb. 615, 617, 264 N.W.2d 677, 679 (1978), in which we stated that Neb. Rev. Stat. §§ 29-2201 and 29-2202 (Reissue 2016) "relating to allocution indicate clearly that sentencing should take place in the presence of the defendant" and that "[t]here is much authority to the effect that a sentence imposed in the absence of the defendant is generally void."

The present case is not a case like *State v. Ernest, supra*, in which a sentencing hearing was held in the defendant's absence, or like *State v. Temple, supra*, where a subsequent written order was alleged to differ from that which was pronounced in court. Becker was present at the sentencing hearing, and the court pronounced the length of the sentences and ordered them to be served consecutively. These critical aspects of the sentence did not differ in the written order that was filed the next day.

As noted, at the sentencing hearing at which Becker was present, the court discussed with the parties the statutory requirement regarding where the sentences would be served. The court referred to § 28-106(2), quoted above, and allowed the parties to comment on the application of the statute. On the undisputed facts of this case, § 28-106(2) clearly required that the sentences be served "in the county jail," which we observe is not under the jurisdiction of the Department of Correctional Services (DCS). In the case of misdemeanors, § 28-106(2) allows for the misdemeanor sentences to be served "in institutions under the jurisdiction of [DCS]" only when they are ordered to be served concurrently with or consecutively to a sentence for a felony conviction. There was no felony conviction at issue in this case, and so, the only statutory option

available to the sentencing court was for the sentences to be served in the county jail as the written order provided.

As stated in *State v. Ernest, supra*, the requirement for the defendant's presence at sentencing stems from §§ 29-2201 and 29-2202. Those statutes focus on the requirement of allocution, i.e., that "the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him." § 29-2201. It also appears to stem from what we have recognized as a defendant's "constitutionally protected right to be present at all critical stages of his or her trial." *State v. Bjorklund*, 258 Neb. 432, 468, 604 N.W.2d 169, 205 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

We think those concerns were addressed in this case, because Becker was at the sentencing hearing and had the opportunity to argue issues related to the length of sentence, which was pronounced, as well as the location issue, which was a subject of discussion.

The record of the July 31, 2018, sentencing hearing shows that there was a discussion between the court and counsel with Becker present which included reference to § 28-106(2), a statute which required the sentences in this case to be served in the county jail, as the subsequent written order provided. Unlike previous versions of § 28-106(2), which we discuss later in our analysis, under the current version of § 28-106(2), in the absence of a felony, the court had no statutory discretion to order the sentences to be served in a DCS facility rather than the county jail. Therefore, there was nothing that Becker could have argued to convince the county court to order the sentences to be served anywhere other than the county jail; the commitment order would not have been any different even if the court had explicitly stated at the hearing that the sentences were to be served in the county jail. Thus, even if we were to conclude that Becker's presence was required when the sentencing court announced the location where the sentences were to be

served, no plain error occurred. The absence of an announcement indicating where the sentences were to be served did not affect Becker's substantial right. Furthermore, if uncorrected, it would not result in damage to the integrity, reputation, and fairness of the judicial process. See *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019). We conclude that the district court did not err when it concluded that the county court's failure to state at the sentencing hearing where the sentences would be served was not plain error.

Eighth Amendment Proportionality Analysis Requires That Consecutive Sentences Be Considered Individually Rather Than Cumulatively; Individual Sentences Imposed on Becker Were Not Disproportionate.

Becker next argues that his sentences violated the Eighth Amendment because they were disproportionate. We determine that this inquiry must focus on each individual sentence rather than the aggregate of all 21 sentences and that, viewed as such, the sentences were not disproportionate.

[9] The Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017). The U.S. Supreme Court has characterized this as a "narrow proportionality principle" which does not require strict proportionality between crime and sentence, but, rather, forbids only extreme sentences that are grossly disproportionate to the crime. *Id*. See *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (citing *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring in part and concurring in judgment; O'Connor and Souter, JJ., join)). See, also, *Lockyer v. Andrade*, 538 U.S. 63, 77, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) ("[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case").

Becker's argument focuses on the fact that he was sentenced to consecutive sentences totaling imprisonment for more than 10 years in the county jail. He contends it is grossly disproportionate to be sentenced to more than 10 years' imprisonment for telephone calls that the victim "didn't have to answer." However, we determine that Eighth Amendment analysis focuses on individual sentences rather than the aggregate of sentences ordered to be served consecutively to one another.

Federal courts have said that the focus of the disproportionality inquiry should be on the individual sentence rather than the aggregate of sentences. "Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *U.S. v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). See, also, *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) (stating that "it is wrong to treat stacked sanctions as a single sanction [because] [t]o do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim"); *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) (stating Eighth Amendment analysis focuses on sentence imposed for each specific crime, not on cumulative sentence for multiple crimes); *United States v. Schell*, 692 F.2d 672, 675 (10th Cir. 1982) (rejecting Eighth Amendment challenge and stating, in part, that considering consecutive sentences would require court to find that "virtually any sentence, however short, becomes cruel and unusual punishment" when considered in connection with "sentences for prior convictions").

The Court of Appeals for the Second Circuit in *U.S. v. Aiello, supra*, and some of the other federal courts cited above relied on dicta from the U.S. Supreme Court's decision in *O'Neil v. Vermont*, 144 U.S. 323, 12 S. Ct. 693, 36 L. Ed. 450 (1892). In *O'Neil*, the defendant was given consecutive sentences totaling over 54 years for 307 liquor law infractions. The circuit court ultimately concluded that it lacked jurisdiction to decide

the question, but in doing so, it noted that the state court had determined that the significant length of the aggregated sentences did not constitute cruel and unusual punishment. The circuit court quoted the state court's reasoning that "'[i]f [the defendant] has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offen[s]es.'" *Id.*, 144 U.S. at 331 (quoting *State v. O'Neil*, 58 Vt. 140, 2 A. 586 (1886)).

State courts have likewise held that the focus should be on individual sentences rather than the aggregate of sentences. In *State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006), the court found no Eighth Amendment violation in a cumulative sentence of imprisonment for 200 years based on consecutive 10-year sentences imposed for 20 counts of possessing child pornography. The Arizona court stated that "'[a] defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts.'" *Id*. at 479, 134 P.3d at 384, quoting *State v. Jonas*, 164 Ariz. 242, 792 P.2d 705 (1990)). The *Berger* court also stated that "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." 212 Ariz. at 479, 134 P.3d at 384. See, also, *State v. Hairston*, 118 Ohio St. 3d 289, 888 N.E.2d 1073 (2008) (stating proportionality review should focus on individual sentences rather than on cumulative impact of multiple sentences imposed consecutively); *State v. Buchhold*, 727 N.W.2d 816 (S.D. 2007) (reviewing cases holding that Eighth Amendment review focuses on individual sentences and concluding that imposition of consecutive sentencing is discretionary matter for sentencing court); *Wahleithner v. Thompson*, 134 Wash. App. 931, 143 P.3d 321 (2006) (stating that except in extremely rare cases, proportionality review for constitutional purposes is review of each individual sentence, not their cumulative effect); *Close v. People*, 48 P.3d 528 (Colo. 2002), *abrogated on other grounds, Wells-Yates v. People*,

454 P.3d 191 (Colo. 2019) (stating if proportionality review were to consider cumulative effect of all sentences imposed, result would be possibility that defendant could generate Eighth Amendment disproportionality claim simply because defendant had engaged in repeated criminal activity); *State v. August*, 589 N.W.2d 740 (Iowa 1999) (determining nothing cruel and unusual about punishing person committing two crimes more severely than person committing only one crime, which is effect of consecutive sentencing). But see *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (stating that under U.S. Supreme Court precedent, "issue of whether consecutive sentences should be viewed separately when conducting a proportionality analysis under the Eighth Amendment remains an open question," particularly with regard to juvenile offenders, in light of *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)).

[10] We agree with the reasoning of these federal and state courts, and we therefore conclude that under ordinary Eighth Amendment analysis, each sentence is considered separately, not cumulatively, for purposes of determining whether it is cruel and unusual. Applying the principle to the instant case, we note that the sentence for each of Becker's 21 convictions was for 180 days in county jail, which was within the statutory limits for a Class I misdemeanor. See § 28-106 (maximum of 1 year's imprisonment for Class I misdemeanor). Eighth Amendment analysis generally respects legislative determinations of statutory sentencing limits. See *State v. Loschen*, 221 Neb. 315, 376 N.W.2d 792 (1985) (stating sentence of imprisonment within limits of valid statute ordinarily not cruel and unusual punishment in constitutional sense). We view each sentence individually and conclude that each individual sentence imposed on Becker was well within the statutory limits and was not grossly disproportionate in violation of the Eighth Amendment. We therefore conclude the district court did not

err when it rejected Becker's Eighth Amendment challenge to his sentences.

District Court Did Not Err When It Determined That County Court Did Not Impose Excessive Sentences.

Becker finally claims that the district court erred when it failed to rule that the county court imposed excessive sentences. Sitting as an appellate court, the district court's standard of review was limited to an examination of the record for error or abuse of discretion. See *State v. Hatfield, ante* p. 66, 933 N.W.2d 78 (2019). As explained below, because the county court did not abuse its discretion when it sentenced Becker, the district court did not err when it affirmed the county court's sentencing order.

[11-13] Becker pled no contest to 21 counts of first offense violating a protection order. As noted above, Becker's sentences of imprisonment for 180 days on each count were within statutory limits. 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. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019). In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Viewing each sentence individually, we find a sentence of 180 days' imprisonment is well under the maximum potential

sentence of 1 year's imprisonment for a Class I misdemeanor. As such, it is difficult to claim that any individual sentence is excessive. Instead, Becker's excessive sentence argument focuses on the fact that the court ordered the 21 sentences to be served consecutively to one another, resulting in an aggregate sentence in excess of 10 years. He generally argues that 10 years' imprisonment is excessive, because his crimes were basically telephone calls that the victim "didn't have to answer" and his prior criminal history does not show him to be violent or dangerous. Becker appears to place some blame for the offenses on the victim, noting that all the calls were placed from the jail and that the jail calling system notifies the recipient of the caller's identity and gives the recipient the option to refuse the call. He argues that because the victim did not have to take the calls, she evidently wanted to talk to him.

[14] We note first that generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018). The cumulative length of the sentences is due largely to the fact that Becker was convicted of 21 separate violations. Becker pled no contest to the 21 charged violations, and he did not challenge the number of charges on double jeopardy grounds or argue that the charges constituted a single offense. See *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002). We note in this regard that the record indicates that Becker made hundreds of calls in violation of the protection order over the course of 21 days and that the State chose to charge him with just one offense for each day.

The county court appeared to consider appropriate factors in making its sentencing decision. At the sentencing hearing in this case, the county court set forth various factors it had considered. These factors included Becker's criminal history, the nature of the offenses, public safety, the need for punishment, and, in particular, the victim's impact statement. The county court also noted Becker's comments at the sentencing

hearing, which seemed to indicate an unwillingness to accept responsibility for the offenses; the court noted that his comments "very much went to blame other people rather than to take personal responsibility and make any promises not to do that in the future." Becker stated at the hearing that the victim "didn't have to answer my phone calls. She could have blocked me. . . . But every time I called she answered." Our review of the record in this case indicates that the court considered relevant factors, and the record does not indicate that the court considered any improper factors.

In connection with his Eighth Amendment argument considered above, Becker in part argued that consecutive sentences were disproportionate because they would result in his spending several years in county jail, a facility which he asserts is not amenable to incarceration for that period of time. As we determined above, for purposes of Eighth Amendment analysis, in the absence of specific law to the contrary, sentences are considered individually, and therefore Becker's argument regarding the cumulative time he will spend in county jail was not relevant to our Eighth Amendment analysis. We therefore consider Becker's cumulative argument as part of Becker's contention that consecutive sentences were excessive and an abuse of discretion.

As we have noted, unless prescribed by statute, sentencing courts are afforded discretion as to whether to impose consecutive sentences. See *State v. Tucker, supra*. The underlying rationale behind Becker's argument against consecutive sentences is that imposition of consecutive terms is improper, because all sentences will be served in county jail rather than in institutions under the jurisdiction of DCS which are better suited than the county jail for incarceration for a longer period of time. However, as we noted above, the only option under the facts and the current provisions of § 28-106 was for the sentences to be served in county jail; the county court had no discretion to order otherwise. Given the sheer volume of Becker's convictions for violation of the protection order, and with due

regard for additional uncharged violations, we do not believe the sentencing court abused its discretion when it imposed consecutive terms.

For completeness, we note that prior to amendments in 2015, Neb. Rev. Stat. § 28-106 (Cum. Supp. 2014) allowed sentences for misdemeanor sentences to be served in DCS facilities under certain circumstances even when not made concurrently with or consecutively to a sentence for a felony conviction. We also note that Neb. Rev. Stat. § 28-105(2) (Reissue 2016) requires that felony sentences for maximum terms of imprisonment for 1 year or more must be served in DCS facilities. This appears to indicate that there has been a legislative policy determination that DCS facilities are better suited than county jails for longer sentences. However, if there are policy reasons that long periods of incarceration for multiple misdemeanor convictions could be better served in DCS facilities rather than in county jails as is now required, that is a determination that would need to be articulated by the Legislature.

We conclude that the district court did not err when it concluded that the county court did not abuse its discretion in sentencing Becker. We reject this assignment of error.

CONCLUSION

We determine that there was no plain error when the county court did not announce at the sentencing hearing where Becker's sentences would be served. We further determine that Eighth Amendment analysis ordinarily focuses on individual sentences rather than the cumulative length of consecutive sentences and that Becker's individual sentences were not grossly disproportionate. We finally determine that because the county court did not impose excessive sentences, the district court did not err when it affirmed Becker's county court convictions and sentences. Finding no errors by the district court, 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.
Arlyn P. Ildefonso, appellant.
936 N.W.2d 348

Filed December 20, 2019. No. S-19-060.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. ____: ____. An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.
3. ____: ____. Decisions regarding appointment of counsel under the DNA Testing Act are reviewed for an abuse of discretion.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Arlyn P. Ildefonso, pro se.

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

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

Cassel, J.

INTRODUCTION

Arlyn P. Ildefonso appeals from the denial of his motions for DNA testing and appointment of counsel. Because Ildefonso failed to demonstrate that DNA testing may produce noncumulative, exculpatory evidence, the district court did not abuse its discretion by denying his motions. We affirm.

BACKGROUND

Circumstances of Crimes

On September 13, 1999, Carr Hume's body was found lying partially on a sidewalk and partially on a curb in front of a house in the area of 42d and Bancroft Streets in Omaha, Nebraska. Blood spatter evidence indicated that he had been shot at that location. Hume died from a single gunshot wound to the head. No shell casings were found at the scene. Items located at the scene included a baseball hat, assumed to belong to Hume; a piece of possible human tissue near a curb across from Hume's body; and a syringe in the street.

Christina Devore-Alexander testified that she was with Ildefonso and Kristine Reh late in the evening on September 12, 1999, and into the early morning hours of September 13. They left an apartment around 3 a.m., with Devore-Alexander driving and Ildefonso giving directions. According to Devore-Alexander, while she was driving, Ildefonso was "very upset" and said the only thing that would make him feel better was "if he shot somebody." Near 42d and Bancroft Streets, Devore-Alexander stopped the car and Ildefonso got out. As Devore-Alexander was talking to Reh, she heard a gunshot and looked up. She saw Ildefonso's extended arm holding a gun and Hume lying on his back on the ground. Reh testified that once the car stopped on 42d Street, Ildefonso got out, Reh heard a gunshot, and then Ildefonso got back in the car. As the vehicle drove away, Reh saw a man lying on the sidewalk.

On approximately September 24, 1999, Mark Anderson told police that he had been with the individuals responsible for the shooting. At that time, Anderson was in police custody due to his suspected involvement in an automobile theft. Based on information from Anderson, police identified Randall Fields and Shannon Smith as possible suspects. Anderson told officers that Fields shoved Hume, produced a handgun, and fired two times, striking Hume with the second

shot. Police arrested Fields and Smith and brought them into custody.

As an officer was preparing to interview Fields, the officer received a call from Amy Taylor, who said that she knew who the shooter was and that the wrong people had been arrested. The officer testified that Taylor told him Ildefonso used a .357-caliber revolver during the shooting and that he was with Devore-Alexander and Reh. The officer asked Taylor to obtain some of the bullets for the gun.

Taylor testified that she called the police after seeing on television that the wrong people had been arrested for Hume's murder. Taylor had been staying with Ildefonso in a motel. She testified that Ildefonso told her that he shot Hume "[b]ecause he was mad and he wanted the world to feel his pain." She had seen Ildefonso with several firearms, including a .357-caliber revolver. At the request of the police, Taylor obtained shells from the .357-caliber revolver from Ildefonso's backpack and gave them to the motel clerk for the police to retrieve. Taylor testified that it was "possible" Fields—whom she last saw 4 years earlier—was the father of one of her children.

After speaking with Devore-Alexander, Reh, and Taylor, officers reinterviewed Anderson. Anderson said that he used news accounts of the murder to concoct the story against Fields and Smith for revenge. An officer testified that in retrospect, parts of Anderson's original stories to the police were not consistent with what the officers learned. After Anderson recanted, he was charged with a crime for delaying the actual suspect from being apprehended.

On October 1, 1999, police took steps to obtain a warrant to search Ildefonso, a vehicle, and a motel room. While surveilling the motel, an officer saw Ildefonso and Taylor leave the motel in a vehicle. Officers subsequently stopped the vehicle. Taylor testified that when pulled over by the police, Ildefonso removed the .357-caliber revolver from his waistband and put it under the front passenger's seat of the vehicle. Police collected the revolver as evidence.

During an autopsy of Hume, a doctor recovered a bullet and bullet fragments from the right side of the base of the skull. An expert testified that the bullet taken from Hume's head was fired from the .357-caliber revolver recovered from under the front passenger's seat of the vehicle in which Ildefonso was seated.

A jury convicted Ildefonso of murder in the first degree and use of a deadly weapon to commit a felony. We affirmed his convictions on direct appeal.[1]

Motion for DNA Testing

In 2018, Ildefonso filed a motion for DNA testing. He identified 12 items/groups of items, including clothing collected from Hume, the hat, the possible piece of human tissue, the syringe, blood swabs, forensic evidence from a Mitsubishi automobile, personal clothing from other individuals (Anderson, Fields, and Smith), bullets or shell casings, firearms, other live or spent ammunition collected from Ildefonso, and Ildefonso's backpack. Ildefonso then set forth claims of actual innocence, wrongful conviction, and violations of his constitutional rights. He theorizes that Taylor set him up to "free her child[']s father," and his motion points to alleged inconsistencies in the testimonies of various trial witnesses. As relevant to DNA testing, Ildefonso lists a series of questions:

> Was the hat found near . . . Hume ever tested for DNA? Does the hat belong to Fields, Smith, Anderson or some other perp[e]trator who was with Anderson that night? Was the syringe and "tissue like substance" tested for DNA? Who do they belong to? Anderson said that Fields shoved . . . Hume prior to shooting him. Were . . . Hume's clothes tested for DNA to see if there is anyone else's DNA on them? Was the stolen Mitsubishi car that Anderson said was used during this crime, ever processed

[1] See *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001).

> for forensic evidence? Was . . . Hume's, Field's, Smith's, Anderson's, or anyone else's DNA located in there? Fingerprints, hair, blood, or anything? Was any search warrants done on Fields, Smith, or Anderson to look for the clothing that Anderson said that they were wearing that night? Was it found? Was . . . Hume[']s DNA or blood on any of them?

In the motion, Ildefonso requested that counsel be appointed to represent him. He subsequently filed a separate motion for appointment of counsel.

After the State filed an index of property, the court entered an order concerning Ildefonso's motion. The court recognized that most of the motion and affidavit reasserted claims raised in Ildefonso's motion for postconviction relief and were irrelevant to issues of DNA testing. Because Ildefonso did not indicate why testing of the various items may present exculpatory evidence, the court allowed him time to file a supplemental affidavit.

Ildefonso then filed a supplemental affidavit. He alleged that Anderson was an eyewitness to and participant in Hume's death and that Anderson said a man shoved Hume before shooting him. Thus, Ildefonso claimed that there might have been a DNA transfer from the killer's hands onto Hume's clothes. And because the hat located near Hume's body was not found conclusively to be Hume's hat, Ildefonso posited that the hat may belong to a person involved in the crime. He believed DNA evidence left by the actual killer would be located on the items.

District Court's Decision

The district court determined that Ildefonso failed to show such testing may produce noncumulative, exculpatory evidence relevant to the claim that he was wrongfully convicted. The court noted that Ildefonso's supplemental affidavit relied on Anderson's statements, even though Anderson admitted fabricating his story. The court stated that Ildefonso "does not

indicate with any particularity, or truthful corroborating evidence, why testing of those items may present any exculpatory evidence relative to the claim that the defendant was wrongfully convicted—only hopeful conclusions." The court denied Ildefonso's motion for appointment of counsel and motion for DNA testing.

Ildefonso filed a timely appeal.

ASSIGNMENT OF ERROR

Ildefonso assigns that the district court erred when it failed to follow the DNA Testing Act[2] and order DNA testing on specific items and, thereafter, to follow the act's protocol, including the appointment of counsel, the conducting of a full fact-finding hearing, and the making of a judicial decision based on all information germane to the case.

STANDARD OF REVIEW

[1,2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[3] An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.[4]

[3] Decisions regarding appointment of counsel under the DNA Testing Act are reviewed for an abuse of discretion.[5]

ANALYSIS

DNA Testing Act

Pursuant to the act, a person in custody takes the first step toward obtaining possible relief by filing a motion in the court that entered the judgment requesting forensic DNA

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[2] Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2016).

[3] *State v. Myers*, 301 Neb. 756, 919 N.W.2d 893 (2018).

[4] *Id.*

[5] *Id.*

testing of biological material.[6] The court has discretion to either consider the motion on affidavits or hold a hearing.[7] Under § 29-4120(5), the court shall order DNA testing upon a determination that

> (a)(i) the biological material was not previously subjected to DNA testing or (ii) the biological material was tested previously, but current technology could provide a reasonable likelihood of more accurate and probative results, (b) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (c) such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

Under the act, "exculpatory evidence means evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody."[8]

Denial of Motion for DNA Testing

Part of the defendant's burden of proof is to provide the court with affidavits or evidence at a hearing establishing the three required factual determinations under § 29-4120(5).[9] We have recognized that the showing needed to satisfy the requirement that DNA testing may produce noncumulative, exculpatory evidence is "relatively undemanding . . . and will generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant."[10] Although the threshold to obtain DNA testing is rather low, we

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[6] *State v. Betancourt-Garcia*, 299 Neb. 775, 910 N.W.2d 164 (2018).

[7] *Id.*

[8] § 29-4119.

[9] See *State v. Young*, 287 Neb. 749, 844 N.W.2d 304 (2014).

[10] *State v. Buckman*, 267 Neb. 505, 515, 675 N.W.2d 372, 381 (2004).

agree with the district court that Ildefonso did not meet this minimal threshold.

A court is not required to order DNA testing if such testing would not produce exculpatory evidence. In *State v. Dean*,[11] we reasoned that "even if [the prisoner] is correct and DNA testing would not detect the presence of his DNA on the objects in question, the result would be at best inconclusive, and certainly not exculpatory." The same is true here. Ildefonso asserts that his DNA will not appear on any of the items. But the absence of his DNA on some of the items would be consistent with the evidence and would not be exculpatory, particularly in light of the testimonies of Devore-Alexander, Reh, and Taylor and Ildefonso's possession of the murder weapon at the time of his apprehension.

Ildefonso essentially seeks DNA testing to corroborate Anderson's original story. Ildefonso maintains that he was framed for the murder, and he argues that testing showing the DNA of Anderson, Fields, or Smith would raise serious doubts regarding the credibility of Devore-Alexander, Reh, and Taylor. One problem for Ildefonso is that the State's index of property does not show that the State has actual or constructive possession of a DNA sample of Anderson, Fields, or Smith with which to compare any testing results. Another problem is that Anderson recanted his story—parts of which police determined were not credible or were not consistent with the evidence—and was charged with a crime for his false report. An admittedly fabricated story does not provide a basis for DNA testing.

We find no error in the district court's factual findings that the evidence Ildefonso desired to have tested would not produce exculpatory evidence. Thus, we find no abuse of discretion by the court in denying Ildefonso's motion for DNA testing.

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[11] *State v. Dean*, 270 Neb. 972, 976, 708 N.W.2d 640, 644 (2006).

Appointment of Counsel

A court shall appoint counsel for an indigent person upon a showing that DNA testing may be relevant to the person's claim of wrongful conviction.[12] Here, Ildefonso did not make the requisite showing that DNA testing may be relevant to his claim of wrongful conviction. Accordingly, the court did not abuse its discretion in refusing Ildefonso's request for appointment of counsel.

CONCLUSION

Because Ildefonso did not meet his burden of showing that DNA testing may produce noncumulative, exculpatory evidence relevant to his claim that he was wrongfully convicted, we conclude that the district court did not abuse its discretion in denying Ildefonso's motions for DNA testing and appointment of counsel.

Affirmed.

Freudenberg, J., not participating.

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[12] § 29-4122.

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

Adair Holdings, LLC, appellant, v. Dennis G. Johnson et al., appellees.

936 N.W.2d 517

Filed January 3, 2020. No. S-18-1214.

1. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
2. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
3. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
4. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
5. **Equity: Quiet Title.** A quiet title action sounds in equity.
6. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
7. **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.

8. **Title: Deeds: Tax Sale.** Actions challenging title obtained via a tax deed are governed by statute.
9. **Title: Deeds: Tax Sale: Quiet Title.** Because a void tax deed grants color of title in a potential future action, it will always be incumbent upon the original landowner to bring an action to quiet title in his or her name.
10. **Title: Deeds: Tax Sale: Words and Phrases.** The word "paid" in Neb. Rev. Stat. § 77-1844 (Reissue 2009) includes tendering payment.
11. **Title: Deeds: Tax Sale: Jurisdiction: Notice.** Neb. Rev. Stat. § 77-1843 (Reissue 2009) has a jurisdictional component that renders a tax deed void when the tax deed holder failed to comply with the statutory notice requirements prior to acquiring the deed.
12. **Title: Deeds: Tax Sale: Notice.** A misstatement in the statutory notice of the expiration of the time of redemption renders the tax deed invalid.
13. **Quiet Title.** The party seeking to quiet title must recover, if at all, on the strength of his own title and not on the weakness of his adversary's title.
14. **Equity.** The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand.
15. **Equity: Quiet Title.** In quiet title actions, one who seeks equity must do equity.
16. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Franklin County: Terri S. Harder, Judge. Affirmed.

Deana K. Walocha for appellant.

Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellee Dennis G. Johnson.

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

Freudenberg, J.

NATURE OF CASE

Adair Holdings, LLC, brought a quiet title action after obtaining a tax deed. Adair Holdings' predecessor in interest attempted to provide Dennis G. Johnson, the owner of record,

with notice of the application for a tax deed via certified mail and then by publication. However, the notice contained incorrect information about the timeframe in which Johnson could redeem the property. On a motion for summary judgment, the trial court determined that the deed was void for incorrect notice and granted Johnson's counterclaim for quiet title. The court did not order Johnson to reimburse Adair Holdings for the delinquent taxes paid by Adair Holdings' predecessor in interest. Adair Holdings appeals.

BACKGROUND

Adair Asset Management, L.L.C. (Adair Management), and BMO Harris Bank purchased a tax sale certificate from Franklin County. This tax sale occurred in March 2014 for taxes that were unpaid from 2012. Adair Management then paid the delinquent taxes for 2013, 2014, and 2015 as well.

After purchasing the tax certificate, Adair Management waited the 3-year statutory period set forth by Neb. Rev. Stat. § 77-1837 (Reissue 2009) and then sent notice in March 2017 by certified mail to Johnson's address of record. This notice indicated that Adair Management would be applying for a tax deed within 90 days if the property was not redeemed. The certified mail was marked as "Return to Sender, Unclaimed, Unable to Forward." After the attempt to provide notice by mail failed, notice was published in the Franklin County Chronicle newspaper on April 5, 12, and 19, 2017.

The content of the notice included the statutory requirements of Neb. Rev. Stat. § 77-1831 (Reissue 2009). The notice also contained a phrase from a more recent version of § 77-1831, which phrase read:

> If the property is owner occupied, the right of redemption shall expire at the close of business on the 45th day after the application for tax deed has been made. An additional redemption fee equal to twenty percent of all other amounts due must be paid if redemption is made after application for treasurer's deed has been made.

This passage was a part of § 77-1831 (Cum. Supp. 2012); however, the statutory scheme contains a savings clause specifying that the 2009 law governs all tax sale certificates sold and issued between January 1, 2010, and December 31, 2014.[1] It does not appear from the record that Adair Management sent a copy of the published notice to Johnson's address of record.

Adair Management and BMO Harris Bank applied for the tax deed on July 19, 2017. The application included an affidavit by counsel stating that Adair Management had complied with the statutory requirements and provided notice via unclaimed certified mail and by publication. The treasurer issued a tax deed on July 25, 2017, and recorded it on July 31. In August, Adair Management and BMO Harris Bank provided a quitclaim deed to Adair Holdings for land described as follows: "The Southeast Quarter (SE ¼) of Section Five (5), Township Four (4) North, Range Fourteen (14), West of the 6th P.M. in Franklin County, Nebraska."

In October 2017, Adair Holdings commenced an action in equity to quiet title to the real estate in its name. Johnson filed an answer and a counterclaim requesting the court to quiet title in his name. Johnson argued that (1) the notice was statutorily defective for including a misstatement of law and (2) the notice was constitutionally defective according to Neb. Const. art. VIII, § 3, which requires that "occupants shall in all cases be served with personal notice before the time of redemption expires." In April 2018, Johnson served Adair Holdings with a set of requests for admissions and received no response.

Johnson moved for summary judgment, and a hearing was held in September 2018. In an affidavit entered at the summary judgment hearing, Johnson averred that he first discovered the existence of the tax deed in early August 2017. Johnson claims that he then reviewed the published notice and relied on the notice in believing he had 45 days to redeem the property. The 45th day from the issuance of the tax deed was Saturday,

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[1] See Neb. Rev. Stat. § 77-1837.01 (Cum. Supp. 2016).

September 2, 2017. Johnson attempted to tender payment to the Franklin County treasurer on the first business day following September 2, and the treasurer refused payment because the tax deed had been issued.

Johnson argued that the notice contained a misstatement of law, as admitted by Adair Holdings' failure to respond to his requests for admissions, and that thus, the tax deed was void. Johnson also argued that Adair Management failed to inspect the land and should have served him personal notice pursuant to the Nebraska Constitution.

The court granted the motion for summary judgment in favor of Johnson, citing Adair Management's failure to comply with the notice requirements. The order (1) ruled that the tax deed was void, (2) ruled that the tax sale certificate was invalid and of no force and effect, and (3) quieted title to the property in Johnson. Adair Holdings appeals.

ASSIGNMENTS OF ERROR

Adair Holdings argues that the district court erred in granting summary judgment to Johnson. Specifically, Adair Holdings argues that (1) the tax sale certificate is still valid because the voiding of a tax deed does not extinguish the lien for delinquent taxes and (2) the tax deed is not void because all the statutory requirements for notice were met and Johnson did not detrimentally rely on the misstatement of the law contained within the notice.

STANDARD OF REVIEW

[1,2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.[2] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.[3]

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

[3] *Id.*

[3] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[4]

[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[5]

[5,6] A quiet title action sounds in equity.[6] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[7]

[7] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[8]

ANALYSIS

[8,9] Disputes involving land that has been subjected to a government tax sale presents a unique situation where there are often two interrelated but distinct causes of action. Actions challenging title obtained via a tax deed are governed by

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[4] *Williamson v. Bellevue Med. Ctr., ante* p. 312, 934 N.W.2d 186 (2019).

[5] *Id.*

[6] *Wisner v. Vandelay Investments, supra* note 2.

[7] *Id.*

[8] *Id.*

statute. However, a successful challenge to a tax deed does not resolve the underlying land dispute. Because a void tax deed grants color of title in a potential future action, it will always be incumbent upon the original landowner to bring an action to quiet title in his or her name.[9] This case presents Adair Holdings' and Johnson's quiet title actions, as well as Johnson's action challenging Adair Management's tax deed under the provisions of Neb. Rev. Stat. §§ 77-1801 to 77-1863 (Reissue 2009). We first address the court's order granting summary judgment in favor of Johnson on his statutory cause of action challenging the tax deed.

Validity of Adair Management's Tax Deed

Sections 77-1801 to 77-1863 govern tax deeds and provide the basic process by which a county may, through a tax sale, sell land to third parties as a means of recovering the landowner's delinquent taxes.[10] This court has long held that the statutory system for tax deeds found in chapter 77, article 18, of the Nebraska Revised Statutes must be strictly complied with and is to be strictly construed in favor of the landowner.[11]

Under the statutory scheme, a third party who pays a landowner's delinquent taxes receives in exchange a tax sale certificate and a tax lien against the property.[12] Title to the land does not immediately transfer to the tax sale certificate holder. These statutes require that a certificate holder must wait 3 years in order to either apply for a tax deed or foreclose upon the property.[13]

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[9] See, *White v. Musser*, 87 Neb. 628, 127 N.W. 1058 (1910); Annot., 38 A.L.R.2d 986 (1954).

[10] See §§ 77-1801 to 77-1822.

[11] See, *King v. Boettcher*, 96 Neb. 319, 147 N.W. 836 (1914); *Howell v. Jordan*, 94 Neb. 264, 143 N.W. 217 (1913).

[12] See §§ 77-1801 to 77-1863.

[13] § 77-1837 and Neb. Rev. Stat. § 77-1902 (Reissue 2009).

During this 3-year period, the landowner maintains the right to redeem the land by paying the delinquent taxes along with a statutorily set interest rate and costs.[14] If, at the end of the 3 years, the property has not been redeemed, the certificate holder has only 6 months to request a tax deed or foreclose before both the certificate and tax lien expire.[15]

In order to apply for a tax deed during this 6-month window, the certificate holder must provide proper notice to all parties of record.[16] The certificate holder must submit an affidavit to the county treasurer to demonstrate that all of the statutory requirements have been satisfied before a tax deed can be issued.[17] Once a tax deed is issued, §§ 77-1843 and 77-1844 specify how a landowner can acquire standing to challenge a tax deed under the statutes and what proof is required.

[10] Johnson's counterclaim seeking to set aside Adair Management's tax deed raises a threshold issue of whether Johnson had standing under § 77-1844, which states that "[n]o person shall be permitted to question the title acquired by a treasurer's deed without first showing . . . that all taxes due upon the property have been paid by such person . . . ." Section 77-1844 provides in full:

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

In applying this statute and its predecessors, we have held that the tender of payment to the county treasurer is sufficient to

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[14] §§ 77-1824 to 77-1830.

[15] § 77-1856.

[16] § 77-1831.

[17] §§ 77-1832 and 77-1833.

grant the party standing.[18] We have understood the treasurer to be the intended payee of the payment described by § 77-1843 and have recognized that the statutory scheme does not actually allow the treasurer to accept a redemption payment after the tax deed is issued.[19] We have explained that it would place an unacceptable barrier to litigation to condition standing on something outside a plaintiff's control.[20] Therefore, the word "paid" in § 77-1844 includes tendering payment. Construing § 77-1844 otherwise would present an absurd result of rendering the remedy of § 77-1843 meaningless and would be contrary to the principle that the statutory framework should be interpreted in favor of the landowner.[21]

It is undisputed that Johnson attempted to tender payment to the county treasurer. He did so outside the statutory redemption period, but within the redemption period that Adair Management set forth in the public notice. It is also undisputed that because the tax deed had already been issued, the treasurer refused to accept the payment. Accordingly, the district court did not err in determining as a matter of law that Johnson's attempt to tender payment complied with § 77-1844 and gives him standing to assert his counterclaim.

[11] Once a party has established standing, § 77-1843 specifies four methods for a landowner to challenge the tax deed. In addition to these enumerated ways of invalidating a tax deed, we have also held that § 77-1843 has a jurisdictional component that renders a tax deed void when the tax deed holder failed to comply with the statutory notice requirements prior to acquiring the deed.[22] Section 77-1843 states:

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[18] See, *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007); *Howell v. Jordan, supra* note 11.

[19] § 77-1824; *Ottaco Acceptance, Inc. v. Larkin, supra* note 18.

[20] See, *Ottaco Acceptance, Inc. v. Larkin, supra* note 18; *Howell v. Jordan, supra* note 11.

[21] See *King v. Boettcher, supra* note 11.

[22] *Thomsen v. Dickey*, 42 Neb. 314, 60 N.W. 558 (1894).

> In all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially by the treasurer *in the manner provided by* sections 77-1831 to 77-1842, the person claiming the title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the title . . . .

(Emphasis supplied.)

When interpreting § 77-1843 and its predecessors, we explained that the language of "in the manner provided by" requires strict compliance with the listed statutes in order for the treasurer to have acquired statutory authority to issue the tax deed.[23]

We agree with the district court that there is no dispute that Adair Management failed to strictly comply with the notice provision of § 77-1831 (Reissue 2009), which specifies the timing and content of the notice that must be served before a tax deed will be granted. Adair Management's notice provided the terms of notice set forth by § 77-1831 (Cum. Supp. 2012), which allowed for an owner who occupies the land to redeem within 45 days of the tax deed being issued. However, this was not the version applicable to Adair Management's tax certificate from the tax sale of Johnson's land. Section 77-1837.01 specified that based on the date of sale for the tax certificate for Johnson's land, the 2009 version of the statutes should be applied. Sections 77-1824 and 77-1831 (Reissue 2009) specified that Johnson's right to redeem expired upon the issuance of the tax deed.

[12] We have held that a misstatement in the statutory notice of the expiration of the time of redemption renders the tax deed invalid.[24] It is uncontested that the notice Adair Management mailed to Johnson and published in the newspaper contained

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[23] See, *Brokaw v. Cottrell*, 114 Neb. 858, 211 N.W. 184 (1926); *Thomsen v. Dickey, supra* note 22.

[24] See, *Kuska v. Kubat*, 147 Neb. 139, 22 N.W.2d 484 (1946); *Stewart v. Ridenour*, 97 Neb. 451, 150 N.W. 206 (1914).

a misstatement of the time available for Johnson to redeem the land. Therefore, the district court correctly determined as a matter of law that the tax deed issued to Adair Management is void.

We disagree with Adair Holdings' contention that Johnson was required to show detrimental reliance as a condition for invalidating a tax deed for inaccurate notice. Adair Holdings provides no case law, and this court is not aware of any precedent in Nebraska or in other states, that would support the creation of such a requirement. Placing a burden on the landowner to show detrimental reliance on the inaccurate notice is not supported by any part of the statutory scheme.

Johnson's Counterclaim for Quiet Title

[13] We turn next to the question of whether the district court erred in granting summary judgment in favor of Johnson on his quiet title claim. Quiet title actions generally require (1) allegations of facts showing his or her ownership, title, or interest in the property in dispute; (2) his or her actual or constructive possession (if possession is a condition of the right to maintain the action) or entitlement to possession of the property in dispute; and (3) the existence and invalidity of the defendant's interest, claim, or lien adverse to the plaintiff.[25] Moreover, the party seeking to quiet title must recover, if at all, on the strength of his own title and not on the weakness of his adversary's title.[26]

Johnson presented uncontested evidence that he was the landowner of record and held a deed registered with the county prior to the tax sale. By invalidating Adair Holdings' deed, Johnson demonstrated that no one else had a superior claim to title. Such facts are sufficient to determine as a matter of law Johnson's legal claim to title.

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[25] See 65 Am. Jur. 2d *Quieting Title* § 67 (2011).

[26] See *Williams v. Daughetee*, 72 Neb. 270, 100 N.W. 316 (1904).

[14,15] But, a quiet title action sounds in equity.[27] The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand.[28] In quiet title actions, we have generally applied the maxim that "'[one] who seeks equity must do equity.'"[29] Specifically, we have required a landowner to do the equity of paying to the clerk of the court the delinquent taxes with costs and interest before obtaining the equitable relief of quiet title.[30] Adair Holdings thus argues on appeal that the district court erred in quieting title in Johnson's name without ordering Johnson to pay to Adair Holdings the delinquent taxes, with costs and interest.

Adair Holdings did not assign as error that the district court erred by not ordering such a payment. It merely proposes in its argument that if we affirm the district court's determination that the tax deed was void, we should remand the matter to the district court to determine the amount of the delinquent taxes. Although not entirely clear, Adair Holdings presumably wishes us to do this so that such amount will be ordered as part of a judgment payable by Johnson to Adair Holdings.

[16] 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.[31] Even if we view this argument as encompassed by Adair Holdings' assignment of error that the trial court erred when it held that the tax sale certificate was invalid and of no force and effect, Adair Holdings' argument lacks merit under the facts of this case. The equitable maxim that one who seeks equity must do equity is not the only applicable legal principle to a case such as this. In fact,

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[27] *Wisner v. Vandelay Investments, supra* note 2.

[28] *Countryside Developers v. Peterson*, 9 Neb. App. 798, 620 N.W.2d 124 (2000).

[29] *Wygant v. Dahl*, 26 Neb. 562, 576, 42 N.W. 735, 739 (1889) (Maxwell, J., concurring). See *Dillon v. Merriam*, 22 Neb. 151, 34 N.W. 344 (1887).

[30] See, *Howell v. Jordan, supra* note 11; *Wygant v. Dahl, supra* note 29.

[31] *Diamond v. State*, 302 Neb. 892, 926 N.W.2d 71 (2019).

the case law that Adair Holdings relies on is inapposite to the case at bar because, in those cases, the former certificate holder asked for recovery for payments made and presented evidence to the trial court that the former certificate holder had paid the delinquent taxes to the county.

In *Wygant v. Dahl*, for instance, we held that a tax deed holder who failed to bring a quiet title action within the statutory period was nevertheless entitled under equity to be reimbursed by the landowner in possession who had brought a quiet title action against the tax deed holder. But we emphasized that the tax deed holder had raised the right to reimbursement below. We cited with approval a case in which the Iowa Supreme Court held that notwithstanding the maxim that one who seeks equity must do equity, if a tax deed holder does not in the proceedings below make a request for equitable relief in the form of a recovery of a tax sale payment, such relief may not be raised for the first time on appeal.[32]

Adair Holdings did not raise below the issue of recovery for payment of the delinquent taxes. We require arguments and theories of litigation to be raised below in order to provide sufficient notice to opposing parties.[33] Unless the landowner has notice that the certificate holder is claiming a right to repayment, the landowner is unlikely to plead and present evidence of any possible equitable defenses which may prevent the tax deed holder from recovering. Adair Holdings had an opportunity to request alternate forms of relief in its pleadings and in its answer to Johnson's counterclaim for quiet title. Adair Holdings did not state any claim for relief in the form of reimbursement by Johnson of the delinquent taxes paid by Adair Management. Neither did Adair Holdings raise the right to any such relief at any other point in the proceedings below.

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[32] See *Wygant v. Dahl, supra* note 29, citing *Tabler v. Callanan*, 49 Iowa 362 (1878).

[33] See *State v. Kruse*, 303 Neb. 799, 931 N.W.2d 148 (2019).

This matter is further complicated by the fact that Adair Holdings is not the entity that actually paid the delinquent taxes to the county. The record demonstrates that a quitclaim deed from Adair Management and BMO Harris Bank transferred whatever interest they had in the land to Adair Holdings. But the record below provides no indication that any claims or rights to relief held by Adair Management or BMO Harris Bank were assigned to Adair Holdings. On the record presented, to require Johnson to pay Adair Holdings would provide Adair Holdings with compensation for a payment made by a third party without a sufficient showing that Adair Holdings has obtained standing to assert such a claim.

We hold, on the facts of this case, that summary judgment in favor of Johnson's counterclaim for quiet title was proper and that equity does not require relief to be granted to Adair Holdings. Adair Holdings did not request any forms of equitable relief below and did not assign any errors related to equitable relief on appeal. We do not make any determination of what rights or relief, if any, Adair Holdings, Adair Management, and/or BMO Harris Bank may be entitled to in a separate action.

CONCLUSION

For the reasons set forth above, 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 Interest of Jeremy U. et al., children under 18 years of age. State of Nebraska, appellant and cross-appellee, v. Tiffany G., appellee and cross-appellant, and Brandon M., appellee.

936 N.W.2d 733

Filed January 3, 2020. No. S-19-215.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
3. **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.
4. **Juvenile Courts: Parental Rights: Notice.** The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016).
5. **Juvenile Courts: Proof.** The State has the burden to prove the allegations of a petition seeking to adjudicate a child by a "preponderance of the evidence," which is the equivalent of the greater weight of the evidence.
6. **Evidence: Words and Phrases.** The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true.
7. **Juvenile Courts: Minors.** The State's right in juvenile proceedings is derived from its parens patriae interest, and it is pursuant to that interest that the State has enacted the Nebraska Juvenile Code.
8. ____: ____. The State has a right to protect the welfare of its resident children, which is a governmental interest of great importance.

9. ____: ____. The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child.
10. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
11. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court should determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
12. **Statutes: Juvenile Courts: Minors: Appeal and Error.** An appellate court liberally construes statutes within the Nebraska Juvenile Code to accomplish its purpose of serving the best interests of the juveniles who fall within it.
13. **Juvenile Courts: Parental Rights: Words and Phrases.** "Parental" as used in the phrase "lacks proper parental care" in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) describes the type and nature of care rather than the relationship of the person providing it.
14. ____: ____: ____. "Proper parental care" under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) includes providing a home, support, subsistence, education, and other care necessary for the health, morals, and well-being of the child. It commands special care for the children in special need because of mental condition. It commands that the child not be placed in situations dangerous to life or limb, and not be permitted to engage in activities injurious to his or her health or morals.
15. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
16. **Juvenile Courts: Jurisdiction: Proof.** While the State need not prove that the child has actually suffered physical harm to assert jurisdiction under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm.

Appeal from the Separate Juvenile Court of Douglas County: Chad M. Brown, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Donald W. Kleine, Douglas County Attorney, Anthony M. Hernandez, and Alexander T. Kelly, Senior Certified Law Student, for appellant.

Reginald Young, of Young & Young, for appellee.

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

Cassel, J.

I. INTRODUCTION

After a newborn reportedly tested positive for methamphetamine, the State sought to adjudicate the newborn—who had been in a hospital with his mother—and his two siblings—who lived with and received appropriate care from their grandmother—solely on the basis that the children "lack[ed] proper parental care."[1] The juvenile court declined to adjudicate them, finding that the State failed to prove they were at risk of harm. On appeal, our decision regarding the older siblings is driven by the plain meaning of the statute on the State's chosen ground, its choice not to allege any other ground, and its failure to establish that the mother exposed or threatened to expose them to her drug usage. We affirm the juvenile court's decision as to them. But because the evidence demonstrated that the newborn lacked proper parental care due to his mother's fault or habits, we reverse the court's decision as to him and remand the cause for further proceedings.

II. BACKGROUND

1. Adjudication Petitions

Tiffany G. is the biological mother of Savannah M., born in March 2015; Ashton M., born in April 2016; and Jeremy U., born in October 2018. Brandon M. is the biological father of Savannah. The fathers of Ashton and Jeremy are not involved in these proceedings.

Four days after Jeremy's birth, the State filed a juvenile petition seeking to adjudicate the children under § 43-247(3)(a) on only one ground: due to a lack of proper parental care by reason of Tiffany's fault or habits. Within the scope of that ground, the petition alleged that the children were at risk for

[1] See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016).

harm due to Tiffany's use of alcohol or controlled substances, her failure to provide proper parental care, and her failure to provide stable housing.

On the same day, the State filed two motions concerning custody. One was an ex parte motion for immediate custody of Jeremy. The other was a motion for protective custody of Savannah and Ashton. Both motions sought an order placing the temporary care and custody of the children with the Nebraska Department of Health and Human Services (DHHS) with placement to exclude Tiffany's home. The court granted the State's motion with respect to Jeremy, stating that Jeremy's urine drug screen was positive for methamphetamine and that Tiffany admitted recent use of the drug. The court later ordered that Savannah and Ashton be placed in the temporary custody of DHHS, with placement to exclude Tiffany's home.

In January 2019, the State filed a supplemental petition. It alleged that Savannah lacked proper care by reason of the fault or habits of Brandon. Specifically, it alleged that Brandon failed to provide proper parental care and safe housing, which put Savannah at risk for harm. The court granted the State's motion for an ex parte order for immediate temporary custody of Savannah.

2. Adjudication Hearing

The court heard testimony from two witnesses during an adjudication hearing. Neither parent testified.

Kelci Christensen, a child and family services specialist with DHHS until November 2018, conducted an initial assessment for the family. The intake that she received informed her that Tiffany was in the hospital for Jeremy's birth and that there were allegations Tiffany tested positive for methamphetamine. When Christensen met with Tiffany, Tiffany reported she was "couch surfing at the time, didn't have a stable place to live."

Christensen testified that Tiffany admitted using methamphetamine almost daily for the past 13 years. She also used

marijuana "pretty often," but not as frequently as methamphetamine. According to Christensen, Tiffany said she used methamphetamine within the week of Jeremy's birth and she believed Jeremy would test positive for the drug. Tiffany had sought treatment, but had not successfully completed it.

Christensen testified that the effects of methamphetamine make it more difficult for an individual to properly "parent" his or her children. Parents under the influence of methamphetamine often have difficulty making appropriate decisions. Christensen would categorize children under age 3—which these children were—as vulnerable children in their parent's custody if the parent was under the influence of methamphetamine. She testified that a child in the presence of a parent who was under the influence of methamphetamine would be unsafe.

When Christensen conducted her investigation, Tiffany had legal custody of the children, but not physical custody. Savannah and Ashton were residing with Tiffany's mother, Tina G. Christensen testified that Savannah and Ashton had appropriate clothing, had a bedroom to sleep in at Tina's house, and appeared to be in good health. Jeremy was initially placed with Carolina O., a friend of the family, but he was eventually placed with Tina.

While at the hospital, Christensen drafted a safety plan. As part of the safety plan, Tiffany agreed to participate in domestic violence classes and to comply with any recommendations of a drug and alcohol evaluation. Tiffany arranged to have someone else care for her children. According to the plan, Tina would care for Savannah and Ashton and Jeremy would stay with Carolina. Tiffany, Tina, and Carolina all signed the safety plan. Christensen observed Tiffany sign a temporary delegation of parental authority form as to Savannah and Ashton and one regarding Jeremy. According to Christensen, a parent's signing a temporary delegation of parental authority form shows that the parent is "willing to at least try to keep that child safe and out of risk of harm." Neither the safety plan nor the delegation forms are in our record.

Despite the execution of those forms, the children were removed and placed in the temporary care and custody of DHHS. Christensen did not agree with the removal of the children, because DHHS' policy is to first offer a parent a safety plan and provide an opportunity to appropriately care for a child without court involvement. Specifically, she did not agree with Jeremy's removal because Tiffany was not given a chance to enact any of the measures agreed upon in the safety plan.

According to Christensen, DHHS determined that the allegations of the petition were unfounded. She explained that it was not child abuse or neglect for Tiffany to realize that she "could not care for her children physically because of her drug use and plac[e] them with appropriate parents who could make sure that . . . her children received everything that they needed in order to be happy and healthy." And due to the safety plan, Christensen did not believe the children were at risk for immediate harm. Christensen acknowledged that the temporary delegation of parental powers could be revoked by a parent at any time. But she testified that as long as a parent who is constantly under the influence of methamphetamine has continued to leave the child with an appropriate caregiver, that is not a risk for harm.

Maranda Buckley, an employee of PromiseShip, provided testimony relevant to Brandon. Her duties with PromiseShip included meeting with families, assessing ongoing safety risks, and "looking out for the best interests of the children and their well-being." Buckley opined that Savannah would be at risk for harm in Brandon's custody due to his not having a house or income and his inability to meet Savannah's needs. Brandon was in jail when Buckley met with him on January 7, 2019, but he was released on January 16. Buckley had not spoken with Brandon since his release, testifying that he "ha[d] not been engaging" and would not return her telephone calls or respond to her text messages. According to Buckley, Brandon had not attempted to visit or call Savannah.

3. Juvenile Court's Order

The court found that the State proved some of the allegations of the petition and supplemental petition. It found to be true that Tiffany failed to provide the juveniles with proper parental care, support, supervision, and/or protection and that she failed to provide them with safe, stable housing. According to the order, the evidence showed that at the time of removal, Savannah and Ashton had not been living with Tiffany and that Tiffany "had not seen them for at least two years." With respect to Brandon, the court found that the State proved he failed to provide Savannah with proper parental care and safe housing.

The court dismissed the petition due to insufficient evidence that the juveniles were at risk for harm due to Tiffany's use of controlled substances, failure to provide proper parental care, and failure to provide stable housing. The court likewise dismissed the allegation of the supplemental petition that Brandon's failures put Savannah at risk for harm.

The court found that *In re Interest of Justine J. et al.*[2] was "controlling." It determined that the State had not shown any risk of harm to Savannah and Ashton, noting that Christensen did not believe the children were at risk of harm. With regard to Jeremy, the court stated that Christensen's testimony "showed that there was not a risk of harm . . . because [Tiffany] had made a rational decision to find a suitable care taker due to her continued methamphetamine addiction." According to the court, Tiffany "had exhibited this rational thinking on at least three occasions, coinciding with her three children." The court recognized that Christensen testified the children would be at a risk of harm if in Tiffany's physical custody, but not at a risk in her legal custody. Due to insufficient evidence to prove risk of harm, the court dismissed the matter and terminated the court's jurisdiction.

The State timely appealed, and Tiffany filed a cross-appeal.

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[2] *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013).

III. ASSIGNMENTS OF ERROR

The State assigns that the juvenile court erred (1) when it found that Tiffany's use of controlled substances did not place the juveniles at risk of harm due to insufficient evidence and (2) when it found that Brandon did not fail to provide Savannah with safe, stable housing.

On cross-appeal, Tiffany assigns that the juvenile court erred when it found that (1) jurisdiction of the court was proper, (2) she had not seen Savannah and Ashton for 2 years, and (3) the allegations that she failed to provide her children with proper parental care and had failed to provide her children with safe, stable housing due to her fault or habits were true by a preponderance of the evidence.

IV. STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[3]

[2] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[4]

V. ANALYSIS

1. Jurisdiction

[3] We begin with an error assigned on cross-appeal: that the juvenile court lacked subject matter jurisdiction. 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] Section 43-247 provides for the juvenile court's jurisdiction over certain individuals and proceedings.

Tiffany's argument is confusing. She concedes that venue was proper. Nonetheless, she argues, "There was simply no evidence presented by the state during the trial as to where

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[3] *In re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016).

[4] *In re Interest of Michael N.*, 302 Neb. 652, 925 N.W.2d 51 (2019).

[5] *Green v. Seiffert, ante* p. 212, 933 N.W.2d 590 (2019).

the alleged incidents in its petition occurred, and without that evidence, the court cannot find that it has jurisdiction in this matter."[6] But in a proceeding under the Nebraska Juvenile Code, the State is not required to prove proper venue, because proof of venue is immaterial to the determination of whether a juvenile falls within the meaning of § 43-247.[7]

A juvenile court petition is to be filed with the clerk of the court having jurisdiction over the matter.[8] The petition here, filed with the clerk of the district court[9] for Douglas County, alleged that the juveniles were living within Nebraska and that Tiffany lived in Omaha, Nebraska. Even if a petition seeking to adjudicate a juvenile was filed in a county other than the county where the juvenile is presently living or domiciled, Neb. Rev. Stat. § 43-282 (Reissue 2016) allows for proceedings to be transferred, after adjudication, to the county where the juvenile lives or is domiciled. We conclude that the separate juvenile court of Douglas County had subject matter jurisdiction. We turn to the merits.

2. Adjudication

We emphasize at the outset that the sole ground alleged by the State for adjudication under § 43-247(3)(a) was that the juveniles lacked proper parental care by reason of the fault or habits of Tiffany and Brandon (as to Savannah only). Section 43-247(3)(a) sets forth numerous grounds by which the juvenile court could take jurisdiction over a juvenile, but the State alleged only one.

Under § 43-247(3)(a), a juvenile court has jurisdiction of any juvenile

> who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or

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[6] Reply brief for appellee on cross-appeal at 6.

[7] See *In re Interest of Leo L.*, 258 Neb. 877, 606 N.W.2d 783 (2000).

[8] Neb. Rev. Stat. § 43-261(1)(b) (Reissue 2016).

[9] See *id.*

> custodian; who is abandoned by his or her parent, guardian, or custodian; *who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian*; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; who is in a situation or engages in an occupation, including prostitution, dangerous to life or limb or injurious to the health or morals of such juvenile; or who, beginning July 1, 2017, has committed an act or engaged in behavior described in subdivision (1), (2), (3)(b), or (4) of this section and who was under eleven years of age at the time of such act or behavior[.]

(Emphasis supplied.) It is obvious that the State's chosen ground was only one among the many which were available.

[4-6] The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of § 43-247(3)(a).[10] And the State then has the burden to prove the allegations of the petition by a "preponderance of the evidence,"[11] which is the equivalent of the greater weight of the evidence.[12] The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true.[13]

Here, because the State alleged only one ground—that the juveniles lacked proper parental care by reason of the fault or habits of their parent, guardian, or custodian—we narrow our focus to that ground only.

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[10] *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012).

[11] See Neb. Rev. Stat. § 43-279.01 (Reissue 2016).

[12] See *Eric H. v. Ashley H.*, 302 Neb. 786, 925 N.W.2d 81 (2019).

[13] *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

(a) Justification for State Involvement

[7-9] The State's right in juvenile proceedings is derived from its parens patriae interest, and it is pursuant to that interest that the State has enacted the Nebraska Juvenile Code.[14] The State has a right to protect the welfare of its resident children, which is a governmental interest of great importance.[15] This right is especially prominent in juvenile adjudications, because the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child.[16]

(b) Interpretation of § 43-247(3)(a)

Key to our analysis is the meaning of the phrase "lacked proper parental care." Specifically, in that context, does the adjective "parental" describe the type and nature of care or the person providing the care? The plain meaning of the statute, supported by our case law, dictates that it describes type and nature.

[10-12] Statutory language is to be given its plain and ordinary meaning.[17] In other words, in discerning the meaning of a statute, a court should determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[18] And we liberally construe statutes within the Nebraska Juvenile Code to accomplish its purpose of serving the best interests of the juveniles who fall within it.[19]

The structure of the phrase is significant. In assessing whether a juvenile "lacks proper parental care by reason of the

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[14] *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017). See, also, Neb. Rev. Stat. § 43-246 (Supp. 2019).

[15] See *In re Interest of Noah B. et al., supra* note 14.

[16] *Id.*

[17] *Christine W. v. Trevor W.*, 303 Neb. 245, 928 N.W.2d 398 (2019).

[18] See *Weatherly v. Cochran*, 301 Neb. 426, 918 N.W.2d 868 (2018).

[19] See *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010).

fault or habits of his or her parent, guardian, or custodian,"[20] the initial focus is on the first component: Does the juvenile lack proper parental care? Typically, only if this question is answered in the affirmative does one look to the cause: whether the lack of proper parental care is due to the fault or habits of the juvenile's parent, guardian, or custodian.

The history of the phrase and our cases construing it support our interpretation—that "parental" describes the type and nature of care. In 1955, the Legislature crafted the current language of "lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian."[21] In 1962, we stated that "[l]egislation authorizing proceedings to declare a child neglected and dependent is applicable only to emergency situations where the child's needs must be met."[22] Although the trial court in that case had found that the children were neglected, we stated:

> Its findings were restricted in their reference to the parents only and in no way made reference to what was being done for the [children] by the [couple] who had them in custody. It appears plainly that at that time they were carefully nurtured, cared for, and loved by them.[23]

Five years later, we announced a definition of the phrase "neglected child."[24] We stated:

> A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child.[25]

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[20] § 43-247(3)(a).

[21] See 1955 Neb. Laws, L.B. 163.

[22] *State v. Gross*, 173 Neb. 536, 544, 114 N.W.2d 16, 20 (1962).

[23] *Id.* at 540-41, 114 N.W.2d at 19.

[24] See *Mullikin v. Lutkehuse*, 182 Neb. 132, 153 N.W.2d 361 (1967).

[25] *Id.* at 134, 153 N.W.2d at 363.

But for two reasons we do not understand our 1967 definition to mean neglect can be based only on a parent's actions or inactions. First, the definition merely repeated the language of the statute while omitting any references to the other statutory words "guardian" or "custodian."[26] Second, if the concern was whether the neglect was by a parent only, it would have been unnecessary for us to discuss in that case whether the child was receiving proper care by her grandmother—the child's custodian at the time of filing the petition.

[13,14] We conclude that "parental" as used in the phrase "lacks proper parental care" describes the type and nature of care rather than the relationship of the person providing it. As we explained in 1979, "proper parental care" includes

> providing a home, support, subsistence, education, and other care necessary for the health, morals, and well-being of the child. It commands special care for the children in special need because of mental condition. It commands that the child not be placed in situations dangerous to life or limb, and not be permitted to engage in activities injurious to his health or morals.[27]

These responsibilities can be performed by a parent or someone standing in place of a parent.

The State advances two contrary arguments, but neither is persuasive. One argument is that "lack[ing] proper parental care" under § 43-247(3)(a) includes abandonment by a parent. But this argument fails because abandonment is specifically covered by a separate ground within § 43-247(3)(a). Immediately before the "lacks proper parental care" ground, the statute provides a ground for adjudication of a juvenile "who is *abandoned* by his or her parent, guardian, or custodian."[28] Because § 43-247(3)(a) separately allows adjudication of a juvenile who is abandoned, "lack[ing] proper parental care"

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[26] See Neb. Rev. Stat. § 43-201(3) (Reissue 1974).

[27] *State v. Metteer*, 203 Neb. 515, 520, 279 N.W.2d 374, 377 (1979).

[28] § 43-247(3)(a) (emphasis supplied).

under § 43-247(3)(a) focuses on something other than abandonment. And the State did not allege abandonment.

[15] The State's other argument is textual. The State asserts that "parental" is focused on performance by a parent. But this argument is inconsistent with the remainder of the phrase "by reason of the fault or habits of his or her parent, guardian, or custodian."[29] If "parental care" could only be provided by a parent, there would be no reason for the statute to include a child's guardian or custodian. 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.[30]

Case law from other jurisdictions supports our long-standing interpretation that "parental" describes the type of care. The Supreme Court of Texas declared:

> The term, "parental care," as used in the statute is purely descriptive; it refers to the kind and quality of care which should be, and ordinarily is, provided by parents. . . . "Parental care" may be provided by persons who occupy a parental position in the life of a child, either permanently or temporarily.[31]

Similarly, the Oregon high court stated that "'"parental care' may be provided by persons who are not parents or guardians" and that "[t]he 'parental care' of which the statute speaks is the kind of care to be expected of a good father and mother."[32] The North Dakota Supreme Court defined the phrase "proper parental care" to mean the "'"minimum standards of care which the community will tolerate."'"[33] And the Vermont Supreme Court

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[29] § 43-247(3)(a).

[30] *In re Interest of Marcella G.*, 287 Neb. 566, 847 N.W.2d 276 (2014).

[31] *Hendricks v. Curry*, 401 S.W.2d 796, 801 (Tex. 1966) (superseded by statute on other grounds as noted in *In re Interest of R.D.S.*, 902 S.W.2d 714 (Tex. App. 1995)).

[32] *In re Murphy*, 218 Or. 514, 521, 346 P.2d 367, 370 (1959) (en banc).

[33] *Interest of J.B.*, 916 N.W.2d 787, 789 (N.D. 2018).

determined that the term "parental care" did not compel an adjudication whenever incapacitated parents leave their children with relatives or others to provide parental care during the period of incapacitation.[34]

To summarize, whether a juvenile "lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian" is a two-step inquiry. The first step is to determine if the juvenile is lacking proper parental care, whether such care is being provided by a parent, a guardian, or a custodian. If the juvenile is not lacking that type of care (and, as discussed below, there is no definite risk of harm), adjudication under this provision of § 43-247(3)(a) is improper. If, on the other hand, the juvenile is lacking such care, the court should proceed to the second step: Does that condition result from the fault or habits of the juvenile's parent, guardian, or custodian? If the answer to that question is also yes, then the juvenile court should take jurisdiction of the juvenile and proceed to a proper disposition.

(c) Risk of Harm

[16] In considering whether a juvenile lacks proper parental care, our case law has incorporated a risk of harm component. This stems from the part of the definition of proper parental care "command[ing] that the child not be placed in situations dangerous to life or limb, and not be permitted to engage in activities injurious to his health or morals."[35] We have stated: "While the State need not prove that the child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm."[36]

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[34] See *In re G.C.*, 170 Vt. 329, 749 A.2d 28 (2000).

[35] *State v. Metteer, supra* note 27, 203 Neb. at 520, 279 N.W.2d at 377.

[36] *In re Interest of Kane L. & Carter L.*, 299 Neb. 834, 846, 910 N.W.2d 789, 799 (2018). Accord, *In re Interest of Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651 (2017); *In re Interest of Justine J. et al., supra* note 2. See, also, *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

In other words, we view risk of harm as a component of a lack of proper parental care. This principle is often invoked where a juvenile is arguably receiving proper parental care, but faces a definite risk of harm. For example, in *Jones v. State*,[37] a child was receiving appropriate care by his caregivers, but his mother was threatening to take the child and the caregivers sought the court's aid to protect the child. Because "there was every reason to believe that the child was in danger of becoming a neglected child if removed from his present home in Nebraska,"[38] we reversed the trial court's judgment of dismissal. Similarly, we determined that where a child "was in danger of becoming a dependent and neglected child in the immediate future if his custody was given to [his parents,] the court should take jurisdiction to protect his interests."[39] And in *In re Interest of M.B. and A.B.*,[40] although there was no indication that the children lacked proper parental care, the court adjudicated the children because their father/stepfather had been convicted of sex crimes against children. We affirmed, stating that "[i]f evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused."[41]

More recently, we applied the risk of harm principle in *In re Interest of Justine J. et al.*,[42] the case relied upon by the juvenile court. There, the mother appealed from an order adjudicating her four children under § 43-247(3)(a). She did not challenge the adjudication of her two oldest children,

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[37] *Jones v. State*, 175 Neb. 711, 123 N.W.2d 633 (1963).

[38] *Id.* at 717, 123 N.W.2d at 637.

[39] *Stewart v. McCauley*, 178 Neb. 412, 419-20, 133 N.W.2d 921, 926 (1965).

[40] *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992).

[41] *Id.* at 1030, 480 N.W.2d at 161-62.

[42] *In re Interest of Justine J. et al., supra* note 2.

who had lived with her, but contested the adjudication of her two youngest children, who lived with their grandparents. We found that the State failed to meet its burden to show there was a definite risk of future harm to the youngest children by reason of the fault or habits of their mother while those children were living with their grandparents. We determined that the State failed to prove "an evidentiary nexus between the neglect suffered by [the oldest children] and any definite risk of future harm to [the youngest children]."[43]

(d) Application to Current Case

(i) Jeremy

As to Jeremy, the facts are clear: he has already suffered harm from Tiffany's lack of parental care in failing to protect him from methamphetamine entering his body. He was exposed to Tiffany's drug use in utero. According to the undisputed evidence at the adjudication hearing, Tiffany admitted to Christensen that she had used methamphetamine within the week of Jeremy's birth and that she believed Jeremy would test positive for methamphetamine. Thus, there was persuasive evidence that Jeremy lacked proper parental care by reason of Tiffany's fault or habits. We conclude that the juvenile court erred by failing to adjudicate Jeremy.

(ii) Savannah and Ashton

But as to Savannah and Ashton, the circumstances differ. The outcome here is driven by the State's litigation strategy and deficiencies of the evidentiary record it developed.

First, the State elected not to allege that by entrusting the children to Tina, their grandmother, Tiffany abandoned the two siblings. If in the future Tiffany's drug addiction persists and she engages in conduct amounting to abandonment, the State may have reason to seek adjudication on that basis. But here,

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[43] *Id.*, 286 Neb. at 255, 835 N.W.2d at 679.

the State did not do so. Rather, the sole ground advanced was lack of proper parental care.

Second, the record did not establish that Savannah or Ashton lacked such care or were at a definite risk of harm. The evidence established that they had been in Tina's physical custody, where they were provided with a place to sleep, food, and clothing. There was no evidence that they had been exposed to Tiffany's drug addiction or that they were at definite risk of being so exposed. Nor was there evidence that Tiffany had previously taken Savannah and Ashton from Tina or that she was threatening to do so. Indeed, all of the evidence was to the contrary. The State's assertion that Tiffany could remove the children from Tina's care at any time rested on pure speculation. Similarly, there was no evidence that Savannah was at risk of harm due to Brandon's fault or habits. But if in the future, these children are exposed to Tiffany's persistent drug use or she threatens or attempts to do so, our decision today would not prevent the State from taking prompt action to protect them.

In other words, should the situation change and the State acquire evidence that Savannah or Ashton lack proper parental care, whether it would be by reason of the fault or habits of their custodian or their parents, the State should again petition the juvenile court for adjudication pursuant to § 43-247(3)(a). But in this appeal, because the State did not show that Savannah and Ashton lacked proper parental care, the juvenile court properly declined to adjudicate them.

(e) Remaining Assignments of Error

Both the State and Tiffany assign errors regarding certain findings and conclusions by the juvenile court. In our de novo review, we have reached conclusions independently of the trial court's findings and have disregarded any findings and conclusions that were unsupported by the evidence. We need not discuss those assignments of error further.

VI. CONCLUSION

We affirm the juvenile court's decision declining to adjudicate Savannah and Ashton, because they did not lack proper parental care. Because Jeremy did lack proper parental care, as demonstrated by Tiffany's drug use during pregnancy until the time of his birth, we reverse the juvenile court's decision declining to adjudicate him and remand the cause for further proceedings.

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



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Marco E. Torres, Jr., appellant.

936 N.W.2d 730

Filed January 3, 2020. No. S-19-276.

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: Appeal and Error.** Appeals of postconviction proceedings will be reviewed independently if they involve a question of law.

Appeal from the District Court for Hall County: James D. Livingston, Judge, Retired. Affirmed.

Marco E. Torres, Jr., pro se.

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

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

Miller-Lerman, J.

NATURE OF CASE

Marco E. Torres, Jr., appeals from the order of the district court for Hall County which denied his third motion for postconviction relief without an evidentiary hearing. Torres asserts that the Legislature's statute providing for the repeal of the

death penalty, 2015 Neb. Laws, L.B. 268, went into effect, thereby changing his death sentence to life imprisonment. Torres further asserts that the rejection of L.B. 268 by public referendum reimposed a death sentence, that the referendum was constitutionally impermissible in a variety of ways, and that he was harmed thereby. We find no merit to Torres' claims and affirm the order of the district court.

STATEMENT OF FACTS

In 2009, a jury found Torres guilty of two counts of first degree murder and other felony offenses. He was sentenced to death for each of the murders and sentenced to prison terms for the other felonies. We affirmed his convictions and sentences on direct appeal. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

Torres first moved for postconviction relief in 2013, raising claims of prosecutorial misconduct and ineffective assistance of counsel. The district court denied postconviction relief after conducting an evidentiary hearing. We affirmed in *State v. Torres*, 295 Neb. 830, 894 N.W.2d 191 (2017).

In his second postconviction proceeding, filed on June 14, 2017, Torres claimed that his death sentences were unconstitutional under *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), and *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). The district court found that Torres' motion for postconviction relief was time barred under the 1-year limitations period of Neb. Rev. Stat. § 29-3001(4) (Reissue 2016) and denied relief without conducting an evidentiary hearing. We affirmed in *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018).

Torres filed a third postconviction proceeding on December 4, 2017. It is the denial of relief from the third postconviction action which gives rise to this appeal. In his third postconviction motion, Torres generally alleged that he was entitled to relief based on the proposition that L.B. 268 changed his sentence from the death penalty to life imprisonment and the 2016

public referendum which "reject[ed]" L.B. 268 changed it back to a death sentence. Neb. Const. art. III, § 3.

Torres specifically alleged that the referendum reimposed the death penalty on him and that such imposition was cruel and unusual punishment, violated due process, constituted an unconstitutional bill of attainder that targeted the individuals on death row, and violated separation of powers. The district court rejected Torres' claims based on the insufficiency of allegations in the motion and denied the third postconviction motion without an evidentiary hearing. Torres appeals.

ASSIGNMENTS OF ERROR

Torres contends, summarized and restated, that (1) the district court's analysis regarding the powers of the Legislature to enact sentencing laws was flawed and (2) the referendum process and result amounted to imposition of cruel and unusual punishment, violated due process, constituted an impermissible bill of attainder, and violated separation of powers.

Because our analysis differs from that of the district court and eclipses Torres' arguments regarding the powers of the Legislature to enact sentencing statutes, it is not necessary to consider Torres' first assignment of error.

STANDARDS OF REVIEW

[1,2] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018). Appeals of postconviction proceedings will be reviewed independently if they involve a question of law. See *State v. Thieszen*, 295 Neb. 293, 887 N.W.2d 871 (2016).

ANALYSIS

As an initial matter, we recognize that the State has suggested that Torres' current postconviction motion is procedurally

barred. Although there may be merit to this argument, as we recognized in *Sandoval v. Ricketts*, 302 Neb. 138, 922 N.W.2d 222 (2019), a postconviction action may be a suitable procedure to examine the claims that are central to this death penalty case, and we therefore proceed to consideration of the merits.

We have reviewed Torres' motion for postconviction relief, and although our reasoning differs from that of the district court, we agree with the determination that Torres has failed to allege sufficient facts to demonstrate a violation of his constitutional rights. See *State v. Allen, supra*. The allegations assert that certain constitutional guarantees were violated; however, we have recently considered and rejected at length the essential substance of each of Torres' allegations. See, *State v. Mata, ante* p. 326, 934 N.W.2d 475 (2019); *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

The principal but flawed premise for Torres' constitutional claims is that L.B. 268 went into effect, thereby changing his death sentence to life imprisonment, and that the successful referendum reimposed the death penalty. In *State v. Jenkins*, we concluded that "the filing of petitions on August 26, 2015—prior to the effective date of L.B. 268—suspended [L.B. 268's] operation until Nebraskans effectively rejected the bill by voting to repeal it. . . . L.B. 268 never went into effect . . . ." 303 Neb. at 710-11, 931 N.W.2d at 879.

In *State v. Mata*, we described the process as follows:

> 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. Within L.B. 268, the Legislature provided that "in any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment." 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.

> 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].'"

Ante at 331-32, 934 N.W.2d at 480. See, also, Neb. Const. art. III, § 3; *State v. Jenkins, supra*.

As we addressed in our analysis of comparable claims in *State v. Mata*, the essential substance of claims based on cruel and unusual punishment, due process, and bill of attainder which assert that L.B. 268 changed a death sentence to life imprisonment fails "because L.B. 268 was suspended and no such changes in his sentence occurred." *Ante* at 340, 934 N.W.2d at 485.

Torres contends that the anxiety created by the potential modification of a sentence is cruel and unusual punishment. However, we have concluded that such potential does not rise to an Eighth Amendment violation. See *State v. Mata, supra*. Accordingly, we reject this claim.

Torres also contends that his due process rights were violated when the successful referendum "reinstat[ed] the capital sentences *en masse*." Brief for appellant at 26. He claims he was denied the benefits of individualized sentencing. However, as we have explained, no resentencing occurred, and therefore this argument fails.

In a similar manner, Torres' assertion that the rejection of L.B. 268 by referendum was essentially a bill of attainder which was directed at him also fails. Torres specifically

claims that the "repeal of LB 268 by referendum sentenced . . . Torres to death." Brief for appellant at 31. As we have explained, Torres' death sentence was not suspended and the imposition of the death penalty was not a direct consequence of the referendum.

Finally, to the extent that Torres' claim is based on a violation of separation of powers, we addressed and rejected this claim in *State v. Mata, ante* p. 326, 343, 934 N.W.2d 475, 487 (2019), in which we concluded that the claim fails "because the result of the referendum is not invalidated even if such actions [of the Governor and other executive officers in the referendum process] were constitutionally improper." The remedy is not invalidation of the referendum, but instead removal from "the violating position." *Id*. at 344, 934 N.W.2d at 487.

CONCLUSION

We have reviewed de novo the district court's determination that Torres failed to allege sufficient facts that demonstrate a violation of his constitutional rights and find no error in this determination. Accordingly, we affirm the district court's order which denied postconviction relief.

Affirmed.

Freudenberg, J., not participating.

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

State of Nebraska, appellee, v. Matthew P. Iddings, appellant.

936 N.W.2d 747

Filed January 3, 2020. No. S-19-304.

1. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Constitutional Law: Waiver: Appeal and Error.** In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
4. **Plea Bargains: Waiver: Appeal and Error.** Where no objection was made to the sentencing judge for a plea bargain violation, the defendant has waived the error and it has not been preserved for appellate review.
5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
6. **Courts: Plea Bargains.** Courts enforce only those terms and conditions actually agreed upon by the parties to a plea agreement.
7. **Plea Bargains.** A party breaches a plea agreement either by (1) violating an express term of the agreement or (2) acting in a manner not specifically prohibited by the agreement but still incompatible with explicit promises made therein.
8. **Plea Bargains: Sentences.** A sentencing recommendation need not be enthusiastic in order to fulfill a promise made in a plea agreement.
9. **Appeal and Error.** It is a fundamental rule of appellate practice that an alleged error must be both specifically assigned and specifically argued

in the brief of the party asserting the error to be considered by an appellate court.

10. ____. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.
11. **Presentence Reports: Waiver.** The statutory right to have a presentence investigation completed prior to being sentenced may be waived so long as that waiver was knowingly and intelligently made.
12. **Waiver.** No formalistic litany of warnings is required to show that a waiver was knowingly and intelligently made.
13. **Presentence Reports: Waiver: Appeal and Error.** The appropriate standard to apply in the case of a waiver of the right to a presentence investigation under Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2014) is whether it is apparent from the totality of the circumstances reflected in the record that the defendant, when waiving the right, was sufficiently aware of his or her right to a presentence investigation and the possible consequences of his or her decision to forgo that right.
14. **Criminal Law: Waiver.** A knowing and intelligent waiver may be demonstrated by or inferred from the defendant's conduct.
15. **Courts: Presentence Reports: Waiver.** It is the better practice for a sentencing court to issue a more direct advisement of the statutory right to a presentence investigation, conduct an explicit inquiry into the voluntariness of a defendant's waiver of that right, and make explicit findings with respect to a waiver.
16. **Sentences: Appeal and Error.** Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.
17. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
18. **Sentences.** 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.
19. **Plea Bargains: Judges: Sentences.** A judge is in no manner bound to give a defendant the sentence recommended by the prosecutor under a plea agreement.
20. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim

without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.

21. **Effectiveness of Counsel: Records: Appeal and Error.** When 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.

Appeal from the District Court for Hall County: John H. Marsh, Judge. Affirmed.

Jonathan M. Hendricks, of Dowding, Dowding, Dowding & Urbom Law Offices, for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

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

Freudenberg, J.

NATURE OF CASE

This case presents an appeal from a sentence imposed after the defendant pled guilty pursuant to a plea agreement. The State and the defendant had jointly agreed to recommend an 18-month period of incarceration. The district court ultimately sentenced the defendant to an indeterminate term of 18 months' to 5 years' incarceration, and the defendant appeals. The defendant asserts that the State breached its agreement to recommend a sentence of 18 months' incarceration by remarking that it "struggled" concerning the sentencing recommendation. Further, the defendant argues that the court erred by failing to order a presentence investigation when, although defense counsel below stated that the defendant was waiving the presentence investigation, the court only articulated that it had found such an investigation to be impractical. The defendant argues that the court abused its discretion in finding a

presentence investigation impractical. The defendant generally asserts that the sentence was excessive and was a result of the court's abuse of discretion in failing to consider all of the sentencing factors, such as mentality, education and experience, or social and cultural background, in part as a result of failing to conduct a presentence investigation. Finally, the defendant argues that defense counsel below was ineffective for failing to request the proper amount of jail time credit pertaining to alleged time spent in jail in another county under arrest warrants for both the present case and the charges filed in that other county.

BACKGROUND

In relation to a traffic stop that occurred in July 2015, the defendant, Matthew P. Iddings, was originally charged under "60-6,196.15" with driving under the influence (DUI), fourth offense aggravated, a Class III felony. Defense counsel and the State reached a plea agreement pursuant to which the State filed an amended information charging Iddings with a nonaggravated DUI, fourth offense, under Neb. Rev. Stat. § 60-6,196 (Reissue 2010), a Class IIIA felony.

The amended information described that on July 2, 2015, Iddings operated a motor vehicle and had a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his blood or .08 of 1 gram or more by weight of alcohol per 210 liters of his breath. The amended complaint further alleged that this was the fourth DUI offense committed by Iddings, who had been previously convicted of DUI in Nebraska on or about May 26, 2005, and March 15 and December 12, 2007.

At the plea and sentencing hearing held on March 6, 2019, defense counsel and the State explained to the court that they had reached a plea agreement under which the State amended the information from aggravated DUI, fourth offense, to nonaggravated DUI, fourth offense, and agreed to recommend jointly with defense counsel that Iddings be sentenced to 18 months' incarceration.

As the factual basis for the crime, the State recited that on July 2, 2015, the "Nebraska State Patrol Help Line" received multiple telephone calls about a potential drunk driver on Interstate 80. An officer was able to locate the vehicle and observed both passenger-side tires drive off the shoulder of the roadway two different times. The officer conducted a traffic stop and, upon contact with the driver, Iddings, noticed a smell of alcoholic beverage. A blood draw was eventually conducted on Iddings, which demonstrated .307 grams of alcohol per 100 milliliters of blood.

Defense counsel agreed with the factual basis. Defense counsel also stated the defense was willing to stipulate to the prior DUI offenses alleged in the information and that Iddings had been represented by an attorney in each of the three prior offenses.

The court found the factual basis adequate to support the plea. After a standard plea colloquy, the court accepted Iddings' no contest plea. The court found that the plea was not a result of any promise or threat; that the plea was entered knowingly, voluntarily, and intelligently; and that Iddings knowingly, voluntarily, and intelligently waived his constitutional rights.

Defense counsel advised the court that Iddings' preference was to proceed immediately to sentencing, noting that he had calculated the jail time credit. The court did so.

When the court asked about a presentence investigation, defense counsel stated, "Your honor, . . . Iddings will waive his right to a presentence investigation." When asked by the court for its comments, the State expressed that it had no objection to Iddings' waiver of the presentence investigation. However, Iddings was not personally addressed by the court regarding such waiver.

The State noted with regard to Iddings' criminal history that other than the three prior convictions listed on the information, Iddings also had a prior DUI in 1997. Further, he had committed a more recent DUI in Sarpy County around the same time as the charge he had just pled to and for which in October 2018

he had been sentenced to 18 months' incarceration. Lastly, Iddings had a pending DUI charge in Grant County.

Defense counsel did not contest this history other than clarifying that Iddings had just finished serving his sentence on the Sarpy County conviction in October 2018, as opposed to being sentenced in October 2018. Further, defense counsel described that Iddings had already pled guilty to the charge of nonaggravated DUI, fourth offense, in Grant County and was awaiting sentencing.

After being so informed of the pending charges in Grant County, the district court for Hall County confirmed that Iddings was "likely to be transported to another county when [Hall County authorities were] done with him." The court found "under those circumstances that a presentence investigation is impractical." Defense counsel did not object to this conclusion. The court did not make an express finding that the presentence investigation had been waived.

Defense counsel asked the court to adopt the plea agreement and sentence Iddings to 18 months' incarceration with 136 days' credit. Defense counsel informed the court that Iddings had been in jail from October 23, 2017, to the date of the hearing, March 6, 2019, and that he had been in jail for 2 additional days in 2015.

Defense counsel asked the court to consider in sentencing that Iddings had not been out of jail since 2017 and had thus experienced a long period of sobriety. According to defense counsel, Iddings fully intended to "walk out of the Department of Corrections a better man than when he went in, and he does believe that he can maintain long-term sobriety."

When asked by the court for its thoughts on sentencing, the State said:

> [W]hen negotiating this case with [defense counsel], I really struggled on what to agree to. We came down to the 18 months because that is what he got on a similar charge in another county. If he was serving any other sentence, I — I don't know if I would have agreed; but since this

> will be consecutive to anything else that he was serving previously, I agreed to recommend the 18 months.
>
> I will note in addition to the DUIs that I've already mentioned, he did fail to appear in this case on June 8th, 2016, and was not arrested until, I believe, a year later; and then he was transported here, I believe, on October 24th of last year.

The record reflects that a bench warrant had been issued by the district court for Hall County on June 8, 2016, for Iddings' failure to appear at a scheduled hearing. The appellate record does not reflect an arrest in Sarpy County in 2017. Instead, a document filed on October 24, 2018, reflects that Iddings was arrested in Hall County on October 23, 2018, on the June 8, 2016, warrant.

Having been present for the foregoing, Iddings was asked by the court whether he had any legal reason why the court should not pronounce its sentence and whether he had anything else to bring to the court's attention before the court sentenced him. Iddings responded that he did not have any reason why the court should not proceed to sentencing. Iddings apologized for not appearing in court on June 8, 2016, explaining, "It was a health issue, I was in the hospital."

The court sentenced Iddings to a term of incarceration of 18 months to 5 years, with "credit for 136 days." Iddings' driver's license was revoked for 15 years. Defense counsel raised no objection to the sentence. In its final order, the court noted that the parties had agreed to 18 months' incarceration and informed Iddings that it was not bound by the plea negotiations. The court reiterated its conclusion that a presentence investigation would be impractical and did not articulate anything pertaining to a waiver of the same.

Iddings appeals his sentence. He has obtained new counsel to represent him on appeal.

ASSIGNMENTS OF ERROR

Iddings assigns that (1) the district court abused its discretion by sentencing him to a term of incarceration of 18 months

to 5 years without due consideration of established sentencing factors, (2) the State violated the plea agreement, (3) he was entitled to additional credit for time served, (4) trial counsel was ineffective for failing to object to the State's violation of the plea agreement, and (5) trial counsel was ineffective for failing to request at the sentencing hearing additional credit for time served.

STANDARD OF REVIEW

[1] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[1]

[2] In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.[2]

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[3]

ANALYSIS

Iddings' fundamental complaint on appeal is that he was sentenced to an indeterminate period of incarceration of 18 months to 5 years rather than 18 months to 18 months. He seeks the option of withdrawing his plea or seeking resentencing before a different judge on the ground that the State allegedly breached its plea agreement by undermining its recommendation of an 18-month sentence of incarceration. Alternatively, Iddings seeks resentencing under the assertions that the court imposed an excessive sentence and that the court's decision to forgo a presentence investigation was plain error. Finally, Iddings argues that defense counsel below was ineffective for

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[1] *State v. Landera*, 285 Neb. 243, 826 N.W.2d 570 (2013).

[2] *State v. Qualls*, 284 Neb. 929, 824 N.W.2d 362 (2012).

[3] *State v. Montoya, ante* p. 96, 933 N.W.2d 558 (2019).

failing to request credit for an additional 58 days' jail time for which he was ineffectively given credit against the sentence imposed in Sarpy County. We find that Iddings' claim regarding credit for time served cannot be determined on direct appeal, and we disagree with Iddings' remaining assignments of error. We affirm the judgment below.

Plea Agreement

[4] Iddings asserts that the State breached its plea agreement to recommend 18 months of incarceration by effectively undermining that sentence in its comments to the court at the sentencing hearing. Trial counsel did not object to the State's comments. Where no objection was made to the sentencing judge for a plea bargain violation, the defendant has waived the error and it has not been preserved for appellate review.[4] Iddings argues, however, that trial counsel was ineffective by failing to object to the alleged breach and either ask the court to allow Iddings to withdraw the plea or demand specific performance of the plea agreement before a different judge.[5]

[5] We agree with Iddings and the State that this ineffective assistance of counsel claim can be resolved on direct appeal, because the record is sufficient to adequately review the question.[6] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[7] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[8]

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[4] See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

[5] See *id*.

[6] See *State v. Stelly, ante* p. 33, 932 N.W.2d 857 (2019).

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

[8] *State v. Oliveira-Coutinho, ante* p. 147, 933 N.W.2d 825 (2019).

[6,7] We enforce only those terms and conditions actually agreed upon by the parties to a plea agreement.[9] A party breaches a plea agreement either by (1) violating an express term of the agreement or (2) acting in a manner not specifically prohibited by the agreement but still incompatible with explicit promises made therein.[10] On this latter means of breaching an express provision of a plea agreement, we have explained that the State must not "effectively undermine the promised recommendation."[11]

Thus, in *State v. Landera*,[12] we held that the State had breached a plea agreement to recommend probation when it stated at sentencing that it could not recommend probation and believed the court should impose incarceration instead, elaborating upon the danger that the defendant would pose to the public if placed immediately on probation. The State had also made a "perfunctory recommendation of probation," but we concluded that "the tenor of [the State's] entire argument undermined its purported recommendation, thereby breaching the express term of the agreement."[13]

[8] *Landera* is distinguishable from the present case. At Iddings' sentencing hearing, the State merely expressed that it had "struggled" with what to agree to. Nevertheless, the State reinforced its agreed-upon sentencing recommendation by stating that after this "struggle[]," it ultimately found 18 months' incarceration to be reasonable given that the sentence would be consecutive to Iddings' sentence on a similar charge in another county. While the State also pointed out Iddings' prior failure to appear, the State did not assert or even imply that this fact, or any other, meant that

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[9] See *State v. Landera, supra* note 1.

[10] See *id.*

[11] *Id.* at 257, 826 N.W.2d at 579.

[12] *State v. Landera, supra* note 1.

[13] *Id.* at 256, 826 N.W.2d at 578-79.

Iddings should be incarcerated more than 18 months. As we stated in *Landera*, "a sentencing recommendation need not be enthusiastic in order to fulfill a promise made in a plea agreement."[14] The State did not effectively undermine its promised recommendation.

Defense counsel below was not deficient for failing to object to the State's alleged breach of the plea agreement, because the State did not commit such a breach.

Lack of Presentence Investigation

[9,10] Next, Iddings argues that the district court committed plain error by failing to procure a presentence investigation before sentencing. The State asserts that this argument was not assigned as error. It is a fundamental rule of appellate practice that an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[15] A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.[16]

While we agree with the State that Iddings' assignment of error could have been better crafted, we will consider the failure to procure the presentence investigation as encompassed by Iddings' assignment of error that "[t]he district court abused its discretion by sentencing [Iddings] to a sentence of eighteen months to five years without due consideration of established sentencing factors." Iddings argues that the absence of the presentence investigation contributed to the court's ultimate failure to consider all the relevant sentencing factors, which constituted the alleged abuse of discretion in reaching the indeterminate 18-month-to-5-year sentence that Iddings asks this court to reverse as excessive.

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[14] *Id.* at 257, 826 N.W.2d at 579.

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

[16] *Id.*

Neb. Rev. Stat. § 29-2261(1) (Cum. Supp. 2014) provides that "[u]nless it is impractical to do so, when an offender has been convicted of a felony other than murder in the first degree, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation." Section 29-2261(3) explains that, among other things,

> [t]he presentence investigation and report shall include, when available, an analysis of the circumstances attending the commission of the crime, the offender's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits, and any other matters that the probation officer deems relevant or the court directs to be included.

We have construed the plain language of § 29-2261 as a mandate upon the sentencing court to obtain and consider a presentence investigation with every felony conviction unless applicable exceptions render such an investigation unnecessary.[17] The presentence investigation serves several functions, including providing information to the court to assist in the imposition of an appropriate individualized sentence based on knowledge of the convicted person's background and character which may not otherwise be available to the sentencing court, especially in a plea-based conviction.[18]

[11] The statutory right to have a presentence investigation completed prior to being sentenced may, however, be waived so long as that waiver was knowingly and intelligently made.[19] We find that Iddings expressly and effectively waived his right to a presentence investigation and that thus,

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[17] *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986). See, also, e.g., *State v. Qualls, supra* note 2; *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Jackson*, 192 Neb. 39, 218 N.W.2d 430 (1974).

[18] *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008).

[19] *State v. Qualls, supra* note 2; *State v. Tolbert, supra* note 17.

he cannot assert on appeal that the trial court erred by failing to order that a presentence investigation be conducted prior to sentencing.

[12,13] No formalistic litany of warnings is required to show that a waiver was knowingly and intelligently made.[20] Instead, the appropriate standard to apply in the case of a waiver of the right to a presentence investigation under § 29-2261 is whether it is apparent from the totality of the circumstances reflected in the record that the defendant, when waiving the right, was sufficiently aware of his or her right to a presentence investigation and the possible consequences of his or her decision to forgo that right.[21] But, as a general matter, being informed of a right to a presentence investigation demonstrates that the defendant was sufficiently aware of both the right and the possible consequences of his or her decision to forgo that right,[22] because the consequences of the failure to procure a presentence investigation for the court's consideration at sentencing are largely self-evident.[23]

Iddings was present and remained silent when his counsel expressly waived what counsel expressly described as Iddings' "right" to a presentence investigation. Later, when the court asked Iddings if there was any legal reason why the court should not proceed to sentencing or anything Iddings would like to add, Iddings failed to raise the lack of a presentence investigation. Iddings, through his silent acquiescence to his counsel's statement of waiver and failure to object or otherwise raise the issue to the court, waived his right to a presentence investigation. We have held in various circumstances that a defendant may waive a right by silently acquiescing to the

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[20] See *State v. Qualls, supra* note 2. See, also, *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

[21] *State v. Qualls, supra* note 2; *State v. Tolbert, supra* note 17.

[22] See, *State v. Qualls, supra* note 2; *State v. Robeson*, 25 Neb. App. 138, 903 N.W.2d 677 (2017).

[23] See *State v. Qualls, supra* note 2.

waiver given by his counsel and by failing to object and raise the issue to a trial court.[24]

We find no merit to any contention that the record fails to demonstrate that this waiver was effective because the district court did not specifically inquire of Iddings whether he understood the right and whether anyone had threatened or promised him anything to waive the right and did not inform Iddings of what a waiver would entail. The facts of this case are similar to those presented in *State v. Robeson*,[25] wherein the Court of Appeals found that it was apparent from the totality of the circumstances reflected in the record that the defendant had knowingly, intelligently, and voluntarily waived the right to a presentence investigation, despite the lack of any colloquy between the court and the defendant.

In *Robeson*, sentencing had been expedited and there was a jointly recommended sentence pursuant to a plea agreement. The district court had confirmed with defense counsel in the defendant's presence that the defendant was waiving his "right" to a presentence investigation. The defendant did not engage in any further discussion or objection with regard to his counsel's statement that he was waiving his right to a presentence investigation. The defendant and his counsel were given the opportunity at the sentencing hearing to present any mitigating factors they wished the court to consider, and defense counsel affirmed that there was no other legal reason why the court should not impose a sentence at that time.[26]

[14] A knowing and intelligent waiver may be demonstrated by or inferred from the defendant's conduct.[27] Iddings'

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[24] See, *State v. Sayers*, 211 Neb. 555, 319 N.W.2d 438 (1982); *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946); *State v. Robeson, supra* note 22.

[25] *State v. Robeson, supra* note 22.

[26] See, *State v. Sayers, supra* note 24; *Sedlacek v. State, supra* note 24; *State v. Robeson, supra* note 22.

[27] See *State v. Qualls, supra* note 2.

defense counsel below, in Iddings' presence, indicated that Iddings wished to proceed immediately to sentencing and waive his "right" to a presentence investigation in order to do so. Immediately prior to this exchange in which defense counsel stated that Iddings was waiving his right to a presentence investigation, Iddings' ability to waive his right to trial had been evaluated under a standard plea colloquy, the court having found no impediment to his capacity in that regard. And Iddings confirmed that he was aware of no legal reason why the court should not pronounce its sentence. Both Iddings and his defense counsel below were given the opportunity to present any mitigating circumstances or other matters. They both highlighted what facts and circumstances they wished the court to consider in sentencing—which would have been reflected in the presentence investigation, had Iddings not waived it.

While appellate counsel points out that the district court did not actually articulate as a finding that Iddings had waived his right to a presentence investigation, that is not dispositive. There is no indication that the court found that Iddings had failed to effectively waive his right to a presentence investigation; the court merely focused on its conclusion that a presentence investigation "is found to be impractical." A silent record is insufficient for a court on appeal to conclude a knowing, intelligent, and voluntary waiver of a constitutional or statutory right,[28] but the record here is not silent. The record need not affirmatively contain the lower court's express finding of a knowing, intelligent, and voluntary waiver in order for this court to observe that the record affirmatively demonstrates that a knowing, intelligent, and voluntary waiver has been made. Again, the appropriate standard to apply in the case of a waiver of a right to a presentence investigation under § 29-2261 is whether it is apparent from the record that the defendant's

[28] See, *State v. Porchia*, 221 Neb. 327, 376 N.W.2d 800 (1985); *State v. Morford*, 192 Neb. 412, 222 N.W.2d 117 (1974); *State v. Balvin*, 18 Neb. App. 690, 791 N.W.2d 352 (2010).

relinquishment of the right was knowingly and intelligently made.[29] The record in this case affirmatively demonstrates that Iddings knowingly, intelligently, and voluntarily waived his statutory right to a presentence investigation.

[15] We agree with the Court of Appeals' statement in *Robeson* that it is "the better practice" for a sentencing court to issue a more direct advisement of the statutory right to a presentence investigation, conduct an explicit inquiry into the voluntariness of a defendant's waiver of that right, and make explicit findings with respect to a waiver.[30] We encourage courts to adopt this better practice. Conducting a colloquy for a waiver of a presentence investigation ensures that the record will affirmatively demonstrate that the defendant has knowingly, intelligently, and voluntarily waived that right. While the record in this case is adequate without such a colloquy, it may not be in another case.

Having concluded that the court did not err in failing to order a presentence investigation, because Iddings expressly waived that statutory right, we need not consider whether the court abused its discretion in determining that a presentence investigation was impractical because Iddings was likely to be transported to another county immediately after sentencing.

Excessive Sentence

[16,17] Next, we address Iddings' excessive sentence argument. Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.[31] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[32]

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[29] *State v. Qualls, supra* note 2.

[30] *State v. Robeson, supra* note 22, 25 Neb. App. at 148, 903 N.W.2d at 686.

[31] *State v. Montoya, supra* note 3.

[32] *Id.*

A Class IIIA felony under Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014), in effect at the time the offense was committed, was punishable with a maximum of 5 years' imprisonment, a $10,000 fine, or both. There was no minimum. Where, as here, 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.[33]

[18] 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. 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.[34]

Appellate counsel asserts that the district court abused its discretion by rendering its sentence without any "real consideration" of the above sentencing factors other than Iddings' criminal history and the factual basis for the crime.[35] But, as already noted, the court gave defense counsel and Iddings the opportunity to present anything they wished the court to consider before reaching its sentencing decision.

Defense counsel responded to this opportunity by asserting that Iddings had been sober since 2017 and planned to remain so. Iddings, for his part, explained that he had failed to appear at a prior hearing because he had been in the hospital. To the extent that the district court did not consider more information

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[33] *Id.* See, also, *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019).

[34] *Id.*

[35] Brief for appellant at 12.

pertaining to Iddings' mentality, education and experience, or social and cultural background, this was due to Iddings' waiver of the presentence investigation and his deliberate decision not to otherwise present at the hearing facts pertaining to these factors. Under such circumstances, we find no abuse of discretion.[36]

We also agree with the State that it is difficult to find an abuse of discretion in an excessive sentence analysis when the minimum imposed was the term the defendant agreed to in a plea bargain agreement. It is the minimum portion of an indeterminate sentence which measures its severity.[37]

[19] We find no merit to Iddings' assertion that the district court "abused its discretion by disregarding the joint plea recommendation."[38] Assuming without deciding that the joint plea recommendation was, as Iddings asserts, for an indeterminate term of incarceration of 18 months to 18 months, a judge is in no manner bound to give a defendant the sentence recommended by the prosecutor under a plea agreement.[39] Given the number of DUI convictions and charges that were undisputed below, it was reasonable for the court to conclude that it was necessary for Iddings' safety and the safety of the public to impose a higher maximum term in order to ensure proper postrelease supervision.

Credit for Time Served

Lastly, appellate counsel argues in this direct appeal that defense counsel below was ineffective for failing to request 58 additional days of jail time credit under Neb. Rev. Stat. § 83-1,106(1) (Reissue 2014), for time spent in jail in Sarpy County. He asserts that according to § 83-1,106(1), 336 days

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[36] See *State v. Qualls, supra* note 2.

[37] See, e.g., *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992); *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

[38] Brief for appellant at 11.

[39] See *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

were simultaneously "as a result of the criminal charge for which a prison sentence [was] imposed" below and as a result of the charge in Sarpy County. According to appellate counsel, although the district court for Sarpy County purported to apply all 336 days against the sentence there imposed, 58 days of that jail time were not truly applied because they were in excess of the 278 days he was sentenced to serve, when calculated with mandatory good time.

[20] According to appellate counsel, defense counsel below should have been aware that the 58 days' jail time credit was the "result of" the underlying charge in this case and that it had not been truly applied in the Sarpy County case. Thus, appellate counsel concludes that defense counsel was ineffective in failing to request the proper amount of jail time credit—when defense counsel had waived the presentence investigation and represented that he was able to accurately inform the court of the applicable jail time. Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.[40]

[21] The determining factor is whether the record is sufficient to adequately review the question.[41] We have said 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.[42] We have also said that when 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

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[40] *State v. Stelly, supra* note 6.

[41] *Id.*

[42] *Id.*

did or did not provide effective assistance, and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[43]

Appellate counsel and the State both suggest that we cannot resolve this claim of ineffective assistance of counsel on direct appeal, since it depends upon facts outside the appellate record. We agree. The exact credit for time served to which a defendant is entitled is objective and not discretionary, and a question of law,[44] but the necessary facts to conduct such an analysis in this case are not contained within the record on direct appeal.

CONCLUSION

For the foregoing reasons, we affirm the judgment below.

Affirmed.

Miller-Lerman, J., participating on briefs.

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[43] *Id.*

[44] See *id.*

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

James Saylor, appellant, v. State of Nebraska et al., appellees.

936 N.W.2d 924

Filed January 10, 2020. No. S-18-793.

1. **Tort Claims Act: Actions: Time.** Neb. Rev. Stat. § 81-8,227 (Reissue 2014) sets out a 2-year limitations period that governs not just the time for submitting claims to the Risk Manager, but also the time for beginning suit under the State Tort Claims Act.
2. ____: ____: ____. Before suit can be filed under the State Tort Claims Act, a claimant must submit the claim in writing to the Risk Manager within 2 years after the claim accrued.
3. ____: ____: ____. Generally speaking, a claimant cannot file suit under the State Tort Claims Act until the Risk Manager or State Claims Board makes a final disposition of the claim, but if no final disposition of a claim has been made after 6 months, the claimant is permitted to withdraw the claim and file suit.
4. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
6. **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.
7. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

8. **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.
9. ____. 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.
10. **Statutes: Immunity.** Statutes authorizing suits against the State are to be strictly construed because such statutes are in derogation of the State's sovereign immunity.
11. **Tort Claims Act: Actions: Time: Legislature.** The Legislature expressly states in Neb. Rev. Stat. § 81-8,227(5) (Reissue 2014) that § 81-8,227 and Neb. Rev. Stat. § 25-213 (Reissue 2016) "shall constitute the only statutes of limitations applicable to the State Tort Claims Act." Because Neb. Rev. Stat. § 25-201.02 (Reissue 2016) is not one of the applicable statutes listed in § 81-8,227(5), it cannot be applied to extend the time period for bringing an action under the State Tort Claims Act.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, Scott R. Straus, and, on brief, David A. Lopez, Deputy Solicitor General, for appellees State of Nebraska and Nebraska Department of Correctional Services.

Henry L. Wiedrich, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee Correct Care Solutions, L.L.C.

Miller-Lerman, Cassel, Stacy, and Funke, JJ.

Stacy, J.

The central issue in this appeal is whether the savings clause of Neb. Rev. Stat. § 25-201.01 (Reissue 2016) applies to an action under the State Tort Claims Act (STCA).[1] We conclude it does not. We therefore affirm the judgment of the district court dismissing this STCA action as time barred.

[1] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014).

BACKGROUND

This appeal requires us to consider the timeliness of a tort action filed in 2017 by James Saylor against the State of Nebraska, the Nebraska Department of Correctional Services (DCS), and 10 others alleged to be employed by DCS. Tort claims against the State and its agents and employees are governed by the STCA.[2] Here, no one disputes that the tort claims alleged in Saylor's 2017 action are governed by the STCA; instead, the dispute is whether his 2017 action was timely commenced under the STCA.

This case has a complicated factual and procedural history. In this opinion, we address only that which bears directly on resolving the central question of whether this action is time barred under the STCA. We begin by setting out the statutes that govern timeliness under the STCA.

STCA

[1-3] Section 81-8,227 sets out a 2-year limitations period that governs not just the time for submitting claims to the Risk Manager, but also the time for beginning suit under the STCA. Pursuant to § 81-8,227(1), before suit can be filed under the STCA, a claimant must submit the claim in writing to the Risk Manager within 2 years after the claim accrued. Generally speaking, a claimant cannot file suit under the STCA until the Risk Manager or State Claims Board makes a final disposition of the claim, but if no final disposition of a claim has been made after 6 months, the claimant is permitted to withdraw the claim and file suit under the STCA.[3]

Section 81-8,227 also contains several provisions that allow the 2-year limitations period to be extended under certain circumstances. For instance, § 81-8227(1) provides:

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[2] See *Komar v. State*, 299 Neb. 301, 908 N.W.2d 610 (2018). See, also, § 81-8,209 ("State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state, any state agency, or any employee of the state on any tort claim except to the extent, and only to the extent, provided by the [STCA]").

[3] § 81-8,227(1).

> The time to begin suit under [the STCA] shall be extended for a period of six months from the date of mailing of notice to the claimant by the Risk Manager or State Claims Board as to the final disposition of the claim or from the date of withdrawal of the claim under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.[4]

Section 81-8,227(3) provides that if a claim is "made or filed under any other law of this state and a determination is made by a state agency or court" that the STCA is the exclusive remedy, "the time to make a claim and begin suit . . . shall be extended for a period of six months." And § 81-8,227(4) provides that if a claim is brought under the Nebraska Hospital-Medical Liability Act, time to begin suit under the STCA can be extended for 90 days.

Section 81-8,227(5) expressly states: "This section and section 25-213 shall constitute the only statutes of limitations applicable to the [STCA]." Generally speaking, Neb. Rev. Stat. § 25-213 (Reissue 2016) tolls the running of the statute of limitations for certain claims, including those under the STCA, if a person is "within the age of twenty years, a person with a mental disorder, or imprisoned" when the claim accrues.

Saylor's Tort Claim

Saylor is an inmate in the custody of DCS. On September 14, 2012, he filed a claim with the State Claims Board pursuant to the STCA.[5] Summarized, the claim asserted that on multiple occasions, employees and agents of DCS negligently failed to provide him necessary medical care. No one contends that Saylor failed to timely submit his claim to the State Claims Board within 2 years of the date it accrued.

On October 19, 2012, the State Claims Board mailed its denial of Saylor's claim. As such, under § 81-8,227(1), Saylor had 6 months from that date to file suit under the STCA. The

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[4] *Id.*

[5] See *id.*

Legislature has vested exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim under the STCA in the district court of the county in which the act or omission complained of occurred.[6]

Saylor Files Tort Action

Saylor filed the instant action in the district court for Lancaster County on May 30, 2017. The named defendants included the State, DCS, and 10 others alleged to be employed by DCS. The 2017 complaint appears to allege the same claims of negligent medical care that Saylor presented to the State Claims Board, and no one contends otherwise. Saylor's 2017 complaint also alleged civil rights violations under 42 U.S.C. § 1983 (2012) against the same defendants, premised on the same facts.

On December 6, 2017, the district court dismissed Saylor's complaint against several defendants who, according to the court file, had not been served within the statutory time period.[7]

Action Removed to Federal Court

On December 8, 2017, the State and DCS filed a notice of removal to federal district court pursuant to 28 U.S.C. § 1446 (2012). Section 1446(d) expressly provides that after notice of removal is given, "the State court shall proceed no further unless and until the case is remanded."

After the case was removed to federal court, the State and DCS sought dismissal of Saylor's action, asserting it was barred by principles of claim preclusion. They argued that Saylor's 2017 complaint alleged the same § 1983 claims previously litigated in a federal court action filed by Saylor in June 2012. In response to the motion to dismiss, Saylor was allowed to amend the 2017 complaint to eliminate the § 1983 claims, leaving only the negligence claims. After doing so, Saylor moved to have the case—now alleging only the STCA

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[6] § 81-8,214.

[7] See Neb. Rev. Stat. § 25-217 (Reissue 2016).

claims—remanded to state court. That request was granted on April 10, 2018.

Proceedings After Remand

After the action was remanded to the state district court, the State and DCS moved to dismiss the "[operative] Amended Complaint" pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6), on the ground the tort claims were time barred under the STCA. Saylor requested and was granted leave to amend his original 2017 complaint to make it "identical" to the amended complaint that had been remanded by the federal court, and no party objected to this procedure. Thereafter, the parties agreed that the motion to dismiss could be converted into a motion for summary judgment and that it should be treated as relating to Saylor's amended complaint.

In support of summary judgment, the State and DCS argued that Saylor's negligence claims were time barred under the STCA because the State Claims Board had denied the claims on October 19, 2012, and Saylor did not file suit on those claims until May 30, 2017. In response, Saylor argued the savings clause in § 25-201.01 should be applied to extend the time period for bringing suit under the STCA.

Summarized, § 25-201.01 provides that if an action is commenced within the time prescribed by the applicable statute of limitations but then fails for a reason other than the merits, voluntary dismissal, failure of service, or inaction on the part of the plaintiff, then the plaintiff may commence a new action "within a period equal to the lesser of (a) six months after the failure of the action or (b) a period after the failure of the action equal to the period of the applicable statute of limitations of the original action." Relying on a somewhat tortuous timeline involving the claims Saylor included in his 2012 federal lawsuit, Saylor argued that even though his 2017 tort action was filed more than 4 years after the State Claims Board denied the claim, it was still commenced within the time allowed by § 25-201.01 and thus should be deemed timely

filed. The State and DCS disagreed and generally argued that the factual circumstances did not implicate the savings clause under § 25-201.01.

The district court found § 25-201.01 did not apply and dismissed Saylor's amended complaint with prejudice, finding it was time barred under the STCA. Saylor filed this appeal, which we moved to our docket on our own motion.

ASSIGNMENTS OF ERROR

Saylor assigns, restated, that the district court erred in dismissing this action as time barred under the STCA and in not applying the savings clause under § 25-201.01. Because we find this assignment of error to be dispositive, we do not reach Saylor's other assignments of error related to rulings made by the district court after the case was removed to federal court but prior to remand.

STANDARD OF REVIEW

[4,5] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[8] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[9]

[6] 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.[10]

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[8] *Larsen v. 401 Main Street*, 302 Neb. 454, 923 N.W.2d 710 (2019).

[9] *Id.*

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

ANALYSIS

STCA Statute of Limitations Not Met

It is undisputed that Saylor's May 30, 2017, lawsuit was filed more than 6 months after his claim was denied by the State Claims Board on October 19, 2012, and thus, the lawsuit was filed outside the statute of limitations set forth in § 81-8,227(1). Before the district court, and again in the appellate briefing, the parties focused their arguments primarily on whether Saylor could satisfy the requirements of the savings clause in § 25-201.01. But at oral argument, the defendants below argued for the first time that there is no circumstance under which the savings clause of § 25-201.01 could apply to an action governed by the STCA, because the plain language of § 81-8,227(5) provides: "This section and section 25-213 shall constitute the only statutes of limitations applicable to the [STCA]." We ordered supplemental briefing on the issue, which presents a question of statutory interpretation.

[7-9] 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] 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.[12] 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.[13]

When it comes to determining the statute of limitations governing commencement of STCA actions, the plain language of § 81-8,227(5) identifies just two applicable statutes: §§ 81-8,227 and 25-213. Saylor concedes that the plain

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[11] *JB & Assocs. v. Nebraska Cancer Coalition*, 303 Neb. 855, 932 N.W.2d 71 (2019).

[12] *Id.*

[13] *Id.*

language of § 81-8,227(5) prevents courts from applying any other statute of limitations to a STCA claim. But he contends that § 25-201.01 is not a statute of limitations, but, rather, is a savings clause. According to Saylor, "a statute of limitations is not a savings clause, and a savings clause is not a statute of limitations."[14] Saylor's argument invites us to construe the term "statutes of limitations" in § 81-8,227(5) to exclude statutes that extend the statutory time for filing under certain circumstances.

Saylor's argument ignores the fact that both statutes referenced in § 81-8,227(5) include provisions that could be characterized as savings clauses. Specifically, § 81-8,227(1) and (3) each authorize the 2-year statute of limitations to be extended for 6 months under certain circumstances. Section 81-8,227(4) authorizes a 90-day extension of the time to begin suit under the STCA when a request for review is filed under the Nebraska Hospital-Medical Liability Act. And finally, § 25-213 tolls the time period for commencing an action under the STCA for persons under certain disabilities at the time their claim accrues.

Given the nature of the statutes described in § 81-8,227(5) as "statutes of limitations," we see no principled reason to construe the term to refer only to statutes prescribing the time period for bringing an action, but not to statutes extending the prescribed time for commencing an action.

[10,11] Statutes authorizing suits against the State are to be strictly construed because such statutes are in derogation of the State's sovereign immunity.[15] The Legislature expressly states in § 81-8,227(5) that §§ 81-8,227 and 25-213 "shall constitute the only statutes of limitations applicable to the [STCA]." Because § 25-201.02 is not one of the applicable statutes listed in § 81-8,227(5), it cannot be applied to extend the time period for bringing an action under the STCA. Saylor

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[14] Supplemental brief for appellant at 3.

[15] *SID No. 1 v. Adamy*, 289 Neb. 913, 858 N.W.2d 168 (2015).

does not contend that any other provision in § 81-8,227 or § 25-213 applies to extend the time period for commencing his STCA action, and we therefore agree with the district court that, as a matter of law, Saylor's STCA claim is time barred.

Additional Assignments

Because the foregoing analysis shows that Saylor's STCA claims were time barred, we need not address his assignments of error related to other rulings made by the district court. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[16]

CONCLUSION

Because Saylor's STCA action is time barred, the district court correctly dismissed it with prejudice.

Affirmed.

Heavican, C.J., and Papik and Freudenberg, JJ., not participating.

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[16] *Woodmen of the World v. Nebraska Dept. of Rev.*, 299 Neb. 43, 907 N.W.2d 1 (2018).

Nebraska Supreme Court
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State of Nebraska, appellee, v. James E. Myers, appellant.

937 N.W.2d 181

Filed January 10, 2020. No. S-19-345.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. ____: ____. An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.
3. ____: ____. Decisions regarding appointment of counsel under the DNA Testing Act are reviewed for an abuse of discretion.
4. **DNA Testing.** Nebraska's DNA Testing Act is a limited remedy providing inmates an opportunity to obtain DNA testing in order to establish innocence after a conviction.
5. ____. If the criteria set forth in Neb. Rev. Stat. § 29-4120(1) (Reissue 2016) are met and if the court further determines that the requirements of § 29-4120(5) have been met, then the court must order testing.
6. **DNA Testing: Evidence.** The requirement that requested DNA testing produce noncumulative exculpatory evidence is relatively undemanding for a movant seeking DNA testing and will generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant.
7. ____: ____. DNA evidence is not a videotape of a crime, and testing shows only whether the biological sample in question belonged to the person tested against.
8. **DNA Testing.** The nonpresence of an individual's DNA profile in a biological sample does not preclude that individual from having been present or in possession of the item tested.
9. ____. The nonpresence of an individual's DNA profile in a biological sample merely shows the individual's DNA was not present in the specific biological sample tested.

10. **DNA Testing: Prosecuting Attorneys: Evidence.** Whether the prosecution improperly withheld evidence is not properly presented in a motion for DNA testing.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

James E. Myers, pro se.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

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

Funke, J.

James E. Myers appeals the district court's denial of his motion for testing under Nebraska's DNA Testing Act[1] and his motion for the appointment of counsel. Myers argues the district court erred in denying his motion by determining that the requested testing would not produce noncumulative exculpatory evidence, denying his request for counsel, and determining that the State did not withhold evidence. This appeal follows our decisions on direct appeal[2] and after remand on an initial denial of Myers' motion for DNA testing.[3] For the reasons set forth herein, we affirm.

BACKGROUND

Myers was convicted of first degree murder, use of a deadly weapon in the commission of a felony, and possession of a deadly weapon by a felon in connection with the 1995 shooting death of Lynette Mainelli. The State's factual allegations asserted that Myers was worried Mainelli was talking to the police about another person, so he killed Mainelli. After a

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[1] Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2016).

[2] *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[3] *State v. Myers*, 301 Neb. 756, 919 N.W.2d 893 (2018).

trial and guilty verdicts, Myers' convictions were affirmed on direct appeal.[4] In Myers' direct appeal, we rejected his claim of insufficient evidence and summarized the evidence presented at trial, in relevant part:

> Edward Wilson testified that he was in the van driven by Myers the night Mainelli was killed. Myers drove to the Blue Lake Manor Apartments, where Mainelli lived. Myers got out of the van, and . . . Wilson saw that he had on gloves. Myers went to the back of the van, and . . . Wilson heard a "clacking" noise, which he recognized as the sound of a bullet moving into a chamber. Myers then left the van and walked toward the apartment complex. He was gone for about 1 hour, and upon his return, he got in the van and took the passengers home [including Wilson and Sam Edwards].
>
> . . . Edwards testified that as Myers dropped him off, Myers gave him a handgun and told him to "put it up" because the police were out and Myers had in-transit stickers on the van. Earlier, Edwards had seen the pistol on Myers' lap. Edwards subsequently retrieved the pistol and gave it to . . . Wilson, who stated the pistol had once belonged to his sister [and] testified that he recognized the gun because it had a unique color and a name written on it and that he thought the black handle was unusual. . . . Wilson sold the pistol because he suspected that it had been used in the murder of Mainelli. The pistol was the same caliber as two .22-caliber casings found beside Mainelli's body. Daniel Bredow, a firearm toolmarks examiner with the city of Omaha, testified that he compared the bullets found at the crime scene with bullets fired from the gun Myers gave Edwards. Bredow concluded that the bullets taken from the crime scene had been fired by the gun which could be traced to Myers.

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[4] *Myers, supra* note 2.

> [Timothy Sanders, who was in the same gang as Myers,] testified that in the summer and early fall of 1995, Myers had said that Mainelli was going to testify against Charles Duncan, so she needed to have "her cap pulled back and to be shot." Sanders saw Myers with a small .22-caliber handgun in the summer of 1995. . . . [Wilson's sister] testified that in December 1996, after Mainelli's death, Myers had told her to tell the police he was with her at the time of the killing.[5]

In review of the trial record, the State also presented evidence about Myers' plan to be intimate with Mainelli in connection with the shooting.[6] Timothy Sanders testified that Myers told him Mainelli needed to be shot and that Myers said he was going to have sex with Mainelli.[7] After Mainelli's death, Sanders testified that Myers told him that Mainelli walked into her bedroom, took off her clothes, and lay on the bed and that Myers shot her once the lights were out.[8] Specifically, in response to questions by the prosecution, Sanders had explained:

> A. . . . [H]e told me he was going to have sex with her. He was gonna kick with her, something of that nature, yeah.
>
> . . . .
>
> Q. After the death of . . . Mainelli —
>
> . . . .
>
> . . . did you have a conversation with . . . Myers concerning the events of that night, the night of her death?
>
> A. Yeah.
>
> Q. What did he tell you?
>
> A. Just that he knocked on the door. She let him in. I guess they acted like — he acted like he was about

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[5] *Id.* at 312-13, 603 N.W.2d at 388-89.

[6] *Myers, supra* note 3.

[7] *Id.*

[8] *Id.*

> to have sex with her or something. And once the lights [were] out, he shot her.

The State referenced this exchange in its opening statements and explained:

> Myers told . . . Sanders that he killed . . . Mainelli; and, more particularly, he told [him] how. He told him that he had shot her; that he talked to her. He convinced her to have sex with him; and that when she had laid down in the bed, he got next to her and shot her in the temple, and she was still moving so he shot her in the temple again.

In closing arguments, the prosecutor summarized: "She took off her clothes; she laid on the bed. He put the gun towards her temple and he shot her."

In 2016, Myers filed his motion for "DNA testing of items of evidence that may contain biological material" pursuant to the DNA Testing Act. Myers listed items of evidence taken from the crime scene, including Mainelli's bedding, bullets, spent .22-caliber casings, beverage containers, clothing, spiral notebooks, cigarette butts and ashtray contents, a gunshot residue test kit from Mainelli's hands, vials of Mainelli's blood, a sexual assault kit, and hair samples. Myers sought to have these items tested in order to exclude himself as a donor of any biological material. Myers asserted that if the testing revealed the presence of other males and failed to confirm his presence, he would be proved innocent. Myers additionally claimed the State withheld findings of biological evidence from him and asked for the appointment of counsel.

The State filed an inventory of evidence confirming the items Myers wished to have tested were in the State's possession.

Following a hearing, the district court denied Myers' motion. The court found DNA testing was not warranted under § 29-4120(5) because the results would not provide exculpatory evidence. However, the court comingled its analysis of whether to require testing under § 29-4120(5) with the more onerous standard for vacating and setting aside a judgment based upon test results under § 29-4123(2) and (3). Accordingly, on appeal,

we remanded the issue to the district court for a determination of Myers' motion based solely upon the requirements of § 29-4120(5), including whether DNA testing of the items requested may produce noncumulative exculpatory evidence which is favorable to Myers and material to the issue of his guilt.[9] Because we remanded the issue of whether Myers' motion for testing should be granted, we also remanded the issue of whether Myers made the requisite showing for the appointment of counsel.[10] We also held that whether the prosecution improperly withheld evidence is not properly presented in a motion for DNA testing and that upon remand, the district court need not consider this argument further.[11]

On remand, the court again denied Myers' motion for DNA testing and determined that, applying only those grounds listed in § 29-4120(5), the results would not provide noncumulative exculpatory evidence. The court first addressed Myers' allegation that testing of the items would fail to detect his DNA. Even if this allegation proved to be true, the court reasoned such a result would prove neither that Myers was not there nor that he did not commit the crimes of which he was convicted. Similarly, the court found Myers' allegation that the DNA results would show other men had been in Mainelli's apartment would not provide evidence that Myers was not there and did not commit the crimes. Regarding the sexual assault kit specifically, the court noted that the State's arguments and the witnesses' testimony did not allege Myers actually had sexual intercourse with Mainelli prior to murdering her and that thus, the absence of his DNA from the sexual assault kit would not exculpate him. Because the court overruled Myers' motion for testing and found the testing would not provide noncumulative exculpatory evidence, the court also declined to appoint counsel.

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[9] *Id.*

[10] *Id.*

[11] *Id.*

ASSIGNMENTS OF ERROR

Myers assigns the district court erred by (1) overruling his motion for DNA testing and finding that testing would not produce noncumulative exculpatory evidence, (2) overruling his motion to appoint counsel, and (3) failing to determine the State withheld evidence.

STANDARD OF REVIEW

[1,2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[12] An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.[13]

[3] Decisions regarding appointment of counsel under the DNA Testing Act are reviewed for an abuse of discretion.[14]

ANALYSIS

Denial of Myers' Motion for DNA Testing

[4] Nebraska's DNA Testing Act is a limited remedy providing inmates an opportunity to obtain DNA testing in order to establish innocence after a conviction.[15] Pursuant to the act, a person in custody takes the first step toward obtaining possible relief by filing a motion in the court that entered the judgment requesting forensic DNA testing of biological material.[16] Section 29-4120(1) provides the parameters for such motion and states:

> Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any

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[12] *State v. Betancourt-Garcia*, 299 Neb. 775, 910 N.W.2d 164 (2018).

[13] *Id.*

[14] *State v. Phelps*, 273 Neb. 36, 727 N.W.2d 224 (2007).

[15] See, § 29-4117; *Betancourt-Garcia, supra* note 12.

[16] *Id.*

time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:

(a) Is related to the investigation or prosecution that resulted in such judgment;

(b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and

(c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.

In the instant case, there is no dispute that Myers met these required criteria for filing a § 29-4120(1) motion.

[5] Contrary to Myers' contention, however, meeting the criteria to file a § 29-4120(1) motion does not require the district court to order testing. Instead, the reviewing court must also determine whether the requirements of § 29-4120(5) have been met. Section 29-4120(5) provides:

> Upon consideration of affidavits or after a hearing, the court shall order DNA testing pursuant to a motion filed under subsection (1) of this section upon a determination that (a)(i) the biological material was not previously subjected to DNA testing or (ii) the biological material was tested previously, but current technology could provide a reasonable likelihood of more accurate and probative results, (b) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (c) such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

Thus, if the § 29-4120(1) criteria are met and if the court further determines that the requirements of § 29-4120(5) have been met, then the court must order testing.[17]

[6] Exculpatory evidence means evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody.[18] This requirement is relatively undemanding for a movant seeking DNA testing and will generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant.[19]

Myers claims the requested testing would show other individuals were present in Mainelli's apartment and would fail to show his DNA on any of the items. He argues that such results will call into question the credibility of the State's witnesses by establishing he was not present and did not commit or participate in the crime. We agree with the district court's determination that even if correct, such results would not rise to the level of exculpatory.

In *State v. Dean*,[20] we addressed the denial of a request for DNA testing by a defendant convicted of murder. In that case, the defendant requested testing of the firearm used in the commission of the offense and argued the testing would not produce any biological material associated with him, which would prove he did not handle the firearm and was not the shooter.[21] We noted the contrary evidence concerning his possession of the firearm, including testimony from another witness and the defendant's eventual confession to police that he had shot the firearm.[22] We determined that even if the defendant was correct that DNA testing would not detect the presence of his DNA on

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[17] *Myers, supra* note 3.

[18] § 29-4119.

[19] *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[20] *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006).

[21] *Id.*

[22] *Id.*

the objects in question, the result would be at best inconclusive, and certainly not exculpatory.[23] We explained:

> [A]ssuming a biological sample did exist and that [the defendant's] DNA was absent from that sample, on the record before us, it would be mere speculation to conclude that the absence of [his] DNA on the firearm and ammunition would exclude him as being the person who fired the fatal shot. This is particularly so in view of the persuasive and undisputed trial evidence to the contrary. . . . We conclude that the trial court did not abuse its discretion in refusing DNA testing because even if such tests produced the result that [the defendant] predicts, the result would not be exculpatory.[24]

[7] Likewise, in *State v. Lotter*,[25] we affirmed the denial of the defendant's request for DNA testing after his murder convictions. In that case, the defendant claimed that blood spatter from the victims on an accomplice's gloves, shoes, or clothing would establish that the accomplice was very close to the victims when they were shot and that the accomplice was not at the locations the accomplice described in his trial testimony.[26] The defendant asserted that such DNA test results would aid in establishing that the accomplice lied at trial and would prove that the accomplice shot all three victims. We concluded that the accomplice's testimony would not have been contradicted even if the defendant's claims that testing would show the victims' blood on the accomplice's clothes were correct.[27] We explained that DNA evidence is not a videotape of a crime and that testing shows only whether the biological sample in question belonged to the person tested against.[28]

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[23] *Id.*

[24] *Id.* at 976-77, 708 N.W.2d at 645.

[25] *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

[26] *Id.*

[27] *Id.*

[28] *Id.*

Because other evidence received was consistent with the alleged presence of the victims' blood on the accomplice's clothes and because testing would have established only whether the blood belonged to one or more of the victims, not how it was deposited on each item, we found it would be mere speculation to conclude that blood was on the accomplice's clothing because he was the shooter.[29]

Similar to the evidence in *Dean*, the evidence received during Myers' trial contradicts Myers' underlying theory that he was not at the apartment and did not possess the gun used in Mainelli's killing.[30] Sanders testified that Myers told him prior to the murder that Mainelli needed to have "her cap pulled back and to be shot" because she was going to testify against another individual. Testimony was received from Edward Wilson and Sam Edwards, both of whom were passengers of the van that Myers drove to Mainelli's apartment on the night of her death. Wilson testified that Myers drove the van to Mainelli's apartment; got out of the van with gloves on; went to the back of the van, from where Wilson heard a noise he recognized as the sound of a bullet moving through a gun's chamber; and walked toward the apartment complex, where he stayed for about an hour until he returned to the van and took the passengers home. Edwards testified that after returning from Mainelli's apartment, Myers gave him a handgun and told him to "put it up" because the police were out and the van had "in transit stickers." Edwards further testified that he had seen the handgun on Myers' lap in the van prior to stopping at Mainelli's apartment. Sanders confirmed that he had also seen Myers with a gun matching the handgun's description around the time of the murder. The handgun was identified by witnesses, matched the caliber of the casings found by Mainelli's body, and was examined by a firearm toolmarks examiner who determined it fired the bullets recovered at the crime scene.

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[29] *Id.*

[30] See *Dean, supra* note 20.

Sanders also testified that after Mainelli's death, Myers told him that Myers got Mainelli to walk into her bedroom, take off her clothes, and lie on the bed where Myers shot her once the lights were out. Wilson's sister testified that Myers told her to tell the police he was with her at the time of the killing. This evidence presented at trial showing Myers was at the apartment with a handgun matching the one used in Mainelli's shooting is overwhelming.

[8,9] Myers' argument that testing will produce results which contradict this testimony and evidence and show he was not present at Mainelli's apartment is not persuasive. DNA evidence is not a videotape of a crime, and the nonpresence of an individual's DNA profile in a biological sample does not preclude that individual from having been present or in possession of the item tested.[31] Instead, such results would merely show the individual's DNA was not present in the specific biological sample tested.[32] It would be mere speculation to conclude that the absence of Myers' DNA on the apartment items, gun, and ammunition excludes him from having been at Mainelli's apartment the night of the shooting. This is so particularly in view of the persuasive evidence of his presence at the apartment and possession of the handgun the night of the murder.

Additionally, assuming the DNA testing would show other individuals' biological samples were present in Mainelli's apartment, such results are consistent with the State's evidence and arguments presented at trial. It is likely testing evidence from Mainelli's apartment would indicate other individuals had been at the apartment. However, evidence received during Myers' trial already established other individuals had been present at Mainelli's apartment prior to her death. Specifically, testimony confirmed that the other individuals who had access to Mainelli's apartment included Mainelli's roommate, that

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[31] See, *id.*; *Lotter, supra* note 25.

[32] See *id.*

other individuals were present in the apartment the night of Mainelli's death, and that Mainelli had numerous boyfriends at the time of her death. Additionally, fingerprints of other men were found at Mainelli's apartment. Myers' trial counsel noted this evidence and placed emphasis on these other individuals' access and the fact that Myers' fingerprints were not found at the scene while other individuals' fingerprints were. Accordingly, the requested DNA testing based upon Myers' claims that it would show other individuals' biological presence in Mainelli's apartment would not produce exculpatory evidence.

As to the sexual assault kit, Myers argues that DNA testing would contradict the State's theory that he had sex with Mainelli prior to her murder. However, as the district court correctly noted, the State did not argue Myers had sex with Mainelli prior to killing her and the State's witnesses did not allege he did so. Instead, the testimony received was that Myers told others he was willing to be intimate with Mainelli in pursuit of his plan to keep her quiet. Sanders testified that prior to Mainelli's death, Myers told him Mainelli needed to be shot, and that Myers said he was willing to have sex with her in pursuit of that goal. Sanders testified that after Mainelli's death, Myers told him Mainelli walked into her bedroom, took off her clothes, and lay on the bed and that Myers "acted like he was about to have sex with her or something" and shot her once the lights were out.

The State used this testimony in opening statements to allege that "[Myers] convinced [Mainelli] to have sex with him; and that when she had laid down in the bed, he got next to her and shot her in the temple, and she was still moving so he shot her in the temple again." Similarly, in closing arguments, the prosecutor summarized: "She took off her clothes; she laid on the bed. He put the gun towards her temple and he shot her." The lack of Myers' biological presence in Mainelli's sexual assault kit would be consistent with the State's theory of the case and the testimony received at trial. As such, the

requested testing of the sexual assault kit would fail to produce exculpatory evidence.

Because the requested testing would fail to lead to noncumulative exculpatory evidence as determined above, the district court did not err in finding Myers' request for DNA testing did not meet the requirements of § 29-4120(5)(c) and in denying Myers' motion.

Declining to Appoint Counsel

Under the DNA Testing Act, a court shall appoint counsel for an indigent person upon a showing that DNA testing may be relevant to the person's claim of wrongful conviction.[33] In similar cases where we affirmed findings that the requested testing would not produce noncumulative exculpatory evidence, we applied that finding to determine the applicants failed to show the DNA testing was relevant to the wrongful conviction claims.[34] For the reasons discussed above, Myers did not make the requisite showing that DNA testing may be relevant to his claim of wrongful conviction and the district court, therefore, did not abuse its discretion in denying his request for appointment of counsel.

Failing to Determine State Withheld Evidence

[10] Myers also assigns the district court erred in failing to determine whether the State refused to allow Myers access to the sexual assault kit. We addressed this assignment of error in our decision after remand on the initial denial of Myers' motion for DNA testing and held the district court need not consider this argument further because such a claim is not part of the DNA Testing Act framework.[35] As a result, whether the prosecution improperly withheld evidence is not properly

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[33] § 29-4122.

[34] See, *Phelps, supra* note 14; *Dean, supra* note 20.

[35] *Myers, supra* note 3.

presented in a motion for DNA testing.[36] Therefore, this assignment of error is without merit.

CONCLUSION

The DNA testing requested by Myers would not result in noncumulative exculpatory evidence relevant to his wrongful conviction claim. We therefore affirm the district court's denial of Myers' motion for DNA testing and motion for appointment of counsel.

Affirmed.

Freudenberg, J., not participating.

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[36] *Id.*

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

Wanda Eddy, appellant, v. Builders Supply Company, Inc., appellee.

937 N.W.2d 198

Filed January 17, 2020. No. S-18-800.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation: Judgments: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence.
4. **Workers' Compensation: Pretrial Procedure.** The Workers' Compensation Court's authority to enforce compliance with reasonable discovery is as broad as that of any trial court in Nebraska.
5. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

7. **Pretrial Procedure.** A party has a right to have interrogatories answered, and the duty to supplement answers previously given in response to an adversary's interrogatories is a continuing duty.
8. **Rules of the Supreme Court: Pretrial Procedure.** A party's failure to answer properly served interrogatories or to seasonably supplement discovery responses may be grounds for sanctions imposed under Neb. Ct. R. Disc. § 6-337.
9. ____: ____. To avoid sanctions under Neb. Ct. R. Disc. § 6-337, an interrogated party must either answer or object to the interrogatories or move for a protective order relieving the interrogated party from answering the interrogatories.
10. ____: ____. Sanctions under Neb. Ct. R. Disc. § 6-337 exist not only to punish those whose conduct warrants a sanction but to deter those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance, neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities.
11. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** An appropriate sanction under Neb. Ct. R. Disc. § 6-337 is determined in the factual context of a particular case and is initially left to the discretion of the trial court, whose ruling on a request for sanction or a sanction imposed will be upheld in the absence of an abuse of discretion.
12. **Pretrial Procedure: Expert Witnesses.** In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness, importance of the expert witness' testimony, surprise to the party seeking preclusion of the expert's testimony, needed time to prepare to meet the testimony from the expert, and the possibility of a continuance.
13. **Rules of the Supreme Court: Pretrial Procedure.** Inasmuch as the Nebraska Court Rules of Discovery in Civil Cases are generally and substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure, Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules.
14. **Motions for Continuance: Time.** A continuance is ordinarily the proper method for dealing with a claim that there has been a failure to disclose in a timely manner.

15. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
16. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.
17. **Workers' Compensation: Negligence: Evidence: Appeal and Error.** An appellate court gives considerable deference to a trial judge's determination of whether particular conduct amounted to willful negligence. If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
18. **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 Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed.

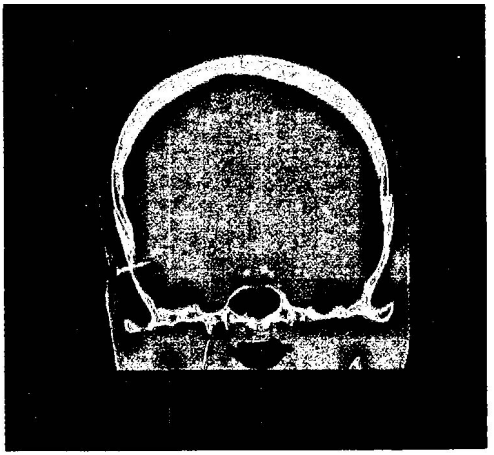
Joseph S. Risko and Nicholas W. O'Brien, Senior Certified Law Student, of Carlson & Burnett, L.L.P., for appellant.

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

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

Funke, J.

Wanda Eddy appeals from an adverse decision of the Nebraska Workers' Compensation Court. The court excluded the testimony of Eddy's expert witness as a discovery sanction, denied her motion to continue trial, and dismissed her petition after finding that she intentionally shot herself in the head with a nail gun. Eddy contends on appeal that the compensation court abused its discretion. For the reasons set forth below, we affirm.



BACKGROUND

On September 24, 2015, a ¾-inch nail became fully imbedded in Eddy's right temple while she was at work for Builders Supply Company, Inc. (Builders Supply). Eddy claims that on the day of her injury, as part of her employment with Builders Supply, she connected her nail gun to an airhose and the gun misfired lodging a nail in her right temple. The nail fully submerged underneath her skin and partially penetrated her skull at nearly a right angle, tilted slightly upward. There were no eyewitnesses as to how the injury occurred.

In November 2015, Builders Supply issued a formal letter to Eddy denying her workers' compensation claim, stating that she had intentionally injured herself. In October 2016, Eddy filed a petition in workers' compensation court which alleged that she had sustained a "severe and permanent brain injury" as a result of an accident with the nail gun. Builders Supply filed an answer which alleged that Eddy's claim is barred, because she "deliberately shot herself in the head with the nail gun."

Trial in the matter was originally scheduled for June 2017, but was continued to November upon stipulation of the parties. In October, Eddy moved to continue the trial. Over Builders Supply's objection, the court granted Eddy's motion and rescheduled trial for February 2018. In January 2018, Eddy filed a motion for partial summary judgment. On February 2, Eddy filed a motion in limine which argued that Builders Supply had willfully destroyed evidence when it disposed of some of the nail guns used in its "'trim shop.'" The court granted Builders Supply's request to set a hearing on the motions to take place on the previously scheduled February trial date. The court denied Eddy's motions on March 16 and rescheduled trial for April 25. On the morning of trial, the court granted Eddy's motion to bifurcate trial over Builders Supply's objection. Trial proceeded on the issue of liability only. The primary issue for trial was whether Eddy intentionally injured herself or was injured in an accident.

Prior to the presentation of Eddy's case in chief, the court considered Builders Supply's motion to exclude the testimony of Eddy's expert witness, Ralph Barnett. Builders Supply argued that Eddy had not identified Barnett as an expert until 2 weeks before trial, did not specify that Barnett would provide live testimony rather than testimony through a report until 5 days prior to trial, and did not disclose Barnett's opinions or his reasons for his opinions. Builders Supply offered into evidence an interrogatory submitted to Eddy on October 18, 2016, requesting the identity of any expert witnesses to be called at trial, a summary of any expert opinion, and the basis for those opinions. In a letter to Builders Supply dated August 2, 2017, Eddy's counsel stated that it had retained Barnett as a consulting expert and requested that the nail gun be made available for testing. Counsel for Builders Supply responded with a letter asking for more information. Eddy did not respond to this letter or move to compel the production of the nail gun.

Eddy provided supplemental answers to discovery on April 11, 2018, which stated: "[Barnett will] offer expert opinions

regarding function of Paslode model T250-F16, 16-gauge finish nailer. Expert opinion documentation will be provided as soon as received by the responding party. See witness' CV attached." On April 20, Eddy provided supplemental discovery responses which stated that Barnett's opinions would be based upon his experience, training, and education in the field of mechanical engineering and based upon experiments and tests he conducted with a "Paslode model T250-F16, 16-gauge finish nailer." The supplemental responses stated that Barnett's expected testimony would include, but not be limited to, the mechanical function of the nail gun, the feasibility of misfiring upon connecting it to an air supply, and the penetrative force of a "3/4-inch brad nail" fired from the nail gun. With the supplemental responses, Eddy provided 174 pages of material relied upon by those in the field of mechanical engineering, which Barnett had reviewed in preparing his testimony.

Following argument, the court sustained the motion to exclude Barnett's testimony due to Eddy's failure to disclose the opinions he would offer. The court found that pursuant to *Norquay v. Union Pacific Railroad*,[1] Eddy had not complied with the rules of discovery.

Eddy moved to continue trial to give Builders Supply an opportunity to depose Barnett. The court denied the motion. The court found that Eddy retained Barnett in the summer of 2017; that at the time of trial, no opinion of Barnett's had been disclosed; that Eddy had already been granted one continuance; and that the court had cleared 2 days for trial and the witnesses were present and ready to testify.

The court heard testimony from Barnett as an offer of proof. Barnett is a professor of mechanical and aerospace engineering at a university in Chicago, Illinois, and has been practicing as a mechanical engineer since 1969. He is the owner and head

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[1] *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987).

engineer of a mechanical engineering firm which specializes in the safety of mechanical devices. Barnett was engaged to analyze two mechanical issues with respect to the nail gun used by Eddy. First, whether it was feasible for a nail gun to discharge a nail when plugged into an air source. Second, whether the location of the nail in Eddy's head showed that she did not intentionally shoot herself in the head with a nail gun. An x ray in evidence, reproduced above as exhibit 142, shows that the nail fully penetrated the outside of Eddy's head and partially entered her skull. To evaluate these issues, Barnett conducted tests using an exemplar nail gun with the same make and model number as used by Eddy. He also reviewed a user's manual and contacted the manufacturer.

As to the first issue, Barnett opined that based on his knowledge of the nail gun industry, it is possible for a nail gun to fire a single nail when connected to an air source, even without engaging the barrel and trigger safeties on the device, if the device has aged and its parts have worn. As to the second issue, Barnett tested the penetrative force of the nail gun by firing it with the barrel pressed up against various items such as a coconut and hardwoods. The nails countersunk through these objects, meaning the heads of the nails traveled completely through the materials. Based on these tests, and his education and experience, Barnett opined that Eddy's injury could only have been caused by a "missile" nail, discharged from a distance, because the nail had only partially penetrated her skull. Barnett stated that had the nail gun been pressed against her head when fired, the nail would have fully penetrated the skull and entered her brain.

During trial, the court heard testimony from numerous witnesses, including Eddy and her husband, who also worked for Builders Supply. Eddy denied that she had attempted suicide and claimed that the gun had misfired. She testified that nails had accidentally been fired in the past, which her husband confirmed during his testimony, as did other coworkers who testified.

Evidence was offered that Eddy was under stress from family issues, including being physically and verbally abused by her adult children, who were incarcerated at the time of trial, and caring for her grandchildren. Eddy stated that she kept a loaded handgun in her home at the time of her injury and that she could have used the handgun had she wanted to kill herself. Records from medical professionals who treated Eddy after the incident stated that Eddy was not at risk of suicidal behavior.

A poem written by Eddy on a Builders Supply envelope was found at her work desk following her injury. Eddy testified she wrote the poem on September 17, 2015. The poem as printed on the envelope read:

> It's To late
> Now The clock has
> Spun my hours have passed
> My time is Done
> The word I Leave with
> are in my heart
> You've always knewn Them
> Right From The start
> I use to hold you in
> my arms Now I only
> hold you in my heart
> But my time is up
> Now it's time to
> Part Just Know I
> take you with me
> all The love within
> my Heart

Eddy posted the poem on her social media account along with a picture of her father and of her mother-in-law, who had both passed away. Eddy then made another post for her mother, also deceased, who was not included in the first post by mistake. Eddy denied that the poem was a suicide note and stated that the poem was meant to provide "closure" regarding

her mother's death. She stated that she was inspired to write the poem because she was working at a saw table in the shop, which is the same location where she learned of the passing of each family member.

Employees of Builders Supply testified that the nail gun worked properly on the day Eddy was injured. They testified that the nail gun has both a barrel safety and a trigger safety, that both safeties must be activated in order for the nail gun to fire, and that therefore a nail gun would not fire when plugged into an airhose. They videotaped tests using the nail gun to show that even if the gun were rigged to fire from a distance, the nail would not countersink beneath skin and penetrate bone.

Eddy's supervisor testified that on the morning of her injury, Eddy came to him and stated that she had to leave work to pick up her grandchild at the hospital. She did not mention that she had been injured. The warehouse manager testified that at times Eddy appeared "emotionally distraught" at work.

In its posttrial order, the compensation court found that the preponderance of the evidence demonstrated that Eddy intentionally shot herself in the head with the nail gun. Based on its review of the testimony and exhibits, the court accepted Builders Supply's position that the nail gun can fire a nail only when the barrel and trigger safeties are engaged and that the nail would not have countersunk into Eddy's head if her injury happened in the way she described.

The court pointed to inconsistencies in Eddy's accounts of the incident. At trial, Eddy testified that the nail gun accidentally misfired when she attached the gun to the airhose. But in a video recorded while Eddy was in the hospital following her injury, she stated that she dropped the nail gun and then it misfired. The court also cited to two statements that Eddy made to medical professionals which indicated that the nail gun was pointed at her head, a fact which Eddy declined to admit while testifying from the witness stand. The court found that the preponderance of the evidence showed that the nail gun was

pressed up against Eddy's head and fired when the two safeties were engaged. The court further concluded that Eddy had acted intentionally and with willful negligence and that her injury was not covered under the Nebraska Workers' Compensation Act. Eddy appealed. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this State.[2]

ASSIGNMENTS OF ERROR

Eddy assigns that the workers' compensation court (1) abused its discretion when it sustained Builders Supply's motion to exclude the testimony of Barnett, (2) abused its discretion in denying her motion to continue, (3) erred in entering an order of dismissal without sufficient evidence regarding the mechanical function of the nail gun, and (4) erred in determining that she willfully attempted suicide without considering psychological evaluations and medical opinions showing that she was not suicidal.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[3]

[2,3] On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[4] In testing the sufficiency of the evidence to support

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

[3] *St. John v. Gering Public Schools*, 302 Neb. 269, 923 N.W.2d 68 (2019).

[4] *Krause v. Five Star Quality Care*, 301 Neb. 612, 919 N.W.2d 514 (2018).

the findings of fact in a workers' compensation case, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence.[5]

ANALYSIS

In her first two assignments of error, Eddy argues that the compensation court acted without or in excess of its powers when it excluded the testimony of her expert witness and denied her motion for a continuance to allow Builders Supply to depose her expert. In her final two assignments of error, Eddy argues that the compensation court's determination that she acted with willful negligence at the time of her injury is not supported by sufficient evidence. Upon review of the arguments Eddy has asserted on appeal, we conclude that her assignments of error are without merit. The compensation court acted within its authority and rendered a decision based on sufficient evidence.

Rules of Discovery

Eddy contends that the compensation court abused its discretion in excluding her expert's testimony, because she provided information regarding her expert as soon as it became available and because her expert's testimony was critical to her claim that her injury was caused by a mechanical malfunction. Builders Supply argues in response that Eddy knew that her expert was an important witness months before trial; that there is no excuse for Eddy's late designation of her expert as a testifying witness; and that at the time of trial, she had not disclosed any of her expert's opinions or the reasons for those opinions.

[4-6] Discovery in the Workers' Compensation Court is governed by the Nebraska Court Rules of Discovery in Civil

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[5] *Id.*

Cases, Neb. Ct. R. Disc. §§ 6-301 to 6-337 (rev. 2016).[6] A workers' compensation court's authority to enforce compliance with reasonable discovery is as broad as that of any trial court in Nebraska.[7] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[8] 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.[9]

The primary purpose of the discovery process is to explore all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute.[10] The discovery process also provides an opportunity for pretrial preparation so that a litigant may conduct an informed cross-examination.[11] Moreover, pretrial discovery enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case.[12]

The liberal discovery of potential testimony of an expert witness is not merely for convenience of the court and litigants, but exists to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact.[13] Section 6-326(b)(4)(A)(i) provides:

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[6] See Workers' Comp. Ct. R. of Proc. 4 (2009).

[7] *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011). See Neb. Rev. Stat. § 48-162(1) (Reissue 2010).

[8] *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017).

[9] *Id.*

[10] *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001).

[11] *Id.*

[12] *Id.*

[13] See *Norquay, supra* note 1.

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

[7] Under § 6-326(e)(1)(B), a party is under a duty seasonably to supplement a response to a request for discovery directed toward the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony. A party has a right to have interrogatories answered, and the duty to supplement answers previously given in response to an adversary's interrogatories is a continuing duty.[14]

[8,9] A party's failure to answer properly served interrogatories or to seasonably supplement discovery responses may be grounds for sanctions imposed under § 6-337.[15] The court "may make such orders in regard to the failure as are just"[16] or may enter "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence."[17] For preclusion of testimony as a sanction for noncompliance with a duty to answer interrogatories under § 6-326(b)(4)(A)(i) or a duty to provide supplemental responses under § 6-326(e)(1)(B), § 6-337 does not require noncompliance with a prior order for discovery.[18] To avoid sanctions under § 6-337, an interrogated party must either answer or object to the interrogatories or

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[14] See, *Larkin v. Ethicon, Inc.*, 251 Neb. 169, 556 N.W.2d 44 (1996); *Norquay, supra* note 1.

[15] See *Paulk, supra* note 10.

[16] § 6-337(b)(2).

[17] § 6-337(b)(2)(B).

[18] See *Norquay, supra* note 1.

move for a protective order relieving the interrogated party from answering the interrogatories.[19]

[10,11] Sanctions under § 6-337 exist not only to punish those whose conduct warrants a sanction but to deter those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance, neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities.[20] An appropriate sanction under § 6-337 is determined in the factual context of a particular case and is initially left to the discretion of the trial court, whose ruling on a request for sanction or a sanction imposed will be upheld in the absence of an abuse of discretion.[21]

[12] As we held in *Norquay*, in determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness, importance of the expert witness' testimony, surprise to the party seeking preclusion of the expert's testimony, needed time to prepare to meet the testimony from the expert, and the possibility of a continuance.

Regarding Eddy's explanation for failing to comply with discovery, she argues that she supplemented her discovery responses with information about Barnett's testimony as soon as it became available.

Builders Supply argues that "[w]hether through neglect or litigation strategy, there was no valid reason to wait until a couple of weeks before trial to obtain an expert witness."[22] Builders Supply concedes that Eddy provided information regarding her expert as soon as the information became known

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[19] *Id.*

[20] *Id.*

[21] *Id.* See *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

[22] Brief for appellee at 10.

to her. It argues that the issue is not Eddy's failure to supplement her discovery responses, but, rather, the issue is Eddy's fundamental failure to disclose any expert opinions prior to trial. We agree with Builders Supply.

The compensation court stated in its posttrial order that it excluded Barnett as a witness because

> he was disclosed in too close proximity to the trial date and because his opinions and the basis for his opinions (whatever they were) were never disclosed to [Builders Supply] prior to trial. . . . While [Eddy] disclosed the topics upon which [Barnett] would testify, his opinions were never disclosed. . . . With the accident having happened on September 24, 2015, there was no reason [Eddy] could not have retained [Barnett] and obtained his opinions long before the last week to ten days before trial.

(Citations omitted.)

[13] Inasmuch as the Nebraska Court Rules of Discovery in Civil Cases are generally and substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure, Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules.[23] "Fed.R.Civ.P. 26(b)(4)(A)(i) requires an expert witness to answer interrogatories and reveal the substance of the facts underlying his or her opinion in order to allow the opposing party to prepare an effective cross-examination."[24] In *Uresil Corp. v. Cook Group, Inc.*, the court found that under "Fed.R.Civ.P. 26(b)(4)(A)(i) . . . when answering interrogatories directed at expert testimony one must precisely state the subject matter upon which the answer is based, explain the terms used in the answer, and disclose potential theories of the expert testimony."[25] *In Williams v. McNamara*, the court found answers to the interrogatories as inadequate

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[23] See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

[24] *Day v. NLO, Inc.*, 147 F.R.D. 144, 146 (S.D. Ohio 1993).

[25] *Uresil Corp. v. Cook Group, Inc.*, 135 F.R.D. 168, 171-72 (N.D. Ill. 1991).

when they did not "inform the defendants of what the testimony of the expert will be at trial so that the defendants can gather evidence to rebut the expert's opinions."[26] The *Williams* court viewed as essential that the "'substance of the opinions'" be stated in a manner that would "inform the interrogating party of the reasons or bases for the opinions. Otherwise, the answers are in large measure useless . . . ."[27]

The record shows that in October 2016, Builders Supply submitted to Eddy an interrogatory fashioned from § 6-326(b)(4)(A)(i) which requested information regarding potential expert testimony. Eddy retained Barnett as a consultant in the summer of 2017. Eddy did not disclose that she intended for Barnett to testify as an expert witness until 2 weeks before trial in April 2018. Even then, Eddy never disclosed Barnett's opinions or his reasons for those opinions. In her first supplemental discovery answers provided on April 11, 2018, Eddy stated that Barnett would offer expert opinions regarding the function of the "Paslode model T250-F16, 16-gauge finisher nailer." In her second supplemental answers provided on April 20, Eddy stated that Barnett would offer expert opinions regarding the function of that model of nail gun; the feasibility of misfiring upon connecting that model of nail gun to an air supply; and the penetrative force of a "3/4-inch brad nail" fired from that model of nail gun. Nothing within either set of supplemental answers would have informed Builders Supply of what opinions Barnett would offer at trial or the reasons or rationale behind those opinions so that Builders Supply could gather evidence to rebut those opinions. Neither did Eddy object or move for a protective order to relieve herself from her disclosure obligations. We find nothing in the record that would excuse Eddy from making these disclosures if she wished to utilize Barnett's testimony.

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[26] *Williams v. McNamara*, 118 F.R.D. 294, 296 (D. Mass. 1988).

[27] *Id.*

Eddy also argues that Barnett's testimony was integral to her claim that the nail gun malfunctioned. Given that the compensation court's posttrial findings placed significant emphasis on the mechanical function of the nail gun, we agree with Eddy that Barnett's testimony went to a critical issue in this case. At the same time, we observe that the arguments Eddy makes on appeal regarding the necessity of Barnett's testimony are somewhat different than the arguments she made to the compensation court when it was considering the motion to exclude. Eddy argued that Barnett was essential to provide rebuttal testimony to Builders Supply's expert on the functionality of the nail gun. The compensation court rejected this argument, stating that Eddy knew of Builders Supply's expert for several months prior to disclosing Barnett as a testifying expert. More importantly though, the court did not permit Builders Supply to call its expert witness because the parties had failed to stipulate that the expert could testify telephonically. Therefore, both sides presented their opposing theories regarding the functionality of the nail gun through testimony from multiple lay witnesses. Although Barnett was an important witness, there was no expert testimony for Eddy to rebut and she was not prevented from presenting witnesses who supported her theory that the nail gun misfired.

Lastly, Eddy argues that Builders Supply was not unduly surprised and had adequate time to prepare for Barnett's testimony. We disagree. The first time Builders Supply learned of Barnett's opinions was during his offer of proof on the morning of the first day of trial. Allowing Barnett to offer undisclosed expert testimony would have forced Builders Supply to conduct an uninformed cross-examination of an important witness. Builders Supply would have been unfairly surprised by the bases for Barnett's opinions, because Eddy did not provide a full description of the tests Barnett had conducted or explain why his tests led him to form his opinions. Litigants

are required to disclose a description of tests that support an expert's opinion.[28]

The issue of whether it is appropriate for a court to exclude a witness as a discovery sanction depends on the factual context of each case. In the context of Eddy's delays of trial in this case, we agree with Builders Supply's argument that the substance of Barnett's testimony supports the compensation court's decision to exclude Barnett, because it demonstrates Eddy's lack of excuse for nondisclosure. Eddy knew Builders Supply's position since she received the denial letter in November 2015. Neither side changed its theory of the case since the initial pleadings were filed in October 2016. The sole factual dispute in the case was whether Eddy's injury was intentional or accidental. Yet, the record indicates that Eddy herself did not know what Barnett's testimony would be until the week prior to trial.

The court's decision to exclude the testimony of Barnett ensured that Builders Supply had a fair determination of its rights. Eddy's contention that the compensation court abused its discretion in excluding the testimony of Barnett as a sanction under § 6-337 is without merit.

Motion to Continue

[14,15] Eddy next contends that the compensation court abused its discretion in denying her motion to continue trial. Continuances are governed by the Workers' Comp. Ct. R. of Proc. 8 (2011), which states in part that "[a] continuance may be granted at the discretion of the trial judge if good cause is shown." A continuance is ordinarily the proper method for dealing with a claim that there has been a failure to disclose in a timely manner.[29] A motion for continuance is addressed to the discretion of the trial court, whose ruling

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[28] See, *Norquay, supra* note 1; John P. Lenich, Nebraska Civil Procedure § 22:2 (2019).

[29] *Johnson v. Ford New Holland*, 254 Neb. 182, 575 N.W.2d 392 (1998).

will not be disturbed on appeal in the absence of an abuse of discretion.[30]

Eddy contends that there was good cause for a continuance due to the importance of Barnett's testimony and the need to allow Builders Supply to depose Barnett, an expense which Eddy offered to cover.

In considering whether Eddy's stated reasons for a continuance satisfy the good cause standard under rule 8 of the Workers' Compensation Court rules of procedure, we consider Eddy's motion in the context of the procedural history of the instant case. Eddy filed her petition on October 3, 2016. In March 2017, the court set the initial trial date for June 27. In May, the parties stipulated to continue trial in a joint filing. In June, the court set a trial date of November 14. On October 24, Eddy moved for a continuance. The court granted the motion over Builders Supply's objection and scheduled trial for February 8 and 9, 2018. Eddy filed a motion for partial summary judgment a month before trial was to begin in February and filed a motion in limine on February 2, a week before the scheduled trial. The court granted Builders Supply's request for a continuance and rescheduled the trial for April 25 and 26. Eddy then moved for a second continuance on April 25. The compensation court entered its order of dismissal on July 18. Another continuance would have reopened discovery and required the court to schedule another 2 days for trial, which would have delayed resolution of the case further. This timeline indicates that Eddy did not show good cause to continue trial, and the compensation court did not act unreasonably when it declined to again continue trial and permit the further delay of resolution of this case.

Eddy further contends that good cause for a continuance existed because Barnett's opinion became available only shortly before trial. Eddy alleges that not until March 2018

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[30] *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994); *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992).

did she become aware that an expert witness would be necessary to rebut Builders Supply's argument that Eddy caused her own injury.

However, Builders Supply denied Eddy's claim in November 2015 for the reason that Eddy caused her own injury. In October 2016, Builders Supply filed an answer again alleging Eddy caused her own injury. Also in October 2016, Builders Supply sought discovery to identify whether Eddy intended to call an expert and, if so, what the expert's opinion would be. In August 2017, Eddy notified Builders Supply that Barnett had been retained as a consulting expert and discussed the need to examine the nail gun. Not until April 11, 2018, did Eddy supplement her discovery to identify that Barnett would be called to offer expert opinions regarding the function of the nail gun. And on April 20, Eddy supplemented her discovery yet again to indicate that Barnett would be called to testify live at trial on April 25.

The record shows that Eddy's untimely disclosures were not caused by a lack of awareness that an expert was needed to rebut Builders Supply's allegation that Eddy caused her own injury as that allegation was clear as early as November 2015 and continued to be clear throughout the pendency of this matter. Any prejudice that may have been cured through a continuance does not excuse Eddy's lack of diligence and does not overcome the unfairness to Builders Supply in delaying its trial and forcing it to continue to prepare its defense by deposing an undisclosed expert. As a result, Eddy did not show good cause to continue trial, and the compensation court did not abuse its discretion in declining to grant Eddy a second continuance.

Sufficient Evidence of Willful Negligence

Neb. Rev. Stat. § 48-101 (Reissue 2010) provides that when personal injury is caused to an employee by accident, arising out of and in the course of his or her employment, such

employee shall receive compensation from the employer if the employee was not willfully negligent at the time of receiving such injury. Under Neb. Rev. Stat. § 48-107 (Reissue 2010), the employer bears the burden to prove the employee's willful negligence. An employee's mere negligence is not sufficient to constitute willful negligence.[31] As relevant here, Neb. Rev. Stat. § 48-151(7) (Reissue 2010) defines the term "willfully negligent" as a deliberate act or as conduct evidencing a reckless indifference to safety. Absent extraordinary circumstances, suicide constitutes willful negligence under § 48-151.[32]

[16,17] As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.[33] An appellate court gives considerable deference to a trial judge's determination of whether particular conduct amounted to willful negligence. If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court.[34]

Eddy contends that the compensation court erred in finding that she acted with willful negligence. Eddy first argues that the court lacked sufficient evidence regarding the mechanical function of the nail gun. As mentioned above, the court heard evidence from Eddy, her husband, and Eddy's coworkers, who testified that the nail gun could have misfired. The court also heard evidence from Builders Supply employees such as Eddy's supervisor and the warehouse manager, who testified

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[31] See *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000).

[32] *Breckenridge v. Midlands Roofing Co.*, 222 Neb. 452, 384 N.W.2d 298 (1986). See *Michael B. v. Northfield Retirement Communities*, 24 Neb. App. 504, 891 N.W.2d 698 (2017).

[33] *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996); *Hernandez v. Hawkins Constr. Co.*, 240 Neb. 129, 480 N.W.2d 424 (1992).

[34] *Estate of Coe v. Willmes Trucking*, 268 Neb. 880, 689 N.W.2d 318 (2004); *Guico, supra* note 31; *Spaulding v. Alliant Foodservice*, 13 Neb. App. 99, 689 N.W.2d 593 (2004).

that the nail gun would not have fired unless both safeties were engaged. The court drew upon evidence in the record to resolve this factual dispute. The court considered the physical evidence and determined that the nail could only have become embedded in Eddy's right temple at nearly a right angle if the gun was pointed at Eddy's head. The court also handled the gun and simulated Eddy's version of events by holding the nail gun near the head in one hand while plugging the nail gun into an imaginary airhose with the other hand. The court determined that it was "physically uncomfortable" to hold the nail gun in this position and found that it was unlikely that the accident happened in the manner Eddy described.

The court also made clear that it did not find Eddy's testimony credible. For example, the court noted that Eddy's behavior after the injury was not consistent with an accident—she left work early shortly after the incident, but instead of informing her supervisor that she had sustained an injury, she falsely told him that she had to pick up her grandchild from the hospital. The court also noted the inconsistencies in Eddy's account of the incident and identified Eddy's conflicting explanations of how the injury occurred.

The compensation court is the sole judge of the credibility of the witnesses and the weight to be given to testimony. Upon review of the court's decision on this issue, we find that the record contains evidence to substantiate the factual conclusions reached by the compensation court.

[18] Eddy also contends that the court erred because it entered its findings absent expert testimony. However, Eddy has not provided any authority stating that a finding of willful negligence under § 48-101 requires expert testimony, and Eddy has not shown that she argued to the compensation court that it could not render its decision absent expert testimony. An appellate court will not consider an issue on appeal that was not passed upon by the trial court.[35]

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[35] *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

Eddy further argues that the compensation court failed to consider medical evidence that she was not suicidal. Eddy contends that the compensation court erred by stating in its posttrial order that "there are no psychiatric treatment records in evidence." We agree with Builders Supply that when properly understood in the context of the record, the court's statement referred to the fact that there were no relevant psychiatrist records regarding Eddy's mental health prior to the time of her injury.

Eddy offered into evidence records from medical professionals regarding evaluations she received after her injury. A neurologist who began treating Eddy in March 2016 found no evidence that she exhibited "pathologically impulsive behavior," and he opined that the nail gun incident was not an intentional act to injure herself. A mental health therapist who evaluated Eddy on January 28, 2016, assessed her as a low suicide risk, as did a psychologist who evaluated Eddy on October 31, 2017. Further, the records indicate that as a result of the nail gun incident, Eddy experienced a traumatic brain injury, change in personality, and reduction in functionality, and that she suffers from anxiety and depression, but is not suicidal. These records were made after the September 2015 incident and were generated as a result of Eddy's medical treatment for her brain injury.

We find Eddy's argument to be without merit. First, the record indicates that the compensation court did consider Eddy's postinjury medical records. The court's order stated that it "reviewed each exhibit offered and received into evidence." Second, the applicable standard of review requires that we view the evidence in the light most favorable to the successful party and give the successful party the benefit of every inference reasonably deducible from the evidence.[36] That being the case, the evidence concerning Eddy's state of mind after her

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[36] See *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

brain injury is not entitled to significant weight, because the evidence is likely more informative about the effects of Eddy's brain injury rather than indicative of Eddy's state of mind at the time of her injury.

Last, Eddy argues that Nebraska has a presumption against suicide, which the court did not significantly consider in its analysis. In Nebraska, there is a general rule that where a cause of death is in issue and there is nothing to show how death was caused, there is a negative presumption against suicide.[37] The presumption against suicide is one of law, not of fact, and is based upon the natural characteristics of persons for love of life and fear of death.[38] Because no cause of death is at issue in this case, the presumption against suicide is not applicable here. Even assuming, for the sake of argument, that the presumption against death by suicide could be extended to a presumption against an injury resulting from an attempted suicide, such a presumption could be overcome and rebutted by the introduction of evidence tending to show how the injury occurred.[39] Our discussion of the record shows that Builders Supply adduced extensive evidence showing how the circumstances of Eddy's injury were consistent with an intentional act, including the nature of the injury, the note penned by Eddy, her behavior, and her personal life.

In addition, there is authority contrary to Eddy's point which states that absent extraordinary circumstances, suicide constitutes willful negligence under § 48-151.[40] Nebraska law has recognized an exception to the rule that suicide constitutes willful negligence when the evidence shows that suicide was nonvoluntary.[41] Eddy has argued that her injury was the result of an accident and not due to injuring herself out of a lack of

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[37] *Michael B., supra* note 32.

[38] *Id.*

[39] See *Breckenridge, supra* note 32.

[40] *Id.*

[41] *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983).

free will. There is sufficient evidence in the record to support the compensation court's decision under our deferential standard of review.

CONCLUSION

The compensation court did not abuse its discretion in excluding the testimony of Eddy's expert witness as a discovery sanction. The compensation court did not abuse its discretion in declining to grant Eddy a second continuance. The compensation court did not err in concluding that Eddy had been willfully negligent.

Affirmed.

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

State of Nebraska, appellee, v. Trevor S. Case, appellant.

937 N.W.2d 216

Filed January 17, 2020. No. S-18-1197.

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. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
5. **Self-Defense: Jury Instructions.** A trial court is required to give a self-defense instruction where there is any evidence in support of a legally cognizable theory of self-defense.
6. **Self-Defense: Jury Instructions: Evidence.** It is only when the evidence does not support a legally cognizable claim of self-defense or the

evidence is so lacking in probative value, so as to constitute a failure of proof, that a trial court may properly refuse to instruct a jury on a defendant's theory of self-defense.

7. **Self-Defense.** To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances.
8. ____. If a defendant has unjustifiably placed himself or herself in harm's way, a court may properly find that such facts do not support a lawful claim of self-defense.
9. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is generally controlled by either a statute or a court rule.
10. **Motions for Continuance: Evidence: Waiver.** If a continuance would have been a sufficient remedy for a belated disclosure in violation of Neb. Rev. Stat. § 29-1912 (Reissue 2016), a defendant who fails to request a continuance waives any rights he or she may have had pursuant to § 29-1912.
11. **Criminal Law: Evidence: Appeal and Error.** When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

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

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

Douglas J. Peterson, Attorney General, and Matthew Lewis for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Trevor S. Case appeals his conviction and sentence in the district court for Lancaster County for assault by a confined person. A jury found Case guilty, and the court thereafter

sentenced him to 365 days in jail followed by postrelease supervision for 12 months. Case claims on appeal that the court erred when it refused his proposed self-defense instruction and when it admitted a recording of a telephone call he made from jail. He also claims there was not sufficient evidence to support his conviction. We affirm Case's conviction and sentence.

STATEMENT OF FACTS

On February 16, 2018, Case, who was confined in the Lancaster County jail, got into an altercation with Kenneth Burley, who was also confined in the jail and who had been a cellmate with Case. As a result of the altercation, the State charged Case with a Class IIIA felony, assault by a confined person, in violation of Neb. Rev. Stat. § 28-932 (Reissue 2016).

On the first day of trial, the court considered certain pretrial motions. Among those was Case's objection to admission of a recording of a telephone call he had made shortly after the altercation and in which he made certain statements regarding the event. Case objected to admission of the recording because the State had provided the recording to Case only the day before trial, which he noted was well beyond the time the State was required to provide evidence pursuant to the court's discovery order. Case asserted that the recording fit within the scope of the discovery statute, Neb. Rev. Stat. § 29-1912(1)(f) (Reissue 2016), which requires production of "[d]ocuments, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority." The State contended that the recording was not subject to § 29-1912. The State further contended that it had become aware of the existence of the recording only the night before it provided it to Case and that because it had provided the evidence to Case, it did not think that "the remedy here is that it be excluded" but that the defense, if it thought it needed additional time,

"could ask for a continuance." After hearing the arguments of the parties, the court overruled Case's objection. Case did not thereafter move for a continuance.

The first witness for the State was William McGlothlin, who was a security manager for the Lancaster County jail. He testified regarding his duties, which included keeping records of persons confined in the jail, maintaining surveillance videos recorded in the jail, and maintaining recordings of telephone calls made from the jail by inmates. Based on knowledge obtained in performing these duties, McGlothlin testified that both Case and Burley were inmates at the jail on February 16, 2018, and that on that date, they were both in the same housing unit, which contained 32 cells. McGlothlin provided foundation for admission of a disc containing surveillance video recordings that showed the altercation between Case and Burley; the disc contained video from two cameras showing the incident from two different angles. Case did not object to admission of the video recordings.

McGlothlin also provided foundation for admission of the recording of a telephone call made from the jail on February 19, 2018. McGlothlin testified that the call was made using a personal identification number that was specific to Case. Case objected to admission of the recording of the telephone call on the basis of foundation. Case maintained that it had not been established that the voice on the call was his. The court overruled the objection. Case also renewed the objection he had made prior to trial and continues to assert on appeal based on the State's failure to comply with the discovery order. The court also overruled that objection and admitted the recording of the telephone call into evidence. Although both the video recordings and the telephone recording were admitted into evidence during McGlothlin's testimony, neither was published to the jury at that time.

On cross-examination by Case, McGlothlin testified that Case and Burley had been cellmates between December 19 and 31, 2017. McGlothlin testified generally regarding reasons

inmates might be moved from one cell to another, but he did not testify regarding reasons Case and Burley were no longer assigned to the same cell. McGlothlin also testified that Case had had no significant disciplinary problems prior to the February 16, 2018, incident.

The State's next witness was Zachary Yost, a correctional officer who was working at the Lancaster County jail on February 16, 2018. On that date, he was assigned to the housing unit in which both Case and Burley were housed. Yost testified that he was at the officer station in the unit when he heard a noise, looked up, and witnessed a physical altercation between Case and Burley. At the time he looked up, both were "throwing closed-fist punches." Yost got up from his desk, called for assistance, and made his way toward the altercation, giving loud verbal commands for the two to stop fighting and for the other inmates to return to their cells. Yost testified that when he first gave the commands, both Case and Burley remained engaged in a physical altercation. When he approached the two, Yost "used [his] right arm to deflect . . . Case from . . . Burley." Burley had stopped throwing punches, but Case continued. Case thereafter "stopped throwing punches, but . . . still continued to posture and advance on . . . Burley." At that time, Burley "had put his hands down and had turned" away. When additional staff arrived, Yost placed Burley in restraints while someone else placed Case in restraints. Both were escorted out of the housing unit and Yost did not have further interaction with either Case or Burley that day. Yost further testified that he had been working the 2 or 3 days prior to the incident and that in the days leading up to the altercation, Case had not told him that he was having any sort of difficulties with Burley.

The surveillance video that had been admitted into evidence during McGlothlin's testimony was played for the jury during Yost's testimony. Yost testified that he had reviewed the video and that it accurately depicted the altercation between Case and Burley. During the playing of the video, counsel for the State

occasionally paused the video to ask Yost questions regarding what was depicted. Yost noted that the video included footage from two cameras that showed different angles on the altercation and that one of the two did not show the beginning of the altercation.

Yost testified that it was common for inmates to walk in circles around the housing unit as some inmates were depicted doing in the video. Yost identified Burley as a person in the video who was walking counterclockwise with another unidentified inmate. At a later point in the video, Yost identified Case as the person who walked out of one of the cells on the outer edges of the area depicted; Yost testified that Case was coming out of his own cell. The video shows that Case came out of his cell and proceeded in a clockwise direction directly toward Burley. Yost testified that in order to be let out of the cell, Case would have needed to request an officer at the control kiosk to allow him to do so. Yost further identified Case and Burley as the persons in the video who began fighting and himself as the person who came to intervene.

The recording of the telephone call was also played for the jury during Yost's testimony. Prior to the recording's being played, Yost testified that he had listened to the recording and that he was familiar with Case's voice. Yost testified that the voice of the person placing the call was Case's and that one of the voices heard during the call was Case's. In the recording, the person identified by Yost as Case appeared to be discussing the altercation with Burley with an unidentified person. At one point, the other person asked, "Did he attack you or did you go for him?" and the person identified as Case responded, "I went for him."

The State's next witness was Burley. He testified that on February 16, 2018, he was an inmate in the Lancaster County jail. He was "doing laps" and talking with another inmate when Case came up to them and said, "'Stop hitting my door.'" Burley denied having hit Case's door. According to Burley, after Case made the accusation, Burley "proceeded to walk off"

and Case "start[ed] viciously attacking [him] . . . kept coming towards [him], consistently, persistently." Burley testified that he backed up from Case and told him he did not want to fight. When asked who threw the first punch in the altercation, Burley testified, "He attacked me viciously, striking me in the face, as well as throwing me to the ground. People were trying to break it up, and he's still coming towards me . . . ."

Burley also testified regarding injuries he received in the altercation. The injuries included swelling in his face, the back of his head, and near his ear, as well as his ankle. Burley further testified that he and Case had previously been cellmates for "several days" and that Burley had been moved to a different cell. Case was serving as an inmate porter, and Burley testified that the reason for the move was because he and Case kept different hours. Burley explained that he needed to be in a bottom bunk because of a disability and that therefore, the move would allow him to get better sleep. Burley testified that prior to the altercation, he had not had any issues with Case and had not bullied or threatened Case.

The State played the surveillance video during Burley's testimony and asked him questions about what was depicted. Burley identified Case as a person depicted in the video and stated that Case could be seen coming "[s]traight out the cell . . . coming straight towards me." Burley testified that at the point when the altercation began, he "tried to take a step away from [Case]." When counsel for the State noted that it appeared in the video that Burley "didn't take a step backwards" but instead "took a step forward," Burley testified that he was "trying to walk away, away from him, get away from this gentleman." Burley testified that after the initial punches, he was "bouncing back, still constantly bouncing back, and [Case was] still persistently coming towards [him]." Burley noted that at one point, he was "on the ground" with Case "on top of [him]." He testified that he ended up on the ground because of the "force of [Case's] punches and his anger, his rage." When asked about some movements he

made that were depicted in the video as occurring before the altercation began, Burley testified that he was showing the person with whom he was walking "how a previous fight [there] happened" but that he was not involved in that previous fight.

The final witness in the State's case in chief was John Winter, a Lincoln police officer who investigated the altercation between Case and Burley. As part of his investigation, Winter had watched the surveillance video and had interviewed both Case and Burley. Winter testified that photographs that had been admitted into evidence accurately depicted injuries to both Case and Burley.

Winter testified that when he interviewed Case, he had advised Case of his *Miranda* rights and Case had waived his right to counsel before talking to Winter. Winter testified that Case said that he and Burley had previously been cellmates and that he "had been having issues with . . . Burley, in the sense that . . . Burley was making statements . . . that were untrue about him." Case further described to Winter that Burley had been "coming by his cell door and lightly tapping on the cell door, just loud enough to cause [Case] annoyance, but not loud enough to draw any more attention." Case told Winter that Burley was "sort of a bully" and that he had told correctional staff about issues he had had with Burley. Winter testified that Case said that because staff had "failed to take any action" to fix his issues with Burley, on the day of the altercation Case determined "he was going to go handle the situation himself and that's why he ended up speaking with . . . Burley." After making that statement, Case declined to elaborate in more detail regarding the altercation.

After the State rested its case, Case made a motion to dismiss. The court overruled the motion to dismiss.

Case chose to testify in his own defense. He testified that he and Burley had been cellmates for "two to three weeks" and that in that time, a relationship had been established in which Burley was "demanding" of Case. Case testified that Burley

had let him know that Burley "was a gang member" and had a certain "ranking in his gang."

While in the Lancaster County jail, Case had been selected to work as a porter with maintenance and cleaning duties. He testified that the position gave him greater access than other inmates to items such as "[c]leaning supplies, foods, [and] laundry" and that this access sometimes prompted other inmates to ask for favors. Case testified that Burley would try to get Case to get him items but that Case would resist because to do so would be a rule violation and he valued his position as a porter. Case testified that his position as a porter required him to work at night until 2 a.m. and that his hours became an issue with Burley because they conflicted with his sleep schedule. Case stated that because of his hours, Burley "felt . . . that [Case] owed him things, and [that Case] needed to . . . give the demanded things that he wanted." Case testified that Burley's demands made him feel "threatened" and "fearful for [his] physical safety." Case testified that one of the ways Burley intimidated him was to talk about how he used to be a boxer and to demonstrate his skills by shadow boxing. Case testified that he had made certain corrections officers, including Jordan Malcolm, aware of his problems with Burley but that he had never filed a formal grievance or complaint because he feared repercussions from Burley. Case testified that Burley was eventually moved to a different cell because of an incident in which Burley made threats to Case.

Case testified that after Burley was moved to a different cell in the same housing unit, Burley continued to make subtle threats and to bully him. Case testified that several days prior to the altercation with Burley, he had seen Burley being physically threatening to another inmate. Case testified that on February 16, 2018, he had been getting the sense that Burley was going to follow through on threats he had been making toward Case. That afternoon, Case was trying to sleep in his cell and heard someone walking by his cell, "trying to

— to get [his] attention or to disrupt or to annoy [his] sleep." Looking out of his cell, he saw Burley walking with another inmate, and, thinking it was Burley trying to get his attention or annoy him, he came out of his cell and "walked over to him, with no demeanor of intent of doing anything, other than just asking." Case asked why Burley was tapping on his door, and Burley "played coy." Case then got the sense that Burley was going to hit him, based on Burley's "look, his body language." Case testified that Burley then initiated physical contact with a motion that Case described as "a jab . . . tuck his shoulder underneath, walk into [Case], step towards [Case]." Case was "startled," and he pushed Burley. This resulted in a series of punches between the two.

Case testified that his actions, including "taking [Burley] to the ground," were because he "had no other choice but to be . . . defenseful [sic] in that manner, without hitting or closed fisting." Case testified that he took his shirt off during the altercation because Burley was using the shirt to pull him down. He also testified that he did not immediately respond to Yost's commands to stop fighting because "the moment was very heated" and he "did not trust Burley in any type of situation." Case testified that "Yost had no control over that situation" and that he thought that because he did not feel safe, he needed "to stand until an officer either puts cuffs on [Burley] or [himself]."

Case testified regarding the recording of the telephone call that had been admitted into evidence and played during the State's case. He testified that he had had several previous conversations with his mother to let her know about the situation that was going on with Burley. He admitted that when she asked, "'Did he attack you or did you go for him,'" he replied, "'I went for him.'" But he testified that this was not a reference to his physically attacking Burley, but "more or less standing up" and "be[ing] forward with my approach with him." Based on his communications with his mother, he believed that she understood it in the same way. And contrary

to Winter's testimony, Case denied having said that he had decided to handle the situation with Burley himself.

Later, on redirect, defense counsel played the surveillance video and asked Case questions about what was depicted. Counsel referred to a point in the video where Burley is seen making motions that counsel described as "shadow boxing." Case testified that he saw those actions from his cell and that it looked to him like "a threat, maybe a pre-warning." Following his testimony, Case rested his defense without presenting further testimony or other evidence.

In rebuttal, the State called Malcolm as a witness. Malcolm testified that he was a correctional officer at the Lancaster County jail and that he had known Case as an inmate during the period from December 2017 through February 2018. Malcolm supervised Case in his work as a porter, and as a result, he likely had more interaction with Case than with other inmates. Malcolm testified that he would sometimes have conversations with Case when no other inmates were around, but he testified that Case had never discussed any problems he was having with Burley and had never confided that Burley was targeting him for assault. Malcolm testified that he had never witnessed Burley bullying Case and that if he had witnessed such behavior or if Case had reported such behavior, he would have documented it in a report according to procedure rather than attempting to handle the situation himself. Malcolm further testified that if Case had reported being threatened by Burley, he could have been placed in protective custody. On cross-examination, Malcolm testified, inter alia, that inmates in protective custody were subject to more restrictions and more time in their cells than other inmates. After the State rested its rebuttal, Case renewed his motion to dismiss and the court overruled the motion.

At the jury instruction conference, the main issue of discussion was Case's proposed instruction on self-defense. Case proposed the following instruction:

> Case acted in self-defense if:
>
> 1. . . . Burley used or threatened force against . . . Case; and
>
> 2. Under the circumstances as they existed at the time, . . . Case reasonably believed that the force he used against . . . Burley was immediately necessary to protect himself against any such force used or threatened by . . . Burley.
>
> The fact that . . . Case [may] have been wrong in estimating the danger does not matter so long as there was reasonable basis for he believed [sic] and he acted reasonably in response to those beliefs.

The State opposed Case's proposed instruction and argued that the evidence showed that Case had unjustifiably placed himself in harm's way. The State noted that Case's own testimony indicated that when he perceived a threat form Burley, "he [left] his cell and immediately [went] to talk with . . . Burley about it. And then, in all less than a minute, this happens." The State argued that Case "could have easily stayed in his cell or he could have easily asked the correctional officer for assistance." The State further argued that the alleged tapping on Case's cell door was "probably annoying" but "not a threat of force" that would "justify him going on the offensive." The State concluded that Case's use of force was not "immediately necessary and justifiable under the circumstances."

Case argued that precedent required the court to give a self-defense instruction where there was any evidence in support of a legally cognizable theory of self-defense. He argued that there was evidence that he had gone into a dayroom, where he had a right to be, with the intention of speaking with Burley and not with the intention of starting a physical fight. He further argued that there was evidence that Burley made a move toward Case, which action gave rise to a claim of self-defense.

The court refused Case's proposed instruction on self-defense. The court stated, "I think the evidence shows that . . .

Case left his cell, went directly to confront . . . Burley, and I think no one's testified that . . . Burley made the initial contact. It was . . . Case that made the initial contact. It was . . . Case that started the confrontation."

After the case was submitted to the jury. The jury returned a verdict finding Case guilty of assault by a confined person. The court accepted the verdict and thereafter sentenced Case to 365 days in jail followed by postrelease supervision for 12 months.

Case appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Case claims that the district court erred when it (1) refused his proposed self-defense instruction and (2) admitted the recording of the telephone call. He also claims there was not sufficient evidence to support his conviction.

STANDARDS 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. Bigelow*, 303 Neb. 729, 931 N.W.2d 842 (2019).

[2] Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion. *State v. Hatfield, ante* p. 66, 933 N.W.2d 78 (2019).

[3] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably

to the State, is sufficient to support the conviction. *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019).

ANALYSIS

Self-Defense Instruction.

Case first claims that the district court erred when it refused his proposed self-defense instruction. In *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990), we stated that only where the jury could reasonably find that the defendant's use of force was justified should the trial court instruct the jury on self-defense. We determine that the evidence did not support a self-defense instruction and that therefore, the court did not commit reversible error when it refused the instruction.

[4] 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. Bigelow, supra*. As discussed below, we determine that Case's tendered instruction on self-defense was not warranted by the evidence and that therefore, we need not consider whether the instruction was a correct statement of the law or whether Case was prejudiced by the court's refusal to give the instruction.

[5] We have held that a trial court is required to give a self-defense instruction where there is any evidence in support of a legally cognizable theory of self-defense. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). Case cites this proposition and emphasizes that because of the "any evidence" language, the court was required to give his proposed self-defense instruction. In support of his argument, Case points to evidence to the effect that Burley had threatened him in the past; that in the days leading up to the incident, the threats had become more immediate; and that before Case threw his first punch, Burley had made a move toward Case that Case characterized as a "jab."

[6] Although the evidence noted by Case could be favorable toward proving a theory of self-defense, the proposition relied on by Case must be read in its entirety. It is not enough to merely show "any evidence" of self-defense to support an instruction thereon. Instead, the defendant must show "any evidence in support of a legally cognizable theory of self-defense." *Id.* at 607, 567 N.W.2d at 292. As we further stated in *Kinser*:

> It is only when the evidence does not support a legally cognizable claim of self-defense or the evidence is so lacking in probative value, so as to constitute a failure of proof, that a trial court may properly refuse to instruct a jury on a defendant's theory of self-defense.

252 Neb. at 606-07, 567 N.W.2d at 292.

Although the evidence noted by Case could be part of a legally cognizable case of self-defense, the court needed to determine without deciding factual issues whether the evidence would support self-defense under Nebraska law. We therefore review aspects of self-defense under Nebraska law that are relevant to assessing the evidence in this case.

[7] Self-defense is a statutorily defined affirmative defense in Nebraska. *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012). Neb. Rev. Stat. § 28-1409(1) (Reissue 2016) provides in relevant part that "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 on the present occasion." We have interpreted § 28-1409 to mean that to successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Kinser, supra*; *State v. Graham*, 201 Neb. 659, 271 N.W.2d 456 (1978).

[8] Extrapolating from the requirement that the force used must be "justified under the circumstances," in a case involving a conviction for assault by a confined person, we stated, "If a defendant has unjustifiably placed himself or herself in harm's way, a court may properly find that such facts do not support a lawful claim of self-defense." *State v. Urbano*, 256 Neb. at 201, 589 N.W.2d at 151. In *Marshall*, this court reasoned that the defendant voluntarily put himself in a position of danger by going outside of his home to confront two men when there was no evidence that anything prevented him from remaining safely in his home and thereby avoiding the occasion to use force.

Applying the law set forth above to the evidence in this case, we determine that the evidence did not support a legally cognizable theory of self-defense. In doing so, we apply the law as set forth in *Urbano* and *Marshall*. The district court rejected Case's self-defense instruction because Case "made the initial contact." As the undisputed facts recited earlier in our opinion show, Case left his cell and walked directly up to Burley. The record is clear that there was no evidence that Case was prevented from remaining safely inside his cell. Instead, he unjustifiably placed himself in harm's way, and such facts do not support a legally cognizable theory of self-defense.

Given the foregoing, we determine that the evidence did not support a self-defense instruction, and we conclude that the district court did not err when it refused the instruction proposed by Case.

Recording of Telephone Call.

Case next claims that the district court erred when it admitted the recording of the telephone call. Although at trial Case objected to the recording based on both foundation and the alleged discovery violation, his argument on appeal is limited to the discovery violation. We conclude that because Case failed to move for a continuance after the evidence was

provided by the State, Case has waived his right to relief from the State's belated production of the recording.

[9,10] Discovery in a criminal case is generally controlled by either a statute or a court rule. *State v. Hatfield, ante* p. 66, 933 N.W.2d 78 (2019). Nebraska's principal discovery statute, § 29-1912, sets forth a list of evidence that may be subject to discovery at the discretion of the trial court. The list includes a defendant's prior criminal record, the names and addresses of witnesses on whose evidence the charge is based, and documents, papers, books, accounts, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority. Neb. Rev. Stat. § 29-1919 (Reissue 2016) sets forth various remedies the court may employ when there is a claimed violation of a discovery order: The court may (1) order such party to permit discovery or inspection of materials not previously disclosed, (2) grant a continuance, (3) prohibit a party from calling a witness not disclosed or introduce evidence not disclosed, or (4) enter another order as it deems just under the circumstance. We have held that if a continuance would have been a sufficient remedy for a belated disclosure in violation of § 29-1912, a defendant who fails to request a continuance waives any rights he or she may have had pursuant to § 29-1912. *State v. Hatfield, supra*.

The record shows that immediately prior to the start of trial, the court considered Case's objection to admission of the telephone recording on the basis that the State had provided the evidence to Case only the day before trial, which was well beyond the time the State was required to provide evidence pursuant to the court's discovery order. There was some dispute between Case and the State as to whether the recording of the telephone call was evidence subject to discovery under § 29-1912 and the court's discovery order. However, the State argued that because it had provided the evidence to Case, even if such late disclosure violated the discovery order, the proper remedy was not to exclude the evidence but to allow a continuance if Case

requested one. The court overruled Case's objection, and Case did not thereafter request a continuance.

While a court may order that a party not be permitted to offer evidence at trial which it failed to disclose, this court has stated a preference for a continuance in such situations. *State v. Hatfield, supra*. In the circumstances of this case, a continuance would have been a sufficient remedy if Case needed additional time to prepare a defense to the newly disclosed evidence. However, Case failed to request a continuance after the court overruled his objection, and therefore, he waived any right he may have had pursuant to § 29-1912. See *State v. Hatfield, supra*. We therefore conclude that the district court did not err when it admitted the recording of the telephone call into evidence.

Sufficient Evidence to Support Conviction.

Case finally claims that the evidence was not sufficient to support his conviction. We conclude that the evidence was sufficient.

[11] When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, 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. Montoya, ante* p. 96, 933 N.W.2d 558 (2019).

Case was charged with assault by a confined person as a Class IIIA felony in violation of § 28-932(1), which provides in relevant part: "Any person (a) . . . who is legally confined in a jail or an adult correctional or penal institution . . . and (b) who intentionally, knowingly, or recklessly causes bodily injury to another person shall be guilty of a Class IIIA felony . . . ." Case does not dispute that the evidence established that at the time of the altercation with Burley, he was legally confined in the Lancaster County jail. Instead, he argues that the evidence was not sufficient to establish that he intentionally, knowingly,

or recklessly caused bodily injury to Burley. Much of his argument in this regard is based on his theory that he acted in self-defense. However, as discussed above, the evidence did not support a legally cognizable theory of self-defense, and therefore, such argument does not establish that the evidence was not sufficient to support Case's conviction.

There was sufficient evidence, including the video recordings, testimony by witnesses including Burley, and Case's statement in the recording of the telephone call that he "went for" Burley, as well as his own testimony, to support a finding that Case physically assaulted Burley. There was also evidence that Burley suffered bodily injury and that such injury had been caused by Case's physical assault. Case argues that Burley's testimony in particular is not credible; however, we do not pass on the credibility of witnesses on appeal, *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019), and Burley's testimony, if believed, as well as other evidence supports the conviction. Case directs us to his testimony that his intent when he approached Burley was not to assault him but merely to talk to him. Case asserts that this testimony establishes that he did not intentionally, knowingly, or recklessly cause bodily injury to Burley. Again, we do not review the jury's credibility assessments of Case's testimony regarding his intent. We conclude that there was sufficient evidence to support Case's conviction.

CONCLUSION

We conclude that the district court did not err when it refused Case's proposed self-defense instruction; nor did it err when it allowed the recording of the telephone call into evidence. We further conclude that there was sufficient evidence to support Case's conviction. We therefore affirm Case's conviction and sentence.

Affirmed.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Tanner Goes, doing business as Goes Construction, appellee, v. Eric Vogler and Destini Vogler, husband and wife, appellants.

Franklin Drywall, Inc., a Nebraska corporation, appellee, v. Eric Vogler and Destini Vogler, husband and wife, appellants, and FBM Lincoln et al., appellees.

937 N.W.2d 190

Filed January 17, 2020. Nos. S-18-1201, S-18-1203.

1. **Mechanics' Liens: Foreclosure: Equity.** An action to foreclose a construction lien is one grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
4. **Contracts.** A cost-plus contract as generally understood is one where the total cost to the contractor represents the whole payment to be made to him or her, plus a stated percentage of profit.
5. **Contracts: Mechanics' Liens.** Under cost-plus contracts, the amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors.
6. ____: ____. In any cost-plus contract, there is an implicit understanding between the parties that the cost must be reasonable and proper.

Contractors do not have a fiduciary duty under a cost-plus contract as a matter of law, other than those obligations already required by law and the contract.

Appeal from the District Court for Cass County: Michael A. Smith, Judge. Affirmed.

Damien J. Wright and Natalie M. Hein, of Welch Law Firm, P.C., for appellants.

James B. Luers, of Cada, Cada, Hoffman & Jewson, for appellee Tanner Goes.

Troy J. Bird, of Hoppe Law Firm, L.L.C., for appellee Franklin Drywall, Inc.

Timothy W. Nelsen, of Fankhouser, Nelsen, Werts, Ziskey & Merwin, P.C., L.L.O., for appellee Shelton Brothers Construction, LLC.

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

Miller-Lerman, J.

NATURE OF CASE

The appellants, Eric Vogler and Destini Vogler, contracted with Shelton Brothers Construction, LLC (Shelton), for the construction of a residential home. Shelton and two of its subcontractors, Tanner Goes, doing business as Goes Construction (Goes), and Franklin Drywall, Inc. (Franklin), subsequently filed construction liens and brought contract suits claiming unpaid balances for construction services rendered. Following trial on the consolidated cases, the district court determined that the construction contract between the Voglers and Shelton was a cost-plus agreement, that defects in workmanship were punch list items and not a breach by Shelton, and that the Voglers committed the first material breach of contract and owed damages to the contractor and subcontractors. The

Voglers appeal, and we ordered the appeals, S-18-1201 and S-18-1203, consolidated for appeal. On appeal, the Voglers claim, inter alia, that the contract was a fixed-price contract breached by Shelton and that, alternatively, even under a cost-plus contract, Shelton breached a fiduciary duty to provide a full accounting for its bills to the Voglers when it requested draw payments. We affirm with respect to all parties and claims.

FACTS

After the Voglers' home was destroyed by fire, they hired Shelton to construct a new home in Nehawka, Nebraska, on the existing foundation. They hired Shelton as their general contractor. After months of negotiating and discussion, the parties entered into a contract in October 2015, memorialized by exhibits 2, 37, and 47 in the record (the contract). Although paragraph 4 of exhibit 47 states that it is a "cost plus contract" with specific fees for overhead, warranty, and profit to Shelton, elsewhere the contract states that "[t]he agreed upon price is $282,000.00." The contract called for an initial payment of $28,000, with progress payments made as monthly draws. Under the contract, Shelton would be able to request a monthly draw, subject to approval by the Voglers, "as needed to pay for materials and services." The payments were to be made within 10 days of the request.

Shelton and its subcontractors began work in October 2015, and as work progressed, various changes were made to the arrangement contemplated by the contract and the scope of work. One arrangement change was the fact that the Voglers and Shelton mutually waived the requirement of written change orders. One scope of work change was that framing for walls was adjusted and the foundation extended by 2 feet—resulting in modifications to the roof trusses and other features. Some of the changes caused spinoff delays and difficulties scheduling subcontractors. The Voglers became concerned with the lack of progress and communication by Shelton.

The Voglers made the initial downpayment and the first two requested draws. Shelton requested a third draw on February 18, 2016, in the amount of $48,972.54. Alleging shoddy workmanship, a fear that Shelton would not finish the project, and a lack of accounting, the Voglers made only a partial payment on one of the draws requested by Shelton. The district court found that only $19,875.40 was paid on the third draw and that the payments were "as late as March 13, 2016."

The Voglers contend that when making its draw requests, Shelton attached some, but not all, of the invoices from subcontractors and suppliers, and the Voglers expressed concern as to how their money was being spent. In February 2016, Eric Vogler emailed Shelton requesting an accounting for the initial $28,000 downpayment. Shelton did not provide itemizations or documentation of expenses to the Voglers' satisfaction. The Voglers' payments did not equal the draw requests, and Shelton terminated the contract. The Voglers hired another contractor to finish the home, and Shelton, Franklin, and Goes all filed construction liens with varying technical success. The three moved to foreclose upon the liens and asserted contract claims. Two consolidated cases encompassing all parties and claims proceeded to trial.

In orders filed on November 26, 2018, the district court found that the Voglers withheld payment because of their concerns about the quality of the work, that the project would not be completed for the price stated in the contract, and that the work would not be completed on time. The district court stated that "[t]he justification for the Voglers' failure to make timely payments hinges on their assertions that the parties had a fixed-price contract and that the contract required written change orders." The district court concluded that the contract was not ambiguous and that it was for a cost-plus contract price, not a fixed-cost contract price. Although the parties did not sign written change orders regarding changes to the project, the district court found that the parties' mutual

conduct amounted to a waiver of the provisions in the contract requiring written change orders. The court determined that any deficiencies in the quality of the work were punch list items, which would have been cured in the ordinary course of completion of the work, and therefore were not a breach of contract by Shelton. Accordingly, the district court found that the Voglers' suspension of payment constituted a breach of contract.

Although FBM Lincoln was served, it did not enter an appearance or assert an interest in the real estate, and the district court found any interest of FBM Lincoln in the real estate would not be recognized.

In case No. S-18-1201, the district court entered judgment against the Voglers in the amount of $64,603.42, wherein Goes was awarded $26,678 and Shelton received the remainder. In the consolidated case, case No. S-18-1203, the trial court found that Franklin's lien was tardy and unenforceable pursuant to Neb. Rev. Stat. § 52-140 (Reissue 2010); however, the district court repeated its award against the Voglers and in favor of Shelton, but allocated $15,000 of Shelton's award to Franklin based on Franklin's successful breach of contract claim against Shelton. The Voglers appeal.

ASSIGNMENTS OF ERROR

On appeal, the Voglers assert, restated, that the district court erred when it (1) characterized the contract as a cost-plus contract, (2) found that the Voglers committed the first material breach of the contract with Shelton, and (3) awarded damages to Shelton, Franklin, and Goes.

STANDARDS OF REVIEW

[1,2] An action to foreclose a construction lien is one grounded in equity. *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial

court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

[3] A suit for damages arising from breach of a contract presents an action at law. *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722, 915 N.W.2d 786 (2018).

ANALYSIS

The district court and parties have treated this case essentially as one arising from breach of contract. And although the record shows construction liens were filed, we believe the appropriate framework is predominantly a contract action and review the matter accordingly. See *Tilt-Up Concrete v. State City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001). With respect to breach, the central issue is whether the Voglers breached the contract first by failing to make draw payments to Shelton or whether Shelton breached the contract first under various theories advanced by the Voglers. Based on the language of the contract and the evidence at trial, we affirm the orders of the district court which found that the Voglers breached the contract, dismissed the Voglers' cross-claims, and entered money judgments in favor of Shelton, Franklin, and Goes.

On appeal, the Voglers contend that the district court erred when it concluded that the agreement was a cost-plus contract rather than a fixed-price contract. They argue, in the alternative, that even assuming the agreement was a cost-plus contract, Shelton breached its duty to provide information to the Voglers regarding the project cost and budget. They also argue that they are a "[p]rotected party" under Neb. Rev. Stat. § 52-129 (Reissue 2010) and that Shelton, and by extension Franklin, can only recover the difference between the prime contract price and the amount the Voglers had already paid.

The Parties Executed a Cost-Plus Contract.

The Voglers' first claim on appeal is that the district court erred when it characterized the contract as a cost-plus contract. Referring to language in paragraph 4 of the contract, which stated that "[t]he agreed upon price is $282,000.00," the Volgers maintain that the parties intended that the price of the house was fixed and limited to $282,000. We conclude the district court did not err when it concluded that the agreement was a cost-plus contract, and we reject this assignment of error.

The contract language provided in significant part as follows:

> 4. The agreed upon price is $282,000.00 to be paid in monthly draws as needed to pay for materials and services provided during the building process. The first monthly draw shall be $28,000.00 and is due and payable upon signing of this contract. Additional draws to be applied on an as needed basis per month for services rendered and the balance of the contract will be 10% of the contract price at completion. All payments to be rendered from owner's bank to Nebraska Title Company which will in turn distribute money to vendors/contractors as allocated in draw submitted. *This contract is to be executed as a cost plus contract where all costs for the project will be presented to the homeowners and the builder's fees will be completed at 2% for warranty, 5% for overhead and 3% for profit or 10% of the total cost of all work performed.*

(Emphasis supplied.)

[4,5] We have stated that a "cost-plus contract as generally understood is one where the total cost to the contractor represents the whole payment to be made to him, plus a stated percentage of profit." *Grothe v. Erickson*, 157 Neb. 248, 251, 59 N.W.2d 368, 370 (1953). We have explained that under cost-plus contracts, the amount owing the builder should be computed on the basis of the amount actually spent

for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors. *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994).

As noted by the district court, the language of paragraph 4 of the contract, which we have highlighted above, explicitly states that the contract is a "cost plus contract," and it describes the allocation of additional fees for overhead, warranty, and profit. Such language is consistent with the general understanding of a cost-plus contract and inconsistent with a fixed-price contract. Taking the contract language as a whole, the district court did not err when it concluded that the agreement between the Voglers and Shelton was a cost-plus contract. We reject this assignment of error.

No Special Fiduciary Duty of Builder Under Cost-Plus Contract in the Absence of Agreement.

The Voglers claim that even assuming the parties were subject to a cost-plus contract, a contractor in a cost-plus contract has additional fiduciary duties to a homeowner as a matter of law, and that the district court erred by not explicitly discussing whether Shelton breached these duties and, consequently, the contract. As we noted above, we have stated that the "amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors." *Robison v. Madsen*, 246 Neb. at 27-28, 516 N.W.2d at 598. The Voglers contend that given the law just quoted, it necessarily follows that a contractor must provide prompt, detailed accountings of actual costs incurred before taking progress payments and, furthermore, must inform the homeowner of potential cost overruns. The Voglers overstate the obligations of a contractor in general and, given the contract, in this case in particular. We reject this assignment of error.

Although there is case law to suggest that occasionally a cost-plus arrangement may place additional burdens upon a contractor, this is typically recognized where the contract language provides that "the contractor accepts a 'relationship of trust and confidence established' between it and the owner." 2 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner & O'Connor on Construction Law § 6:81 at 641 (2002). For example, in a Maryland appellate case relied on by the Voglers, the contractor accepted a "'relationship of trust and confidence'" with the homeowners and explicitly agreed to further their interests by performing "'the Work . . . in the most . . . economical manner consistent with'" their interests and to "'keep . . . full and detail[ed] accounts.'" *Jones v. J.H. Hiser Constr. Co.*, 60 Md. App. 671, 676, 484 A.2d 302, 304 (1984). Given these provisions, the court held that there was a relationship of trust and confidence between the parties, i.e., a fiduciary relationship grounded in the explicit language of the contract. *Jones v. J.H. Hiser Constr. Co., supra*.

[6] The contract between the Voglers and Shelton does not explicitly contain language creating a fiduciary relationship. As a general matter, it has been observed and we agree that "'[i]n any cost-plus contract there is an implicit understanding between the parties that the cost must be reasonable and proper.'" *Forrest Const. Co., LLC v. Laughlin*, 337 S.W.3d 211, 223 (Tenn. App. 2009) (quoting *Kerner v. Gilt*, 296 So. 2d 428 (La. App. 1974)). However, other than those already required by law and by the parties' contracts, we decline to impose further fiduciary duties on contractors as a matter of law.

Here, the cost-plus contract required that "all costs for the project will be presented to the homeowners and the builder's fees will be completed at . . . 10% of the total cost of all work performed." Under the contract, Shelton was required to present its actual costs to the Voglers to determine the builder's fee at completion. According to the contract, the progress draws were "to be paid in monthly draws as needed to pay

for materials and services." Contrary to the Voglers' argument, we do not read this provision as requiring only retrospective payments nor do we read this provision as requiring extensive accounting. Compare *Forrest Const. Co., LLC v. Laughlin*, 337 S.W.3d at 222 (stating that contract language provided that each draw would be submitted with "'full back-up support for all amounts requested'" and contractor "'shall have full responsibility and obligation to keep full and accurate records of all costs and expenses to satisfy tax laws and [o]wner'" (emphasis omitted)).

Although it appears the Voglers were deeply dissatisfied with their communication with Shelton and did not want to pay prospectively for work not yet performed, the record does not show that Shelton breached any term of the contract. A managing partner in Shelton testified that after the Voglers questioned the initial downpayment, the parties "talked through that, and then additional money was paid out" to "get everybody started." Although it would have been helpful to all parties and to the court if Shelton had provided periodic detailed invoices, it appears from the record that the parties had periodic conversations about the costs which, if believed, were sufficient for the district court to conclude that Shelton's obligations under the contract had been met when it requested draw payments.

Nor does the record show that Shelton breached a duty to keep costs reasonable and proper. It is undisputed that the Voglers, consistent with a cost-plus contract, elected for several changes or upgrades from the initial build plan. Among other aesthetic changes, a wall was moved 2 feet back on the back of the house, and windows, doors, a fireplace, and angled walls were added, increasing the project costs. Although the Voglers raised concerns at trial and on appeal that the project costs would have been unreasonable and improper, the evidence, if believed, was generally consistent with the conclusion that cost overruns were explained by the items added by the Voglers and the necessity of the situation "as is" and that the overruns

were not a failure by Shelton to keep costs reasonable. At trial, a managing partner in Shelton testified that if Shelton had been allowed to finish and the Voglers had followed the allowances, Shelton could have brought the contract in at $282,000 and on time. The district court, having heard the evidence and reviewed the documentation in the record, found that the Voglers breached their contract with Shelton and awarded damages to Shelton and its subcontractors. Where credible evidence is in conflict, we consider 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. *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994). We find no merit to this assignment of error.

Goes' Construction Lien.

The court ordered that Goes was to receive $26,678. The Voglers claim that the court erred in making an award to Goes. The Voglers contend that Goes is not entitled to recover the amount sought in its lien because the Voglers are a "[p]rotected party" contracting owner under § 52-129. Pursuant to Neb. Rev. Stat. § 52-136 (Reissue 2010), lien liability is limited to the difference between the "prime contract price" less payments properly made thereon. However, under Neb. Rev. Stat. § 52-127(2) (Reissue 2010), the "[c]ontract price" is defined, in pertinent part, as "the amount agreed upon by the contracting parties for performing services and furnishing materials covered by the contract, increased or diminished by the price of change orders or extras." The Voglers' argument and claim that it has already paid the prime contract price is not supported by the record, and we reject this assignment of error.

Eric Vogler testified that he had paid $203,485 on the contract with Shelton, but the contract provided for $282,000 even before the cost of changes and extras were added. The Voglers' payments to other entities as part of their project did not reduce their contract liability to Shelton under the contract. The

Voglers remain obligated to Goes and the other parties who perfected liens for the unpaid part of their contract, as ordered by the district court. See § 52-136.

CONCLUSION

We determine that the district court did not err when it found that the contract was a cost-plus contract and that the Voglers breached their contract with Shelton when they failed to pay draws required under the contract. We conclude that Shelton met its obligations under the contract to receive draw payments for materials and to pay subcontractors and that Shelton did not fail to ensure costs were reasonable and proper under the circumstances. Any remaining assignments of error not summarized above have been considered and are without merit. The orders and judgments of the district court are affirmed with respect to all parties and claims.

Affirmed.

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

Kevin Drought and Kyle Fessler, appellants, v. Eric Marsh and The Bar at the Yard, LLC, doing business as Longwells Restaurant, appellees.

937 N.W.2d 229

Filed January 17, 2020. No. S-19-018.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. **Statutes: Judgments: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
3. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** 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.
4. **Employer and Employee: Employment Contracts: Wages: Appeal and Error.** Under Neb. Rev. Stat. § 48-1229 (Cum. Supp. 2018), an appellate court will consider a payment a wage subject to the Nebraska Wage Payment and Collection Act if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Jennifer M. Tomka, of Amen Law, for appellants.

Brian S. Koerwitz, of Endacott, Peetz & Timmer, P.C., L.L.O., for appellees.

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

Cassel, J.

INTRODUCTION

After two employees separated from their employment with a restaurant, they sued for "paid time off" (PTO) compensation under the Nebraska Wage Payment and Collection Act (Wage Act).[1] Upon cross-motions for summary judgment, the district court sustained the employer's motion. Because the employees did not meet the written employment agreement's stated conditions to earn PTO, we affirm the summary judgment.

BACKGROUND

Parties

The Bar at the Yard, LLC, doing business as Longwells Restaurant, is a restaurant and bar in Lincoln, Nebraska. Eric Marsh is the owner of Longwells Restaurant. We will refer to The Bar at the Yard, LLC; Longwells Restaurant; and Marsh collectively as "Longwells."

Kevin Drought worked as the general manager of Longwells from October 2013 to October 22, 2015. He was paid a yearly salary of $80,000. Kyle Fessler worked as Longwells' head chef from October 2013 to December 8, 2015. His annual salary was $49,999.99.

Employment Agreement

Drought and Fessler were required to sign a "Longwells Employee Agreement" in order to obtain employment. Under "Work Hours," the agreement stated in part that "you will be expected to work a minimum of 40 hours per week other than paid time off which is addressed below." The "Termination" provision of the agreement stated that "if, at any point, 60 days

[1] See Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2010, Cum. Supp. 2018 & Supp. 2019).

pass with you billing no hours to a client, this agreement will be considered terminated."

The "Compensation" section of the agreement included the following provisions:

> 1. You will be paid weekly
> 2. Your earnings will be based on your billable hours
> 3. You will be paid <<**employee's hourly wage rate**>> . . . for every hour billed to and approved by the client
> 4. Billable hours are determined based on the Company's understanding with its clients
> 5. You will be required to provide the Engagement Manager with a timesheet signed off by the client designee in order to be paid
> 6. The Company will provide the timesheet template to you separately
> 7. If you do not produce an approved time sheet then you will not be considered to have earned billable hours
> 8. Approved timesheets are to be submitted per the "Time and Expense Reimbursement Policy and Procedure" which will be provided to you separately

The PTO section specified that PTO included vacation, sick days, and holidays. A table showed that when the "Employment Anniversary" is "[l]ess than 2 years," an employee would earn 4 hours of PTO "per 40 hour + week billed." Once the employment anniversary reached 2 years, the amount of PTO earned increased to 5 hours.

Lawsuit

After separating from employment, Drought and Fessler requested compensation for PTO that they claimed had been earned but not paid. Longwells refused the requests. Drought and Fessler then sued Longwells, alleging a violation of the Wage Act. They asserted that the employment agreement governed PTO to be paid. The complaint alleged that Longwells owed PTO of $16,430.86 to Drought and $10,027.61 to Fessler.

As an affirmative defense, Longwells asserted mutual mistake. But Longwells also asserted that if the court found that the employment agreement should not be rescinded or reformed based upon mutual mistake, Drought and Fessler's claims were barred by the terms of the agreement. Specifically, Longwells contended that no PTO accrued under the agreement, because Drought and Fessler did not have billable hours and did not bill hours to a client.

Summary Judgment

The parties filed cross-motions for summary judgment. The evidence was undisputed that as salaried employees, Drought and Fessler were not required to keep track of their hours worked. It was also undisputed that Drought and Fessler did not have clients or billable hours.

Drought and Fessler claimed to have "easily worked at least 40 hours per week," but Marsh stated that Drought worked less than 30 hours in a week on multiple occasions. Drought testified in a deposition that he was paid a salary every week regardless of the number of hours he worked. Drought took 1 week of vacation in 2014, and Longwells paid him for that vacation time. Fessler took 1 week of vacation in 2014 and in 2015, and he similarly stated that Longwells paid him for that vacation time. Marsh testified that Drought and Fessler took time off, but that there was never a PTO offer or policy. Marsh testified that he "never docked anyone's salary when they were off for sick time or vacation time." According to Marsh, PTO was not discussed at the time of hiring, was not a term of employment, and neither he nor Drought or Fessler knew the PTO clause was in the agreement when it was signed.

Marsh stated that he asked Drought and Fessler to sign the employment agreement for the sole purpose of the noncompete provision. The employment agreement was based off a document used by an information technology company that employed independent contractors who serviced clients of the

information technology company. According to Marsh, the agreement contained a number of provisions that were never intended to apply to employees of Longwells.

The court found that there was no dispute payment for accrued PTO is compensation for labor or services and that Drought and Fessler each signed the employment agreement containing a provision for PTO. The court framed the dispute as whether Drought and Fessler satisfied the terms of the employment agreement in order to be entitled to PTO. The court found that Drought and Fessler could not have earned any PTO because they did not have timesheets signed by clients nor did they have billable hours. The court determined that hours worked did not equate to hours billed and that there was no agreement to provide PTO based on hours "worked." The court reasoned that because Drought and Fessler did not bill any hours to clients, they could not have earned any PTO under the plain language of the employment agreement. Thus, the court sustained Longwells' motion for summary judgment, overruled Drought and Fessler's motion, and dismissed the complaint.

Drought and Fessler filed a timely appeal.

ASSIGNMENTS OF ERROR

Drought and Fessler assign that the court erred in (1) failing to find that they were entitled to their earned but unused PTO; (2) failing to find that there were terms in the employment agreement that were inapplicable to their employment situation, in finding that they did not earn PTO because they could not prove billable hours, and in failing to address that there could be no mutual mistake in a unilateral employment agreement; (3) failing to find that the parties' understanding and agreement of how PTO was earned was demonstrated by the fact that both Drought and Fessler had been paid for PTO before their terminations; and (4) sustaining Longwells' motion for summary judgment and overruling Drought and Fessler's motion for summary judgment.

STANDARD OF REVIEW

[1] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2]

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

ANALYSIS

Wage Act

The Wage Act requires an employer to pay "unpaid wages" to an employee who separates from the payroll.[4] It defines "[w]ages" to include "fringe benefits, when previously agreed to and conditions stipulated have been met by the employee."[5] The Wage Act further provides that "[p]aid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective-bargaining representative have specifically agreed otherwise."[6]

[3] In *Fisher v. PayFlex Systems USA*,[7] a majority of this court determined that because the employees in that case could use PTO hours for any purpose, the unused PTO hours must be treated the same as earned but unused vacation hours, i.e., a wage that must be paid upon separation of employment.

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[2] *Williamson v. Bellevue Med. Ctr., ante* p. 312, 934 N.W.2d 186 (2019).

[3] *Professional Firefighters Assn. v. City of Omaha*, 290 Neb. 300, 860 N.W.2d 137 (2015).

[4] § 48-1230(4)(a).

[5] § 48-1229(6).

[6] *Id.*

[7] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

The dissent identified two difficulties in applying the law to the facts of the case: (1) The Legislature did not define the term "'vacation leave'" and (2) the employer's PTO policy allowed employees to use PTO for both vacation and other purposes in the employee's discretion.[8] Although the dissent invited clarification by further amendment of the statute and the Legislature indeed amended § 48-1229 the following year,[9] it did not provide any clarification regarding vacation leave or fringe benefits payable upon separation. 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.[10] Thus, PTO which can be used as vacation leave should be treated the same as earned but unused vacation leave under the Wage Act.

Entitlement to PTO Under Agreement

The crux of Drought and Fessler's argument is that Longwells owed them PTO because the employment agreement—which they were required to sign—contained a section concerning PTO. We disagree.

[4] The statute imposes three requirements. Under § 48-1229, an appellate court will consider a payment a wage subject to the Wage Act if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.[11] Here, the decision turns upon the third requirement.

Drought and Fessler's claim fails the third requirement, because they did not satisfy the conditions set forth in the

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[8] *Id.* at 824, 829 N.W.2d at 716 (Stephan, J., dissenting; Heavican, C.J., and Cassel, J., join).

[9] 2014 Neb. Laws, L.B. 765, § 1.

[10] *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

[11] *Fisher v. PayFlex Systems USA, supra* note 7.

agreement. Under the agreement, an employee earned PTO "per 40 hour + week billed." The agreement specified that earnings were based on billable hours and that an employee will not be considered to have earned billable hours if the employee did not produce an approved timesheet "signed off" by a client designee. But Drought and Fessler were paid a set salary—they did not have clients, did not have billable hours, and did not submit timesheets.

Drought and Fessler attribute significance to the past payment of vacation time. They argue that if billing clients and proving a 40-hour workweek had been required to earn PTO, Longwells would not have paid them for their PTO during their employment. But it appears from the evidence that as salaried employees, Drought and Fessler were paid the same amount each week no matter how many, if any, hours they worked.

Drought and Fessler assign that the district court erred in failing to address Longwells' assertion of a mutual mistake, which they argue does not apply to a unilateral employment agreement. However, the court had no need to do so. Drought and Fessler claimed they were entitled to PTO due to the inclusion of a PTO section in the employment agreement. But because they did not meet the conditions required under the written employment agreement to earn PTO, it is not a wage subject to the Wage Act.[12]

CONCLUSION

There is no dispute that Drought and Fessler did not bill to clients more than 40 hours of work per week. Accordingly, they did not earn PTO under the terms of the employment agreement. We affirm the order of the district court which granted summary judgment in favor of Longwells.

Affirmed.

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[12] See *id.*

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

In re Interest of Zoie H., a child under 18 years of age. State of Nebraska, appellee, v. Zoie H. appellant.

937 N.W.2d 801

Filed January 24, 2020. No. S-18-1028.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Constitutional Law: Appeal and Error.** The review of constitutional standards is a question of law and is reviewed independently of the trial court's determination.
4. **Constitutional Law: Statutes: Waiver.** The proper procedure for raising a facial constitutional challenge to a criminal statute is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
5. **Constitutional Law: Convictions: Statutes.** A defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution.
6. **Criminal Law: Jury Trials.** When considering a criminal defendant's right to a jury trial, it is well established that the right does not extend to those criminal offenses categorized as petty but attaches only to those crimes that are considered serious offenses.
7. **Jury Trials: Sentences: Time: Legislature.** The right to a jury trial attaches when the potential term of incarceration exceeds 6 months or if the additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a serious one.

8. **Juvenile Courts.** Juvenile adjudications are civil, not criminal, in nature.
9. **Juvenile Courts: Weapons.** The prohibition on possessing firearms in Neb. Rev. Stat. § 28-1204.05 (Cum. Supp. 2018) is not punishment imposed for a prior juvenile adjudication.
10. **Constitutional Law: Juvenile Courts: Jury Trials.** A juvenile court proceeding is a civil proceeding, and under the doctrine of parens patriae, the constitutional guarantees of a jury trial and the incidents thereto are not applicable to a juvenile proceeding.
11. **Criminal Law: Evidence.** The owner of chattel may testify as to its value in a criminal case.

Appeal from the Separate Juvenile Court of Lancaster County: Roger J. Heideman, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, James G. Sieben, and Mark D. Carraher for appellant.

Patrick F. Condon, Lancaster County Attorney, Mary Norrie, and Elise Harris, Senior Certified Law Student, for appellee.

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

Stacy, J.

Zoie H. appeals from an order of the separate juvenile court adjudicating her pursuant to Neb. Rev. Stat. § 43-247(2) (Reissue 2016) for the act of attempted theft by unlawful taking, $5,000 or more. We affirm.

I. BACKGROUND

On the afternoon of September 25, 2018, Heidi Cuca was fueling her Lexus at a convenience store in Lincoln, Nebraska. While standing outside the Lexus, Cuca observed two young females had entered her vehicle and were seated inside—one in the driver's seat and the other in the backseat. The female in the driver's seat was later determined to be Zoie.

It appeared to Cuca that Zoie was trying to start the Lexus, but was having trouble getting the engine to turn over. Cuca heard the female in the back seat shout, "'Zoie let's go.'" So

Cuca attempted to retrieve the Lexus keys from inside the vehicle and throw them. An altercation ensued, during which Zoie shouted, "'Don't, let me go. I'm going to take it.'" The convenience store manager heard Cuca yelling for help and called the 911 emergency dispatch service.

Zoie escaped before police arrived, but someone was able to grab Zoie's arm and hold her long enough for Cuca to take a photograph. Cuca provided the photograph to police, who eventually located Zoie and contacted her at school a few days later.

Sgt. Mike Ripley, an officer with the Lincoln Police Department, met with Zoie and her father to conduct a followup investigation. Zoie waived her *Miranda* rights and agreed to an interview. Zoie admitted she made plans to steal the Lexus, explaining she "'just felt like taking the car.'" Zoie described how she and a friend entered the Lexus from the passenger side while Cuca was fueling up on the other side. Zoie also described the altercation that ensued and how she eventually escaped.

1. Juvenile Court Proceedings

On October 16, 2018, the State filed an amended supplemental petition in the separate juvenile court of Lancaster County. It alleged that on or about September 25, 2018, Zoie intentionally engaged in conduct which, under the circumstances as she believed them to be, constituted a substantial step in a course of conduct intended to culminate in her commission of the crime of theft by unlawful taking in the amount of $5,000 or more. Attempted theft by unlawful taking is a Class IIIA felony when the value of the thing involved is $5,000 or more.[1]

Zoie filed a motion to quash the amended supplemental petition. Alternatively, she filed a demand for jury trial. Both requests were premised on the enactment of Neb. Rev. Stat.

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[1] See Neb. Rev. Stat. §§ 28-201(4)(c), 28-511, and 28-518(1) (Reissue 2016).

§ 28-1204.05 (Cum. Supp. 2018), which went into effect on July 19, 2018, and provides in pertinent part:

> (1) . . . [A] person under the age of twenty-five years who knowingly possesses a firearm commits the offense of possession of a firearm by a prohibited juvenile offender if he or she has previously been adjudicated an offender in juvenile court for an act which would constitute a felony or an act which would constitute a misdemeanor crime of domestic violence.
>
> (2) Possession of a firearm by a prohibited juvenile offender is a Class IV felony for a first offense and a Class IIIA felony for a second or subsequent offense.

Other portions of the statute exempt members of the armed forces and law enforcement[2] and establish a procedure for those under 25 years of age to request reinstatement of the right to possess a firearm.[3] Zoie was not charged with violating § 28-1204.05, but her motion to quash alleged that adjudication for theft by unlawful taking over $5,000 "would subject [her] to criminal prosecution under an unconstitutional statute, Neb. Rev. Stat. § 28-1204.05 (Cum. Supp. 2018)." Zoie's demand for a jury trial was also premised on the enactment of § 28-1204.05. Generally speaking, she argued that the statute's restriction on firearm possession amounted to a penalty for being adjudicated and thereby rendered the adjudication proceedings a "serious criminal case" entitling her to a jury trial pursuant to *Duncan v. Louisiana*[4] and *State v. Wiltshire*.[5]

After holding a hearing, the juvenile court overruled the motion to quash, finding there was no defect on the face of

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[2] See § 28-1204.05(3).

[3] See § 28-1204.05(4).

[4] *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

[5] *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

the amended supplemental petition. The juvenile court denied the demand for jury trial, reasoning that Neb. Rev. Stat. § 43-279(1) (Reissue 2016) requires the adjudication portion of juvenile court proceedings "shall be conducted before the court without a jury, applying the customary rules of evidence in use in trials without a jury." The matter proceeded to an adjudication hearing on the amended supplemental petition.

2. Adjudication Hearing

At the adjudication hearing, the State called three witnesses: Cuca, the convenience store manager, and Sergeant Ripley. Cuca described the events of September 25, 2018, as set out above, and identified Zoie as the female who attempted to steal the Lexus. The manager largely confirmed Cuca's testimony, and she too identified Zoie as the female who attempted to steal the Lexus. Sergeant Ripley testified about his interview with Zoie, including that she received *Miranda* warnings prior to the interview.

Both Cuca and Sergeant Ripley offered testimony about the value of the Lexus. Cuca testified that she purchased the 2012 Lexus RX350 3 years earlier for around $21,000 and that it currently had 60,000 miles on it. When Cuca was asked her opinion on the value of the Lexus, Zoie objected to the question as speculative. The objection was overruled, and Cuca answered that according to Kelley Blue Book, the value of her Lexus with 60,000 miles "is around $21,000 list price." There was no motion to strike Cuca's response and no cross-examination on Cuca's valuation testimony.

Sergeant Ripley also relied on Kelley Blue Book for his valuation testimony. He estimated the "average trade in value" of the Lexus was $15,529. He did not contact Cuca to get information on the vehicle's mileage, condition, or accessories. Instead, he used the value for a "base model" Lexus in "good" condition with 75,000 miles. When asked on cross-examination what the value of the Lexus would be if its condition had been "poor," Sergeant Ripley estimated it would still be between $10,000 and $12,000. He testified it was unlikely a 2012

Lexus in working condition would be worth less than $5,000. He based his opinion on his experience investigating car thefts and his research into the value of Cuca's Lexus. There was no objection to Sergeant Ripley's valuation testimony or to the admission of the Kelley Blue Book printout showing that valuation.

Zoie rested without presenting any evidence. In a journal entry and order filed October 23, 2018, the juvenile court adjudicated Zoie on the allegations of the amended supplemental petition, finding the State proved beyond a reasonable doubt that Zoie was a juvenile as described in § 43-247(2).

Zoie timely appealed and filed a petition to bypass that included a notice of constitutional question under Neb. Ct. R. App. § 2-109(E) (rev. 2014). We granted the petition to bypass.

II. ASSIGNMENTS OF ERROR

Zoie assigns, restated, that the juvenile court erred by (1) overruling her motion to quash, (2) denying her demand for jury trial, and (3) finding she committed the act of attempted theft by unlawful taking, $5,000 or more, when the State failed to meet its burden of proof regarding the value of the vehicle.

III. STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[6]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[7]

[3] The review of constitutional standards is a question of law and is reviewed independently of the trial court's determination.[8]

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[6] *In re Adoption of Micah H.*, 301 Neb. 437, 918 N.W.2d 834 (2018).

[7] See *id.*

[8] *State v. Montoya, ante* p. 96, 933 N.W.2d 588 (2019).

IV. ANALYSIS

1. Motion to Quash

[4] Neb. Rev. Stat. § 29-1808 (Reissue 2016) provides, "A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." We have consistently held that the proper procedure for raising a facial constitutional challenge to a criminal statute is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.[9]

But here, Zoie's motion to quash did not challenge the constitutionality of the criminal statute on which she was being adjudicated. Instead, her motion to quash raised a facial constitutional challenge to an entirely different statute, § 28-1204.05. Zoie sought to quash the amended supplemental petition by arguing that adjudication for acts that would constitute theft by unlawful taking over $5,000 "would subject [her] to criminal prosecution under an unconstitutional statute, Neb. Rev. Stat. § 28-1204.05."

[5] In the criminal context, a defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution.[10] We have generally described this as a rule of standing and have applied it to motions to quash in a criminal prosecution, reasoning that a defendant has standing to challenge only those statutes that are relevant to the prosecution.[11] We conclude this rule is equally applicable to motions to quash filed in juvenile adjudication proceedings.

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[9] *State v. Hibler*, 302 Neb. 325, 923 N.W.2d 398 (2019).

[10] *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012); *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999).

[11] See *id.*

Zoie was being adjudicated for acts which would constitute felony theft by unlawful taking, and her motion to quash challenged the constitutionality of § 28-1204.05, a statute that was collateral to the adjudication, and which would apply, if at all, only after an adjudication. Zoie was attempting to avoid adjudication by challenging the constitutionality of a statute that was irrelevant to the statutes under which the State was seeking adjudication, and the juvenile court correctly overruled the motion to quash.

Given our resolution of this assignment of error, we do not reach, in this appeal, any of Zoie's constitutional challenges to § 28-1204.05.

2. Demand for Jury Trial

In her second assignment of error, Zoie argues that if § 28-1204.05 is constitutional, it effectively transforms a juvenile adjudication for an act which would be a felony or a misdemeanor act of domestic violence into a serious criminal offense to which the right to a jury trial attaches.

[6,7] When considering a criminal defendant's right to a jury trial, it is well established that the right does not extend to those criminal offenses categorized as "'petty,'" but attaches only to those crimes that are considered "serious[]" offenses.[12] This court has said that the right to a jury trial attaches when the potential term of incarceration exceeds 6 months or if the "'additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one.'"[13]

Zoie urges us to apply the "serious offense" test to her juvenile adjudication, and she asks us to find that the passage of § 28-1204.05 reflects a legislative determination that

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[12] See *Blanton v. North Las Vegas*, 489 U.S. 538, 541, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989).

[13] *Wiltshire, supra* note 5, 241 Neb. at 820-21, 491 N.W.2d at 327.

juvenile adjudications for acts which would constitute a felony are serious offenses that must be tried to a jury. Her argument is premised on the fundamental assumption that § 28-1204.05 imposes a criminal penalty for juvenile adjudication. We explore that assumption first and reject it. We then consider the right to jury trial generally in juvenile court adjudications, and we conclude the juvenile court correctly denied Zoie's demand for a jury trial.

(a) § 28-1204.05 Is Not Penalty for Juvenile Adjudication

To address Zoie's argument that § 28-1204.05 transforms juvenile adjudications into serious offenses that require a jury trial, we first consider whether § 28-1204.05 can fairly be characterized as punishing juvenile adjudication at all. The answer to this question is key because if § 28-1204.05 is not punishment imposed for her juvenile adjudication, then Zoie's argument that § 28-1204.05 transforms the adjudication into a serious offense necessarily fails.

[8] In the criminal context, we often analyze such questions using the "'intent-effects'" test established by the U.S. Supreme Court, "which requires an initial determination of whether the Legislature intended the statute to be criminal or civil [in nature]."[14] But juvenile adjudications are civil, not criminal, in nature. As we explained in *In re Interest of Laurance S.*:[15]

> "We have long recognized that a juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution. . . . The purpose of our statutes relating to the handling of youthful offenders is the education,

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[14] See *State v. Payan*, 277 Neb. 663, 670, 765 N.W.2d 192, 200 (2009) (applying test from *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)).

[15] *In re Interest of Laurance S.*, 274 Neb. 620, 624, 742 N.W.2d 484, 488 (2007).

> treatment, and rehabilitation of the child, rather than retributive punishment. . . . The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature."

A juvenile adjudication does not result in a conviction and sentence; instead, when a juvenile is adjudicated for acts which would constitute a felony, Neb. Rev. Stat. § 43-286 (Cum. Supp. 2018) sets out the dispositional options available to the juvenile court. And even when a disposition is similar to that imposed as punishment for a crime, we have not found the disposition to be punishment.[16] Because juvenile adjudications are civil rather than criminal in nature, it is difficult to envision any circumstance under which a juvenile disposition could be successfully challenged as punishment.

Here, of course, the prohibition on possessing firearms contained in § 28-1204.05 is not part of the juvenile code, but, rather, it is contained within the statutory provisions governing criminal offenses. To answer the question whether § 28-1204.05 is properly characterized as punishment for the juvenile adjudication, we find guidance in our holding in *State v. Peters*.[17]

In that case, we held that a similar statute, Neb. Rev. Stat. § 28-1206 (Reissue 1995), which prohibits firearm possession by convicted felons, does not impose punishment for the prior felony. We reasoned that although § 28-1206 punished the specific conduct of possessing a firearm after being convicted of a felony, it did not increase the punishment for the prior felony. In *Peters*, we recognized that one's status

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[16] See, e.g., *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007) (dispositional order of restitution in juvenile court rehabilitative in nature and not punishment); *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989) (dispositional placement of juvenile in youth training center is not punishment, but, rather, is furnishing of protection, care, and training by State as substitution for parental authority).

[17] *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001).

as a convicted felon made the statutory firearm prohibition applicable, but we found the legal consequences for the past criminal conduct remain unchanged. Stated differently, the statutory prohibition on possessing firearms may be a collateral consequence of a prior felony conviction, but it is not part of the punishment imposed for that prior felony conviction. We noted that the majority of jurisdictions agree that statutes prohibiting felons from possessing firearms "are viewed not as further punishment for the underlying felony or felonies, but as a future prohibition on a felon's conduct."[18]

[9] Given our holding in *Peters* that the prohibition on possessing firearms in § 28-1206 is not punishment for the prior felony conviction, we likewise hold that the prohibition on possessing firearms in § 28-1204.05 is not punishment imposed for a prior juvenile adjudication. We therefore reject Zoie's argument that § 28-1204.05 transformed her juvenile adjudication into a serious offense and entitled her to a jury trial. And as we explain below, we see no other legal basis on this record to support Zoie's demand for a jury trial in her juvenile court adjudication.

(b) No Constitutional Right to Jury in Juvenile Adjudications

The U.S. Supreme Court in *McKeiver v. Pennsylvania*[19] held that a jury trial is not constitutionally required in a juvenile court's adjudicative stage. The plurality opinion discussed the Court's earlier decisions in *Kent v. United States*,[20] *In re Gault*,[21] and *In re Winship*[22] and reasoned generally that the

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[18] *Id.* at 422, 622 N.W.2d at 924.

[19] *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

[20] *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

[21] *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[22] *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

full spectrum of criminal constitutional rights afforded adults has not been imposed on juvenile court proceedings. *McKeiver* emphasized, however, that if a state decides to offer jury trials in juvenile adjudications that would be its "privilege and not its obligation."[23]

Post-*McKeiver*, some states have extended the right to jury trial to juvenile adjudications under certain circumstances, through either statutes or court decisions.[24] But the majority have not,[25] including Nebraska.

Nebraska's preeminent case on the issue is the pre-*McKeiver* case of *DeBacker v. Brainard*.[26] There, we considered a habeas petition challenging the constitutionality of a recently enacted statute requiring that juvenile court hearings "shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts."[27] The juvenile at issue had been adjudicated delinquent for the act of forgery, a felony, and

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[23] *McKeiver, supra* note 19, 402 U.S. at 547.

[24] See, e.g., Kan. Stat. Ann. § 38-2357 (Cum. Supp. 2018) (granting juveniles right to request jury trial); Mass. Gen. Laws Ann. ch. 119, § 55A (West 2017) (requiring trial by jury unless waived); *In re L.M.*, 286 Kan. 460, 186 P.3d 164 (2008) (holding juvenile code lost its parens patriae character and concluding juveniles have right to jury trial under Kansas Constitution); *RLR v. State*, 487 P.2d 27 (Alaska 1971) (holding state constitution guarantees juvenile's right to jury trial).

[25] See, e.g., Conn. Gen. Stat. Ann. § 54-76e (West 2009) ("trial shall be held by the court without a jury"); § 43-279; S.D. Codified Laws § 26-7A-30 (2016) (lists rights of juveniles but does not include right to jury trial); *In re A.K.*, 825 N.W.2d 46, 51 (Iowa 2013) ("[n]either statutory nor constitutional provisions guarantee juveniles the right to a jury trial"); *State v. Burns*, 205 S.W.3d 412, 416 (Tenn. 2006) ("legislature has determined that, while they are still within the juvenile court system, our juveniles are to be tried by judges, not juries"); *Richard M. v. Superior Court*, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971) (jury trial is inapplicable in juvenile proceedings).

[26] *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508 (1968).

[27] Neb. Rev. Stat. § 43-206.03 (Reissue 1968).

was placed at a boys' training school. He filed a petition for writ of habeas corpus, alleging § 43-206.03 was unconstitutional because it denied him the right to a jury trial. The district court rejected the constitutional claim and denied habeas relief. On appeal, four members of this court opined that the new statute was unconstitutional because it denied juveniles the right to a jury trial for acts that would be felonies if charged as an adult. In large part, the majority read the U.S. Supreme Court's *In re Gault* decision to require such a result. Three judges, however, found *In re Gault* "does not hold or even infer that a jury trial is essential to due process in a delinquency case, even where the supporting evidence points to criminal conduct on the part of the juvenile."[28] Due to the absence of a supermajority under Neb. Const. art. V, § 2, this court affirmed the dismissal of the habeas petition.[29]

[10] The following year, a majority of this court again held that "a juvenile court proceeding, under the controlling statute in the State of Nebraska, is a civil proceeding and under the doctrine of parens patriae, the constitutional guarantees of a jury trial and the incidents thereto are not applicable to a juvenile proceeding under our statute."[30]

Currently, § 43-279(1) provides in part: "The adjudication portion of hearings shall be conducted before the court without a jury, applying the customary rules of evidence in use in trials without a jury." Zoie does not directly challenge the constitutionality of § 43-279(1), but instead argues that the enactment of § 28-1204.05 "elevates felonies alleged in juvenile court to 'serious criminal case' status [so] the constitutional requirement of a jury trial right supersedes the language in § 43-279(1)."[31]

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[28] *DeBacker, supra* note 26, 183 Neb. at 477, 161 N.W.2d at 516.

[29] See, also, *Laurie v. State*, 108 Neb. 239, 188 N.W. 110 (1922) (juvenile petition does not charge crime and does not entitle juvenile to jury trial).

[30] *McMullen v. Geiger*, 184 Neb. 581, 584, 169 N.W.2d 431, 433 (1969). See, also, *Laurie, supra* note 29.

[31] Brief for appellant at 45.

Recognizing that juvenile adjudications are civil in nature, and having rejected the premise that § 28-1204.05 imposes a penalty for juvenile adjudication, we agree with the juvenile court that § 43-279(1) requires a juvenile adjudication hearing to be conducted without a jury. Zoie's second assignment of error lacks merit.

3. Burden of Proof Regarding Value of Property

In her final assignment of error, Zoie argues that the evidence presented at the adjudication hearing was insufficient to prove the value of the Lexus. The amended supplemental petition alleged Zoie committed acts which would constitute the Class IIIA felony of attempted theft by unlawful taking, $5,000 or more. Under § 28-518(8), value is an essential element of the offense of theft which must be proved beyond a reasonable doubt.

The juvenile court found the State had met its burden of proof and adjudicated Zoie under § 43-247(2) as a juvenile who committed an act which would constitute a felony under the laws of this State. On appeal, Zoie challenges only the sufficiency of the evidence regarding the value of the Lexus, and we limit our analysis accordingly. After a de novo review of the record, we find the State met its burden of proving that the Lexus had a value of $5,000 or more.

[11] It has long been the rule in Nebraska that the owner of chattel may testify as to its value in a criminal case.[32] At the adjudication hearing, Cuca testified that her Lexus had a value "around $21,000." The investigating officer testified, based on his experience investigating car thefts and his research into the value of Cuca's Lexus, that it had a value of $15,529 if it was in good condition. Moreover, he testified it would have a value in excess of $10,000 even in poor condition. Zoie did not object to this testimony and presented no evidence to the contrary.

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[32] See *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982).

On this record, we find the State presented sufficient evidence to prove beyond a reasonable doubt that the value of the Lexus was $5,000 or more. We therefore conclude that the evidence was sufficient to adjudicate Zoie under § 43-247(2) and that her third assignment of error has no merit.

V. CONCLUSION

For the foregoing reasons, we affirm the juvenile court's order.

Affirmed.

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

Cheryl Loyd, appellant, v. Family Dollar Stores of Nebraska, Inc., appellee.

937 N.W.2d 487

Filed January 24, 2020. No. S-19-230.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Workers' Compensation: Final Orders: Appeal and Error.** There are three types of final orders which may be reviewed on appeal, one of which is an order that affects a substantial right made during a special proceeding. Because workers' compensation proceedings are special proceedings, the issue is whether the court's order is final.
5. **Workers' Compensation: Compromise and Settlement.** Under Neb. Rev. Stat. § 48-139(2)(b)(iv) (Reissue 2010), if an application for approval of a lump-sum settlement is not approved, the compensation court may (1) dismiss the application at the cost of the employer or (2) continue the hearing, in the discretion of the compensation court.
6. **Rules of the Supreme Court: Attorney and Client: Jurisdiction: Appeal and Error.** The Nebraska Rules of Professional Conduct do not authorize appellate jurisdiction over adverse rulings on claims involving privilege.
7. **Appeal and Error.** The right of appeal in Nebraska is purely statutory.
8. **Pretrial Procedure: Final Orders: Attorney and Client: Appeal and Error.** In the context of discovery orders, an interlocutory order

compelling the production of documents for which a claim of privilege is asserted is appealable neither as a final order nor under the collateral order doctrine.

Appeal from the Workers' Compensation Court: John R. Hoffert, Judge. Appeal dismissed.

Michael W. Meister for appellant.

Patrick J. Sodoro and Lyndsey A. Canning, of Law Office of Patrick J. Sodoro, L.L.C., for appellee.

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

Heavican, C.J.

INTRODUCTION

This is an appeal from an order disapproving the parties' application for an order approving a lump-sum settlement on the grounds that the application was not in compliance with the Nebraska Workers' Compensation Act.[1] The Nebraska Workers' Compensation Court found the application was not in the best interests of the claimant, after the claimant's attorney objected to the compensation court's requirement that he disclose the amount of his fees. Because the compensation court's order of disapproval was not a final, appealable order, we dismiss this appeal for lack of jurisdiction.

BACKGROUND

On October 12, 2016, the appellant, Cheryl Loyd, filed a petition seeking benefits under the Nebraska Workers' Compensation Act for injuries sustained while performing her job duties at Family Dollar Stores of Nebraska, Inc. (Family Dollar), the appellee in this matter. Loyd claimed she had been injured while unloading a truck and had developed a hernia as a result. Family Dollar initially denied the claims, but

[1] See Neb. Rev. Stat. § 48-101 et seq. (Reissue 2010, Cum. Supp. 2018 & Supp. 2019).

later agreed to settle the dispute for a lump-sum payment of $150,000, along with the establishment of an interest-bearing account for additional medical payments. Because Loyd is a Medicare beneficiary, § 48-139(1)(a) requires the lump-sum settlement to be submitted to the compensation court for approval. After the application for approval was submitted, the compensation court requested that the parties make certain revisions to the application, provide an itemized list of medical expenses, and provide the amount of fees and costs to be paid from the settlement amount to Loyd's attorney.

In response to the compensation court's request, the parties filed a joint stipulation, which included the requested revisions and medical expenses. However, the stipulation did not include the amount of fees and costs, because Loyd's attorney objected to the required disclosure. After a hearing on the objection, on February 15, 2019, the compensation court issued a written "Order of Disapproval of Lump Sum Settlement Application and Joint Stipulation." In its order, the compensation court found it had the authority to order that the amount of attorney fees and costs be disclosed under § 48-139, because the statute requires a determination of whether the application and joint stipulation are in conformity with the compensation schedule and in the best interests of an employee "under all the circumstances."

Without the amount of fees and costs, the court determined it was unable to review and approve such fees, as required by § 48-108, and found that the application and joint stipulation were not in compliance with the Nebraska Workers' Compensation Act and not in the best interests of Loyd. Both parties appeal the compensation court's refusal to approve the application for a lump-sum settlement.

ASSIGNMENTS OF ERROR

Each of the parties' assignments of error relates to the compensation court's requirement that Loyd disclose her attorney fees as a prerequisite to approving the lump-sum settlement agreement.

Loyd assigns that the compensation court erred in (1) failing to recognize that the objection to the required disclosure of attorney fees and costs was Loyd's assertion of her attorney-client privilege and not her attorney's own objection; (2) misinterpreting and misapplying § 48-108, which has always been applied to fee disputes between clients and attorneys or between law firms; and (3) reading meaning into §§ 48-108 and 48-139 that was not warranted by the language of the statutes.

Family Dollar's sole assignment of error is that the compensation court erred in denying the parties' settlement application for failure to disclose Loyd's fee agreement with her attorney, because it hindered the parties' expectations for settlement compared to the time, costs, and uncertainty associated with trial. We note that although Family Dollar assigned error, it failed to properly present a cross-appeal pursuant to Neb. Ct. R. App. P. § 2-109 (rev. 2014), because it did not include the required cross-appeal designation on the cover of its brief.

STANDARD OF REVIEW

[1] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[2]

[2] A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.[3]

ANALYSIS

[3] The threshold issue we must first address is whether this court has jurisdiction over the appeal. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken;

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[2] *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018).

[3] *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[4]

[4] There are three types of final orders which may be reviewed on appeal,[5] one of which is an order that affects a substantial right made during a special proceeding.[6] Because workers' compensation proceedings are special proceedings, the issue is whether the court's order is final.[7]

In a special proceeding, an order is final and appealable if it affects a substantial right of the aggrieved party. An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.[8] Stated another way, an order affects a substantial right if it "'"affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing."'"[9]

Loyd asserts that this court has jurisdiction because the appeal was filed within 30 days of the compensation court's order disapproving the lump-sum settlement agreement and joint stipulation. Loyd further asserts that this court has jurisdiction over the appeal, because it centers around § 3-501.6 of the Nebraska Rules of Professional Conduct[10] and the comment section of the rule specifically allows for appeal under the circumstances presented in this case.

Compensation Court's Disapproval.

[5] Under § 48-139(2)(b)(iv), if an application for approval of a lump-sum settlement is not approved, the compensation

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

[5] Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[6] *Id.*

[7] *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

[8] *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

[9] *Id.* at 581, 879 N.W.2d at 33-34 (quoting *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015)).

[10] See Neb. Ct. R. of Prof. Cond. § 3-501.6 (rev. 2019).

court may (1) dismiss the application at the cost of the employer or (2) continue the hearing, in the discretion of the compensation court. Here, the compensation court did neither. Instead, it entered an order of disapproval.

The order of disapproval did not impact the subject matter of the proceeding. Nor did it prevent Loyd from submitting another application for approval. Loyd's case is retained for further action. Absent an order actually dismissing the application, there is no final and appealable order from which Loyd can appeal. We conclude that the compensation court's order of disapproval, standing alone, is not a final, appealable order.

Nebraska Rules of Professional Conduct.

[6] The Nebraska Rules of Professional Conduct do not, as Loyd suggests, authorize appellate jurisdiction over adverse rulings on claims involving privilege. Comment 11 of § 3-501.6 provides:

> A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[7] Comment 11 does not confer appellate jurisdiction. The right of appeal in Nebraska is "'purely statutory.'"[11] Comment

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[11] *Heckman, supra* note 3, 296 Neb. at 461, 894 N.W.2d at 299 (quoting *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014)).

11 merely requires the attorney *to consult with the client about the possibility of appeal*.

[8] Moreover, in the context of discovery orders, we have held that an interlocutory order compelling the production of documents for which a claim of privilege is asserted is appealable neither as a final order nor under the collateral order doctrine.[12] We have concluded that other available mechanisms such as mandamus actions and authorized appeals from interlocutory civil contempt orders are appropriate and "'serve as useful "safety valve[s]" for promptly correcting serious errors'" in claims involving privileged information.[13] Here, Loyd asserts a claim of privilege; however, the compensation court's order was not a final, appealable order. Hence, there is no appellate jurisdiction in this case.

CONCLUSION

The order from which the parties appeal was not a final, appealable order. Accordingly, we dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

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[12] See, *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

[13] *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 160, 794 N.W.2d 685, 693 (2011) (quoting *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)).

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

TNT Cattle Company, Inc., appellee, v. Dianna Fife, appellant.

937 N.W.2d 811

Filed January 31, 2020. No. S-18-1067.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Declaratory Judgments: Appeal and Error.** In appellate review of an action for a declaratory judgment in a law action, factual findings by the trier of fact will not be set aside unless such findings are clearly erroneous.
3. **Breach of Contract: Leases.** An action for breach of a lease agreement is an action at law.
4. **Jurisdiction: Pleadings: Appeal and Error.** Factual findings in a court's determination of a factual challenge to subject matter jurisdiction are reviewed under a clearly erroneous standard.
5. **Parties: Words and Phrases.** An indispensable party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
6. **Parties: Waiver.** Neb. Rev. Stat. § 25-323 (Reissue 2016) deprives a court of the authority to determine a controversy absent all indispensable parties and cannot be waived.
7. **Parties.** The burden of procuring the presence of all indispensable parties is on the plaintiff.
8. **Breach of Contract: Time: Words and Phrases.** An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an unequivocal repudiation of the contract.

9. **Breach of Contract: Time.** When there is an anticipatory breach, the promisee has the option to treat the contract as ended so far as further performance is concerned and maintain an action immediately rather than await the promisor's time for performance.
10. **Pleadings: Evidence: Trial.** A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable.
11. **Pleadings: Evidence: Waiver.** The pleadings in a cause are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.
12. **Pleadings.** Statements in pleadings remain binding only until the pleading is amended.
13. **Pleadings: Evidence.** Matters contained in superseded pleadings are simple admissions that are admissible as evidence of the facts alleged therein and may be introduced and considered the same as any other evidence.
14. **Pleadings.** A judicial admission does not extend beyond the intendment of the admission as clearly disclosed by its context and must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.
15. **Property: Contracts: Leases.** A transferor of an interest in leased property, who immediately before the transfer is obligated to perform an express or implied promise of the lease resting on privity of contract, continues to be obligated after the transfer.
16. **Landlord and Tenant: Leases: Liability.** A landlord who has transferred his or her interest in the land remains liable under a lease agreement, on the implied promise of quiet enjoyment, for disturbances of the tenant by the former landlord himself or herself or by someone whose conduct is attributable to the former landlord.
17. **Leases: Evidence: Intent.** Where the terms of a written lease appear to be ambiguous and uncertain as to the intended length of the tenancy or the beginning or end of the term, then, as in other cases of ambiguity, parol evidence may properly be resorted to for the purpose of resolving the uncertainty and explaining the parties' true intentions in that respect.
18. **Contracts.** Instruments made in reference to and as part of the same transaction are to be considered and construed together.
19. **Contracts: Intent: Appeal and Error.** When a document is ambiguous, it is for the trier of fact to determine the intent of the parties from all the facts and circumstances, and such findings will be upheld on appeal unless they are clearly erroneous.

20. **Contracts: Rescission: Words and Phrases.** A "rescission" amounts to the unmaking of a contract.
21. **Contracts.** A modification continues the original contract with some changes.
22. **Contracts: Rescission.** In determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances.
23. **Contracts: Rescission: Intent.** Mutual rescission of a contract must be clear, positive, unequivocal, and decisive, and it must manifest the parties' actual intent to abandon their contract rights.
24. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
25. ____: ____. One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.
26. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
27. ____: ____. Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.
28. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Affirmed.

Jack W. Besse, of Parker, Grossart & Bahensky, L.L.P., for appellant.

Siegfried H. Brauer, of Brauer Law Office, for appellee.

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

Freudenberg, J.

I. NATURE OF CASE

This appeal involves a dispute between an out-of-state landlord and her tenant as to the duration of their farm lease agreement. Two writings were considered by the court as embodying their agreement, one which stated that the "lease period will go from January 2007 until December 2017 a ten year period" and the other providing that "[t]he land will be maintained . . . from January 2007 until December 2017." The court found for the tenant that there was an 11-year lease and awarded damages for breach of contract. The landlord argues on appeal that the lower court lacked jurisdiction to issue the judgment, because title to the farmland was transferred into a trust before the tenant was evicted, and that therefore, the landlord in her capacity as sole trustee of the trust was an indispensable party. On the underlying merits, the landlord asserts that the lease was for 10 years and that, in any event, an oral modification replaced the written agreement such that an oral year-to-year lease governed when she gave notice of termination. The landlord also argues that the district court's calculation of the tenant's damages was based on speculative and conjectural evidence. We affirm the judgment below.

II. BACKGROUND

Rowland Trampe is the sole owner and president of TNT Cattle Company, Inc. (TNT). He entered into a long-term lease agreement with Dianna Fife to lease farmland located at "Section Twenty-Six (26), Township Ten (10) North, Range Seventeen (17), West of the 6th P.M., Buffalo County, Nebraska" (Fife farm). When Fife indicated to Trampe that he should vacate the Fife farm before the end of the lease term as understood by Trampe, TNT sued Fife. The fundamental disagreement between TNT and Fife was whether their written agreement provided that the lease period would end in December 2016 or in December 2017 and, further, whether a subsequent oral agreement to change the crops grown on the Fife farm rescinded the written agreement such that they were

operating under an oral year-to-year lease when Fife advised Trampe the tenancy would be ending.

TNT's original complaint was filed on April 19, 2017, and relied on a singular document containing the parties' notarized signatures and stating that the "lease period will go from January 2007 until December 2017 a ten year period." An amended complaint claimed that this document in conjunction with another document executed at the same time constituted the written agreement between the parties. The other document, containing the notarized signatures of the parties dated the same as the first document, described that "[t]he land will be maintained by TNT . . . from January 2007 until December 2017," without mention of a "ten year period."

TNT alleged in its original complaint filed on April 19, 2017, that "[Fife] has forwarded certain communications to [TNT] within the last few months that taken together indicate that [Fife] intends to breach the Lease and deny [TNT] possession of and access to the [Fife f]arm for the 2017 crop year." More specifically, TNT alleged Fife had asserted that the lease would terminate as of December 31, 2016, and that she had the right to exclude TNT after that date. TNT sought injunctive relief from any action by Fife to terminate the lease or dispossess TNT from the Fife farm before December 31, 2017; declaratory judgment that the lease ran through December 31, 2017; and damages for anticipatory breach of the lease. In the amended complaint, filed on September 14, 2017, TNT repeated the allegations of the original complaint, alleging still that TNT's "anticipated dispossession" for the 2017 crop year would cause TNT irreparable harm and that in the event TNT is not granted injunctive relief, it would suffer damages for lost profits from the 2017 crop year.

Fife, in her answers, alleged that the parties had agreed that the lease term would end on December 31, 2016, and that any reference to "December 2017" was a mistake that should be construed against TNT, which she alleged was the scrivener. She alleged that, in any event, the long-term lease agreement

was no longer controlling, because it was subsequently modified to an oral year-to-year lease. Fife counterclaimed against TNT for an accounting of her crop share during the course of their lease agreement, intentional interference with the contractual relationship with a lease agreement between "defendant" and a new tenant, and trespass, when Trampe allegedly allowed his cattle to graze on stalks on the Fife farm in the fall and winter of 2009 through 2012. TNT did not file any pleading in response to the counterclaim.

After a pretrial hearing, the court found the evidence insufficient to warrant a temporary injunction, reasoning that TNT had failed to establish a clear right to an injunction by virtue of the lease agreement, because that agreement was ambiguous. A bench trial was held on permanent injunctive relief and the underlying claims of declaratory judgment and breach of contract, bifurcating the trial on the underlying merits of these claims from a determination of any damages. Trial on Fife's counterclaim was postponed until after the court's determination on Fife's claims. The court ultimately found that injunctive relief was moot, but found in favor of TNT for breach of contract and awarded TNT damages.

1. Oral Year-to-Year Lease From 2003 to 2008

The evidence at trial demonstrated that Fife had purchased the Fife farm in January 2003 and that from that time until 2008, Trampe farmed the land under an oral year-to-year arrangement. Prior to Fife's acquisition, Trampe had been farming the land for the previous landlord.

2. Long-Term Written Lease Agreement for Row Crop

Trampe testified that in the summer of 2007, he and Fife began discussing putting an irrigation pivot on the Fife farm in order to utilize all the approved irrigated acres and thereby not lose the Fife farm's designation with the U.S. Department of Agriculture Farm Service Agency. Trampe noted that the

dry hay was "becoming older hay and was going to fizzle out" anyway.

Trampe offered to assist at his own expense with some of the "dirt work" necessary for installation of a pivot so long as he could recoup that investment through a 10-year lease. The pivot was installed and began operation in 2008 for the 2008 farm year.

According to Trampe, he understood that the 10-year lease period would commence once the pivot was in place. Trampe explained that when negotiating the new arrangement, he was aware that the pivot would not be installed until the spring of 2008. Thus, he understood that the duration of the new lease would be for one final year of dryland hay production plus 10 years of irrigated row crop production.

Fife acknowledged multiple telephone conversations with Trampe generally pertaining to installation of pivot irrigation, but she could not recall "anything at all" with respect to what was said.

(a) Exhibits 3 and 4

Trampe testified that after discussing the matter at length over the telephone, Fife mailed a lease document to him with the crops and percentages left blank. The original draft lease agreement sent by Fife with items left blank was entered into evidence as exhibit 4. Trampe explained that he had found the document the night before the trial.

The document as sent by Fife originally provided: "The land will be maintained by TNT Cattle Co, . . . from January 2007 until December 20__." Further, several lines of the document described that "[c]rop percentage will be __% for the sale of [specified crop]," alternating "for TNT Cattle Co." and "for Dianna S. Fife Trust." These lines specified alfalfa, soybeans, and corn. Four similar lines following left the crop blank. The document provided that "None of Dianna S. Fife heirs may contest this contract."

The forwarding letter, exhibit 3, which Trampe had also located the evening before trial, stated in relevant part:

> I am enclosing a rough draft of a contract for us to sign. See what you think and let me know. If you like it, just fill in the number of years in the blank and the percentage of crops etc. You can re-type it if you like. I think you will need to initial the % areas when you go to a Notary. I will have to do the same so they know we both agree on it. You can go to a Notary and then send them to me and I will sign them in front of a Notary. I will send your copy back to you and I will keep a copy. I have no problem with the number of years you want to work the land. I don't plan to sell it for a long time.

Fife did not recall the letter, but acknowledged that her signature was on it.

The blank for the end date of the lease period in exhibit 4 was filled in by Trampe as 2017. Trampe filled in the percentages for the sale of alfalfa as 50 percent to TNT and 50 percent to the "Dianna S. Fife Trust." Trampe filled in the blanks for the lines pertaining to soybeans and corn as 66.7 percent to TNT and 33.3 percent to the "Dianna S. Fife Trust." The four other lines were simply left blank. Trampe then signed the agreement in the presence of a notary.

Fife objected to the admission of exhibits 3 and 4 on the grounds of foundation and unfair surprise. The court overruled the objections and admitted exhibits 3 and 4 into evidence.

(b) Exhibit 1

Trampe testified that based on the letter and exhibit 4, he had created another document, exhibit 1, which provided in full:

> Rowland Trampe owner and operater of TNT Cattle Co. Inc. agrees to rent the farm ground from Dianna Fife in section 26 T-10-N-R-17-W in Grant township. The lease period will go from January 2007 until December 2017 a ten year period. The ground will be rented on shares in corn and soybeans 66.7 percent to TNT Cattle Co. and 33.3 percent to Dianna Fife. Dianna will pay her share of the Fertilizer and TNT Cattle Co. will pay

his share of Fertilizer plus 100 percent of the herbicides and insecticides. Dianna will pay all bills for the repairs of the wells the pumps gear heads the pivot and her well motor.

(c) Exhibits 1 and 4 Signed Simultaneously

Trampe testified that he signed both exhibit 1 and exhibit 4 in front of a notary on January 16, 2007, and the exhibits so reflect. Trampe testified that he mailed both documents to Fife together. Fife subsequently returned both documents to Trampe via the postal service, after signing them both in the presence of a notary on February 7, 2007.

Fife signed exhibit 1 "Dianna Fife," but signed exhibit 4 as "Dianna S. Fife Trust."

Fife could not specifically recall preparing or signing exhibit 4, but she verified that it was her signature on the document. Trampe testified that he received the signed documents back from Fife sometime around mid-February 2007.

3. Change of Crop to Organic Alfalfa

The lease arrangement continued without incident until 2015. Before the 2015 growing season commenced, Fife approached Trampe, expressing the desire to switch from the genetically modified row grain crop that was being grown on the Fife farm to organic alfalfa. Further, Fife expressed to Trampe that she no longer wished to contribute to any of the farming expenses.

Trampe explained that alfalfa seed is an expensive perennial and that switching to alfalfa from the row crops required more fieldwork and water. Furthermore, the first year of an alfalfa crop does not yield a good harvest. After the first year, the perennial crop produces a good yield for about 6 years.

Trampe testified that he believed he had at least 3 more years under the lease agreement to recoup his investment. In other words, they were simply modifying the agreement to

change the crop and the percentage shares of costs and profits, not the lease term. Trampe testified that he expected to have at least three cuttings of alfalfa in 2015 and four in 2016 and 2017. He would not have planted such an expensive crop at his own expense for only a 2-year lease.

Trampe proposed that they could split the profits 50-50 if Fife paid half of the farming expenses. If, on the other hand, Fife did not contribute to any of the farming expenses, she could receive one-third of the profits, while Trampe would retain two-thirds. According to Trampe, Fife told him that she wished to enter into the one-third arrangement where she would not incur any farming expenses.

TNT replowed and reconfigured the ground to allow for the production of alfalfa, planting the first new crop in the spring of 2015. Thereafter, TNT made three cuttings of alfalfa in 2015 and four in 2016, keeping two-thirds for himself and allocating the remaining one-third of the yield to Fife. The evidence was undisputed that Fife received one-third of the profits from these harvests.

4. Termination

(a) Letter

Trampe testified that he received a letter from Fife in August 2016, in which Fife first communicated she might be looking for another tenant, and that she and Trampe had different ideas about the end date of the lease agreement. Trampe described that the letter stated Fife "had other offers to farm the ground." Fife described that she sent the letter in July 2016 and that in the letter, she notified Trampe that TNT's lease would terminate effective December 31, 2016. The letter was not in evidence.

(b) Conversations

Trampe and Fife spoke on the telephone after Trampe received the letter. The court found that they discussed their disagreement as to when the lease period would end and "apparently negotiated through 2016 calendar year."

Trampe and Fife had a face-to-face meeting at a restaurant in Kearney, Nebraska, in September 2016. The exact date of the conversation is unclear. Trampe testified that during the conversation, he expressed his opinion that their lease agreement was until 2017:

> [B]ut I said if it would help . . . , if you want a new contract—because she told me just give her a new bid on it. She wanted to go a three-year contract. So I thought about it and I did, I sent her a new proposal, assuming that if that was the case, well, I would be all right with that because planting the hay, I was hoping to get five or six years out of it where I incurred all the expenses, to kind of recoup some of those expenses.

Fife testified she told Trampe during this conversation that the 10-year lease would end on December 31, 2016, but that she had not entered into an agreement with anyone else and was "more than willing to have him send me a new contract starting in 2017." She did not recall Trampe's end of the conversation, but acknowledged that Trampe sent her some proposals afterward.

(c) Negotiations for New Lease Unsuccessful

Ultimately, Fife did not accept Trampe's offer, because she had better bids. Trampe responded it would be hard to compete with other bidders who did not have to recoup an investment into the ground and who could take advantage of the seed he had planted.

(d) Notice of Eviction

Trampe testified that at some later point, he received a letter from Fife telling him that "I needed to have my stuff or possession and/or shared payoff by December 31 of '16 or there would probably be a sheriff there to greet me if I was trespassing on her land, that she would consider it trespassing after December 31 of '16." By December 31, 2016, Trampe had removed himself and his belongings from the Fife farm.

5. Changing Theories of Recovery and Ownership of Fife Farm

In its original complaint, TNT had sued Fife in her individual capacity and alleged that the parties' original lease agreement was represented in a singular ambiguous written instrument, exhibit 1, and that Fife breached the agreement when she demanded Trampe vacate the premises before the intended end date of the lease. In her answer to the original complaint, Fife admitted she was a nonresident landowner "possessed of and fee owner of" the Fife farm. Further, Fife's counterclaim alleged that "defendant" was the owner of the Fife farm. She attached to her counterclaim the warranty deed that conveyed the Fife farm to "Dianna S. Fife" in 2003. Fife did not sign the pleadings and was not present at the hearing on TNT's request for a temporary injunction. It was undisputed that although the "Dianna S. Fife Trust" (hereinafter Fife trust) existed when Fife and TNT entered into the long-term lease agreement, Fife held title to the Fife farm as an individual at that time.

But, at the July 2017 trial, both parties presented evidence that conflicted with the original pleadings. Fife was called by her counsel as a witness and testified that in September 2016, she had transferred the Fife farm into an irrevocable trust, the Fife trust, and that the Fife farm had remained in the Fife trust since that time. Fife described that she was the sole trustee but was not asked to provide any additional details about the Fife trust or its beneficiaries. No evidence was adduced as to the precise date of the transfer, and the deed itself is not in the record.

At the close of direct examination and before cross-examination of Fife, TNT asserted that Fife was precluded by the judicial admission in her answer and counterclaim to the original complaint from claiming she no longer owned the Fife farm. Despite Fife's counsel's objection that Fife had not signed or verified the answer and counterclaim, the court agreed and stated that the judicial admission controlled over the testimony at the hearing. The court denied a motion by

Fife's counsel to withdraw the admissions so as to conform to the evidence or, alternatively, to amend by interlineation.

But Trampe had also presented evidence of exhibit 4 as constituting part of the written lease agreement, which had not been pled. And a subsequent hearing was held on November 30, 2017, after TNT filed a motion seeking to amend its complaint to conform to the evidence that there were two writings forming the lease agreement instead of one. The proposed amended complaint still named Fife in her individual capacity as the only defendant.

Fife objected to the amended complaint on the ground of unfair surprise. The court allowed the amended complaint, but also allowed Fife to file an amended answer and counterclaim. Further, the court allowed the evidence to be reopened and held a continuation of the trial on November 30, 2017.

In her amended answer, Fife affirmatively alleged that the Fife farm "is owned by the [Fife trust] and that the trustee of said trust is . . . Fife." She did not change the allegation in her counterclaim that "[Fife] is the owner of the real estate . . . ." The court explicitly recognized both the amended complaint and the amended answer and counterclaim, explaining that the case was to "proceed on those documents at this point."

Neither the parties nor the judge discussed at the continuation of trial the fact that the operative answer alleged that the Fife trust owned the Fife farm and that Fife was no longer bound by her statements in the prior pleadings. TNT did not assert that any statement in Fife's amended answer was a judicial admission.

While Fife testified at the reopened trial telephonically, no further testimony was adduced pertaining to who or what entities would be directly affected by the judgment. Rather, Fife reiterated that when she asked Trampe for a copy of their agreement, Trampe sent her only exhibit 1. Fife also submitted evidence that the document found in exhibit 1 was the only document filed with the U.S. Department of Agriculture Farm Service Agency in June 2017.

There was no motion by Fife to dismiss for lack of an indispensable party, and there was no attempt by TNT to join in the action Fife in her capacity as trustee.

6. Order of December 2017

The court issued its order on liability in December 2017. In the prior hearing on temporary injunctive relief under the original complaint, the court had determined that the lease reflected in exhibit 1 was ambiguous. The court reiterated that determination in its December 2017 order deciding the questions of permanent injunctive relief, declaratory judgment, and breach of contract.

In determining Fife's liability, the court considered the evidence admitted at the three hearings on May 31, July 26, and November 30, 2017. The court opined that both Trampe and Fife were "poor historians," but that Trampe's recollection of events was clearer than Fife's. Thus, the court found "generally that . . . Trampe's recollection of events is the more credible."

The court considered exhibit 4 as an "additional document memorializing the lease agreement of the parties" and found that because exhibit 4 was partially prepared by Fife and both parties executed exhibit 1, "[b]oth are responsible for any ambiguity and lack of clarity that arises from these two documents."

The court ultimately concluded that it was "clear . . . that it was the parties' intention that the lease period would run from January 2007 until December 2017, an eleven-year farm lease." Further, the court rejected Fife's contention that the 11-year lease was terminated by virtue of the subsequent agreement to produce organic alfalfa on the Fife farm. In this regard, the court noted that Fife had relied on the 10-year language in exhibit 1 in asserting that TNT's tenancy was due to end. Thus, the court concluded that Fife had breached the lease agreement.

In its order, the court did not consider the question of when exactly the breach had occurred and whether any indispensable parties were missing from the action. The court appeared to

find that Fife was simultaneously the owner of the Fife farm and not the owner of it:

> Fife is a resident of the State of Washington *who owns* agricultural land located within Section 26, Township 10, Range 17 West of the 6th P.M. in Buffalo County, Nebraska. [Fife] purchased this land in her own name on January 20, 2003 from the Richard J. Cook Family Trust which she was then serving as Co-Trustee (Exhibit No. 5). *She has since transferred this land to her own family trust*.

(Emphasis supplied.)

The court found that by the time of the order, injunctive relief was moot. The court found in favor of TNT on its causes of action for declaratory relief and breach of contract, and the case proceeded for a determination of damages.

7. Damages

The joint pretrial conference memorandum clarified that the hearing was to determine the amount of damages sustained as a result of the loss of the hay crop that would have been harvested from the Fife farm during the 2017 crop year. Trampe had previously testified that he had last harvested alfalfa from the Fife farm in the fall of 2016.

(a) Yield and Market Value

At the trial on damages, Trampe testified that he had been farming alfalfa and other crops for approximately 40 years. Trampe testified that in his experience in farming alfalfa on the type of ground that the Fife farm consisted of, the normal range of expected production would be 8 to 10 tons per acre on irrigated land and around 5 tons on dryland. Production on the Fife farm was close to average, though "it might have been a touch lower because it was new hay." Trampe testified that he farmed 29.14 dry acres on the Fife farm and 130.8 "irrigated acres." Approximately 86 of the irrigated acres were irrigated by the pivot, while the remaining 44 certified irrigated acres had been irrigated through a gravity irrigation

system. Trampe, however, did not irrigate those acres in 2015 and 2016.

TNT admitted into evidence receipt for the sale on January 24, 2017, of some alfalfa that had been grown in 2016 from different harvests. It was not all of the crop he had grown and harvested in 2016. He received $85 per ton. At the hearing for a temporary injunction, Trampe had said that he fed 90 percent of his alfalfa bales from the Fife farm to his cattle, but it was unclear what time period Trampe was referring to. Trampe did not sell alfalfa in 2017, because he used all his hay to feed his cattle.

Trampe testified that he was familiar with the alfalfa hay market in 2018, in which farmers were selling their 2017 harvests. Trampe said that the price of alfalfa had risen to a range of $90 to $100 per ton.

Trampe had expected a full growing season of alfalfa to yield an average harvest, or "cuttings," of 8.6 tons per acre. Trampe testified that, generally, the density and weight of the bales increased from the first to the last cuttings of the season. Thus, a bale from the first harvest would average 1,425 pounds, a bale from the second harvest would average 1,475 pounds, a bale from the third harvest would average 1,500 pounds, and a bale from the fourth harvest would average 1,700 pounds.

A farmer in the same area who was the current tenant of the Fife farm testified that in 2016, he had purchased from Fife 380 bales of alfalfa harvested from the Fife farm. The average weight per bale ranged from 1,366 to 1,685 pounds. He paid $65 per ton. He testified that prices rose the following year. In 2017, alfalfa of the sort grown on the Fife farm sold for $85 per ton.

(b) Lost Farm Program Payment

Trampe testified that every year, it was his normal practice to apply for farm program payments by certifying the acres each year. Trampe had always certified the acres on Fife's behalf through the exercise of a power of attorney she had given him. Though there were initially complications, Trampe

was ultimately able to receive the farm program payment for 2016. He had also received a farm program payment in 2015. For both years, the amount of the payment was approximately $3,460. Despite acknowledging that 2017 was governed by a new farm bill, Trampe was unaware of any reason why he would not have received the farm program payment for 2017 had he been allowed to farm the Fife farm that year.

(c) Expenses

(i) Seed

Trampe testified that he paid $14,300 for the alfalfa seed that he planted in 2015.

(ii) Fertilizer

Trampe spent $8,280 on a combination of annual fertilizer and a starter fertilizer. In 2016, Trampe hauled and spread his own cattle's manure onto the Fife farm as fertilizer. He did not give an estimate as to what that fertilizer was worth, and he did not recall what any transportation costs were. Trampe testified that he would have fertilized the Fife farm for the 2017 crop year, but obviously did not. A "rough guess" of the cost of fertilizer was $40 to $45 per acre.

(iii) Pivot Operation

TNT paid the electric bills pertaining to the operation of the pivot irrigation system on the Fife farm. Those bills were $3,337.21 for 2015 and $3,424.63 for 2016. Based on his experience in 2017 farming other properties, Trampe believed that the electric company had increased its rates between 2016 and 2017 by about 4 to 6 percent. Trampe also spent about $100 per year in drip oil for the pivot irrigation system.

(iv) Swathing, Raking, Baling, and Loading

Trampe testified that there are a number of expenses relating to harvesting. Operating swathers, tractor-pulled rakes and balers, and loaders requires fuel. Trampe testified that

per harvest of the Fife farm's 130 acres of irrigated land, he used a 120-gallon tank of fuel to operate the swather. Raking the same land consumed approximately 26 gallons of fuel per harvest. Baling the same field consumed approximately 55 gallons of fuel per harvest. In addition, the netting for the bales costs $200 a roll, with each roll wrapping about 125 bales of the 6-foot-tall bales that Trampe made. Each bale, Trampe testified, weighed about 1,500 pounds. The loading process required 13 or 14 gallons of fuel per harvest of the 130 irrigated acres. Two fuel bills in October 2017 demonstrated that farm diesel was priced at approximately $2.10 and that clear diesel was priced at $2.60 per gallon. Trampe testified that a normal farm year for alfalfa consisted of four harvests.

A witness called by Fife who specializes in hay production and transportation for third-party clients testified that in 2017, his business charged $15 per acre of alfalfa to swath and rake it, $15 per bale of alfalfa to bale it, and $2 per bale to move it to the edge of the field for the customer. The witness opined that those prices were fair and reasonable for the Buffalo County area. The Fife farm's current tenant testified that he agreed that those prices were fair and reasonable for the Buffalo County area.

(v) Vehicle and Equipment Maintenance

Trampe testified that he had to service his two tractors approximately every 200 hours of use. In addition to the Fife farm's 159 acres, Trampe farmed 1,200 other acres of land. He serviced his tractors three or four times per year at a cost of approximately $100 per service, not including labor. Trampe did not determine how many hours his equipment had been used on the Fife farm versus the other acres he farmed.

Trampe also had his two balers inspected and serviced every 3 years. The balers were used only on the Fife farm and 70 acres of Trampe's own land. He estimated that one-third of the total usage was on the Fife farm. He had the balers serviced in 2016 for approximately $9,000.

(d) September 2018 Order on Damages

In an order on September 24, 2018, the court found that at the beginning of the 2017 crop year, TNT "was anticipating the production of a crop that was just about to reach its peak productivity." Further, "TNT's discovery efforts to obtain records of alfalfa production on the Fife [f]arm during 2017 from . . . Fife was wholly unproductive," because Fife kept no records. This left TNT "in the unenviable position of having to project the anticipated yield using sources of information other than records of the actual yield itself."

Utilizing the testimony and evidence submitted by TNT, the court calculated that there were 85 acres of "actually" irrigated ground, which would have yielded 731 tons of hay (8.6 tons per acre of expected production). Further, there were 74 acres of nonirrigated ground that would have yielded 370 tons of hay (5 tons per acre of nonirrigated ground).

While the court noted that Fife has admitted evidence that her one-third crop share from the Fife farm in 2016 was only 286.55 tons, such yield was from the second year of production, not the third year, in which a higher yield was expected. Moreover, the court found that Fife,

> having failed to produce any records whatsoever of the actual production of hay from the Fife [f]arm in question in 2017, a year in which the Fife [f]arm was totally under her control cannot, in the Court's opinion, persuasively argue that she is being treated unfairly if the Court accepts . . . Trampe's opinion as to the expected yield in 2017.

The court found that alfalfa in 2017 was worth $85 per ton. Thus, Trampe had shown that the 2017 farm year would have produced a total of $93,585 in gross profits from the land.

As expenses, the court calculated $6,757.50 for fertilizer; $100 for oil for the pivot; $3,549.96 in electricity for the pivot (based on a 5-percent increase in rates); $1,823.28 in fuel costs for swathing, raking, baling, and stacking; and $2,388 in net wrap.

The court rejected Fife's contention that the alfalfa seed cost should be prorated and also deducted from the damages calculation. The court explained:

> TNT . . . sustained this one-time seed expense expecting receipt of the benefit of this investment over the entire productive life of this perennial crop. . . . Fife's termination of the lease a year early in 2017, not only damaged TNT . . . in its loss of profits in 2017, but kept it from recovering the benefits of its seed investment over the full cycle in which this perennial crop would have been expected to produce economically harvestable hay. . . . Its seed cost/investment amounted to a one-time overhead expense. It should not be subjected to further loss in 2017 by charging it with prorated portion of this overhead again.

The court also rejected Fife's argument that Trampe's costs should include costs of transporting machinery to and from the Fife farm and of transporting alfalfa to market or to Trampe's land to feed his cattle and that the failure to adduce evidence of transportation costs rendered any damages calculation speculative. The court explained that transportation costs between the Fife farm and Trampe's cattle operation a short distance away were part of the expected overhead of the cattle operation and that there was no evidence that cost was saved in 2017 rather than used to raise, harvest, or transport other feed or hay. Whatever transportation costs Trampe would have incurred had likely actually been incurred: "The cost of transporting the replacement feed it used in 2017 has already been paid."

Relying on *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*,[1] the court found that fixed overhead expenses, such as TNT's costs to inspect and maintain its equipment over the full breadth of its farm operations, need not be deducted from gross income to arrive at the net profit properly recoverable.

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[1] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

Thus, deducting a total of $14,518.74 in expenses from TNT's two-thirds share in the 2017 expected profits, the court found a total loss of net profits in the amount of $47,821.26.

The court then added $3,461 in the lost 2017 farm program payment. The court explained that at the time of the trial on damages, the federal farm program benefits for 2017 had not yet been calculated by the U.S. Department of Agriculture Farm Service Agency, but "there is nothing to suggest that Congress will change the existing farm program."

The court awarded TNT a total of $51,332.26 in damages, plus costs. Following the court's denial of her motion for new trial, Fife timely appealed.

III. ASSIGNMENTS OF ERROR

Fife assigns that the trial court erred in (1) awarding TNT a money judgment against her when she did not own the Fife farm and was not the landlord, (2) failing to find that the written lease agreement was terminated and became a year-to-year oral lease agreement beginning in 2015 and thus was properly terminated by written notice, (3) determining that the written lease agreement was for 11 years rather than 10 years, and (4) awarding $51,332.26 based upon speculative evidence.

IV. STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[2]

[2] In appellate review of an action for a declaratory judgment in a law action, factual findings by the trier of fact will not be set aside unless such findings are clearly erroneous.[3]

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[2] *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

[3] *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989).

[3] An action for breach of a lease agreement is an action at law.[4]

[4] Factual findings in a court's determination of a factual challenge to subject matter jurisdiction are reviewed under a clearly erroneous standard.[5]

V. ANALYSIS

1. Indispensable Party Question

[5] We first address the threshold question of whether TNT's action lacked an indispensable party. Fife asserts that the evidence was undisputed that the Fife farm had been transferred to the Fife trust by the time of the alleged breach. Thus, Fife asserts that in her capacity as trustee, she was an indispensable party to TNT's action for damages and declaratory judgment based on breach of contract and the court lacked jurisdiction over TNT's claims when she was named only in her individual capacity. An indispensable party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[6]

[6] Neb. Rev. Stat. § 25-323 (Reissue 2016) mandates that indispensable parties be joined in an action, stating in relevant part that "when a determination of the controversy cannot be had without the presence of other parties, the court must order

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[4] See, *Caeli Assoc. v. Firestone Tire & Rubber Co.*, 226 Neb. 752, 415 N.W.2d 116 (1987); *Quinn v. Godfather's Investments*, 213 Neb. 665, 330 N.W.2d 921 (1983).

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

[6] *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017).

them to be brought in."[7] Section 25-323 deprives a court of the authority to determine a controversy absent all indispensable parties and cannot be waived.[8]

[7] The burden of procuring the presence of all indispensable parties is on the plaintiff.[9] This burden is similar to the burden to establish other factual matters that the court's subject matter jurisdiction depends upon.[10] The party invoking the court's jurisdiction ordinarily has the burden of proving by a preponderance of the evidence the necessary facts for subject matter jurisdiction.[11]

Fife and TNT disagree as a factual matter whether the Fife farm belonged to the Fife trust when the events occurred that TNT sought to litigate. The relevant time period for the cause of action for breach of contract and declaratory relief tried below is when the breach occurred.[12] Though TNT originally pled injunctive relief, that claim was moot by the time of trial and the case was tried as an action at law under the alleged lease contract.

[8,9] Ordinarily, there is no breach until the time for performance.[13] While TNT's operative complaint alleged anticipatory breach, such was not the theory upon which the case was tried. An anticipatory breach of contract is one committed before the time has come when there is a present duty of

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[7] See *id*. See, also, Neb. Rev. Stat. § 25-21,159 (Reissue 2016).

[8] See *Midwest Renewable Energy v. American Engr. Testing, supra* note 6.

[9] See *Pestal v. Malone*, 275 Neb. 891, 750 N.W.2d 350 (2008).

[10] See, *Jacobs Engr. Group v. ConAgra Foods, supra* note 5; *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006). But see *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

[11] See 61A Am. Jur. 2d *Pleading* § 506 (2010).

[12] See *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 279 N.W.2d 849 (1979).

[13] See, *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002); *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000); 1 Howard O. Hunter, Modern Law of Contracts, § 12:1 (2019).

performance and is the outcome of words or acts evincing an unequivocal repudiation of the contract.[14] This is distinguishable from a disagreement about the interpretation or meaning of a term in a contract.[15] When there is an anticipatory breach, the promisee has the option to treat the contract as ended so far as further performance is concerned and maintain an action immediately rather than await the promisor's time for performance.[16] TNT did not cease to pay rent and sue Fife immediately when it became apparent that they disagreed as to the meaning of the duration terms of their lease agreement. Rather, TNT sued Fife after she gave notice of eviction, and the trial commenced after Fife had evicted TNT. The case was tried on the ground that by evicting TNT, Fife had breached the implied term of quiet enjoyment that was part of her ongoing duty of performance under a lease term that had not yet ended.

[10,11] TNT does not contest that the operative period of time for the action was the eviction in December 2016, but points out that the district court found by judicial admission that the Fife farm still belonged to Fife in her individual capacity in December 2016. At TNT's request, the court had acknowledged from Fife's original answer and

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[14] See, *Weber v. North Loup River Pub. Power*, 288 Neb. 959, 854 N.W.2d 263 (2014); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

[15] See, *Hughes v. Cornhusker Cas. Co.*, 235 Neb. 656, 456 N.W.2d 765 (1990); 1 Hunter, *supra* note 13. See, also, *Mobley v. N. Y. Life Ins. Co.*, 295 U.S. 632, 55 S. Ct. 876, 79 L. Ed. 1621 (1935); *Trans Union Credit Info. v. Assoc. Credit Services*, 805 F.2d 188 (6th Cir. 1986); *American Hosp. Supply v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986); *Pacific Coast Eng. Co. v. Merritt-Chapman & Scott Corp.*, 411 F.2d 889 (9th Cir. 1969); *Lowenstein v. Federal Rubber Co.*, 85 F.2d 129 (8th Cir. 1936); *Kimel v. Missouri State Life Ins. Co.*, 71 F.2d 921 (10th Cir. 1934); 17A Am. Jur. 2d *Contracts* § 686 (2016).

[16] See *Hooker and Heft v. Estate of Weinberger, supra* note 12. See, also, 23 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 63:33 (4th ed. 2018).

counterclaim to the original complaint a judicial admission that she "owned" the Fife farm as an individual. Fife testified at the trial that she had transferred the Fife farm to the Fife trust in September 2016, but the court had originally refused to consider this testimony that contradicted her judicial admission. A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable.[17] The pleadings in a cause are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.[18]

However, after the court acknowledged as judicial admissions Fife's statements in her original pleadings, it allowed TNT to amend its complaint. The court also permitted Fife to amend her answer. When she did so, she no longer admitted to TNT's allegation that she owned the Fife farm. Rather, in her amended answer, Fife affirmatively alleged that the Fife farm was owned by the Fife trust. The court then reopened and continued the trial in which Fife had testified that she had transferred the Fife farm into the Fife trust.

[12,13] Statements in pleadings remain binding only until the pleading is amended.[19] Matters contained in superseded pleadings are simple admissions that are admissible as evidence of the facts alleged therein and may be introduced and considered the same as any other evidence.[20] Such original pleading is not conclusive evidence, but competent, as any other admission of a party against interest, and should be given such weight as the trier of fact deems it entitled in the light of

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[17] See *Cook v. Beermann*, 201 Neb. 675, 271 N.W.2d 459 (1978).

[18] See *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

[19] See *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224 (9th Cir. 1988).

[20] See, *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *Cook v. Beermann, supra* note 17.

the pleader's explanation, if any, of the circumstances under which the admissions were made.[21]

At no point after Fife's original answer and counterclaim were superseded did TNT offer them into evidence as an ordinary admission to be weighed in considering the question of the ownership of the Fife farm as of September 2016. Since TNT did not offer the original answer or counterclaim as evidence to be considered in the continuation of the trial under the amended pleadings, Fife's testimony that the Fife farm was owned by the Fife trust as of September 2016 was undisputed.

[14] It is true that the amended counterclaim remained unchanged insofar as it stated the "defendant" was the owner of the subject real estate, but TNT did not seek to rely on the amended counterclaim as either a simple admission or a judicial admission. The consideration of admissions is at the option of the opposing party.[22] Furthermore, this statement in the amended counterclaim in the context of the amended answer to which it was attached did not qualify as a judicial admission. A judicial admission does not extend beyond the intendment of the admission as clearly disclosed by its context[23] and must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.[24] In light of the clear statement in the amended answer that the Fife farm had been transferred to the Fife trust, the unchanged statement in the counterclaim that "[d]efendant is" the owner of the Fife farm was not unequivocal, deliberate, and clear, but instead appears to be the product of mistake or inadvertence.

The district court did not ultimately find as a factual matter that Fife continued to own the Fife farm. It is true that the

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[21] *Johnson v. Griepenstroh*, 150 Neb. 126, 33 N.W.2d 549 (1948).

[22] See, *Prime Home Care v. Pathways to Compassion, supra* note 18; *Cook v. Beermann, supra* note 17.

[23] *Cervantes v. Omaha Steel Castings Co.*, 20 Neb. App. 695, 831 N.W.2d 709 (2013).

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

court stated in its order that Fife "is" a Washington resident who "owns" the Fife farm, but it also found that "[s]he has since transferred this land to her own family trust." The confusing nature of the verb tenses notwithstanding, it appears the court found that at some unspecified point in time before its order, the ownership of the Fife farm was transferred to the Fife trust. This finding was not clearly erroneous.

The question thus becomes whether Fife is correct that because she no longer owned the Fife farm when she evicted TNT, and was allegedly acting instead in her capacity as sole trustee for the Fife trust, which owned the land at that time, Fife in her capacity as trustee was an indispensable party to TNT's action. We conclude that Fife in her capacity as trustee of the Fife trust was not an indispensable party.

At the time of the breach, the lease implicated principles of both privity of contract and privity of estate.[25] Fife relies on our statements in other contexts that a suit must be brought by or against a person or persons who have an interest in the property and will be affected by the order of the court[26] and that parties to whom or from whom contractual obligations are jointly owed are indispensable parties to actions concerning contractual obligations.[27] These propositions are inapposite to the case at bar. The transfer of the Fife farm to the Fife trust meant that privity of estate was transferred to the Fife trust, while privity of contract remained with Fife as the individual who entered into the lease agreement with TNT. Privity of contract is not transmitted to the purchaser of a leasehold.[28]

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[25] See *Brick Development v. CNBT II*, 301 Neb. 279, 918 N.W.2d 824 (2018).

[26] See *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

[27] See, *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991); *Wolfenbarger v. Britt*, 105 Neb. 773, 181 N.W. 932 (1921); *Harker v. Burbank*, 68 Neb. 85, 93 N.W. 949 (1903); *Council Bluffs Savings Bank v. Griswold*, 50 Neb. 753, 70 N.W. 376 (1897); *Bowen v. Crow*, 16 Neb. 556, 20 N.W. 850 (1884).

[28] *Brick Development v. CNBT II, supra* note 25.

[15,16] A transferor of an interest in leased property, who immediately before the transfer is obligated to perform an express or implied promise of the lease resting on privity of contract, continues to be obligated after the transfer.[29] Specifically, a landlord who has transferred his or her interest in the land remains liable under a lease agreement, on the implied promise of quiet enjoyment, for disturbances of the tenant by the former landlord himself or herself or by someone whose conduct is attributable to the former landlord.[30] It was under this theory that the case was tried. The evidence presented was that Fife held herself out as an individual with authority to evict TNT from the land, causing TNT to vacate the Fife farm, thereby breaching Fife's implied promise, as an individual, not to disturb TNT's right to quiet enjoyment for the duration of the lease period.

Although a covenant of continuing quiet enjoyment would run with the land under privity of estate to the Fife trust as the new owner of the Fife farm, the alleged act of eviction by Fife in her individual capacity was not an act of joint liability with Fife in her official capacity. Neither does the judgment against Fife in her individual capacity affect the person or persons who have an interest in the property since its transfer into the Fife trust. The transferor landlord is liable under privity of contract for the transferor's acts interfering with quiet enjoyment, while the transferee landlord is liable under privity of estate for the transferee's acts interfering with quiet enjoyment.[31] The determination of one does not affect the interests of the other, nor would it leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[32]

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[29] See 2 Restatement (Second) of Property: Landlord and Tenant §§ 16.1 and 16.3 (1977).

[30] See 2 Restatement (Second), *supra* note 29, § 16.3.

[31] See *id.*

[32] See *Midwest Renewable Energy v. American Engr. Testing, supra* note 6.

The present situation is admittedly unique because the transferor and the agent of the transferee are the same person in different capacities. And it is true that a principal is under a duty to reimburse its agent for payment of damages which the agent is required to make to a third person on account of the authorized performance of an act which constitutes a tort or breach of contract. But the trial below did not litigate whether Fife was secretly acting in her authorized capacity on behalf of the Fife trust when she evicted TNT.

In sum, Fife is correct that she demonstrated she did not personally own the Fife farm when the breach occurred that formed the basis for TNT's action. Nevertheless, under privity of contract, she was a proper defendant in TNT's action for breach of contract and related declaratory judgment action stemming from her act of evicting TNT. Fife in her capacity as trustee of the Fife trust was not an indispensable party regardless of whether Fife can later prove that she was, undisclosed to TNT, acting at the time of the eviction on behalf of the Fife trust. The lower court had jurisdiction to issue the challenged judgment. We turn next to the underlying merits of the appeal.

2. Underlying Merits

Fife argues on appeal that the district court erred in concluding that the lease agreement was for 11 years, ending in December 2017, instead of concluding that it was for 10 years, ending in December 2016. Alternatively, Fife asserts the district court erred by failing to conclude that the written long-term lease had been rescinded due to an oral modification and that the parties were operating under an oral year-to-year lease at the time of the alleged breach.

[17,18] Where the terms of a written lease appear to be ambiguous and uncertain as to the intended length of the tenancy or the beginning or end of the term, then, as in other cases of ambiguity, parol evidence may properly be resorted to for the purpose of resolving the uncertainty and explaining

the parties' true intentions in that respect.[33] Further, instruments made in reference to and as part of the same transaction are to be considered and construed together.[34]

Fife argues that the court's conclusion that the lease agreement was for 11 years was the result of improperly considering exhibits 3 and 4 together with exhibit 1. But Fife does not assign and argue as error that exhibits 3 and 4 were improperly admitted, and 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.[35]

Fife merely offers the conclusory statement that "[t]he court's consideration of Exhibit 3 and Exhibit 4 was improper in light of the testimony of [Trampe]" that it was his intention that the farm lease would last for 10 years.[36] Fife has taken this testimony out of context. Trampe testified that he understood that the 10 years would begin once the irrigation pivot was in place, which was not until 2008.

[19] Exhibit 4, which was signed by both Fife and TNT, provided unambiguously that the lease agreement was until December 2017. Exhibit 1 is less clear in its statement that the "lease period will go from January 2007 until December 2017 a ten year period," and this phrase renders the agreement embodied by the two documents ambiguous. When a document is ambiguous, it is for the trier of fact to determine the intent of the parties from all the facts and circumstances, and such findings will be upheld on appeal unless they are clearly erroneous.[37]

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[33] See, *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993); Annot., 151 A.L.R. 279 (1944).

[34] *Norwest Corp. v. State*, 253 Neb. 574, 571 N.W.2d 628 (1997).

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

[36] Brief for appellant at 18.

[37] See *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990). See, also, e.g., *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990).

The district court's finding that the parties intended the lease to end in December 2017 was not clearly erroneous. The court found that Trampe's recollection of events was more credible than Fife's, and Trampe testified that it was their intent for the lease to end in December 2017. The documents read together also support the district court's conclusion that TNT and Fife intended the lease to end in December 2017. The "December 2017" end date is consistent with the December 2017 end date specified in exhibit 4, and it is the more specific term in exhibit 1 that controls over the characterization of "a ten year period."[38]

[20,21] Likewise, we find no error in the district court's conclusion that the parties did not intend to rescind their long-term lease agreement ending in December 2017 when they orally agreed in 2015 to change their arrangement with regard to the crops to be grown by TNT on the Fife farm. Rescission of contract means to abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party.[39] A "rescission" amounts to the unmaking of a contract.[40] The cancellation, abandonment, or rescission of a written contract may not only be written, but it may also be oral.[41] As opposed to rescission, a modification continues the original contract with some changes.[42] The terms of a written executory contract may be changed by a subsequent parol agreement prior to any breach of such contract.[43]

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[38] See *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005).

[39] *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995).

[40] *Id.*

[41] *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977).

[42] See 2A David Frisch, Lawrence's Anderson on the Uniform Commercial Code § 2-209:59 (3d ed. 2013).

[43] *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 466 N.W.2d 73 (1991), *overruled on other grounds, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992).

[22,23] In determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances.[44] Mutual rescission of a contract must be clear, positive, unequivocal, and decisive, and it must manifest the parties' actual intent to abandon their contract rights.[45]

Fife did not present clear and unequivocal evidence that she and Trampe intended to abandon all rights under the written long-term lease agreement. Trampe testified that he would not have agreed to invest in planting organic alfalfa without the assurance under the written lease that he had three full crop years to recoup his investment. Further, Fife relied on the "ten year" language of the long-term lease agreement when giving TNT notice of termination. The district court correctly found the evidence demonstrated that Trampe and Fife intended to orally modify their long-term written lease agreement to change the crops grown and their respective shares and expenses and that they intended to leave unchanged the other provisions of their agreement, including its duration.

It is undisputed that Fife evicted TNT in December 2016, prior to the December 2017 end date of the lease agreement. She sent Trampe a letter warning him that if he did not vacate the Fife farm by December 31, 2016, he would be considered trespassing. TNT accordingly removed its possessions and ceased operations on the Fife farm by that time. The district court did not err in finding that Fife thereby breached the lease agreement.

3. Damages

Fife argues that even if the court were correct in finding her liable, it erred in the amount of damages awarded. She generally asserts in this regard that the award of $51,332.26 was based on speculative evidence. We disagree.

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[44] *Hoeft v. Five Points Bank, supra* note 39.

[45] 17B C.J.S. *Contracts* § 585 (2011).

[24,25] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.[46] One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.[47]

[26-28] While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.[48] Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.[49] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.[50]

In evaluating the evidence of damages in this case, the court noted that although Fife and her new tenant had harvested in 2017 the alfalfa planted by TNT, TNT's discovery efforts to obtain records of the alfalfa production on the Fife farm in 2017 were wholly unproductive. This left TNT "in the unenviable position of having to project the anticipated yield using sources of information other than records of the actual yield itself."

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[46] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[47] *Id.*

[48] *Id.*

[49] *Sack Bros. v. Great Plains Co-op*, 260 Neb. 292, 616 N.W.2d 796 (2000); *Union Ins. Co. v. Land and Sky, Inc.*, 253 Neb. 184, 568 N.W.2d 908 (1997).

[50] *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

Fife takes issue with TNT's proof in its efforts at making such projections. First, Fife asserts that the district court erred by accepting Trampe's testimony that TNT would have produced 1,101 tons of alfalfa had he been allowed to stay on the land for the 2017 crop year. Fife argues that the district court erred by accepting Trampe's testimony "based solely upon [his] farming experience without foundation for the opinion."[51] However, Fife did not object to this testimony during the trial. A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.[52] It was not unreasonable for the court to accept Trampe's calculation over the evidence submitted by Fife of the yield produced on the Fife farm in 2016, when, in 2016, the alfalfa crop was only in its second year of production, and Trampe testified that the second year of production would ordinarily produce a smaller yield than the third year of production.

Second, Fife asserts that the court erred in applying alfalfa's 2017 market value to the damages calculation, because Trampe testified that in 2017, he fed all the alfalfa he produced on other farmland to his cattle. According to Fife, because he fed alfalfa to his cattle, it was necessary for Trampe to present evidence "as to the economic impact feeding one's own alfalfa has on the impact of his cattle production."[53] Fife does not explain why the absence of such evidence rendered the damages calculation speculative. We find that it was not unreasonable for the district court to base damages on the lost market value of the lost crops, whether or not Trampe would have fed the 2017 alfalfa yield to his cattle.

Third, Fife asserts that the district court did not properly deduct from its damages calculation the costs of production, specifically, seed costs and transportation costs. The seed costs

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[51] Brief for appellant at 20.

[52] *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

[53] Brief for appellant at 21.

were incurred in 2015, but Fife argues that the court should have prorated that expense over the 3 years that remained of the lease from the time of the modification to organic alfalfa. The district court rejected this argument, reasoning that prorating the seed expense would exacerbate the loss to TNT resulting from the premature eviction that prevented TNT from recovering the benefits of its one-time seed investment over the expected 3-year alfalfa cycle. We find no error in this determination.

Likewise, the court's failure to deduct the transportation costs was not unreasonable. As the district court noted, those costs were incurred as part of TNT's normal overhead for its cattle operation, and the cost of transporting replacement feed used in 2017 had already been paid by TNT. There was no evidence that transportation costs were saved rather than used to raise and transport replacement feed. Such fixed overhead expenses need not be deducted from gross income to arrive at the net profit properly recoverable.[54]

Lastly, Fife asserts that the court erred by adding to TNT's damages calculation the lost benefit of his anticipated 2017 farm subsidy. Fife points out that the subsidy had not yet been approved at the time of trial. Trampe testified, however, that TNT's application for the subsidy had been approved in all the prior years on the Fife farm. It was not unduly speculative and conjectural for the court to conclude that TNT would have received this subsidy in 2017 as well.

We find no merit to Fife's contention that the amount of the district court's damages award was based on speculative and conjectural evidence. Rather, the district court's decision was supported by the evidence and bore a reasonable relationship to the elements of the damages proved.

VI. CONCLUSION

The district court did not lack jurisdiction over the action brought by TNT against Fife solely in her individual capacity.

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[54] See *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, supra* note 1.

We affirm the district court's judgment finding that the lease agreement between Fife and TNT was for a period of 11 years, that the agreement was not rescinded by the parties' modification in 2015 of the crops to be grown on the land, and that TNT suffered $51,332.26 in damages as a result of Fife's evicting TNT from the Fife farm a year early.

Affirmed.

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

Gage County, Nebraska, appellant, v. Employers Mutual Casualty company, appellee.

937 N.W.2d 863

Filed January 31, 2020. No. S-18-1118.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the court below.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
4. **Insurance: Contracts.** A court construes insurance contracts like other contracts, according to the meaning of the terms that the parties have used.
5. ____: ____. In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof.
6. **Insurance: Contracts: Proof.** In a coverage dispute between an insured and the insurer, the burden of proving prima facie coverage under a policy is upon the insured.
7. ____: ____: ____. If the insured meets the burden of establishing coverage of the claim, the burden shifts to the insurer to prove the applicability of an exclusion under the policy as an affirmative defense.
8. **Insurance: Contracts.** Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.

9. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
10. **Insurance: Contracts.** In situations involving the interplay between primary and umbrella coverages, courts should examine the overall pattern of insurance and construe each policy as a whole.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Reversed and remanded for further proceedings.

Joel D. Nelson and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellant.

Karen K. Bailey and L. Paige Hall, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

Funke, J.

This is a declaratory judgment action brought by Gage County, Nebraska, alleging that its insurer, Employers Mutual Casualty Company (EMC), has defense and indemnity obligations for federal court judgments entered against Gage County in 2016. The district court overruled Gage County's motion for partial summary judgment and entered summary judgment in favor of EMC. We reverse the district court's decision and remand the cause for further proceedings.

I. BACKGROUND

The following background describes the judgments underlying Gage County's insurance claim, the nature of the insurance dispute between Gage County and EMC, and the district court's decision granting summary judgment in favor of EMC.

1. Murder and Prosecution

Helen Wilson was raped and murdered in Beatrice, Nebraska, on February 5, 1985. After months of investigation, the case

became cold. In 1989, Gage County Sheriff Jerry DeWitt and five deputy sheriffs—Burdette Searcey; Wayne Price, who was also a psychologist; Gerald Lamkin; Kent Harlan; and Mark Meints—reopened the investigation. DeWitt, Searcey, and Price were the primary investigators and interviewed multiple witnesses and suspects.

After the additional investigative efforts, the Gage County Attorney Richard Smith charged six people with crimes related to Wilson's death: Joseph White, James Dean, Kathleen Gonzalez, Thomas Winslow, Ada Joann Taylor, and Debra Shelden. They became known as the Beatrice Six. Dean, Gonzalez, Taylor, and Shelden agreed to plead guilty and testify against White and Winslow. In November 1989, a jury convicted White of Wilson's murder, and in December 1989, Winslow entered a no contest plea. Nearly two decades later, the Beatrice Six were exonerated after DNA evidence showed that they were not present at the crime scene. In 2009, the Nebraska Board of Pardons granted pardons to each member of the Beatrice Six.

2. Civil Rights Lawsuits

In July 2009, five members of the Beatrice Six filed civil rights lawsuits in the U.S. District Court for the District of Nebraska. The sixth member, Shelden, filed suit in 2011, and the cases were consolidated. The defendants were Gage County, the Gage County sheriff's office, the Gage County Attorney's office, and, in their individual and official capacities, DeWitt, Smith, Searcey, Price, Lamkin, Harlan, and Meints. The complaints alleged that the defendants had manufactured and coerced false or misleading evidence for the purpose of arresting, prosecuting, convicting, and imprisoning the Beatrice Six for Wilson's death. The complaints alleged that the defendants made intentional misrepresentations in arrest warrants, utilized improper interrogation techniques, conducted a reckless investigation, and intentionally prosecuted the plaintiffs without proper evidentiary support. The complaints asserted claims for malicious prosecution, false arrest, conspiracy, and having

policies, practices, and customs that deprived the plaintiffs of their civil rights.

3. Insurance Policies

On February 2, 1989, Gage County purchased three insurance policies from EMC: (1) a commercial general liability (CGL) policy, (2) a linebacker policy, and (3) an umbrella policy. The effective period of the three policies was from February 2, 1989, to February 2, 1990.

(a) CGL Policy

The CGL policy was written on an occurrence basis, with a $1 million limit per occurrence and $2 million aggregate limit. Under the insuring clause, EMC agreed to pay sums that Gage County becomes legally obligated to pay as damages because of "'personal injury' . . . to which this insurance applies." The policy states, "This insurance applies to 'personal injury' only if caused by an offense: (1) [c]ommitted . . . during the policy period; and (2) [a]rising out of the conduct of your business . . . ." The policy defines "personal injury" to mean "injury, other than 'bodily injury,' arising out of one or more of the following offenses: . . . [f]alse arrest, detention or imprisonment [or] [m]alicious prosecution."

An endorsement to the CGL policy excludes coverage for "'personal injury' . . . due to the rendering [of] or failure to render any professional service." The endorsement applies to "any and all professional services" but the term "professional services" is not defined in the CGL policy or endorsement.

(b) Linebacker Policy

The linebacker policy is a claims-made policy covering losses from errors or omissions in the discharge of organizational duties. The linebacker policy excludes coverage for "[a]ny liability for personal injury" (emphasis omitted). Like that of the CGL policy, the linebacker policy's definition of "personal injury" includes injury arising out of the offenses of false arrest, detention, or imprisonment or malicious prosecution.

The linebacker policy similarly excludes liability arising from the "rendering [of] or failure to render professional services" (emphasis omitted). The policy defines "professional services" as "anyone employed in any of the following professions while performing their duties as such":

> 1. The practice of medicine, such as (but not limited to) physician, surgeon, osteopath, chiropractor, anesthesiologist, dentist, psychiatrist, psychologist, nurse, paramedic, EMT, pharmacist, etc.
> 2. The practice of law (including the judiciary).
> 3. The practice of accounting.
> 4. Architects, engineers, surveyors or draftsmen.

Gage County does not contend that the linebacker policy provides coverage for the federal court judgments. In not doing so, Gage County acknowledges that the linebacker policy is a claims-made policy and that no claims were made during the effective period.

(c) Umbrella Policy

The umbrella policy covers "loss in excess of the primary limit" of the policies "listed in Schedule A . . . because of . . . Personal Injury" (emphasis omitted). Schedule A lists both the CGL policy and the linebacker policy issued by EMC to Gage County. In an endorsement applicable to political subdivisions, coverage under the umbrella policy was expressly conditioned on the availability of coverage under a primary policy described in schedule A. Like the two other policies, the umbrella policy's definition of "personal injury" includes injuries arising out of the offenses of false arrest, detention, or imprisonment or malicious prosecution. Under certain circumstances, the umbrella policy will drop down and provide primary coverage if the primary aggregate limit is totally used up.

The umbrella policy contains an exclusion for liability arising out of "professional liability" or "excluded occupations liability," but the exclusion states that it does not apply to the extent that "professional or excluded occupations liability

coverage" is provided by a CGL policy (emphasis omitted). The umbrella policy defines "professional liability" as "liability arising out of the rendering of a service relating to a profession in a manner which is reasonable and in keeping with the standards of that profession and formal accreditation or failure to render a service." The definition

> includes but is not necessarily limited to, professions such as:
>
> A. The practice of medicine, i.e., physician, surgeon, osteopath, chiropractor, anesthesiologist, dentist, psychiatrist, psychologist, nurse, paramedic, EMT, pharmacist, etc.
>
> B. The practice of law
>
> C. The practice of accounting
>
> D. Insurance sales or consulting
>
> E. Real estate sales or management
>
> F. Architects, engineers, surveyors, or draftsmen
>
> G. Stockbrokers

The umbrella policy separately defines "excluded occupations liability" as

> liability arising out of the rendering of a service relating to an occupation listed below or the failure to render a service:
>
> A. A Director or Officer of an Organization
>
> B. Data Processing or Computer Software Development
>
> C. Law Enforcement
>
> D. Travel Agents
>
> E. Publishers, Printers, or Broadcasters[.]

4. Tender of Defense

In July 2009, Gage County tendered defense of the first five Beatrice Six lawsuits to EMC and provided copies of the five complaints which had been filed. In October, EMC denied Gage County's request for a defense and indemnification under all three insurance policies. EMC denied coverage under the linebacker policy, because no claims were brought during the policy period, from 1989 to 1990.

With respect to the CGL policy, EMC noted it covered personal injury arising out of offenses such as false arrest or imprisonment and malicious prosecution. However, EMC stated that the professional services exclusion applied. EMC stated:

> The lawsuits filed by the Plaintiffs against you allege the use of improper investigative techniques, improper training techniques, malicious prosecution, false arrest and conspiracy to violate civil rights. A professional service has been determined to be a service involving specialized skill, training or knowledge. Your investigation leading to the arrests of the Plaintiffs involved special skill, training and knowledge, which constitutes a professional service.

EMC stated that it did not have a duty under the CGL policy to defend or indemnify Gage County in the lawsuits. EMC denied coverage under the umbrella policy due to the professional liability and excluded occupations liability exclusions. That section of the denial letter stated:

> The definition of "professional liability" includes "the practice of law" and psychiatry or psychology and the definition of "excluded occupations liability" includes "law enforcement". Consequently, . . . the [u]mbrella [policy] does not provide coverage for liability arising out of law enforcement or the practice of law, psychology or psychiatry.

5. Jury Finds in Favor of Beatrice Six

The claims that went to the federal district court jury were whether DeWitt, Searcey, and Price manufactured evidence or conducted a reckless investigation which resulted in the convictions or pleas of the Beatrice Six. The jury also considered whether DeWitt, Searcey, and Price engaged in a conspiracy to violate constitutional rights and whether Gage County through DeWitt had a policy or custom of violating civil rights.

The jury concluded that Searcey and Price had manufactured evidence or engaged in a reckless investigation with respect to each of the plaintiffs. The jury found that DeWitt had not violated the plaintiffs' rights and that the defendants had not engaged in a conspiracy. The jury found Gage County liable through DeWitt's policy or custom of allowing violations of civil rights. In total, the jury entered judgments in favor of the plaintiffs and against Gage County for more than $28 million in damages. The jury's decision was upheld on appeal.

6. Present Insurance Lawsuit

In January 2017, Gage County filed its complaint for declaratory judgment against EMC alleging that under the CGL policy, EMC had a duty to defend Gage County in the Beatrice Six litigation and a duty to indemnify Gage County up to the $2 million aggregate policy limit. The complaint also alleged there "may be" additional limits available under the linebacker or umbrella policy. EMC filed an answer in which it alleged, among other affirmative defenses, that Gage County's claims were not covered under the CGL policy due to the professional services exclusion. EMC also alleged that neither the linebacker policy nor the umbrella policy afforded coverage for Gage County's claims.

In April 2018, EMC moved for summary judgment on all Gage County's coverage claims, and in May, Gage County moved for partial summary judgment on the question whether, "[f]or purposes of [Gage County's] coverages with [EMC], law enforcement was an occupation and not a profession."

On November 1, 2018, the district court granted EMC's summary judgment motion and denied Gage County's partial summary judgment motion. The court ruled that the CGL policy's professional services exclusion barred coverage under the CGL policy for all claims brought against the Gage County defendants in the Beatrice Six litigation. The court also held that there was no coverage under either the linebacker policy or the umbrella policy.

The court found that pursuant to *Marx v. Hartford Acc. & Ind. Co.*,[1] the professional services exclusion applied, because the allegations about the investigation concerned law enforcement's decisionmaking process based on training and experience. The court found that the professional services exclusion applied to the claims based on the acts of the county attorney and the acts of Price as a psychologist, in addition to those acts Price provided as a sheriff's deputy.

Gage County appealed, and we granted its petition to bypass the Nebraska Court of Appeals.

II. ASSIGNMENTS OF ERROR

Gage County assigns, restated, that the district court erred (1) in concluding the professional services exclusion in the CGL policy barred coverage; (2) in failing to conclude that when the policies are considered in context, the parties intended for law enforcement to be an occupation and not a professional service; (3) in relying upon the definition of "professional service" from *Marx*[2]; (4) alternatively, in failing to conclude that the term "professional services" in the CGL policy is ambiguous; (5) in concluding that there was no excess coverage under the umbrella policy; and (6) in concluding that Price was engaged in providing professional services as a psychologist.

III. STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the court below.[4]

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[1] *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968).

[2] *Id.*

[3] *Chase County v. City of Imperial*, 302 Neb. 395, 923 N.W.2d 428 (2019).

[4] *Id.*

[3] The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.[5]

IV. ANALYSIS

[4,5] The issue presented is whether the district court correctly applied the professional services exclusion in the context of the insurance policies and claims at issue here. We construe insurance contracts like other contracts, according to the meaning of the terms that the parties have used.[6] In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof.[7]

[6,7] In a coverage dispute between an insured and the insurer, the burden of proving prima facie coverage under a policy is upon the insured.[8] If the insured meets the burden of establishing coverage of the claim, the burden shifts to the insurer to prove the applicability of an exclusion under the policy as an affirmative defense.[9]

Due to a stipulation entered into between the parties, the sole issue before us on appeal is the applicability of the professional services exclusion. We therefore express no opinion on any other coverage-related issue in the case. As the case comes before the court, in denying Gage County's insurance claim, EMC did not contest that the allegations of malicious prosecution or false arrest, detention, and imprisonment asserted in the Beatrice Six complaints sufficiently alleged a "personal injury" as defined under the CGL policy. The question is therefore whether EMC met its burden to prove that the professional

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[5] *Drake-Williams Steel v. Continental Cas. Co.*, 294 Neb. 386, 883 N.W.2d 60 (2016).

[6] *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

[7] *Harleysville Ins. Group v. Omaha Gas Appliance Co.*, 278 Neb. 547, 772 N.W.2d 88 (2009).

[8] *Drake-Williams Steel, supra* note 5.

[9] *Id.*

services exclusion applies on these facts. To answer that question, we must determine the meaning of the term "professional services" under the policies at issue.

EMC urges us to apply the definition of "professional services" announced in *Marx* and conclude as a matter of law that the conduct of law enforcement in this case qualifies as a professional service.[10] Gage County urges us to apply the definition of "profession" from our cases construing Neb. Rev. Stat. § 25-222 (Reissue 2016), the statute of limitations governing professional negligence, and conclude as a matter of law that law enforcement is not a profession. We address both arguments below. We find that neither body of case law is controlling and that the unambiguous terms of the insurance policies are controlling.

1. Case Law Definitions Not Controlling

The district court found that the seminal meaning of "professional services," when undefined in an insurance policy, comes from our decision in *Marx*. In *Marx*, in considering the meaning of the term "professional services" as it appeared in a professional liability insurance coverage provision, we defined a professional act or service to mean "one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual."[11] We said that to "determin[e] whether a particular act is of a professional nature or a 'professional service' we must look not to the title or character of the party performing the act, but to the act itself."[12] *Marx* held that the boiling of water for sterilization purposes was not a professional service, because it was a routine equipment cleaning act that any unskilled person

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[10] See *Marx, supra* note 1.

[11] *Id.* at 14, 157 N.W.2d at 872.

[12] *Id.*

could perform. The *Marx* definition of "professional services" has been "'widely accepted'"[13] by both state and federal courts and is the "most commonly employed"[14] definition.

Before the district court, Gage County argued that *Marx* does not control this case, because *Marx* concerned a claim under a professional liability policy and because subsequent Nebraska jurisprudence concerning the statute of limitations applicable to actions for professional negligence further developed the meaning of "professional services."[15] The district court disagreed with Gage County, stating that a more recent case, *R.W. v. Schrein*,[16] relied upon *Marx* to define the term "professional services" as used in an insurance policy. The court stated that although Nebraska's appellate courts have not yet decided the issue, courts in other jurisdictions have applied *Marx* and held that law enforcement services qualify as professional services.[17]

On appeal, Gage County argues that *Marx* and *Schrein*, which also concerned a professional liability policy, do not control the meaning of "professional services" in the context of a professional services exclusion in a CGL policy. In support

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[13] *Medical Records Assoc. v. American Empire Surplus*, 142 F.3d 512, 514 (1st Cir. 1998), quoting *Roe v. Federal Ins. Co.*, 412 Mass. 43, 587 N.E.2d 214 (1992). See *Harad v. Aetna Cas. and Sur. Co.*, 839 F.2d 979 (3d Cir. 1988).

[14] *Bank of California, N. A. v. Opie*, 663 F.2d 977, 981 (9th Cir. 1981). See *Nautilus Ins. Co. v. Strongwell Corp.*, 968 F. Supp. 2d 807 (W.D. Va. 2013).

[15] See, *Wehrer v. Dynamic Life Therapy & Wellness*, 302 Neb. 1025, 926 N.W.2d 107 (2019); *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 830 N.W.2d 53 (2013); *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987).

[16] *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002).

[17] See, *Western World Ins. v. American and Foreign Ins.*, 180 F. Supp. 2d 224 (D. Me. 2002); *Lansing Community College v. National Union Fire*, No. 1:09-CV-111, 2010 WL 774877 (W.D. Mich. Mar. 1, 2010) (unpublished opinion). See, also, *Yatsko v. Graziolli*, No. 1:18 CV 1675, 2019 WL 2497794 (N.D. Ohio June 17, 2019).

of this view, Gage County relies upon our jurisprudence in the area of professional negligence in which we have held that in determining whether the statute of limitations for a professional negligence claim applies, the court must determine whether the defendant is a professional and then must determine whether the defendant was acting in a professional capacity in rendering the services upon which the claim is based.[18] Gage County contends that we analyze the same two questions in the insurance context to determine whether a particular act qualifies as a professional service.

According to Gage County, the first inquiry is whether an individual's occupation rises to the level of a profession. The definition of "profession" for the purpose of determining the professional negligence statute of limitations under § 25-222 is (1) a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods, as well as in the scientific, historical, or scholarly principles underlying such skills and methods; (2) maintaining by force of organization or concerted opinion high standards of achievement and conduct; and (3) committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.[19] The second inquiry under Gage County's argument is whether a particular act falls within the scope of a profession and arose out of the specialized skill, knowledge, or training associated with the profession. Gage County argues that based on the first inquiry alone, we should reverse the district court's decision. Gage County further contends that *Marx* and *Schrein* did not address the first inquiry, because the insured in an insurance dispute involving a professional liability policy necessarily will be a professional. Gage County argues that *Marx* and *Schrein* address only the second inquiry of whether a particular act falls within the scope of a profession.

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[18] See *Churchill, supra* note 15.

[19] *Wehrer, supra* note 15.

In response, EMC contends that courts have applied *Marx* to define a professional services exclusion in a CGL policy.[20] For example, the district court relied upon *Western World Ins. v. American and Foreign Ins.*,[21] a decision issued by a U.S. magistrate judge which addressed a claim under a CGL policy based on a death from an officer-involved shooting. The magistrate judge relied upon the definition of "professional services" from *Marx* and found that the professional services exclusion applied, because the officer's decision to use deadly force was based on the officer's specialized training and experience.

The district court also relied upon a federal district court decision which involved facts similar to those of this case.[22] At issue in *Lansing Community College v. National Union Fire*[23] was a college's defense and indemnity request based on a claim that college law enforcement officers had manufactured evidence in a murder investigation. The court relied upon *Marx* and found that the activities of police officers fell within a professional services exclusion in a CGL policy, because police officers receive specialized training and education and often are called upon to make decisions using this training. The court found that police activities such as interviewing suspects and witnesses, investigating crimes, and assisting in the prosecution of criminal cases are the types of activities that may be considered professional services.[24]

While we agree with EMC and the district court that *Marx* has been followed by courts across the country, we need not decide, in this case, whether it is more appropriate to apply

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[20] See, *American Economy Ins. Co. v. Jackson*, 476 F.3d 620 (8th Cir. 2007); *Harad, supra* note 13; *Boggs v. Camden-Clark Memorial Hosp. Corp.*, 225 W. Va. 300, 693 S.E.2d 53 (2010); *Hollingsworth v. Commercial Union Ins.*, 208 Cal. App. 3d 800, 256 Cal. Rptr. 357 (1989).

[21] *Western World Ins., supra* note 17.

[22] *Lansing Community College, supra* note 17.

[23] *Id.*

[24] *Id.*

the definition from *Marx* or the definition from our cases defining "profession" for purposes of § 25-222. This case does not require us to import definitions from our case law to answer the question of whether law enforcement is considered a profession, because the plain language of the EMC policies answers that question for the parties to this dispute.

2. Contract Is Clear and Unambiguous

[8,9] Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.[25] When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.[26]

[10] We have generally recognized that in situations involving the interplay between primary and umbrella coverages, courts should examine the overall pattern of insurance and construe each policy as a whole.[27] All three EMC policies have exclusions for either "professional services" or "professional liability," and two of the three policies contain definitions of these terms. When determining the meaning of "professional services," we cannot overlook the plain language of the EMC policies.

When the CGL policy, linebacker policy, and umbrella policy are analyzed as a whole, we are persuaded that an ordinary and reasonable person would understand the professional services exclusion to be inapplicable to the acts of law enforcement.

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[25] See *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982).

[26] *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002).

[27] *Harleysville Ins. Group, supra* note 7.

The CGL policy, linebacker policy, and umbrella policy provide an interrelated pattern of insurance. According to the deposition testimony of the EMC claims manager, at the time these three policies were issued, it was common for insureds like Gage County to purchase all three lines of coverage. In fact, the claims manager testified that in the early 1990's, approximately 100 to 200 municipalities were insured with EMC and most of those municipalities had a CGL policy, a linebacker policy, and an umbrella policy.

The umbrella policy is related to both the CGL policy and the linebacker policy and, under certain conditions, provides excess coverage for both policies. To the extent the umbrella policy provided excess coverage for the linebacker policy, it did so on a claims-made basis. Both the CGL policy and the umbrella policy cover claims for damages arising out of false arrest, detention, or imprisonment or malicious prosecution. In certain circumstances, the umbrella policy provides primary coverage depending on the availability of coverage under the CGL policy. In addition, the applicability of the umbrella policy's professional or excluded occupations liability exclusion in the umbrella policy depends on whether the CGL policy covers professional or excluded occupations liability.

On appeal, both parties argue in their briefs that the policies here are interrelated and must be considered together.

The CGL policy does not define the term "professional services" as used in the professional services exclusion. However, the linebacker policy expressly defines "professional services" to mean anyone employed in an exclusive list of professions, including the practice of medicine, the practice of law, the practice of accounting, architects, engineers, surveyors, or draftsmen. Similarly, the umbrella policy provides a nonexhaustive list of professions which are included within the "professional liability" exclusion, which applies to "liability arising out of the rendering of a service relating to a profession." The list includes services related to the practice of medicine, the practice of law, the practice of

accounting, insurance sales or consulting, real estate sales or management, architects, engineers, surveyors or draftsmen, and stockbrokers. Law enforcement does not appear within the list of professions, but instead appears as one of five specified categories of occupations under the occupations liability exclusion, along with data processing, travel agents, publishers, printers, and broadcasters.

Based on these policy provisions, we conclude that the professional services exclusion under the EMC policies does not apply to law enforcement. Under both the linebacker policy and the umbrella policy, law enforcement clearly does not qualify as a professional service; it is not listed in the exclusive list of professions in the linebacker policy, and it is listed as an "occupation" rather than a profession in the umbrella policy.

The fact that the umbrella policy lists law enforcement as an occupation rather than a profession is a particularly compelling indication of the parties' understanding. It indicates that the parties understood professions and occupations to have separate meanings and include different types of acts or services. It also indicates that they understood law enforcement not to be a profession. Had the parties understood law enforcement as being a profession, it would have been unnecessary to separately list law enforcement as an excluded occupation. And while the umbrella policy contains an "occupations liability . . . exclusion" (emphasis omitted), there is no similar exclusion in the CGL policy that would lead a reasonable person to understand that the CGL policy excludes coverage for law enforcement services. Additionally, the CGL policy's definition of covered "personal injuries" includes "injury . . . arising out of . . . [f]alse arrest, detention or imprisonment [or] [m]alicious prosecution," which are typically understood as acts performed by law enforcement.

Because the result in this case is dictated by a definition of "professional services" supplied by the parties' contract, we reject the parties' arguments which suggest that we apply definitions from case law. Were we to apply definitions from

our case law rather than the definitions the parties have used, we would be rewriting insurance policies. We have recognized that "'it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction.'"[28]

Upon de novo review, we find merit to Gage County's assignments of error that the district court erred in (1) concluding that the professional services exclusion barred coverage, (2) determining on summary judgment that no excess coverage is available under the umbrella policy, and (3) concluding that the professional exclusion applies to the acts of Price as a psychologist.

The extent of EMC's liability under the CGL policy remains for the district court to determine in the first instance upon remand. Provisions within the umbrella policy suggest that there may be coverage available under that policy if EMC is found to be responsible under the CGL policy. We therefore determine that the district court erred in finding a lack of coverage under the umbrella policy as a matter of law at this stage.

We determine that the court erred in finding that coverage for the claims asserted against Price may be excluded because he is a psychologist, because we do not find that the claims asserted against Price were based on his work as a psychologist. None of the claims against Price were based on medical malpractice, and we agree with Gage County that in manufacturing evidence and engaging in a reckless investigation, Price rendered acts and services as a sheriff's deputy and not as a psychologist. Even if Price was acting as both a sheriff's deputy and a psychologist, the result would be the same. When the underlying lawsuit alleges injuries resulting from the provision of both professional services and nonprofessional services, a professional services exclusion does not negate the insured's

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[28] *Safeco Ins. Co. of America, supra* note 25, 211 Neb. at 25-26, 317 N.W.2d at 748.

claim.[29] Our decision does not affect Gage County's concession that the claims based on the acts of the county attorney come within the professional services exclusion.

For the foregoing reasons, we reverse the district court's decision granting EMC's motion for summary judgment and remand the cause with directions to sustain Gage County's motion for partial summary judgment and find that the professional services exclusion in the CGL policy does not preclude coverage for Gage County's insurance claims.

V. CONCLUSION

Based upon the preceding analysis, we conclude that it was error to enter summary judgment in favor of EMC and to overrule Gage County's motion for partial summary judgment. Accordingly, we reverse the district court's decision and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

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[29] See *National Cas. Co. v. Western World Ins. Co.*, 669 F.3d 608 (5th Cir. 2012).

Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Ann Coyle White, appellee and cross-appellant, v. Timothy Vincent White, appellant and cross-appellee.

937 N.W.2d 838

Filed January 31, 2020. No. S-19-047.

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.
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.** Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process.
5. ____: ____. The first step in the equitable division of property 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.
6. ____: ____. All property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to this general rule.
7. ____: ____. The marital estate does not include property that a spouse acquired before the marriage, or by gift or inheritance.
8. ____: ____. Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.

9. ____: ____. The original capital or value of an asset may be nonmarital, while all or some portion of the earnings or appreciation of that asset may be marital.
10. **Divorce: Property Division: Presumptions.** Accrued investment earnings or appreciation of nonmarital assets during the marriage are presumed marital unless the party seeking the classification of the growth as nonmarital proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is not due to the active efforts of either spouse.
11. **Divorce: Property Division: Words and Phrases.** Appreciation caused by marital contributions is known as active appreciation, and it constitutes marital property.
12. ____: ____: ____. Passive appreciation is appreciation caused by separate contributions and nonmarital forces.
13. **Divorce: Property Division: Proof.** The burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income.
14. **Evidence: Appeal and Error.** 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.
15. **Divorce: Property Division.** Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse.
16. ____: ____. If the separate property remains segregated or is traceable into its product, commingling does not occur.
17. ____: ____. The second step in the equitable division of property is to value the marital assets and marital liabilities of the parties.
18. **Divorce: 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.
19. **Divorce: Property Division.** The third step in the equitable division of property is to calculate and divide the net marital estate between the parties in accordance with the principles contained in Neb. Rev. Stat. § 42-365 (Reissue 2016).
20. ____: ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed as modified.

Anthony W. Liakos and, on brief, Pamela Hogenson Govier, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellant.

Paul M. Shotkoski and Michael F. Coyle, of Fraser Stryker, P.C., L.L.O., for appellee.

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

Cassel, J.

I. INTRODUCTION

Timothy Vincent White (Tim) appeals from a decree dissolving his marriage to Ann Coyle White. Ann cross-appeals. The main issue is whether the growth in value of one investment account, derived from a nonmarital source, was properly classified as marital property. Under the active appreciation rule, Tim had the burden to prove that the growth was not due to the active efforts of either spouse. Under the specific facts here, he failed to do so. But he established that part of another investment account was nonmarital, and we modify the decree accordingly. Upon de novo review, we find no abuse of discretion regarding the court's valuation date, division of a tax liability, and order for an equalization payment. As so modified, we affirm the decree.

II. BACKGROUND

Ann and Tim were married in September 1990. In May 2017, Ann filed a dissolution action. There were no minor children, alimony was not contested, and the parties mostly agreed to the division of property. On appeal, the parties dispute only the marital or nonmarital characterization of two investment accounts: the Waddell & Reed 6300 account (6300 account) and the Charles Schwab account (Schwab account), the valuation date for the two accounts, the allocation of the 2017 tax liability, and the amount of the equalization payment. We begin with the accounts.

1. Inheritance and Gifts

In 2008, Tim's mother died. As an inheritance, he received 4,900 shares of ConAgra stock and $100,000. In April 2012, he used the $100,000 to purchase mutual funds and transferred the funds to open the 6300 account. He then used the 4,900 shares of ConAgra stock to open the Schwab account. From that point on, the accounts differed.

(a) 6300 Account

Regarding the 6300 account, Tim never made any deposits or withdrawals from the account. The account was solely in Tim's name. Ann was aware of the account but unaware that it was in his name. Tim testified that he told Ann he would take the $100,000 and diversify it into mutual funds. Because Tim is a licensed financial advisor, he allocated the investments using "modern portfolio theory"—which he used for all his clients. Each year, he reinvested any income earned on the account. Tim presented evidence that the balance of the 6300 account as of June 30, 2017, was $338,852. Tim's valuation date represented the parties' separation date. Ann presented evidence that the balance of the 6300 account as of July 31, 2018—a date close to trial—was $357,213.

In the district court's decree, it found that June 30, 2017, was the valuation date for the marital estate "as that date is best supported by the evidence and represents the separation of the parties['] working finances."

Further, the court recognized that the account was created with Tim's inherited funds and was opened solely in his name. The taxable income derived from the account, the court noted, was reported on the parties' joint tax returns. It found that the parties discussed the management of the account—specifically, the diversification of the money into four mutual funds. The court reasoned that Tim made a marital contribution to the appreciation, because "there clearly [was] a causal connection between [Tim's] investment strategy and the growth in value." It awarded the initial $100,000 investment as a nonmarital

asset to Tim. It then classified the appreciation as a marital asset and awarded it to Tim.

(b) Schwab Account

Tim opened the Schwab account with the 4,900 shares of ConAgra stock. After this account was opened, Tim's father gave 38,000 shares of ConAgra stock to Tim by two direct transfers into the account. Throughout the parties' marriage, they had received gifts of ConAgra stock. All previous gifts were deposited into the parties' joint account. Tim testified that "I was going to keep it separate from our joint account, which was a margin account, because we had blown through all of those assets on margin living beyond our means."

Tim managed all withdrawals and deposits from the Schwab account. In 2013, Tim transferred funds from the Schwab account to purchase a new marital home. About $240,000 of marital funds were transferred from the joint account to the Schwab account. Tim diversified the Schwab account and sold shares of ConAgra to purchase shares in four other companies. He then purchased several units of exchange trade funds (ETF's) with proceeds from ConAgra stock and marital moneys in the account. Throughout the marriage, Tim withdrew money from the Schwab account for household expenses, trips, major repairs, and remodeling the marital home. Neither party deposited any income into the Schwab account.

Tim presented evidence that the value of the Schwab account on June 30, 2017, was $1,432,796. According to evidence Ann submitted, the value of the Schwab account on July 31, 2018, was $1,648,705.

In the district court's decree, it reasoned that no evidence, other than opening the account in his name, supported an intent to treat the Schwab account differently from previously gifted assets. After reviewing the evidence regarding the Schwab account, the district court reasoned that the difference in the purpose, management, and utilization of the Schwab account, in contrast to the 6300 account, resulted in the entire account being a marital asset. The court stated:

> [T]he totality of evidence before the Court makes it clear that both parties intended the [Schwab account] as a "nest egg" for the parties' future and the entirety of the account should be treated as a marital asset, as valued on June 30, 2017, at $1,432,796. This amount is ordered to be equally divided between the parties.

2. Tax Liability and Equalization Payment

At trial, Tim testified that the parties always had filed a joint tax return. He agreed that in practice, if the withholdings from Ann's salary did not satisfy the entire tax obligation, the balance would be paid from the Schwab account. The district court determined that because the valuation date of the Schwab account and the 6300 account was June 30, 2017, Tim would be required to pay the 2017 tax liability.

The district court found that the marital estate should be divided equally. Pursuant to the parties' stipulations and the court's division of the disputed accounts, it ordered Tim to pay Ann $14,373 to equalize the division.

Tim filed a timely appeal, and Ann cross-appealed. We moved the proceeding to our docket.[1]

III. ASSIGNMENTS OF ERROR

On appeal, Tim assigns that the district court erred in (1) finding that the appreciation in the 6300 account constituted marital property, (2) finding that the Schwab account was marital property, (3) ordering him to pay the entirety of the parties' 2017 joint tax liability, and (4) ordering him to pay an equalization amount.

Ann cross-appeals and assigns that the district court erred in valuing the accounts on June 30, 2017, rather than July 31, 2018.

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

IV. STANDARD OF REVIEW

[1] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.[2]

[2] 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.[3]

[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]

V. ANALYSIS

[4] It is well settled that under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process.[5] Because the parties' assignments of error attack different steps in the process, we take up each assignment as it fits into the three-step framework.

1. Classification

[5] The first step in the equitable division of property 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.[6] Tim makes two arguments regarding the court's classification decisions. First, he argues that the appreciation in the 6300 account was nonmarital, because

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[2] *Burgardt v. Burgardt, ante* p. 356, 934 N.W.2d 488 (2019).

[3] *Id.*

[4] *Id.*

[5] See *Dooling v. Dooling*, 303 Neb. 494, 930 N.W.2d 481 (2019).

[6] See *id.*

it was the direct fruit of his inheritance. Second, he argues that the court erred in classifying the entirety of the Schwab account as marital property, because, he contends, the growth of the account was readily identifiable and traceable to the nonmarital property. We address each argument in turn.

(a) 6300 Account

Tim argues that the appreciation on the 6300 account could not be considered marital property, because he did not actively manage the account. His testimony showed, he contends, that after selecting the initial mutual funds, he relied on professional money managers to manage the funds. He contends that the district court's reliance on *Stephens v. Stephens*[7] was misplaced, because the instant case involves classification of an inheritance and not a business interest. Additionally, he contends that our broad definition of active appreciation in *Stephens*, if extended to the 6300 account, would make it "virtually impossible . . . to retain the non-marital nature of a particular asset" where the inheriting spouse has "merely made the decision to invest in funds that happen to grow over time."[8]

[6-9] All property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to this general rule.[9] The marital estate does not include property that a spouse acquired before the marriage, or by gift or inheritance.[10] Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.[11] "Therefore, the original capital or value of an asset may be nonmarital, while all or

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[7] *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

[8] Brief for appellant at 18.

[9] *Stephens v. Stephens, supra* note 7.

[10] *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

[11] *Stephens v. Stephens, supra* note 7.

some portion of the earnings or appreciation of that asset may be marital."[12]

Here, the focus is only on the growth of the 6300 account. The district court allocated the original investment of $100,000 solely to Tim as nonmarital.

[10-13] The active appreciation rule sets forth the relevant test to determine to what extent marital efforts caused any part of an asset's appreciation or income.[13] Accrued investment earnings or appreciation of nonmarital assets during the marriage are presumed marital unless the party seeking the classification of the growth as nonmarital proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is not due to the active efforts of either spouse.[14] Appreciation caused by marital contributions is known as active appreciation, and it constitutes marital property.[15] Passive appreciation is appreciation caused by separate contributions and nonmarital forces.[16] The burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income.[17]

As an initial matter, Tim contends that the active appreciation rule in *Stephens* did not apply here, because the rule addressed appreciation on a nonmarital business interest rather than an inheritance.[18] We disagree. In *Stephens*, we held that "the principles set forth in [*Stanosheck v. Jeanette*[19]] apply equally to appreciation or income during the marriage of

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[12] *Id*. at 201, 899 N.W.2d at 592.

[13] See *Stephens v. Stephens, supra* note 7.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] See *id.*

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

any nonmarital asset."[20] We did not limit our holding solely to retirement accounts and business interests, and we decline to do so now. Therefore, the burden was on Tim to rebut the presumption that the appreciation in the 6300 account was marital.

Tim satisfied the first test of the active appreciation rule. Neither party disputes that the growth in the 6300 account was readily identifiable and traceable to the nonmarital portion of the account. Accordingly, the issue before us is the rule's second prong: whether the growth in the 6300 account was due to the active efforts of either spouse.

Tim contends that the definition of active appreciation in *Stephens* and our application of the active appreciation rule is too broad.[21] As we quoted above, he contends that the rule imposes an "impossible" burden on an inheriting spouse to maintain an asset's nonmarital character. In making this argument, he relies on academic criticism of *Stephens*, which, he argues, illustrates that our broad definition of active appreciation encapsulates passive market conditions. Referring to our decision, the writer commented:

> In particular, [*Stephens*] held that "[e]ven favorable market conditions are not passive inasmuch as they create merely the opportunity that the skilled, owning spouse detects and seizes." . . . The court cited for this point [to] § 5:57 of the third edition of this treatise. But § 5:57 did not say that all appreciation caused by favorable market conditions is active. On the contrary, it stated expressly that appreciation caused by market conditions is generally passive.[22]

We will address Tim's argument in two parts. First, we will discuss case law concerning the development of the active

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[20] *Stephens v. Stephens, supra* note 7, 297 Neb. at 205, 899 N.W.2d at 595 (emphasis supplied).

[21] See *Stephens v. Stephens, supra* note 7.

[22] 3 Brett R. Turner, Equitable Distribution of Property, § 10:29.2 at 408 (4th ed. 2019).

appreciation rule in Nebraska and its application in other states. Then, we will apply the active appreciation rule to the facts of this case.

(i) Case Law on Active Appreciation

We first discussed the concept of active appreciation in *Coufal v. Coufal*.[23] In *Coufal*, we discussed whether the appreciation on the husband's nonmarital contributions to his state retirement account was marital property. We began by examining to what extent the appreciation in the nonmarital portion of the account was caused by the efforts of either spouse. We relied on *Van Newkirk v. Van Newkirk*[24] and *Buche v. Buche*[25] for the reasoning that "some level of indirect or direct effort was required by the nontitled spouse—not just inflation or market forces—in order to include the increase in value in the marital estate."[26]

In *Coufal*, we then analogized the account to a certificate of deposit with a fixed rate of interest that was owned by a spouse prior to the marriage. We explained that both the principal and the interest remained separate property, because it was acquired before the marriage and no marital effort or contribution affected the accrual of interest. We reasoned that because the interest accrued solely from the operation of Neb. Rev. Stat. § 84-1301 (Cum. Supp. 2018), no effort of either spouse directly or indirectly affected the appreciation. We rejected the wife's argument that the marital and nonmarital portions of the account were commingled. We reasoned that the appreciation on the nonmarital portion of the account was readily identifiable and traceable. Thus, we concluded, the appreciation of the nonmarital portion of the husband's state retirement account was also nonmarital.

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[23] *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015).

[24] *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), *abrogated, Stephens v. Stephens, supra* note 7.

[25] *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988).

[26] *Coufal v. Coufal, supra* note 23, 291 Neb. at 384, 866 N.W.2d at 78.

In *Stanosheck v. Jeanette*,[27] we discussed the application of *Coufal* to nonmarital retirement accounts. We agreed that *Coufal* was not restricted to any particular kind of retirement account; instead, its applicability was dependent on the facts of each case. Extrapolating a test from *Coufal*, we stated that investment earnings accrued during the marriage on the nonmarital portion of a retirement account may be classified as nonmarital where the party seeking the classification proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is due solely to inflation, market forces, or guaranteed rate rather than the direct or indirect effort, contribution, or fund management of either spouse.[28]

In *Stephens*, we discussed the concept of active appreciation regarding a business interest.[29] We rejected the husband's argument that *Coufal* and *Stanosheck* apply only to appreciation on retirement accounts. After reexamining *Van Newkirk* and our case law on awards under *Grace v. Grace*,[30] we found them inapplicable in our modern dual classification system but did not absolutely forbid a court from taking into account nonmarital assets in its equitable division of the marital estate.[31]

Then, relying on *Stanosheck*, we articulated in *Stephens* the active appreciation rule. In doing so, we agreed with several other jurisdictions that the burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation and expressly held that the appreciation or income of a nonmarital asset during the marriage is marital

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[27] *Stanosheck v. Jeanette, supra* note 19.

[28] *Id.*

[29] *Stephens v. Stephens, supra* note 7.

[30] See *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), *abrogated, Stephens v. Stephens, supra* note 7.

[31] *Stephens v. Stephens, supra* note 7.

insofar as it was caused by the efforts of either spouse or both spouses.[32]

Applying the active appreciation rule in *Stephens*, we reasoned that the district court should not have excluded the business interest from the marital estate. We explained that the growth in the value of the husband's business interest depended on the extent of growth of the business that was caused by his active efforts. We discussed the husband's active efforts as someone in first-tier management. The husband was a cofounder of the business and worked full time for 25 years, contributing significantly to the business' growth.

We then discussed in *Stephens* the direct and indirect efforts of a spouse. We rejected the argument that "'"ground work"'" for growth was laid before the marriage and would preclude appreciation of the company's value during the marriage as marital.[33] We illustrated a spouse's indirect efforts as active efforts when his or her mere presence was identified with the business entity and tied to its goodwill.

Regarding direct efforts, we cited to Turner's treatise on equitable distribution. "'[E]ven favorable market conditions are not passive inasmuch as they create merely the opportunity that the skilled, owning spouse detects and seizes.'"[34] In the context of *Stephens*, the quotation merely explained how a business owner could actively exploit favorable market conditions. We reject the interpretation that favorable market conditions necessarily result in active appreciation. We reasoned that the husband did not carry his burden to demonstrate that any portion of his business' appreciation was due to passive efforts or "the active efforts of third parties who would qualify as first-tier management or similar."[35] In light of the burden of proof, the record presented evidence that the husband's active efforts

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[32] *Id.*

[33] *Id.* at 208, 899 N.W.2d at 596.

[34] 3 Turner, *supra* note 22.

[35] *Stephens v. Stephens, supra* note 7, 297 Neb. at 208, 899 N.W.2d at 596.

were responsible for at least 34 percent of the business' growth during the marriage.

In *Baker v. Baker*,[36] the Minnesota Supreme Court discussed active appreciation on the nonmarital portion of the husband's retirement account. The husband had 11 separate accounts, which were moved between several financial institutions, including Merrill Lynch. The Merrill Lynch manager of the husband's account testified that he and his money managers had discretion to invest the money from the accounts. The Merrill Lynch manager had power to direct investment and transfer funds between investment institutions. The husband directed only one trade to be made in 13 years at Merrill Lynch. He never made a withdrawal or received distributions from the accounts during the marriage. All investment returns were reinvested. The Minnesota Court of Appeals reasoned that because the husband had control over the accounts by transferring them between institutions, he actively managed the accounts and defeated the claim that the investment was passive.

In disagreeing with the lower court's analysis, the Minnesota Supreme Court in *Baker* made five points. Its precedent on active appreciation focused on the spouse's efforts and not the spouse's control over an asset. Its case law regarding active appreciation dealt primarily with appreciation in the value of a small business or real estate. In evaluating an investment portfolio, the court looked to the character of the underlying investments. And it rejected the lower court's reliance on agency principles to attribute Merrill Lynch's efforts to the husband. Instead, the Minnesota Supreme Court reasoned that by utilizing professional investment institutions, the husband avoided the need to devote significant marital efforts to managing his retirement funds. Thus, the court concluded, the husband's efforts were insufficient to render the appreciation active.

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[36] *Baker v. Baker*, 753 N.W.2d 644 (Minn. 2008).

In *Chapman v. Chapman*,[37] the Florida District Court of Appeal discussed active appreciation on bonds in a retirement account. The issue before the court was whether the trial court erred in holding that a portion of increase of nonmarital securities resulted from marital labor. The husband's efforts were limited to replacing investment grade bonds, as they became due, with similar bonds. The wife's expert opined that the husband's active trading of stocks and bonds enabled him to achieve a greater annual return than the benchmark for stocks and bonds. The wife presented evidence of "the benchmark [of return] for stocks [through] the Standard & Poors 500 Stock Index" and "[t]he benchmark for . . . bonds [through] the Lehman Brothers Aggregate Bond Index . . . ."[38] The appellate court affirmed the trial court's treatment of the portion of the appreciation which could have been achieved through passive investment as nonmarital and the additional appreciation as marital.

In *O'Brien v. O'Brien*,[39] the North Carolina Court of Appeals discussed appreciation in an investment account funded with inherited moneys. After setting forth the evidence which persuaded the court that the original nonmarital investments were traced to the existing account, the court then discussed whether the appreciation should be considered marital. It adopted a multifactorial approach from the Missouri Court of Appeals to determine whether either spouse performed substantial services during the marriage to increase the value of the investment.

> In making the determination of whether the services of a spouse are substantial, the trial court should consider, among other relevant facts and circumstances of the particular case, the following factors: (1) the nature of the investment; (2) the extent to which the investment decisions are made *only* by the party or parties, made by

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[37] *Chapman v. Chapman*, 866 So. 2d 118 (Fla. App. 2004).

[38] *Id.* at 118-19.

[39] *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998).

> the party or parties in consultation with their investment broker, or solely made by the investment broker; (3) the frequency of contact between the investment broker and the parties; (4) whether the parties routinely made investment decisions in accordance with the recommendation of the investment broker, and the frequency with which the spouses made investment decisions contrary to the advice of the investment broker; (5) whether the spouses conducted their own research and regularly monitored the investments in their accounts, or whether they primarily relied on information supplied by the investment broker; and (6) whether the decisions or other activities, if any, made solely by the parties directly contributed to the increased value of the investment account.[40]

The North Carolina appellate court agreed with the trial court that because the spouses jointly met with the broker and routinely chose between the broker's alternative recommendations, neither spouse's services were substantial.

We adhere to the active appreciation rule articulated in *Stephens*. Tim had the burden to prove that all or some portion of the growth in value was not attributable to his or Ann's active efforts. We reject his assertion that this imposed an "impossible" burden. And we agree that in an appropriate case and depending upon the particular circumstances, the factors articulated by the North Carolina appellate court may be useful in assessing whether growth was attributable to the efforts of either spouse.

(ii) Application

[14] Upon a de novo review of the record for an abuse of the district court's discretion, we conclude that Tim failed to carry his burden. And here, witness credibility becomes important. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and

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[40] *Id*. at 421, 508 S.E.2d at 307.

observed the witnesses and accepted one version of the facts rather than another.[41]

We concede that there was no evidence of any active efforts on Ann's part; thus, we look solely to Tim's efforts. At oral argument, neither party disputed that the growth amounted to something in the neighborhood of *15 percent compounded annually*. In other words, both acknowledged what appeared to be a highly successful rate of growth.

Tim presented no evidence to establish that this growth was attributable solely to passive market forces or separate contributions, even in part. Tim did not present evidence of some recognized benchmark of general market growth, which might have been very persuasive evidence of the effect of market forces.[42] Nor did he present evidence that the annual rate of return, or some portion of it, was guaranteed or statutorily prescribed.[43] He failed to show that he relied on the recommendations or management of his account by a third party.[44] To the contrary, in light of the district court's findings, the evidence showed that through Tim's direct efforts of employing his modern portfolio theory, he achieved a highly successful return on his investment. He did not distinguish these efforts from similar efforts he provided to his clients. Without evidence showing that his direct or indirect efforts did not cause the appreciation, we agree with the district court that there was a causal connection between Tim's efforts in employing his modern portfolio theory and the appreciation on the account.

Had the evidence provided a basis for distinguishing the results attributable to his efforts from the results that would have occurred merely because of market forces, the district

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[41] *Burgardt v. Burgardt, supra* note 2.

[42] See *Chapman v. Chapman, supra* note 37.

[43] See, *Coufal v. Coufal, supra* note 23; *Stanosheck v. Jeanette, supra* note 19.

[44] See *Stephens v. Stephens, supra* note 7. See, also, *Baker v. Baker, supra* note 36; *O'Brien v. O'Brien, supra* note 39.

court might have abused its discretion in failing to treat some or all of the appreciation as nonmarital. But, here, Tim had the burden of proof and he simply failed to carry that burden. Accordingly, the district court did not err in classifying the appreciation on the 6300 account as marital.

(b) Schwab Account

Tim argues that the entirety of the Schwab account is nonmarital, because the growth was readily identifiable and traceable to the inherited and gifted assets. Tim contends that the record showed that he never had the intent to make the gifted or inherited assets marital property, because he opened the account solely in his name and the growth in the account was not due to his active efforts. He contends that the district court placed extensive emphasis on its interpretation of Tim's intent and erroneously considered Ann's intent regarding the account.

As stated earlier in this opinion, the marital estate does not include property that a spouse acquired before the marriage, or by gift or inheritance.[45] The burden of proof rests with the party claiming that property is nonmarital.[46]

The record shows that Tim inherited shares of ConAgra stock from his late mother and received gifts of additional shares of ConAgra stock from his father and his uncle. All stock was placed in the Schwab account, along with other marital property. Although the vast majority of the ConAgra stock was converted into other assets, at the valuation date, 6,500 shares of ConAgra stock remained.

[15,16] Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists.[47] Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other

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[45] *Stephens v. Stephens, supra* note 7.

[46] *Rohde v. Rohde*, 303 Neb. 85, 927 N.W.2d 37 (2019).

[47] *Brozek v. Brozek, supra* note 10.

spouse.[48] If the separate property remains segregated or is traceable into its product, commingling does not occur.[49]

(i) Remaining ConAgra Stock

Tim showed that the ConAgra stock left in the Schwab account remained segregated and traceable. The evidence is undisputed that all of the shares of ConAgra stock that came into the Schwab account were Tim's by inheritance or gift. Although most of the stock was sold, there were 6,500 shares remaining at the time of trial. We conclude that Tim met his burden of tracing the remaining shares of ConAgra stock and proving it to be nonmarital. Therefore, the district court erred in classifying the 6,500 shares of ConAgra stock as marital property. We modify the court's decree to determine that the remaining 6,500 shares of ConAgra stock in the Schwab account were Tim's nonmarital property.

(ii) Other Holdings in Schwab Account

Marital and nonmarital funds were withdrawn and deposited into the Schwab account. In order to purchase the parties' marital home, Tim wired funds directly from the Schwab account to the real estate company. The parties acquired several large sums of money from a settlement award, the mortgage on the marital home, and the proceeds from the sale of the former marital home. Some of the moneys were placed in the joint account, some were used for home improvements, and the remaining $240,000 was placed in the Schwab account.

Additionally, Tim diversified the account with both marital and nonmarital funds. The record shows that Tim sold thousands of ConAgra shares and purchased ETF's. The record further shows that as Tim moved marital funds into the Schwab account, he diversified those moneys into the same ETF's. He then sold some of the ETF's and purchased other ETF's.

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[48] *Id.*

[49] *Id.*

Except for the 6,500 shares of remaining ConAgra stock, the evidence presented did not show that the gifted stock was segregated or traceable into its products. Several gifted shares and marital moneys were used to purchase ETF's. ETF's were then sold to purchase different ETF's. Clearly, the nonmarital property became commingled when it was inextricably mixed with the marital property through diversification. It was Tim's burden to show what portion of the parties' assets were attributable as nonmarital assets. Tim did not meet his burden. We conclude that the district court did not abuse its discretion when classifying the Schwab account, other than the 6,500 shares of ConAgra stock, as marital property.

The district court's decree valued the Schwab account at $1,432,796 and divided it equally between the parties, i.e., $716,398 to each party. Having modified the decree to classify the remaining 6,500 shares of ConAgra stock, which were valued at $232,440, as Tim's nonmarital property, we further modify the decree to divide the remaining value of the Schwab account, totaling $1,200,356, equally between the parties, i.e., $600,178 to each party. Thus, of the value of the Schwab account totaling $1,432,796, Tim shall receive $832,618 and Ann shall receive $600,178.

2. Valuation Date

[17] The next assignment of error falls within the second step of the three-step framework for division of property. The second step in the equitable division of property is to value the marital assets and marital liabilities of the parties.[50]

On cross-appeal, Ann argues that the district court erred in valuing the 6300 account and the Schwab account on June 30, 2017, instead of July 31, 2018. She contends that Tim received a windfall from the growth in the accounts between the two valuation dates. She contends that the district court considered the growth of the accounts when it ordered Tim to pay the tax liability. Ann does not explain why the June 30, 2017,

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[50] See *Dooling v. Dooling, supra* note 5.

valuation date was not reasonably related to the property. She requests that if we change the district court's findings in any way, we should consider this growth.

[18] Ann's argument lacks merit. As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate.[51] She has failed to show how the June 30, 2017, valuation date does not reasonably relate to the property. And she has failed to identify why the July 31, 2018, valuation date reasonably relates to the property. The district court found that the June 30, 2017, valuation date was "best supported by the evidence and represents the separation of the parties[']working finances." Upon a de novo review of the record, we cannot say that the district court abused its discretion in determining the valuation date.

3. Division

[19,20] The remaining assignments of error fall within the third step in the process of dividing property. The third step in the equitable division of property is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.[52] The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.[53]

(a) 2017 Tax Liability

Tim argues that the district court erred in allocating the parties' 2017 tax liability. He relies on *Meints v. Meints*[54] for the proposition that income tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, income tax liability should generally be treated as a marital debt. He contends that *Meints* effectively holds that

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[51] *Rohde v. Rohde, supra* note 46.

[52] See *Dooling v. Dooling, supra* note 5.

[53] *Id.*

[54] *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000).

one spouse cannot be solely responsible for the parties' tax liability. He contends that the district court did not equitably divide the marital debt. We disagree.

In *Meints*, during the course of the marriage, the husband accrued a federal income tax liability and statutory penalties for late filings.[55] The district court found that the husband was responsible for the accrued income tax liability. We reasoned that although income tax liability was a marital debt, when an innocent spouse has filed a separate tax return and paid his or her taxes in a timely manner, the innocent spouse should not be forced to share in the statutory penalties. We concluded that the district court erred in attributing all past due tax liability to the husband and that the tax liability should have been equitably divided, while the statutory penalties should remain as nonmarital debt of the husband.

While the *Meints* rule generally applies, the specific facts of this case support a different outcome. The record supports that the district court gave proper consideration to fairness and reasonableness when dividing the 2017 tax liability. The district court determined that because "the operative date of the appropriate determination of the value of the disputed marital assets is June 30, 2017 for both [the 6300 account and the Schwab account], [Tim] is ordered to pay the 2017 tax liability." The record showed that if Ann's federal and state income tax withholdings were insufficient to cover the entirety of the parties' tax liability, Tim would pay the tax liability from the Schwab account. It showed that Ann earned a salary of over $200,000 a year and that she had significant federal and state income withholdings. Additionally, there was evidence of significant growth in both the 6300 account and the Schwab account between the argued for valuation dates, which would effectively be awarded to Tim. Based upon the facts of the case, it appears that the district court considered fairness and reasonableness as to the parties' circumstances

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[55] *Id.*

when distributing the tax liability. We cannot say that the district court abused its discretion when ordering Tim to pay the 2017 tax liability.

(b) Equalization

Based upon all his arguments, Tim argues that it was inequitable for the district court to order an equalization payment. He contends that if we were to remove the appreciation on the 6300 account and the entirety of the Schwab account from the marital estate, 56 percent of the estate would accrue to Ann and only 44 percent to him. The circumstances, he suggests, do not justify a disparate division of the marital estate.

But we have rejected the conditions on which his argument is premised. We do not remove the appreciation on the 6300 account and the entirety of the Schwab account from the marital estate. Thus, his argument necessarily fails. And because we have already accounted for the removal of the 6,500 ConAgra shares and the equal division of the remainder of the value of the Schwab account above, no further modification is necessary here.

VI. CONCLUSION

After reviewing the record de novo, we conclude that the district court did abuse its discretion when it found that the remaining 6,500 shares of ConAgra stock in the Schwab account were marital property. We otherwise conclude that the district court did not abuse its discretion in classifying, valuing, and dividing the remaining marital estate. We modify the decree to classify the remaining 6,500 shares of ConAgra stock, which were valued at $232,440, as Tim's nonmarital property, and to divide the remaining value of the Schwab account, totaling $1,200,356, equally between the parties, i.e., $600,178 to each party. As so modified, we affirm the decree of the district court.

Affirmed as modified.

Heavican, C.J., participating on briefs.

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

Robert Bohling, appellant, v. Kimberly Bohling, appellee.

937 N.W.2d 855

Filed January 31, 2020. No. S-19-225.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. ____: ____. An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. **Appeal and Error.** Appellate review of a district court's use of inherent power is for an abuse of discretion.
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. **Records: Affidavits: Appeal and Error.** The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to an appellate court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by the appellate court.
6. **Judicial Notice: Records: Appeal and Error.** Papers requested to be judicially noticed must be marked, identified, and made a part of the bill of exceptions.
7. **Judicial Notice: Evidence.** Judicial notice of an adjudicative fact is a species of evidence.
8. **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.

9. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the District Court for Johnson County: Ricky A. Schreiner, Judge. Reversed and remanded for further proceedings.

Angelo M. Ligouri, of Ligouri Law Office, for appellant.

Richard R. Smith for appellee.

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

Cassel, J.

INTRODUCTION

After a will contest was transferred from the county court to the district court, the proponent sought and obtained a summary judgment determining that the decedent's will was valid. The contestant appeals. Because the bill of exceptions does not contain the proponent's evidence, only the contestant's evidence is properly before us. Obviously, with literally no evidence to support it, the summary judgment for the proponent must be reversed. And because the matter is likely to recur upon remand, we briefly address Neb. Ct. R. § 6-1526 (rev. 2018), "Summary Judgment Procedure."

BACKGROUND

Will Contest

Willis Bohling died in March 2018. Kimberly Bohling, Willis' daughter, filed an application for informal probate in county court. In response, Willis' son, Robert Bohling, filed an objection to the application for informal probate and a formal petition for adjudication of intestacy, determination of heirs, and appointment of a special administrator. Two days after the

county court entered an order noting Robert's objection, Robert filed a notice of transfer to district court.[1] Kimberly filed additional pleadings in the county court, and shortly thereafter, the county court clerk certified the will contest proceeding to the district court. Kimberly then moved for summary judgment.

Motion for Summary Judgment

Under § 6-1526(A), at the time Kimberly filed her motion for summary judgment, she was required to simultaneously file an evidence index and an annotated statement of undisputed facts. She did not do so. Instead, she attached to her motion her own affidavit and an affidavit of the attorney who prepared the will.

Nineteen days later, in an apparent attempt to comply with § 6-1526(B), Robert filed an "Annotated Statement of Disputed Facts" and an "Evidence Index in Opposition." He also filed five affidavits, which were itemized in his evidence index. Later that day, Kimberly filed a brief addressing the merits of her motion for summary judgment. A few days later, Robert filed an opposing brief.

At the hearing on Kimberly's summary judgment motion, Kimberly requested the district court to take judicial notice of Willis' will. Specifically, Kimberly's counsel stated: "[T]he will itself, . . . I would like to offer that for the purpose of this hearing or have the Court take judicial notice of it. It should have been filed with the Petition for Informal Probate." After the court inquired whether Kimberly was requesting the court to take judicial notice and her counsel responded affirmatively, the court stated: "So noted." But the will was not marked or received as an exhibit, and its content does not otherwise appear in the bill of exceptions.

Kimberly's counsel then stated that Kimberly would also "offer the affidavits that we have previously submitted with our Motion for Summary Judgment. I don't believe those have

[1] See Neb. Rev. Stat. § 30-2429.01 (Cum. Supp. 2018).

been separately marked, but they are required to be submitted to the Court and I'm asking the Court to consider those." He added: "They would have been attached to the Motion for Summary Judgment." In response, the court stated: "There is an affidavit attached to the original Motion for Summary Judgment. It looks like it was filed January 4th of 2019. I will review those and consider those as well." But the affidavits were not marked as exhibits and do not appear in the bill of exceptions. Kimberly's counsel then stated: "I think that's the extent of my evidence, Your Honor."

Robert offered and the court received exhibits 1 through 7 into evidence, which consisted of an affidavit from Robert, an affidavit from Willis' girlfriend, three affidavits from friends of Willis, the objection to the petition for informal probate, and, in a single document, the objection to the motion for summary judgment and the annotated statement of disputed facts. These exhibits appear in the bill of exceptions.

Robert then objected to any evidence presented by Kimberly, based upon her failure to submit an evidence index or an annotated statement of undisputed facts "pursuant to [§] 6-1526." He argued that the failure to comply with § 6-1526 must constitute grounds to deny the motion. Kimberly acknowledged that she did not comply with the rule. She argued that denial of the motion was inappropriate, because Robert was not prejudiced by her failure when her motion contained the evidence to be presented and her brief contained a statement of facts with annotations to the evidence.

The district court overruled Robert's objection. The court stated:

> You are prepared for a Motion for Summary Judgment this morning. I'm going to overrule that [objection]. I'm going to take [Kimberly's counsel's] affidavits, receive those and those attachments to his motion. . . .
>
> [Robert's counsel], I do appreciate the statement of — of what exactly is in dispute here on your end of it and it makes it so much easier for the Court.

> [Kimberly's counsel], I would appreciate next time — I try to run — I try to give counsel some leeway on these and let everybody try their case. I'm interested in trying things and getting things settled on the facts instead of strict compliance with the rules.

Despite the court's statements regarding receiving Kimberly's affidavits, they were not marked as exhibits and do not appear in the bill of exceptions. After hearing arguments, the court took the matter under advisement. On February 10, 2019, the court's summary judgment, styled as an order granting summary judgment, was entered. The summary judgment determined that Willis left a valid will.

Robert filed a timely appeal, which we moved to our docket.[2]

ASSIGNMENTS OF ERROR

Robert assigns, condensed and restated, that the district court erred in granting the motion for summary judgment when (1) it failed to require Kimberly to present prima facie evidence in support of her motion; (2) Kimberly failed to file an evidence index and an annotated statement of undisputed facts with her motion, pursuant to § 6-1526; and (3) it found no dispute of material fact as to the ambiguity in Willis' will, testamentary capacity, and undue influence.

STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts

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

[3] *Williamson v. Bellevue Med. Ctr., ante* p. 312, 934 N.W.2d 186 (2019).

and that the moving party is entitled to judgment as a matter of law.[4]

[3] Appellate review of a district court's use of inherent power is for an abuse of discretion.[5]

ANALYSIS

Summary Judgment

A motion for summary judgment is to be granted "if the pleadings and *the evidence admitted at the hearing* show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law."[6] "The evidence that may be received on a motion for summary judgment includes depositions, answers to interrogatories, admissions, stipulations, and affidavits."[7]

But, here, our bill of exceptions contains only Robert's evidence. Kimberly's evidence does not appear in the bill.

[4,5] This court has stated on numerous occasions that a bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[8] In 1959, we explained at length:

> "An affidavit used as evidence in the district court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. . . . The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If

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[4] *Id.*

[5] *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

[6] Neb. Rev. Stat. § 25-1332(1) (Cum. Supp. 2018) (emphasis supplied).

[7] *Id.*

[8] See *Gomez v. Gomez*, 303 Neb. 539, 930 N.W.2d 515 (2019).

> such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court. . . . A judgment of the district court brought to this court for review is supported by a presumption of correctness and the burden is upon the party complaining of the action of the former to show by the record that it is erroneous. It is presumed that an issue decided by the district court was correctly decided. The appellant, to prevail in such a situation, must present a record of the cause which establishes the contrary. . . .”[9]

This requirement is not new. In 1934, we set forth as “the settled law of this state” the principle that “error must affirmatively appear of record and that affidavits and other written documents used as evidence on a hearing in the district court cannot be considered by the [S]upreme [C]ourt unless they are made a part of the record by being embodied in a bill of exceptions.”[10] There, we cited numerous cases, dating back to a case from 1886.[11] The 1886 opinion, in turn, cited to many more cases, the earliest being from 1877.[12]

We have often recited the rule or variations thereof, but we have not explained its underlying rationale; at least, we have not done so recently. In 1963, we set forth one straightforward variation: “The bill of exceptions is the only vehicle for bringing evidence before the court on appeal.”[13] To support that particular articulation, we cited an Alabama case.[14] In that case, the Alabama Supreme Court stated that “[t]he bill of

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[9] *Peterson v. George*, 168 Neb. 571, 576-77, 96 N.W.2d 627, 631 (1959) (citations omitted).

[10] *Berg v. Griffiths*, 127 Neb. 501, 502, 256 N.W. 44, 45 (1934).

[11] See *McMurtry v. State*, 19 Neb. 147, 26 N.W. 915 (1886).

[12] See *Ray v. Mason*, 6 Neb. 101 (1877).

[13] *Everts v. School Dist. No. 16*, 175 Neb. 310, 315, 121 N.W.2d 487, 490 (1963).

[14] See *Sovereign Camp, W. O. W. v. Wiggins*, 238 Ala. 424, 191 So. 470 (1939).

exceptions, as it appears, in the record is all that the court can or will consider."[15] For that proposition, the Alabama Supreme Court relied upon *Pearce v. Clements*.[16] In *Pearce*, the Alabama Supreme Court began by stating that "[b]ills of exceptions are the mere *creatures of statute*, being entirely unknown to the common law . . . ."[17] It described its precedent of interpreting the strict procedures of a bill of exceptions and discussed the necessary production of evidence, stating:

> A record is something which is proved by its mere *production* and *inspection*, whether of the original or of a copy, and nothing can be construed to be a part of it, which does not appear, *on the face of it*, to be such, without the aid of oral evidence, explanatory of clerical errors which may have crept into such judicial proceedings, whether errors of omission or errors of commission.[18]

The *Pearce* court concluded that these principles applied with equal force to bills of exceptions, where the law has placed several exacting safeguards around the execution of a bill of exceptions. Likewise, a bill of exceptions in Nebraska is a creature of statute.[19] And it is one with ancient origins.[20] We have engaged in this extended discussion to explain why we adhere to the "settled law" and the statutory basis compelling our fidelity.

[6,7] Kimberly's request for judicial notice did not circumvent the necessity of presenting evidence in a bill of exceptions. Papers requested to be judicially noticed must be marked, identified, and made a part of the bill of exceptions.[21]

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[15] *Id*. at 427, 191 So. at 472.

[16] *Pearce v. Clements*, 73 Ala. 256 (1882).

[17] *Id*. at 257 (emphasis in original).

[18] *Id*. at 258 (emphasis in original).

[19] See Neb. Rev. Stat. § 25-1140 (Reissue 2016).

[20] See 1877 Neb. Laws, § 2, p. 11.

[21] See *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

The will and Kimberly's affidavits were not included in the bill of exceptions; thus, they are not properly before us. But this should not be read to suggest that offering an exhibit is a proper occasion for the exercise of judicial notice. Judicial notice of an adjudicative fact is a species of evidence.[22] We do not read the colloquy between Kimberly's counsel and the court as a true request for judicial notice of an adjudicative fact, but, rather, as an unauthorized substitute for the proper method of making an evidentiary record.

Similarly, the presence of the proffered will and Kimberly's proposed affidavits in the transcript does not bring them before us as evidence. As we recited above, the fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court.[23]

[8] So, on appeal, we confront a bill of exceptions that contains only Robert's evidence. But the absence of Kimberly's evidence is not attributable to any fault on Robert's part. Kimberly failed to have her exhibits properly marked and received. And the district court acquiesced in the improper procedure. 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.[24] Because Kimberly was the moving party, she bore the burden to prove a prima facie case. And because Kimberly did not produce her evidence in a manner so as to be included in a bill of exceptions, she effectively failed to make a prima facie case. Accordingly, the

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[22] *Id.*

[23] *Peterson v. George, supra* note 9.

[24] *Kaiser v. Union Pacific RR. Co.*, 303 Neb. 193, 927 N.W.2d 808 (2019).

summary judgment must be reversed and the cause must be remanded for further proceedings.

§ 6-1526

[9] Robert argues that because Kimberly failed to file an evidence index and an annotated statement of undisputed facts, her motion for summary judgment should have been denied for failure to comply with § 6-1526. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[25] Although it is not necessary to the disposition of this appeal, we discuss § 6-1526 because it is likely to recur upon remand.

The rule was prompted by legislative action. In 2017, the Legislature amended the summary judgment statutes to "require[] a party to provide citations to the record to support its assertion that a fact cannot be or is genuinely disputed."[26] It did so by amending § 25-1332. In response, we adopted § 6-1526 in 2018. This rule provides specific procedures to carry out the purpose of the statutory amendment.

In order to accomplish the legislative goal of judicial economy, § 6-1526 was crafted for three reasons. First, it benefits parties by making the parties' respective claims as to undisputed or disputed facts clear and precise. Second, it serves both trial and appellate courts by exposing the precise claims of the parties. The parties' briefs are not an effective substitute for an evidence index and an annotated statement of undisputed or disputed facts. A judge should not have to scour through a party's brief to identify factual claims that are intermixed with legal arguments. Third, it was adopted to focus the parties and the court on the specific factual contentions.

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[25] *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

[26] *Ecker v. E & A Consulting Group*, 302 Neb. 578, 583, 924 N.W.2d 671, 676 (2019). See, also, 2017 Neb. Laws, L.B. 204.

Trial courts should have some discretion to adapt procedures to the needs of a particular case, and an appellate court will not intervene except where the discretion is abused. But trial courts should not condone a party's failure to follow § 6-1526 merely because the party finds it inconvenient or unfamiliar. There is a systemic value to the prompt and inexpensive resolution of disputes. Section 6-1526 should not be lightly ignored. We encourage district courts to set deadlines in compliance with the rule and require parties to submit necessary materials.

CONCLUSION

For the reasons set forth above, we reverse the judgment of the district court and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jason Assad, appellant.

938 N.W.2d 297

Filed February 7, 2020. No. S-17-1193.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Effectiveness of Counsel: Proof.** 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.
3. ____: ____. 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.
4. ____: ____. 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.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Riedmann and Bishop, Judges, on appeal thereto from the District Court for Cheyenne County, Derek C. Weimer, Judge. Judgment of Court of Appeals affirmed.

Gerald L. Soucie and Brian S. Munnelly for appellant.

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

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

Papik, J.

After Jason Assad was convicted of several criminal offenses, he appealed. The only errors his appellate counsel initially assigned, however, pertained to issues that were not preserved for appellate review. And although his counsel later sought leave to assert that trial counsel was ineffective in failing to preserve issues for appeal, those attempts were unsuccessful and Assad's convictions were summarily affirmed. Assad now seeks postconviction relief, asserting that his appellate counsel was ineffective and arguing that, unlike most defendants asserting ineffective assistance of counsel, he is not required to demonstrate that he was prejudiced as a result of counsel's deficient performance. The district court rejected Assad's argument that he was entitled to a presumption of prejudice and denied his motion for postconviction relief without an evidentiary hearing. The Nebraska Court of Appeals affirmed, but did not address Assad's argument regarding a presumption of prejudice.

Upon further review, we find this is not a circumstance in which prejudice is presumed, but, rather, Assad is required to demonstrate that his counsel performed deficiently and that he was actually prejudiced as a result of that deficient performance. Because Assad has not even attempted to demonstrate prejudice, we find that he is not entitled to postconviction relief and affirm.

BACKGROUND

Assad's Convictions.

On the morning of September 14, 2014, police in Sidney, Nebraska, received a call from an individual who reported hearing the sound of a woman's scream coming from a nearby motel. Assad and his wife lived at the motel at the time. A police officer went to the motel to investigate. After the officer was unable to make contact with anyone at the motel, he

obtained a search warrant. During the execution of the search warrant, officers entered the room in which Assad and his wife resided. There, the officers were confronted by Assad, who was yelling profanities. The officers later found Assad's wife with injuries to her head and face. They also found what appeared to be evidence of narcotics. The officers then obtained additional search warrants. During the execution of the additional search warrants, officers seized surveillance videos, which included footage from the inside of the motel room. Officers continued to investigate and determined that Assad had possession of a knife and a rifle in the motel room and that he had previously been convicted of a felony.

Assad was later charged with possession of a weapon by a prohibited person, first degree false imprisonment, terroristic threats, use of a weapon to commit a felony, and possession of a firearm by a prohibited person. Prior to trial, he filed a series of suppression motions, each of which sought to suppress evidence obtained through the September 14, 2014, searches. The district court held a hearing on the motions to suppress and denied the motions, concluding that the searches were done pursuant to valid search warrants and, alternatively, that the good faith exception recognized in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), applied.

At trial, when the State introduced evidence seized through the September 14, 2014, searches, Assad did not renew the objections he made in his pretrial motions to suppress. A jury found Assad guilty of each of the charged offenses listed above. Assad was later found to be a habitual criminal at a sentencing enhancement hearing. He was sentenced to an aggregate period of 35 to 60 years' imprisonment.

Direct Appeal.

Assad's trial counsel filed a notice of appeal, but shortly thereafter new counsel entered an appearance and his trial counsel was granted leave to withdraw. His appellate counsel later filed a 40-page brief assigning two errors on appeal, both

of which addressed the denial of Assad's pretrial motions to suppress. The brief contained arguments that evidence seized in the search of his residence should be suppressed, because officers violated his Fourth Amendment rights when they entered his residence, and that evidence seized after the search of his residence should be suppressed as fruit of the poisonous tree.

The State responded by filing a motion for summary affirmance. In support of its motion, the State noted that Assad's trial counsel had not objected at trial to the evidence that was the subject of the motions to suppress. As a result, the State contended, Assad's arguments that evidence should have been suppressed were not properly preserved for appellate review.

Following the State's motion for summary affirmance, Assad's appellate counsel filed a motion requesting leave to file a revised brief. The motion stated that the revised brief would "address issues raised in [the State's] Motion for Summary Affirmance." Attached to the motion was a proposed revised brief, which added a new assignment of error alleging that trial counsel's failure to object at trial to the evidence Assad previously sought to suppress constituted ineffective assistance of counsel. The Court of Appeals denied leave to file the revised brief. It later granted the State's motion for summary affirmance. The Court of Appeals' disposition stated in full:

> Motion of appellee for summary affirmance sustained; judgment affirmed. See Neb. Ct. R. App. P. § 2-107(B)(2); State v. Podrazo, 21 Neb. App. 489, 840 N.W.2d 898 (2013) (defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning admissibility of that evidence).

Assad's appellate counsel subsequently filed a motion to file a supplemental brief. This motion attached a proposed supplemental brief containing a single assignment of error: that trial counsel's failure to object at trial to the evidence that was the subject of the suppression motions constituted

ineffective assistance of counsel. The Court of Appeals denied the motion.

Assad's appellate counsel then filed a petition for further review on Assad's behalf. This court denied the petition for further review.

Postconviction Proceedings.

After the conclusion of the direct appeal proceedings, Assad, represented by yet another attorney, filed a verified motion for postconviction relief. The postconviction motion asserted various claims for relief. One layered claim of ineffective assistance of counsel is relevant for present purposes. Assad alleged that his appellate counsel's failure to allege ineffective assistance on the part of his trial counsel constituted ineffective assistance of appellate counsel. Assad claimed his appellate counsel should have asserted that trial counsel's failure to preserve a number of issues for appellate review, including the claim that the motions to suppress should have been granted, amounted to ineffective assistance.

The State filed a motion to dismiss the postconviction motion without an evidentiary hearing. Assad filed a brief in opposition. In the brief, Assad claimed that as a result of appellate counsel's performance, he was denied all appellate review and was entitled to a new direct appeal.

The district court granted the State's motion to dismiss and denied Assad's motion for postconviction relief without an evidentiary hearing. In a written order, the district court rejected Assad's argument that he was entitled to a new direct appeal. Instead, it concluded that Assad was entitled to relief under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (*Strickland*), only if he could show that his counsel was deficient and that this deficient performance prejudiced him. With respect to Assad's layered claim of ineffective assistance of counsel, the trial court concluded that Assad could not show prejudice because the arguments he claimed counsel should have presented lacked merit.

Court of Appeals.

Assad appealed to the Court of Appeals. Among his assignments of error was a contention that the district court erred in rejecting his layered claim of ineffective assistance of counsel. He argued that under cases such as *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), he should not have been required to prove prejudice, because prejudice should be presumed, and that he was thus entitled to a new direct appeal.

The Court of Appeals affirmed the district court's order. *State v. Assad*, No. A-17-1193, 2019 WL 951169 (Neb. App. Feb. 26, 2019) (selected for posting to court website). The Court of Appeals observed that, with one exception not relevant here, Assad did not make any specific argument on appeal as to why his trial counsel's failures to preserve issues for appellate review amounted to ineffective assistance. It thus concluded that Assad had not sufficiently argued his claim that appellate counsel was ineffective for not asserting a layered claim of ineffective assistance of counsel and did not consider its merits.

Petition for Further Review.

Assad filed a petition for further review. His sole assignment of error was that the Court of Appeals erred by affirming the district court's dismissal of his ineffective assistance of appellate counsel claim. He again argued that, under the circumstances, prejudice should be presumed and that he should have been awarded a new direct appeal for his appellate counsel's deficient performance.

We granted Assad's petition for further review. We directed the parties to file supplemental briefs addressing whether, under the circumstances, Assad was required to demonstrate prejudice under *Strickland* or whether this is a case in which prejudice is presumed.

ASSIGNMENT OF ERROR

As noted above, Assad assigns one error in his petition for further review. He contends that the Court of Appeals erred

by affirming the district court's denial of relief on his claim for ineffective assistance of appellate counsel. He argues that, under the circumstances, he is entitled to a presumption of prejudice and a new direct appeal.

STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Martinez*, 302 Neb. 526, 924 N.W.2d 295 (2019).

ANALYSIS

Question at Issue:
Is Prejudice Presumed?

In most cases in which ineffective assistance of counsel is alleged, the case turns on whether the defendant can satisfy both parts of the familiar two-part framework of *Strickland*. Under that framework, a defendant must show that his or her counsel's performance was deficient and that counsel's deficient performance actually prejudiced the defense in his or her case. *Martinez, supra*. This case is different. It is different because Assad does not even attempt to show that his defense was prejudiced as a result of his appellate counsel's allegedly deficient performance.

The Court of Appeals essentially concluded that because Assad did not make an argument as to prejudice, he had not presented sufficient argument in support of his ineffective assistance of appellate counsel claim. See *State v. Assad*, No. A-17-1193, 2019 WL 951169 (Neb. App. Feb. 26, 2019) (selected for posting to court website). From the beginning of this postconviction proceeding, however, Assad has consistently argued that because prejudice is presumed, he is not required to demonstrate prejudice and is entitled to a new direct appeal. We will thus proceed to consider if this is indeed a case in which a presumption of prejudice arises. We will do

so by first reviewing the applicable legal standards and then by applying those standards to this case.

Legal Standards Regarding Presumed Prejudice.

[2-4] As noted above, generally to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. See *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018). 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. *Id.* 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. *Id.* These familiar general elements of a claim of ineffective assistance of counsel were set forth in the U.S. Supreme Court's opinion in *Strickland*.

There are some cases, however, in which a defendant asserting ineffective assistance need not demonstrate prejudice in order to prevail. In *Strickland* and in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), another ineffective assistance of counsel opinion issued the same day as *Strickland*, the U.S. Supreme Court recognized that in some situations, prejudice is presumed. In *Strickland*, the Court stated that "[a]ctual or constructive denial of the assistance of counsel altogether" and "various kinds of state interference with counsel's assistance" would result in a presumption of prejudice. 466 U.S. at 692. In *Cronic*, the Court held that prejudice would also be presumed if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." 466 U.S. at 659. These circumstances, the *Cronic* Court observed, "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658.

In the years following *Strickland* and *Cronic*, the U.S. Supreme Court has made clear that in order for prejudice to

be presumed as a result of counsel's inadequate performance, the failure must be extreme. In *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), the Sixth Circuit Court of Appeals applied a presumption of prejudice in a case in which defense counsel in a first degree murder trial waived his closing argument in a sentencing proceeding that ultimately resulted in a death sentence. The U.S. Supreme Court reversed. It explained that the presumption of prejudice based on an attorney's failure to test the prosecution's case recognized in *Cronic* was limited to cases in which the attorney's failure to do so was "complete." *Bell*, 535 U.S. at 697. A presumption was not appropriate in *Bell*, the Court reasoned, because the defendant was merely arguing that his counsel failed to oppose the prosecution at specific points of the sentencing proceeding rather than throughout.

Two years later in *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), the U.S. Supreme Court again reversed a lower court's decision, holding that a presumption of prejudice was not called for under the circumstances. In that case, defense counsel conceded the defendant's guilt without the defendant's consent. The Court held that a presumption of prejudice was not warranted and described the presumption of prejudice as a "narrow exception" to *Strickland* that will arise "infrequently." *Nixon*, 543 U.S. at 190.

The cases discussed to this point have considered the general principles that determine whether a presumption of prejudice ought to apply to an ineffective assistance of counsel claim. The U.S. Supreme Court has also, in a number of cases, considered whether a presumption of prejudice was appropriate in cases in which ineffective assistance of appellate counsel was alleged.

In the appellate context, the U.S. Supreme Court has held that the presumption of prejudice applies when the accused is deprived of the assistance of counsel on appeal. See *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). It reached this conclusion by relying on the language in

Strickland and *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), explaining that a presumption of prejudice is appropriate upon the actual or constructive denial of counsel. See *Penson, supra*.

Reasoning that a denial of an appeal altogether is even more serious than the denial of counsel during an appeal, the U.S. Supreme Court has also held that a presumption of prejudice arises if counsel fails to file a notice of appeal when requested to do so by the defendant. See *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). In that circumstance, the Court has held that the proper remedy is to afford the defendant a new opportunity to appeal. See *Garza v. Idaho*, ___ U.S. ___, 139 S. Ct. 738, 203 L. Ed. 2d 77 (2019). We have held the same. See *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).

With these principles in mind, we turn to whether a presumption of prejudice ought to apply in this case.

Does Presumption of Prejudice Apply Here?

In considering whether prejudice should be presumed here, we reject at the outset Assad's argument that this case is directly controlled by *Garza, supra*, and *Flores-Ortega, supra*. As explained above, in those cases, the U.S. Supreme Court held that prejudice is presumed when counsel fails to file a notice of appeal as requested by the defendant, thereby depriving the defendant of a desired appeal altogether. In this case, a notice of appeal *was* filed on Assad's behalf. And although the Court of Appeals resolved the appeal summarily, it considered the issues raised on appeal and affirmed the convictions rather than dismissing the appeal. Assad was thus not denied a direct appeal entirely, and this case cannot be quickly resolved in his favor with nothing more than a citation to *Garza* and *Flores-Ortega*.

Even if not directly governed by *Garza* and *Flores-Ortega*, Assad nonetheless urges us to find that prejudice is presumed here because, in his words, he "effectively received no direct

appeal." Supplemental brief for appellant on petition for further review at 13. We are not aware, however, of any cases of the U.S. Supreme Court that would characterize the set of circumstances here as equivalent to the complete denial of an appeal. And, as we will explain, what the U.S. Supreme Court has said about a presumption of prejudice in the appellate context leads us to conclude that a presumption of prejudice is not warranted in this case.

In *Smith v. Robbins*, 528 U.S. 259, 286, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000), another case in which a party alleging ineffective assistance of appellate counsel argued for a presumption of prejudice, the U.S. Supreme Court drew a distinction between a "denial of counsel altogether on appeal" and "mere ineffective assistance of counsel on appeal." The former, the Court explained, warranted a presumption of prejudice while the latter did not.

Although appellate counsel's performance in this case may well have been deficient, we think it unfair to characterize it as amounting to nothing. As we have noted, Assad's counsel filed a 40-page appellate brief, which assigned multiple errors. Additionally, once the State filed its motion for summary affirmance, Assad's counsel made multiple attempts to raise additional assignments of error in the Court of Appeals and sought further review in this court. Just as it cannot be said that Assad was denied an appeal, it cannot be said that Assad effectively went without appellate counsel.

This is not to say that the performance of Assad's appellate counsel was flawless. Indeed, all involved recognize that Assad's counsel made a serious mistake by only assigning error to the district court's admission of evidence challenged in the motions to suppress rather than asserting that trial counsel was ineffective for failing to preserve the right to raise the motions to suppress on appeal. Again, however, *Smith, supra*, indicates that this type of alleged error—raising some issues rather than others—is subject to the usual *Strickland* requirements rather than the presumed prejudice exception.

In *Smith*, the U.S. Supreme Court acknowledged that appellate counsel can provide deficient performance by "'ignor[ing] issues [that] are clearly stronger than those presented.'" 528 U.S. at 288, quoting *Gray v. Greer*, 800 F.2d 644 (7th Cir. 1986). The Court made clear, however, that a defendant attempting to establish a claim of ineffective assistance of appellate counsel on the theory that counsel raised the wrong issues must establish traditional *Strickland* prejudice, i.e., demonstrate a reasonable probability that the outcome of the proceeding would have been different had counsel raised a different argument. In *Penson v. Ohio*, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988), the Court did the same, distinguishing the case before it in which prejudice was properly presumed from a case in which "counsel fails to press a particular argument on appeal."

To all this, we imagine that Assad would likely contend that even if defendants generally must prove prejudice when asserting that counsel performed deficiently by raising the wrong appellate issues, this should be treated as an exceptional case given that Assad's appellate counsel raised only issues that were not preserved for appellate review. But again, language from the U.S. Supreme Court leads us to conclude this case is subject to the usual *Strickland* rule.

In *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), when discussing whether prejudice ought to be presumed when counsel waived closing argument in a sentencing proceeding, the Court noted that the difference between circumstances in which prejudice is presumed and in which prejudice must be proved under *Strickland* "is not of degree but of kind." We read this language to undercut any notion that a presumption of prejudice might apply in some exceptional cases in which it is alleged that appellate counsel should have raised additional arguments. Appellate counsel may have failed to a serious degree in this case, but that failure does not differ in kind from other cases in which a defendant alleges that his appellate counsel raised the wrong issues on

appeal and, as discussed, defendants must prove prejudice under those circumstances.

Given our understanding of the U.S. Supreme Court's pronouncements in this area, we are unpersuaded by the arguments Assad presents based on decisions of other courts. Some of the decisions Assad cites in which a presumption of prejudice was found to apply are cases in which counsel failed to file an appellate brief and, for that reason, the appeal was dismissed. See, e.g., *Hardaway v. Robinson*, 655 F.3d 445 (6th Cir. 2011); *People v. Moore*, 133 Ill. 2d 331, 549 N.E.2d 1257, 140 Ill. Dec. 385 (1990). But in cases like those, the appellate court does not consider any issues and the appeal is dismissed as a result of appellate counsel's failure. It is thus, at least arguably, not meaningfully different from a case in which counsel fails to perfect an appeal when requested to do so by the defendant and the defendant is denied an appeal altogether. In contrast, Assad's appellate counsel did file a brief and his appeal was not dismissed. The Court of Appeals gave consideration to the errors assigned, but found they were not properly preserved, and affirmed.

Another case Assad directs us to, *Hendricks v. Lock*, 238 F.3d 985 (8th Cir. 2001), presents a slightly different scenario, but, in our view, it is also unavailing. In *Hendricks*, the Eighth Circuit determined that prejudice should be presumed in a case in which appellate counsel filed a brief, but the Missouri Supreme Court refused to address the issues raised because it found that the brief lacked any reasoned arguments and thus "'provide[d] nothing for meaningful review.'" 238 F.3d at 986, quoting *State v. Hendricks*, 944 S.W.2d 208 (Mo. 1997). The Eighth Circuit distinguished the circumstances from a case in which it was alleged that counsel failed to raise a particular issue, concluding that prejudice was presumed because the inadequacy of the appellate brief led the Missouri Supreme Court to decline to address the issues the defendant raised on appeal.

We believe the reasoning of the Eighth Circuit in *Hendricks* actually supports our determination that prejudice should not be presumed here. The failure on the part of Assad's appellate counsel was not a failure to provide argumentation in support of the issues raised; it was a failure to assert particular issues on appeal. *Hendricks* indicates that prejudice is not presumed in the latter circumstance.

For similar reasons, we are also not persuaded by Assad's reliance on a concurring opinion in *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (2019) (Cassel, J., concurring; Miller-Lerman, J., joins). In *Sundquist*, counsel failed to file a statement of errors in an appeal from county court to district court. The State conceded that this was deficient performance, but this court found that there was no prejudice. The concurring opinion emphasized the importance of filing a timely statement of errors and suggested that a presumption of prejudice might have been appropriate if not for the district court's consideration of the defendant's argument for prejudicial error, even though the failure to file a statement of errors would have justified a more "cursory review by the district court for plain error." *Id.* at 1026, 921 N.W.2d at 146 (Cassel, J., concurring; Miller-Lerman, J., joins).

Assad argues that his direct appeal received the same type of cursory review the concurring opinion in *Sundquist* suggested might give rise to a presumption of prejudice. We do not agree. The Court of Appeals did summarily affirm Assad's direct appeal, but it did not review the errors assigned for mere plain error or under some other cursory standard of review. The summary affirmance was not the result of a cursory standard of review, but, rather, the unpreserved issues appellate counsel raised. And, as we have explained, an assertion that counsel ineffectively raised some issues rather than others requires a showing of prejudice.

Though cited by neither party, we believe it also appropriate to mention a decision of the Pennsylvania Supreme Court, given its similarity to the facts of this case. In *Commonwealth*

v. Rosado, 637 Pa. 424, 150 A.3d 425 (2016), much like this case, the only issue appellate counsel raised on appeal was an issue that was not properly preserved in the trial court. The Pennsylvania Supreme Court found that prejudice should be presumed. It reasoned that there was no meaningful difference between an attorney who completely fails to file a notice of appeal "and one who makes all necessary filings, but does so relative solely to claims he has not preserved for appeal, producing the same end." *Id.*, 637 Pa. at 439-40, 150 A.3d at 434.

It appears that Assad would be entitled to a presumption of prejudice under the reasoning articulated by the Pennsylvania Supreme Court in *Rosado*. We, however, respectfully disagree with the conclusion that the raising of unpreserved claims is equivalent to the complete failure to file a requested notice of appeal for purposes of deciding whether a presumption of prejudice arises.

It is of course true that a defendant will not obtain relief on direct appeal both when appellate counsel fails to file a notice of appeal and when appellate counsel raises only unpreserved issues, but the same could be said of any case in which appellate counsel raises issues lacking merit and the defendant later claims that others should have been raised. But when a claim is made that appellate counsel was ineffective for raising some issues rather than others, the U.S. Supreme Court has made clear that prejudice must be shown. And, in our view, Assad, by asserting that his counsel was ineffective for raising only unpreserved issues, is raising just this type of claim.

Proving Prejudice Under Strickland.

For all the reasons we have discussed, we do not believe this is a case in which prejudice is presumed. That does not mean, however, that Assad had no opportunity to establish a claim of ineffective assistance of appellate counsel. Instead, just as in most other cases in which a defendant alleges ineffective assistance, Assad would be entitled to relief under *Strickland*

if he could prove that his appellate counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance.

In this case, Assad likely would have had little problem establishing deficient performance. His entitlement to relief would thus depend solely on whether he could demonstrate a reasonable probability that, but for his appellate counsel's deficient performance, the result of his appeal would have been different. This would require a showing that had his trial counsel properly preserved issues for appellate review, there was a reasonable probability that his direct appeal would have resulted in something other than his convictions being affirmed.

Assad has never attempted to make such a showing. Instead, he has relied exclusively on his argument that prejudice is presumed and he is entitled to a new direct appeal. Because we find that prejudice is not presumed and because Assad has not attempted to demonstrate prejudice, his motion for postconviction relief based on a claim of ineffective assistance of appellate counsel was properly denied without an evidentiary hearing.

CONCLUSION

For the reasons discussed above, we find that Assad was required to demonstrate prejudice under *Strickland* and that he failed to do so. We therefore affirm the decision of the Court of Appeals.

Affirmed.

Freudenberg, J., not participating.

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

In re Guardianship of Eliza W., a minor child.
Susan W., appellee, v. Tara W., appellant.

938 N.W.2d 307

Filed February 7, 2020. No. S-18-1141.

1. **Guardians and Conservators: Judgments: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2016 & Cum. Supp. 2018), are reviewed for error on the record. When reviewing a judgment for errors 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. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment for errors on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Statutes: Intent.** When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes: Legislature: Intent.** While policy statements or statutory preambles may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part, it is generally recognized that such a provision cannot restrict or expand the meaning of the operative portions of a statute if they are unambiguous.

7. ____: ____: ____. Statutory policy statements and preambles cannot be used to arrive at an interpretation that would give words and phrases of the operative text itself a meaning that they cannot bear. Courts are bound to respect not only the purposes a legislative body has selected, but also the means it has deemed appropriate, and prescribed, for the pursuit of those purposes. It is a mistake to assume that anything that furthers a statute's primary purpose is the law and that anything that does not perfectly do so is not.
8. **Statutes.** When a statute specifically provides for exceptions, items not excluded are covered by the statute.

Appeal from the County Court for Douglas County: Marcela A. Keim, Judge. Reversed and remanded with directions.

Jonathan Seagrass, of Legal Aid of Nebraska, for appellant.

Ashley L. Albertsen, Melissa M. Oestmann, and Jacob A. Acers, of Smith, Slusky, Pohren & Rogers, L.L.P., for appellee.

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

Papik, J.

The federal Indian Child Welfare Act (ICWA) and the Nebraska Indian Child Welfare Act (NICWA) provide specific procedures and requirements that apply in certain proceedings involving the custody and adoption of and termination of parental rights to Native American children. This case requires us to decide whether those procedures and requirements apply in a case in which a maternal grandmother sought to establish a guardianship for an Indian child over the objection of her daughter, the child's mother. After interpreting the relevant statutory language, we conclude that the guardianship proceeding at issue was governed by ICWA and NICWA. In addition, we find that the grandmother did not make the showing required by ICWA and NICWA. We therefore reverse the order of the county court establishing the guardianship and remand the cause with directions to vacate the guardianship, dismiss the petition, and return custody to the child's mother.

BACKGROUND

Petition for Guardianship.

This case began when Susan W. filed a petition asking the Douglas County Court to appoint her as temporary and permanent guardian for her granddaughter, Eliza W. In the petition, Susan alleged that Eliza had lived with Susan and her husband, Jay W., since Eliza's birth; that Eliza's mother, Tara W., only intermittently resided at Susan and Jay's home; that neither Tara nor Eliza's father was able to meet Eliza's financial, physical, and emotional needs; that Susan and Jay provided the primary financial, physical, and emotional support for Eliza; and that the appointment of a guardian was in the best interests of Eliza and necessary to protect and care for her. Eliza was 4 years old at the time Susan filed the petition.

On the same day Susan filed the petition for guardianship, she filed an ex parte application requesting that the county court immediately appoint her as temporary guardian until a hearing could be held on the matter. The court granted Susan's application and appointed her as temporary guardian and conservator for Eliza.

Susan later filed an amended petition. The amended petition contained many of the same allegations as the original, but also included an assertion that Jay "is a registered member of the Muscogee Creek Indian Nation" and that Eliza "is subject to [ICWA]."

At her first appearance in a hearing in this matter, Tara, representing herself, objected to the appointment of Susan as guardian.

Requests for Appointed Counsel.

Tara requested on several occasions that she be appointed counsel. Tara initially filed a form document used to request appointed counsel in custodial sanction cases. On that form document, Tara asserted that she was entitled to appointed counsel under a provision of NICWA, Neb. Rev. Stat. § 43-1505(2) (Reissue 2016), that she had no forms of income,

and that she received public assistance in the form of food stamps and Medicaid.

Tara later submitted a letter to the court in which she requested appointment of counsel under § 43-1505(2). Documents indicating that Tara was a citizen of the Muscogee (Creek) Nation and that she was eligible to receive food stamps and Medicaid were attached to the letter.

Tara again requested that she be appointed counsel at a hearing prior to trial. She again asserted an entitlement to counsel under § 43-1505(2) on the grounds that Susan's petition was a "removal, placement, or termination proceeding" for purposes of that statutory provision and that Tara was indigent.

A discussion between the court and Tara regarding her entitlement to counsel under § 43-1505(2) followed. The court expressed skepticism about whether Tara was entitled to appointed counsel under § 43-1505(2) in a guardianship proceeding. The court also suggested that Tara had not followed the proper procedure for requesting appointed counsel. The court did not expressly rule on Tara's requests for counsel, and Tara continued to represent herself at all proceedings in the county court.

Trial on Petition for Guardianship.

At the trial on Susan's petition, Susan testified that Eliza had lived her entire life in Susan and Jay's home. She testified that although Tara also lived there and provided Eliza with some care, Tara had on prior occasions left the home without notice, leaving Susan to care for Eliza. Susan testified that she and Jay were Eliza's primary caregivers and that Tara functioned more like a babysitter for Eliza. Susan also testified to her belief that Tara previously had problems with substance abuse and that she exposed Eliza to individuals with criminal backgrounds.

Jay also testified and generally agreed with Susan's testimony. In addition, he testified that he was of Native American descent and that through his lineage, Eliza was a member of the Muscogee (Creek) Nation Tribe.

Susan called a physician to testify. He testified that he was friends with Susan and Jay and had served as their family physician. He also testified that his daughter had served as Eliza's babysitter. Much of the physician's testimony was based on his observations of members of Eliza's family outside of a physician-patient relationship. Although he testified that based on his observations, Susan was Eliza's primary caregiver, he testified that he had observed Tara and Eliza together and believed they had a good relationship, loved each other, and interacted well. When asked whether he would have any concerns if the court did not appoint Susan as guardian, he testified that he believed Susan and Jay were providing Eliza with the proper physical and emotional support and that he did not "know that Tara would be able to do that."

Tara testified in her own behalf. She testified that when Eliza was born, Tara was working full time and was Eliza's primary caregiver. She testified that she was diagnosed with viral meningitis in November 2016 and that she continued to suffer from associated headaches at the time of trial. She testified that after her medical condition began to improve, she enrolled in college, and that she, Susan, and Jay began to share duties caring for Eliza. Tara testified that her relationship with her parents began to sour in 2018. At that point, she decided that she and Eliza should move out of her parents' home. Tara then lived with Eliza at the home of a friend, Mark Keller, for a time. She also informed her parents she was considering moving to Oklahoma with Eliza.

Tara also called Keller as a witness. Keller testified that Tara and Eliza had lived at his home with his four children. Keller testified that he did not believe there was any reason Eliza would be harmed while staying at his home. Keller admitted on cross-examination that he had previously been convicted of felony drug possession charges.

In closing argument, Tara argued that Susan had not made the showing necessary for the appointment of a guardianship under ICWA and NICWA. In particular, she emphasized that

ICWA and NICWA required expert testimony proving Tara's continued custody of Eliza was likely to result in serious emotional or physical damage to Eliza and that no such testimony had been provided.

Appointment of Guardian.

At the conclusion of the evidence at trial, the county court stated on the record that it had found a sufficient basis for the appointment of Susan as Eliza's guardian. It stated that the evidence showed that Tara was not a "fit and proper person to care for Eliza; that she is unable, at this time, to provide a safe and secure environment for her." In what was presumably a reference to Tara's arguments regarding the applicability of ICWA and NICWA, the court also stated that the request for a guardianship was "not a removal proceeding" or "a foster care placement proceeding." The court later entered a written order, which did not mention ICWA or NICWA, appointing Susan as guardian for Eliza.

Tara timely appealed.

ASSIGNMENTS OF ERROR

Tara assigns, condensed and restated, that the district court erred (1) by failing to apply ICWA and NICWA to the guardianship proceeding and (2) by concluding that Tara was unfit to care for Eliza or that she had forfeited her right to custody.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2016 & Cum. Supp. 2018), are reviewed for error on the record. *In re Guardianship of K.R., ante* p. 1, 932 N.W.2d 737 (2019). When reviewing a judgment for errors 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 judgment for errors on the record, will not substitute its

factual findings for those of the lower court where competent evidence supports those findings. *Id.*

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Griffith v. Nebraska Dept. of Corr. Servs., ante* p. 287, 934 N.W.2d 169 (2019).

ANALYSIS

Tara argues that the county court did not comply with ICWA and NICWA when it appointed Susan as guardian for Eliza. The parties dispute, however, whether ICWA and NICWA apply in these circumstances. We therefore begin our analysis with that question.

Do ICWA and NICWA Apply?

We have previously described ICWA and NICWA as generally providing "heightened protection to the rights of Indian parents, tribes, and children in proceedings involving custody, termination, and adoption." *In re Adoption of Kenten H.*, 272 Neb. 846, 853, 725 N.W.2d 548, 554 (2007). Tara argues, as she argued in the county court, that the protections of ICWA and NICWA apply to a "foster care placement" and that the guardianship proceeding at issue here meets the definition of "foster care placement" under 25 U.S.C. § 1903(1)(i) (2012) and Neb. Rev. Stat. § 43-1503(3)(a) (Reissue 2016). Susan disagrees that the guardianship proceeding qualifies as a "foster care placement."

[4,5] To decide the parties' dispute, we must turn to the language of ICWA and NICWA, particularly those statutes' definitions of "foster care placement." As we often say, the starting point and focus of the inquiry when interpreting a statute is the meaning of the statutory language, understood in context. See *State v. Garcia*, 301 Neb. 912, 920 N.W.2d 708 (2018). Our analysis must begin with the text, because statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation

to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Wal*, 302 Neb. 308, 923 N.W.2d 367 (2019).

ICWA and NICWA's definitions of "foster care placement" are substantially the same. NICWA defines "foster care placement" as follows:

> [A]ny action removing an Indian child from his or her parent or Indian custodian for temporary or emergency placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

§ 43-1503(3)(a). ICWA's definition is nearly the same, except that it contains no reference to emergency placement. 25 U.S.C. § 1903(1)(i).

An application of our familiar principles of statutory interpretation suggests that the guardianship proceeding initiated by Susan falls within the definitions of "foster care placement" in ICWA and NICWA. The definitions include four straightforward elements: (1) an action removing an Indian child from his or her parent or Indian custodian, (2) temporary placement (or emergency placement in NICWA) in a foster home or institution or the home of a guardian or conservator, (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights are not terminated, each of which appear to be present here. The object of the guardianship proceeding was to remove custody of Eliza from her parent, Tara, and place custody with Susan, who would serve as guardian. In addition, our law recognizes guardianships as temporary custody arrangements, the creation of which does not terminate parental rights, but which cannot be terminated without court approval. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004); § 30-2616.

Based on similar reasoning, courts from a number of other jurisdictions have interpreted ICWA's definition of "foster care placement" to include guardianship proceedings. See, e.g.,

Matter of Guardianship of Q.G.M., 808 P.2d 684 (Okla. 1991); *Empson-Laviolette v. Crago*, 280 Mich. App. 620, 760 N.W.2d 793 (2008); *In re Custody of A.K.H.*, 502 N.W.2d 790 (Minn. App. 1993).

The only argument Susan makes based on the statutory definition of "foster care placement" goes to the evidence of one element, rather than the definition itself. Susan claims that there was no demonstration that Eliza is an "Indian child" for purposes of ICWA and NICWA. This argument is somewhat puzzling since Susan alleged in her amended petition that Eliza is subject to ICWA, her counsel conceded at trial that Eliza was "an Indian child" under ICWA and NICWA, and Jay testified that Eliza is a member of the Muscogee (Creek) Nation Tribe. Moreover, at trial, Susan offered and the court received into evidence a letter from the Muscogee (Creek) Nation stating that Eliza was a tribal citizen or eligible for enrollment through Tara. This evidence shows that Eliza qualifies as an "Indian child." Both ICWA and NICWA define the term as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4); § 43-1503(8).

Rather than focusing on the statutory definition of "foster care placement," Susan primarily points to other provisions of ICWA and NICWA and contends that those other provisions should lead us to conclude that a "foster care placement" occurs only when proceedings are initiated by the government. We address these other statutory provisions below, but, as we will explain, we are not persuaded by Susan's arguments.

First, Susan points to broad statements of policy in both ICWA and NICWA. In particular, she refers us to 25 U.S.C. § 1902 (2012), which provides in part:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment

> of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.

In addition, she directs us to Neb. Rev. Stat. § 43-1502 (Reissue 2016), in which the Nebraska Legislature stated that the purpose of NICWA "is to clarify state policies and procedures regarding the implementation by the State of Nebraska of [ICWA]."

Susan contends that these provisions show that in passing ICWA and NICWA, Congress and our Legislature were concerned with situations in which government actors took actions to remove Indian children from their families and placed them in homes lacking an appreciation for Native American culture. Susan contends that this purpose is not served in this case, because the government is not a party to the guardianship proceeding. Although Susan does not cite the case, she is asking us to follow the same approach taken by the Montana Supreme Court in *Application of Bertelson*, 189 Mont. 524, 617 P.2d 121 (1980). In that case, the court relied on the language in 25 U.S.C. § 1902 and concluded that ICWA should not apply to an intrafamily custody dispute. As we will explain, however, we believe the approach taken by the *Application of Bertelson* court places too much weight on 25 U.S.C. § 1902.

[6] As noted above, 25 U.S.C. § 1902 of ICWA is a policy statement. While this court has previously held that policy statements or statutory preambles may be used, "if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part," *State v. Buckman*, 267 Neb. 505, 516, 675 N.W.2d 372, 381 (2004), it is generally recognized that such a provision cannot restrict or expand the meaning of the operative portions of a statute if they are unambiguous. See, generally, 2A Norman J. Singer & Shambie Singer, Statutes and Statutory Construction, § 47:4 (7th ed. 2014). No less an authority than the U.S. Supreme Court recently articulated this understanding. The Court rejected an argument

based on statutory statements of purpose, explaining that such provisions, "by their nature 'cannot override [a statute's] operative language.'" *Sturgeon v. Frost*, 587 U.S. 28, 57, 139 S. Ct. 1066, 203 L. Ed. 2d 453 (2019), quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 220 (2012).

[7] We find sound the view that statutory policy statements and preambles cannot be used to arrive at an interpretation that would "give words and phrases of the [operative] text itself a meaning that they cannot bear." Scalia & Garner, *supra* at 218. After all, courts are bound to respect not only the purposes a legislative body "has selected, but [also] the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 n.4, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994). It is thus a mistake to assume that anything that furthers a statute's primary purpose is the law and that anything that does not perfectly do so is not. See, *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017); Scalia & Garner, *supra* at 219.

Here, we find that Susan is asking us to use the policy statement in 25 U.S.C. § 1902 to give "foster care placement" a meaning that the text defining the phrase cannot bear. As we have already indicated, Susan can point to nothing in the definition of "foster care placement" suggesting it is limited to proceedings initiated by a state actor. In fact, the language expressly indicates otherwise—the phrase is defined to include "any action" in which the four elements discussed above are present, not just some. See, 25 U.S.C. § 1903(1)(i); § 43-1503(3)(a); *In re Interest of Powers*, 242 Neb. 19, 23, 493 N.W.2d 166, 169 (1992) ("in popular parlance, the word 'any' usually means all or every").

[8] Susan's preferred interpretation also fails to account for the fact that ICWA and NICWA expressly create a similar, but narrower, exception than the one she asks us to infer.

ICWA and NICWA exclude from their scope "an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1); § 43-1503(3). In other words, both Congress and the Nebraska Legislature specifically excluded one type of exclusively intrafamily custody dispute from the protections of ICWA and NICWA. One of our rules of statutory interpretation provides that when a statute specifically provides for exceptions, items not excluded are covered by the statute. *Castonguay v. Retelsdorf*, 291 Neb. 220, 865 N.W.2d 91 (2015). Susan's preferred interpretation obviously runs counter to this canon, because she asks us to find that all intrafamily custody disputes are not covered by ICWA and NICWA when Congress and our Legislature excluded only some.

Moreover, if, as Susan asserts, ICWA and NICWA apply only to actions initiated by the government, the statutory exclusion for awards of custody in divorce proceedings would serve no purpose. This, too, runs counter to our rules of statutory interpretation. We strive, if possible, to give effect to all parts of a statute such that no sentence, clause, or word is rendered meaningless. See *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018). Several courts have pointed to ICWA's exclusion of custody awards in divorce proceedings as a reason for not following the Montana Supreme Court's approach in *Application of Bertelson*, 189 Mont. 524, 617 P.2d 121 (1980). See, e.g., *In re Custody of A.K.H.*, 502 N.W.2d 790 (Minn. App. 1993); *Matter of Guardianship of Q.G.M.*, 808 P.2d 684 (Okla. 1991). See, also, *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982) (rejecting argument based on *Application of Bertelson* as contrary to the express provisions of ICWA).

Neither are we persuaded by Susan's argument that we should conclude that the protections of ICWA and NICWA do not apply to proceedings initiated by parties other than the government, based on NICWA's "active efforts" provision. NICWA requires parties seeking to effect a foster care placement of or termination of parental rights to an Indian child to prove that they used "active efforts" to "provide remedial services and

rehabilitative programs designed to prevent the breakup of the Indian family or unite the parent or Indian custodian with the Indian child and that these efforts have proved unsuccessful." § 43-1505(4). Elsewhere, NICWA provides that "[a]ctive efforts shall mean and include, but not be limited to" several specific measures. § 43-1503(1).

Susan describes the "active efforts" measures codified in § 43-1503(1) as a "colossal undertaking and expenditure of resources" and contends it is clear this standard was not intended to apply to private individuals initiating guardianship proceedings. Brief for appellee at 17. Susan's argument fails to account for our rejection of the notion that the measures listed in § 43-1503(1)(a) to (h) form a "checklist" in which the initiating party is required to show compliance with each item. See *In re Adoption of Micah H.*, 301 Neb. 437, 450, 918 N.W.2d 834, 846 (2018). And, in any event, Susan fails to identify any statutory text that supports her argument regarding legislative intention.

For all these reasons, we are not persuaded by Susan's arguments that the guardianship proceeding she initiated does not qualify as a "foster care placement" under ICWA and NICWA.

Did County Court Comply With ICWA and NICWA?

Our conclusion that this guardianship proceeding qualified as a "foster care placement" for purposes of ICWA and NICWA does not resolve the parties' disagreements. Tara asserts that the guardianship proceeding failed to comply with ICWA and NICWA in a number of ways. She contends that she was denied a right to appointed counsel which she possessed under ICWA and NICWA, that Susan failed to comply with notice requirements of ICWA and NICWA, that Susan failed to demonstrate the "active efforts" required by ICWA and NICWA, and that Susan failed to meet the heightened standard of proof required by ICWA and NICWA. To this, Susan offers an alternative

argument: that even if the county court erroneously concluded that the guardianship proceeding was not a "foster care placement," it nonetheless complied with ICWA and NICWA in all respects. As we will explain, we again disagree.

At first glance, it may appear that the county court clearly erred by not granting Tara's requests for appointed counsel. ICWA and NICWA provide that "[i]n any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding." 25 U.S.C. § 1912(b) (2012); § 43-1505(2). This language appears to grant Tara a right to court-appointed counsel in the guardianship proceeding if she was indigent. It is not clear, however, whether the county court declined to appoint counsel based on a determination that ICWA and NICWA did not apply or because it found that Tara used an incorrect procedure or failed to adequately demonstrate indigency. In the end, we find it unnecessary to sort out this question and many other ICWA and NICWA compliance arguments raised by Tara, because we find that Susan failed to meet the heightened standard of proof imposed by ICWA and NICWA.

NICWA provides that a court may not order foster care placement "in the absence of a determination by the court, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 43-1505(5). ICWA contains a provision that is substantially the same. See 25 U.S.C. § 1912(e). ICWA and NICWA thus not only impose a heightened standard of proof for "foster care placements," they also require that the person seeking the placement meet that standard with expert testimony. Tara focuses her argument on the expert testimony requirement, contending that no qualified expert witness testified at trial.

Susan concedes that none of the witnesses she called as part of her case provided the expert testimony required by ICWA

and NICWA. She maintains, however, that the expert witness requirement was met through testimony provided by Tara. We disagree and find that Tara neither qualified as an expert nor provided expert testimony.

This court has previously relied on guidelines promulgated by the federal Bureau of Indian Affairs to determine whether a witness qualifies as an expert under ICWA. See *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *overruled on other grounds, In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012). Those guidelines recognized the following categories of individuals as likely to meet the requirements of ICWA:

> "(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> "(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.
>
> "(iii) A professional person having substantial education and experience in the area of his or her specialty."

239 Neb. at 824, 479 N.W.2d at 111, quoting Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,854, 67,593 (1979) (not codified). NICWA includes a definition of "qualified expert witness" that is similar to these guidelines. See § 43-1503(15).

More recently, the Bureau of Indian Affairs issued formal regulations and new guidelines discussing the implementation of ICWA. With respect to the expert witness requirement, the formal regulations provide as follows:

> A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be

> qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

25 C.F.R. § 23.122(a) (2019).

The accompanying new guidelines indicate that there may be some cases in which expert testimony from an individual with knowledge of tribal culture is not required. They provide, in part:

> The rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. The rule recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard. For example, a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child. Thus, while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding.

U.S. Dept. of Interior, Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act G.2 at 54 (Dec. 2016).

Susan argues that Tara qualified as an expert witness based on her prior attendance at a Native American college, her ability to speak Cherokee, and the fact that she is pursuing a bachelor's degree that will include two "subconcentrations," one of which is in Native American studies. Susan also asserts in her brief that Tara testified to serving as president of the "Native Indian Centered Education" program of Omaha Public

Schools. Brief for appellee at 25. This assertion, however, misstates the record. Tara testified to serving as president of a parental advisory board affiliated with another educational program. There is no indication in the record this educational program was similarly focused on Native American children.

We harbor serious doubts that the record shows that Tara was qualified to testify regarding prevailing social and cultural standards of Eliza's tribe. The record shows only that Tara was a member of the tribe, spoke Cherokee, and had pursued some Native American studies, the scope of which was unclear. There is no indication that she was recognized by a tribal community as knowledgeable of Indian customs and childrearing practices or that she had experience in the delivery of child and family services to Indians. When presented with a similar record, the Nebraska Court of Appeals concluded that a child's mother was not a qualified expert under NICWA. See *In re Interest of Ramon N.*, 18 Neb. App. 574, 789 N.W.2d 272 (2010).

But even if Tara was qualified to testify regarding prevailing social and cultural standards of Eliza's tribe, there is no indication in the record that she was qualified to provide expert testimony regarding whether her continued custody of Eliza was likely to result in serious emotional or physical damage to Eliza. The recent formal regulations make clear an expert "*must* be qualified" to present such testimony. 25 C.F.R. § 23.122(a) (emphasis supplied). In addition, even if Tara was qualified to provide such testimony, we do not believe she actually did so. In support of her argument that Tara provided the required expert testimony, Susan directs us to portions of Tara's testimony and contends they show that Tara does not consider Eliza's best interests and that it was in Eliza's best interests to remain in Susan's care. In that testimony, however, Tara was explaining why she made certain decisions concerning Eliza. Regardless of whether Tara's explanations were compelling, this factual testimony cannot be fairly construed as an expert opinion as to whether her continued custody of

Eliza would likely result in serious emotional or physical damage to Eliza.

From all appearances, both Susan's trial counsel and the county court assumed that this was not a "foster care placement" and that therefore Susan need only show that Tara was an unfit parent in order to be appointed as guardian. As we have explained, however, that assumption was incorrect. This was a "foster care placement" for purposes of ICWA and NICWA, and Congress and our Legislature have made a policy decision that courts cannot order such a placement based on an ordinary showing of parental unfitness alone. Because there was an absence of the expert testimony required by ICWA and NICWA, the county court erred by appointing Susan as Eliza's guardian.

Disposition.

Having determined that Susan did not make the required showing under ICWA and NICWA, all that remains is the disposition of this appeal. Tara suggests that Neb. Rev. Stat. § 43-1512 (Reissue 2016) is determinative. Section 43-1512 states:

> When any petitioner in an Indian child custody proceeding before a state court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his or her parent or Indian custodian unless returning the child to his or her parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

ICWA contains a nearly identical provision. See 25 U.S.C. § 1920 (2012).

Tara contends that the county court improperly removed Eliza from the custody of Tara and that, therefore, § 43-1512 applies and requires us to reverse the order and remand the

cause to the county court for a determination of whether returning Eliza to Tara would subject Eliza to substantial and immediate danger or a threat of such danger. We disagree that this provision applies here.

The language in § 43-1512 expressly applies when "any *petitioner*" improperly removes an Indian child from the custody of his or her parent or improperly retains custody of the child. (Emphasis supplied.) See, also, 25 U.S.C. § 1920 (same). The provision gives no indication that it also applies where a court order brings about the removal of a child and the petitioner merely follows that order. Indeed, it would be more than a stretch to call such a removal "improper." We are not the only court to have read this language to apply only when parties remove or retain custody of the child extralegally. See, e.g., *D.E.D. v. State*, 704 P.2d 774, 782 (Alaska 1985) (concluding 25 U.S.C. § 1920 "'is aimed at those persons who improperly secure or improperly retain custody of the child without the consent of the parent or Indian custodian and without the sanction of law'" (emphasis omitted), quoting Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 110, 92 Stat. 3069).

Here, Susan did not improperly remove or retain custody of Eliza extralegally; rather, a county court order removed Eliza from Tara's custody. Consequently, we conclude that § 43-1512 does not apply.

Because ICWA and NICWA do not set forth specific rules governing our disposition in this case, we believe it appropriate to dispose of the case as we would an ordinary guardianship proceeding in which a petitioner failed to meet his or her burden of proving the right to custody of a child. We thus reverse, and remand with directions to vacate the guardianship, dismiss the petition, and return Eliza to Tara's custody. See, e.g., *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004) (reversing, and remanding with directions to terminate guardianship and return child to custody of mother where grandparents failed to prove child's mother forfeited parental rights); *In re Interest of Tyler W.*, No. A-11-1097, 2012 WL

5328645 (Neb. App. Oct. 30, 2012) (selected for posting to court website) (reversing, and remanding with instructions to dismiss guardianship action where petitioner failed to prove mother was unfit or forfeited right to custody of child). See, also, *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997) (explaining that because State did not meet burden to allow for continued detention of juvenile, appellate courts lacked authority to order continued detention).

CONCLUSION

The record does not contain the expert testimony required by ICWA and NICWA, and therefore the county court's decision to appoint Susan as guardian was not supported by competent evidence. Because of the failure of proof, we must reverse, and remand with directions to vacate the guardianship and dismiss the petition.

Reversed and remanded with directions.

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

Shelter Mutual Insurance Company, appellee, v. Larry Freudenburg, appellant.

938 N.W.2d 92

Filed February 7, 2020. No. S-19-265.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
4. ____: ____. An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.
5. **Statutes: Legislature: Intent.** A collection of statutes pertaining to a single subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
6. **Statutes.** It is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects a statute's purpose.
7. ____. 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.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Reversed and remanded for further proceedings.

George H. Moyer and Jack W. Lafleur, of Moyer & Moyer, for appellant.

Theresa D. Koller and Nathan D. Clark, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

Freudenberg, J.

NATURE OF CASE

The primary issue in this case is whether Neb. Rev. Stat. § 60-310 (Cum. Supp. 2018) allows provisions known as partial household exclusion clauses, which reduce automobile liability coverage from the policy amount to the state minimum when the injured person is an insured, relative, or resident of the insured's household. The district court found that the statute unambiguously defined an automobile policy as coverage in the amounts set by the state minimums and that the second sentence of the statute prevented complete household exclusions, but did not prohibit partial exclusions. The district court granted summary judgment in favor of Shelter Mutual Insurance Company (Shelter) upholding the partial household exclusion clause, which reduced the insured's coverage from the policy amount of $100,000 to $25,000.

BACKGROUND

The insured, Larry Freudenburg, appeals from an order granting summary judgment in favor of Shelter in its action for declaratory judgment regarding the application of § 60-310 to the underlying automobile liability policy and against Freudenburg on his counterclaim for breach of contract. Freudenburg did not file a cross-motion for summary judgment. Shelter originally

brought the action against both Freudenburg and Bruce R. Ramage, the director of the Nebraska Department of Insurance, in his official capacity. Ramage was later dismissed from the case and is not part of this appeal.

The facts are undisputed. On October 20, 2016, Freudenburg was traveling as a passenger in a car covered by a policy Freudenburg and his wife had purchased from Shelter. Freudenburg made a claim for his injuries under the Shelter policy because the injuries were not covered by any other policies. After the accident, Freudenburg filed a claim for reimbursement of expenses based on his injuries totaling over $100,000. Rather than paying the policy limit for bodily injury in the amount of $100,000, Shelter paid $25,000, which is the minimum level of automobile liability coverage that drivers in Nebraska are required by law to carry.

Shelter refused to pay Freudenburg's request for an additional $75,000 based on a partial household exclusion clause in Freudenburg's policy. A section titled "Partial Exclusions From Coverage A and Coverage B" begins with the following:

> Coverage A [for bodily injury] and Coverage B [for property damage] do not cover any of the types of **damages** listed below unless no other policy of liability insurance provides coverage for those **damages** in the amount required by the applicable **financial responsibility law**. In that event, the minimum dollar amount of coverage required by the applicable **financial responsibility law** will be provided by this policy. No additional benefits that are not required by that law will be provided.

Subsection 13 of this provision allows for a reduction in bodily injury coverage for "[**d**]**amages** owed to any **insured, relative,** or **resident** of an **insured's** household." Shelter asserted that the $100,000 policy for bodily injury was reduced to the Nebraska minimum of $25,000 pursuant to the partial household exclusion clause.

Shelter received a letter from Ramage on behalf of the Nebraska Department of Insurance which asked Shelter why it

had not paid the full $100,000 of the policy. Shelter's response cited the partial household exclusion clause and asserted that such an exclusion was not prohibited by Nebraska law, specifically that it did not fall under the prohibition found in § 60-310. The Nebraska Department of Insurance sent a letter indicating it disagreed with Shelter's interpretation of § 60-310, which provides:

> Automobile liability policy means liability insurance written by an insurance carrier duly authorized to do business in this state protecting other persons from damages for liability on account of accidents occurring subsequent to the effective date of the insurance arising out of the ownership of a motor vehicle (1) in the amount of twenty-five thousand dollars because of bodily injury to or death of one person in any one accident, (2) subject to the limit for one person, in the amount of fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and (3) in the amount of twenty-five thousand dollars because of injury to or destruction of property of other persons in any one accident. An automobile liability policy shall not exclude, limit, reduce, or otherwise alter liability coverage under the policy solely because the injured person making a claim is the named insured in the policy or residing in the household with the named insured.

In June 2017, Shelter brought a declaratory action seeking to declare that partial household exclusions are permissible under Nebraska law. The district court determined that § 60-310 unambiguously forbade only reductions or alterations in coverage that result in the coverage for the insured, relative, or household member's falling below the mandatory minimums described in the first sentence of the statute. The court declined to consider the legislative history concerning the 2013 change to § 60-310, which added the language "limit, reduce, or otherwise alter" to the prior version of the statute and explicitly discussed the Legislature's intent to thereby prohibit partial

household exclusions. The court concluded that partial household exclusions are not prohibited by § 60-310. The court granted summary judgment to Shelter. Freudenburg appeals.

ASSIGNMENTS OF ERROR

Freudenburg assigns that summary judgment was improper because the trial court erred in (1) interpreting the last sentence of § 60-310 to allow for reductions in coverage down to the state minimum; (2) refusing to consider the legislative history of 2013 Neb. Laws, L.B. 316; and (3) enforcing the partial household exclusion contained in the policy Freudenburg purchased from Shelter.

STANDARD OF REVIEW

[1] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[1]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[3]

ANALYSIS

Although Freudenburg has assigned several errors on appeal, the errors are rooted in a single question of how to interpret

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[1] *Williamson v. Bellevue Med. Ctr., ante* p. 312, 934 N.W.2d 186 (2019).

[2] *Id.*

[3] *In re Adoption of Micah H.*, 301 Neb. 437, 918 N.W.2d 834 (2018).

§ 60-310. Shelter believes the only question in this regard is how to understand § 60-310's term "automobile liability policy" in the context of the statute's prohibition that "[a]n automobile liability policy shall not exclude, limit, reduce, or otherwise alter liability coverage under the policy solely because the injured person making a claim is the named insured in the policy or residing in the household with the named insured" (hereinafter the household exclusion prohibition). We also find the statute's term "liability coverage" to be essential to our analysis.

[4-7] An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.[4] A collection of statutes pertaining to a single 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.[5] It is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects a statute's purpose.[6] 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.[7]

The Motor Vehicle Registration Act[8] generally provides the rules and regulations for acquiring and maintaining registration of vehicles that are operating on Nebraska roadways. The first sentence of § 60-310 expressly defines "automobile liability policy" to be coverage in certain amounts based on state minimums for each category, stating:

> Automobile liability policy means liability insurance written by an insurance carrier duly authorized to do

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[4] *State v. Montoya, ante* p. 96, 933 N.W.2d 558 (2019).

[5] *State v. Paulsen, ante* p. 21, 932 N.W.2d 849 (2019).

[6] *State v. McColery*, 301 Neb. 516, 919 N.W.2d 153 (2018).

[7] *Id.*

[8] See Neb. Rev. Stat. §§ 60-301 to 60-3,231 (Reissue 2010 & Cum. Supp. 2016).

> business in this state protecting other persons from damages for liability on account of accidents occurring subsequent to the effective date of the insurance arising out of the ownership of a motor vehicle (1) in the amount of twenty-five thousand dollars because of bodily injury to or death of one person in any one accident, (2) subject to the limit for one person, in the amount of fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and (3) in the amount of twenty-five thousand dollars because of injury to or destruction of property of other persons in any one accident.

The coverage so described is commonly referred to as "25/50/25 coverage." Other statutes of the Motor Vehicle Registration Act then set forth that a driver must show proof of financial responsibility[9] or a current "automobile liability policy"[10] in order to register a vehicle and must have a current "automobile liability policy"[11] anytime the vehicle is operated in Nebraska.

The second, and last, sentence of § 60-310 addresses the legality of policy provisions that seek to exclude or alter coverage based on the injured claimant in the accident's being the named insured or a member of the named insured's household. This is in contrast to a friend or acquaintance who is injured as the driver or passenger of the insured's vehicle, who would be covered up to the general coverage limits of the insured's policy.

The two sentences of § 60-310 both use the term "automobile liability policy," and we logically must read both sentences as using the same meaning for that term. Further, under a plain reading of the second sentence of § 60-310, we understand "under the policy" as referring to that same "automobile liability policy."

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[9] See § 60-346.

[10] See § 60-387.

[11] See § 60-390.

Shelter observes that the definition of "automobile liability policy" in the first sentence of § 60-310 has no modifier and simply describes coverage "in the amount of" 25/50/25 coverage. Shelter proposes that the plain language of § 60-310 thus requires that we read "automobile liability policy" as a policy providing coverage "only" or "exactly" in the amount of 25/50/25. Freudenburg, in contrast, asserts that "automobile liability policy" should be read as a policy providing "at least" 25/50/25 coverage. We agree with Freudenburg.

Shelter's proposed definition of "automobile liability policy," i.e., "25/50/25 . . . liability insurance"[12] (nothing more and nothing less), engenders absurd consequences when applied to the second sentence of § 60-310, as well as elsewhere under the act. If, under the second sentence of § 60-310, a policy with coverage greater than the 25/50/25 minimum is not an "automobile liability policy," then the household exclusion prohibition of the second sentence would not apply to such policies at all. Under Shelter's proposed construction, the household exclusion prohibition of § 60-310 would read as follows: "[A 25/50/25] automobile liability policy shall not exclude, limit, reduce, or otherwise alter liability coverage under the [25/50/25] policy solely because the injured person making a claim is the named insured in the [25/50/25] policy or residing in the household with the named insured." Such a reading would mean that the household exclusion prohibition of the second sentence of § 60-310 would not even be applicable to Freudenburg's policy under Shelter's interpretation of "automobile liability policy," because his policy was for coverage referred to as "100/300/100." Under Shelter's proposed definition of "automobile liability policy," Shelter would have been free under Nebraska law to completely exclude Freudenburg from coverage.

Furthermore, such a reading would lead to the absurd result that the Motor Vehicle Registration Act does not regulate

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[12] Brief for appellee at 13.

all automobile insurance purchased by Nebraska residents, but only insurance for coverage in the minimum amount of 25/50/25.[13] This appears contrary to the overall intent of the statutory scheme, as usage of the term "automobile liability policy" elsewhere seems to include policies with coverage in excess of the 25/50/25 minimums set forth in § 60-310.[14] For example, reading the definition of "automobile liability policy" to include policies that exceed the state minimums is in harmony with the language of § 60-390, which provides in part:

> On the back of the certificate, the certificate of registration shall include a statement in boldface print that an automobile liability policy or proof of financial responsibility is required in Nebraska. By paying the required registration fees, every person whose name appears on the registration of the motor vehicle or trailer certifies that a current and effective automobile liability policy or proof of financial responsibility will be maintained for the motor vehicle or trailer at the time of registration and while the motor vehicle or trailer is operated on a highway of this state and that he or she will also provide a current and effective automobile liability policy, evidence of insurance, or proof of financial responsibility for the motor vehicle or trailer upon demand.

Under Shelter's interpretation of "automobile liability policy," anyone carrying proof of a policy in amounts that are not exactly 25/50/25 is not carrying proof of an effective automobile liability policy.

Thus, "automobile liability policy" must mean a policy with coverage in at least the 25/50/25 amount and not a policy with overall limits of "only" or "exactly" the minimum 25/50/25 coverage amount. Understanding "automobile liability policy" to mean coverage in the amount of at least 25/50/25 is in

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[13] See §§ 60-301 to 60-3,231.

[14] See §§ 60-323, 60-387, 60-390, 60-3,167, and 60-3,168.

harmony with the term's usage throughout the Motor Vehicle Registration Act.[15] Moreover, this understanding avoids two absurd results: First, it avoids a situation where the Motor Vehicle Registration Act only regulates policies with coverage limits of 25/50/25. Second, it avoids the situation where a policy that includes coverage limits above 25/50/25 does not qualify as proof of an automobile liability policy elsewhere in the act.[16]

Perhaps realizing that it would be nonsensical to read the household exclusion prohibition as applying to only 25/50/25 policies, Shelter does not acknowledge the logical consequences of its plain language argument that "automobile liability policy" means a policy providing "only" or "exactly" 25/50/25 coverage. Shelter instead asserts that a consistent application of its understanding of "automobile liability policy" results merely in prohibiting exclusions for a claimant insured or household member, in policies with underlying maximum coverage in any amount, which result in lowering coverage for such claimants below the 25/50/25 minimum required of drivers under Nebraska law. By conceding the applicability of the household exclusion prohibition to policies providing coverage above the 25/50/25 minimum, such a proposed reading of the statute actually utilizes Freudenburg's understanding of "automobile liability policy" as a policy providing coverage in at least the 25/50/25 amount, not Shelter's understanding of "automobile liability policy" as a policy with coverage in only the 25/50/25 amount.

What Shelter's argument really is about is the term "liability coverage." In essence, Shelter's reading proposes the insertion of the modifier "the minimum 25/50/25" into the phrase "liability coverage" in the last sentence of § 60-310. In other words, Shelter wants to make the term "liability coverage" synonymous with the definition of "automobile liability policy."

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[15] See *State v. Paulsen, supra* note 5.

[16] See § 60-387.

The Motor Vehicle Registration Act does not define "liability coverage." But while not controlling, the term "liability coverage" is used elsewhere in the statutes governing insurance to refer collectively to the various categories of insurance that cover liability arising out of automobile accidents.[17] We give the term the same plain meaning in § 60-310.

As such, the term "liability coverage" refers more broadly to the various types of liability coverage afforded in an automobile liability policy. From its plain meaning, it follows that where, as we have already determined, "automobile liability policy" includes all policies with coverage of at least 25/50/25, the second sentence of § 60-310 clearly prohibits any "exclu[sions], limit[ations], reduc[tions], or . . . alter[ations]" to the policy's liability coverage "solely because the injured person making a claim is the named insured in the policy or residing in the household with the named insured."

We hold that § 60-310 applies to policies both with coverage limits at the minimum required by law and with coverage limits above the minimum required by law and that it prohibits both exclusions that seek to completely exclude liability coverage for an injured insured or household member and exclusions that seek to limit, reduce, or alter the liability coverage to the minimum required by law for an injured insured or household member. Simply put, an automobile liability policy in any coverage amount is not permitted to exclude or reduce liability coverage under the policy solely on the ground the claimant is a named insured or resident in the named insured's household.

Because the plain language of § 60-310, viewed with the other sections of the Motor Vehicle Registration Act, permits only one reasonable interpretation, we do not consider the legislative history. However, for the sake of completeness, we note that in 2013, the Legislature amended the household exclusion prohibition to its current form. The bill proposing

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[17] See, e.g., Neb. Rev. Stat. §§ 44-514 and 60-1407.01(3) (Reissue 2010).

the 2013 amendment was introduced with the specific intent to render invalid both partial household exclusions and total household exclusions. The record of the committee hearings for 2013 Neb. Laws, L.B. 316, demonstrates the bill's sponsor and the committee understood that the language originally added in 1995 resulted in preventing only total household exclusions, which was not what the Legislature had wished to achieve.

The intent of the 2013 amendment was to prohibit all household exclusions, both total and partial.[18] The bill's sponsor, Senator Burke Harr, explained it this way:

> For example, a person might have a policy providing $500,000 in coverage, which we discussed earlier, but the insurer includes a provision that says if the insured person . . . the injured person . . . is related to or residing with the named insured, the coverage is only $25,000. This thwarts the intent of the Legislature. I believe (LB)316 maintains the intent of the Legislature in repealing the guest statute and prohibiting household exclusions.[19]

Harr provided the same explanation to the entire Legislature during the floor debates.[20] The Legislature passed the law on a vote of 44 to 0.[21]

CONCLUSION

We conclude that the district court erred in granting summary judgment to Shelter on its declaratory judgment action, and therefore, we must reverse that decision and remand this matter for further proceedings consistent with this opinion. For the foregoing reasons, the judgment of the district court

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[18] See Introducer's Statement of Intent, L.B. 316, Committee on Banking, Commerce and Insurance, 103d Leg., 1st Sess. (Feb. 11, 2013).

[19] Committee on Banking, Commerce and Insurance Hearing, L.B. 316, 103d Leg., 1st Sess. (Feb. 11, 2013).

[20] Floor Debate, L.B. 316, 103d Leg., 1st Sess. (Mar. 01, 2013).

[21] Floor Debate, L.B. 316, 103d Leg., 1st Sess. (Mar. 28, 2013).

is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

Papik, J., not participating.

Stacy, J., concurring.

I agree with the majority's resolution of this case, which presents a very narrow question of statutory construction. We are asked to determine whether a 2013 amendment to Neb. Rev. Stat. § 60-310 (Reissue 2010) should be understood to prohibit, or instead to authorize, a clause in an automobile liability policy that reduces liability coverage down to the statutory minimum when the claimant is a named insured or resides in the named insured's household. The parties refer to such a provision as a "partial household exclusion." I write separately to provide a brief overview of the historical treatment of household exclusions under Nebraska law.

In a series of opinions beginning with *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*,[1] decided in 1989, this court held that household exclusions in automobile liability insurance policies were valid and enforceable under Nebraska law and not contrary to public policy.[2] In these cases, we reasoned generally that household exclusions, when contained in an automobile liability policy not being used as proof of future financial responsibility, did not violate public policy because the statutes prescribing the general requirements for automobile liability

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[1] *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 444 N.W.2d 676 (1989).

[2] See *id*. (holding household exclusion in automobile liability policy is not invalid as against public policy); *State Farm Mut. Auto. Ins. Co. v. Hildebrand*, 243 Neb. 743, 502 N.W.2d 469 (1993) (holding household exclusion in automobile liability policy not used as proof of financial responsibility under Motor Vehicle Safety Responsibility Act does not violate public policy and is enforceable); and *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 243 Neb. 779, 502 N.W.2d 484 (1993) (same).

policies in Nebraska did not contain language prohibiting such exclusions.[3]

In 1995, the Legislature changed that by adding the following language to Neb. Rev. Stat. § 60-301(3) (Supp. 1995): "An automobile liability policy shall not exclude liability coverage under the policy solely because the injured person making a claim is the named insured in the policy or a spouse or relative residing in the same household with the named insured."[4] The practical effect of this new statutory language was to establish, as a matter of public policy in Nebraska, that household exclusions were no longer valid and enforceable in automobile liability policies.

In 2005, the Legislature recodified the Motor Vehicle Registration Act and, as relevant here, repealed § 60-301 and enacted § 60-310.[5] After the 2005 amendments, § 60-310 prohibited provisions in automobile liability policies that "exclude liability coverage under the policy solely because the injured person making a claim is the named insured in the policy or residing in the household with the named insured."[6] Thereafter, in 2013, the Legislature amended that portion of the statute which prohibits household exclusions, so that § 60-310 (Cum. Supp. 2018) currently provides: "An automobile liability policy shall not exclude, limit, reduce, or otherwise alter liability coverage under the policy solely because the injured person making a claim is the named insured in the policy or residing in the household with the named insured."

Shelter argues that its partial household exclusion does not run afoul of the current language in § 60-310 because it neither completely excludes liability coverage nor reduces liability coverage below the statutory minimum required under Nebraska law.

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[3] See *id.*

[4] See 1995 Neb. Laws, L.B. 37.

[5] 2005 Neb. Laws, L.B. 274.

[6] See *id.*

In that regard, it is worth noting that some other courts have construed their statutory scheme to allow partial or limited household exclusions in automobile liability policies, so long as liability coverage is afforded up to the minimum limits required by the state's financial responsibility statute.[7] However, I agree with the majority's conclusion that the plain language in § 60-310 simply is not amenable to such a construction.

Section 60-310 uses language that is plain and unambiguous to prohibit automobile liability policies from excluding, limiting, reducing, or otherwise altering liability coverage solely because the claimant is the named insured or residing in the named insured's household. This statutory language, both on its face and in light of its historical evolution, leaves no room for a successful argument that by amending § 60-310 in 2013, the Legislature intended to actually allow household exclusions in automobile liability policies so long as they did not reduce liability coverage below the minimum required limits.

It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.[8] While there may be sound public policy reasons to limit insurance coverage based on whether one resides in the

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[7] See, e.g., *Shook v. State Farm Mut. Ins. of Bloomington, Ill.*, 872 F. Supp. 768 (D. Mont. 1994) (household exclusion that limited coverage to statutory minimums did not violate public policy inherent in Montana's mandatory insurance law); *Stearman v. State Farm*, 381 Md. 436, 849 A.2d 539 (2004) (household exclusion reducing limit of liability coverage to statutory minimum amount valid when policy otherwise provided liability coverage in excess of statutory minimum liability limits); *Hoque v. Empire Fire and Marine Ins. Co.*, 281 Ga. App. 810, 637 S.E.2d 465 (2006) (when policy provides liability coverage above statutorily minimum, household exclusion does not violate public policy so long as recovery is permitted in amount of compulsory minimum insurance).

[8] *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011).

named insured's household,[9] that is a decision properly left to the Legislature, not the courts. Because I agree with the majority that the language of § 60-310 is plain and unambiguous in prohibiting provisions in an automobile liability policy that exclude, limit, reduce, or alter liability coverage solely because the claimant is the named insured or resides in the named insured's household, I concur in the result reached here.

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[9] See, e.g., *id.* (holding exclusions in uninsured and underinsured motorist coverage for vehicles owned or regularly used by named insured or any resident of their household do not violate public policy as expressed by Legislature because exclusions mirror statutory provisions). See, also, Neb. Rev. Stat. § 44-6407(2) (Reissue 2010) (defining uninsured or underinsured motor vehicle to exclude vehicles "[o]wned by, furnished, or available for the regular use of the named insured or any resident of the insured's household").

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